4. THE STRUCTURE AND MAIN PROVISIONS OF THE EC TREATY

(1) INTRODUCTION

159. The structure of the EC Treaty. The EC Treaty consists of a Preamble and six Parts, as follows:
(1) Principles
(2) Citizenship of the Union
(3) Community Policies
(4) Association of the Overseas Countries and Territories
(5) Institutions of the Community

The scheme of the Treaty is to progress from the general to the specific. Part One (the 'Principles') sets out the basic aims and principles in the light of which the remainder of the Treaty is to be interpreted and applied. The German text uses the word *Grundsiitze* (ground rules), which expresses more clearly what is implied. The substantive rules, some of which require to be implemented by legislation adopted in accordance with the appropriate procedures, follow in Part Three.

160. Annexes, Protocols and Declarations. Annexed to the EC Treaty are four Annexes which supplement particular Treaty articles, 29 Protocols and a large number of Declarations. The Protocols, some of which are spent, form an integral part of the Treaty. The Declarations indicate a policy intent on the part of the governments of the member states but are not binding as part of the Treaty text.

161. The substantive law of the Treaty. The substantive Treaty law of which students and practitioners must be aware are almost all contained in articles 2-7c (Principles), 9-84 (formerly called the 'Foundations') and 85-102 (the 'common rules'), together with article 119 (equal pay). It is especially important to note that the Court of Justice will have recourse to the Treaty as a whole, including its Preamble, and especially the Principles, as an aid to interpretation of a particular provision of the Treaty.

(2) THE PRINCIPLES

162. The 'task' of the Community. Article 2 sets out in general terms the economic, social and political 'task' (mission; Aufgabe) which the Community has been set up to perform.

1 EC Treaty, art 239.
2 See paras 128–129 above.
163. The common market. The most immediate task of the Community was the establishment of a ‘common market’ for all forms of economic activity (excepting those governed by the ECSC and Euratom Treaties'). There is no definition of a common market in the Treaty, but the Court of Justice said:

The concept of a common market . . . involves the elimination of all obstacles to intra-Community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market'.

In order to achieve this common market it is necessary to remove not only such obvious barriers to trade as tariffs and quotas, but also hidden ‘non-tariff’ barriers. These may consist in obvious protectionist devices designed to protect domestic producers and suppliers against foreign competition, but they may simply be the result of the fact that independent states have pursued their own policies, and developed their own laws and administrative practices in a different way from each other. Thus differences in the law of trade marks and patents may be an obstacle to the free flow of manufactured goods between countries, and differences in professional organisation and rules of conduct may be an obstacle to the professional person practising his profession in another country. Individuals and companies too may erect their own barriers to the free flow of goods or services where, for example, they agree not to compete with each other in the same market. The Treaty seeks to dismantle all these forms of barrier.

164. Economic and monetary union; financial discipline. Article 2 of the Treaty now also includes as part of the Community’s task the establishment of an economic and monetary union’, the details of which are considered below’. As it will require a high degree of economic convergence, article 3a imposes an obligation for both the Community and the member states to comply with ‘guiding principles’ of stable prices, sound public finance and monetary conditions and a sustainable balance of payments, all conducted in accordance with the principle of an open market economy with free competition.

165. The activities of the Community. Article 3 sets out, under twenty heads, the ‘activities’ of the Community. The list of activities is, in essence, the programme for Part Three (‘Community Policies’). They include inter alia:

a) the elimination of customs duties, quantitative restrictions and all measures having equivalent effect;

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1 EC Treaty, art 232. Aspects of these sectors not expressly governed by the ECSC and Euratom Treaties fall within the domain of the EC Treaty; see eg Opinion 1/94 re the World Trade Organisation, opinion of 15 November 1994, not yet reported.


3 See paras 262-267.
b) a common commercial policy;
c) an internal market;
d) measures concerning the entry and movement of persons in the internal market;
e) a common policy in the sphere of agriculture and fisheries;
f) a common policy in the sphere of transport;
g) a system ensuring that competition is not distorted;
h) the approximation of national laws to the extent necessary for the common market to function.

166. General obligations of the Community. Article 3b lays down ground rules setting the parameters of the activities of the Community and its institutions. The Community is to act within the limits of powers conferred upon it and the objectives assigned to it by the Treaty. Its activities are subject to the principle of subsidiarity; and they must be proportionate.

167. General obligations of the member states. Article 5 of the EC Treaty imposes upon the member states two general obligations, one positive, the other negative. There is a positive obligation for the member states to:

‘take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community’s tasks’.

There is, correspondingly, a negative obligation to:

‘abstain from any measure which could jeopardize the attainment of the objectives of this Treaty’.

These fundamental legal obligations require good faith, ‘loyal co-operation and assistance’ and are frequently referred to by the Court of Justice when assessing the lawfulness of the conduct of member states. However, they apply only in so far as the situation in question is regulated by a specific subsequent provision of the Treaty. It is of fundamental importance, here and elsewhere, to note that the obligation is imposed upon the member state. The internal allocation of tasks to regional or local authorities and the constitutional allocation of power or jurisdiction amongst the various branches of

1 See para 157 above.
2 See para 155 above.
government is not for the Community to determine and so, correspondingly, does not affect the obligations of the member state. This is why a national court, charged with applying Community law, may be required to set aside national rules which limit the effective protection of a Community right or to interpret national law in accordance with the relevant provisions of Community law. This latter duty applies primarily in the context of directives, but extends to a duty to interpret national legislation in the light of the objectives of Treaty provisions so as to ensure that the exercise of Community rights does not produce less favourable treatment under national law.

168. Non-discrimination upon grounds of nationality. Article 6 of the EC Treaty states one of the most important principles affecting the rights of individuals:

'Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited'.

The effect, for practical purposes, is to require the member states to be 'nationality blind' and to ensure equality of treatment for the citizens of all Community countries in any sphere falling within Community activities. More specific rules of non-discrimination are provided in subsequent Treaty provisions, but article 6 applies autonomously in their absence. On the other hand, Community law does not in general require member states not to practise 'reverse discrimination' by treating its own nationals less favourably than it is required to treat the nationals of other member states.

169. The transitional period. Article 7 (formerly article 8) of the EC Treaty laid down the timetable for the implementation of the Treaty within a 'transitional period' of twelve years ending on 31 December 1969. The timetable was not adhered to, but article 7(7) was important for the interpretation of some later Treaty articles. It provides that:

'Save for the exceptions or derogations provided for in this Treaty, the expiry of the transitional period shall constitute the latest date by which all the rules laid down must enter into force and all measures required for establishing the common market must be implemented'.

This enabled the Court of Justice to hold that, where a rule in the Treaty establishes a result to be achieved by the end of the transitional period, that

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1 See para 139 above.
2 See para 148 above.
3 Case C-165/91 Van Munster v Rijksdienst voor Pensioenen, judgment of 5 October 1994, not yet reported.
5 See paras 194, 209 below.
rule must, once that period has expired, have direct effect and be enforceable in the courts.1

170. The internal market. The common market was not fully achieved by the end of the transitional period. In 1985 Lord Cockfield, then Commissioner with responsibility for the internal market, produced his White Paper, which identified the remaining barriers to trade within the Community, grouping them within three principal categories: physical barriers, technical barriers, and fiscal barriers. The White Paper then set out some three hundred items of legislation which, it argued, would be both necessary and sufficient to eliminate those barriers. As a means of implementing the Cockfield proposals the Single European Act amended the EEC Treaty to include a new definition of ‘the internal market’ as

‘an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty’,

a new timetable for its completion by 31 December 1992 and specific legislative procedures to assist in achieving it. Between 1985 and 1993 some 500 internal market measures were adopted, and much of the programme was in fact completed by the end of 1992. Some work however still remains; in particular the free movement of persons is not fully achieved. The Court of Justice has not yet been called upon to determine whether these Treaty provisions on the internal market are directly effective. Some measures which would assist in achieving the free movement of persons are now pursued outside Community machinery under Title VI of the Treaty on European Union on co-operation in the fields of justice and home affairs.

(3) CITIZENSHIP OF THE UNION

171. Citizenship of the Union. Articles 8 to 8e of the EC Treaty, added by the Treaty on European Union, create ‘citizenship of the Union’. They do not confer upon the Community any competences as to citizenship or

2 See para 26 above.
3 EC Treaty, art 7a, 2nd para.
4 Ibid, art 7a, 1st para.
5 Ibid, arts 100a and 100b.
6 This was formally recognised by the European Council at the Edinburgh Summit in December 1992; see European Council in Edinburgh, Conclusions of the Presidency, Bull EC 12-1992, p 11.
7 A declaration annexed to the Single European Act provides: ‘Setting the date of 31 December 1992 does not create an automatic legal effect’.
8 See paras 295-298 below.
naturalisation, which remain firmly within the sphere of national sovereignty. Rather they provide simply that any citizen of a member state, as defined by the nationality law of each state, is also a citizen of the Union. Citizens of the Union enjoy:

(1) the right to move and reside freely within the territory of the Community subject to the limitations and conditions laid down in the Treaty;
(2) the right to vote and stand as a candidate in municipal and European elections (but not for election to national or regional parliaments) in a member state in which he resides;
(3) the right to diplomatic representation by the diplomatic or consular authorities of another member state in the territory of a third country where the state of which he is a national is not represented; and
(4) the right to petition the European Parliament on a matter which comes within the Community’s fields of activity.

A most important provision of this Part of the Treaty may come to be that which provides:

‘Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby’.

This is the first express recognition in the Treaty of the individual as a person deriving rights and obligations directly from it.

(4) COMMUNITY POLICIES

172. General. Part Three of the Treaty, comprising articles 9 to 130 and arranged under seventeen Titles, is entitled ‘Community Policies’. The most

1 So, a Declaration on Nationality of a Member State attached to the Treaty provides that ‘the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned’.
2 Eg for the United Kingdom as defined by the British Nationality Act 1981, c 61; see also the Declaration by the United Kingdom replacing the Declaration on the Definition of the term ‘Nationals’, OJ C23, 28.1.83, p 1; Cmd 9062. By virtue of these measures British citizens, British subjects with right of abode in the UK and British Dependent Territories and citizens of Gibraltar are citizens of the Union. Channel Islanders, Manxmen and nationals of British overseas territories are not, and such rights as they have in the United Kingdom continue to be governed by United Kingdom law.
3 EC Treaty, art 8(1).
6 EC Treaty, art 8c.
7 Ibid, art 8d.
8 Ibid, art 8(2).
9 In Case 26/62 Van Gend en Loos v Nederlandse Tarievencommissie [1963] ECR 1, [1963] CMLR 105 (see para 133 above) the Court of Justice held that in its original form the Treaty by necessary implication directly created rights and obligations for natural and legal persons. The citizenship provisions of arts 8–8e apply only to natural persons.
important of these are the free movement of goods (of which agricultural products are a special category), persons, services (of which transport is a special category) and capital. Under the EEC Treaty these were called ‘the Foundations of the Community’ (the basic infrastructure of the Community system) and are frequently referred to as ‘the Four Freedoms’.

(a) The Four Freedoms

173. The Four Freedoms: goods, persons, services, capital. As noted above, the immediate aim of the EC Treaty was to establish a free and open common market for all forms of economic activity. These are dealt with in Titles I to IV of Part Three of the Treaty under four general headings – goods, persons, services and capital. These four categories are intended to comprehend all possible forms of economic activity, but the lines of demarcation between them are not always clear-cut. Persons and services are dealt with under three headings (‘chapters’): ‘workers’, ‘right of establishment’ and ‘services’. The rules on movement of money, although it falls within the general chapter on ‘capital’, depends upon whether the movement is a self-standing investment or one connected with the movement of goods, persons or services.

174. ‘Effects’. The Treaty frequently speaks of ‘effects’. Thus, in dealing with the free movement of goods, the Treaty envisages the prohibition of ‘customs duties ... and of all charges having equivalent effect’1. The significance of this is that the Treaty considers the substance of what is done – what actually happens and what is its practical effect – rather than the form or method by which it is done.

175. ‘Results’. The way in which a particular result is achieved may vary from state to state. Thus, one state may require action by the legislature or the judiciary where another can achieve the result through administrative action. The Treaty is not concerned with the method adopted, provided the required result is achieved. An important consequence is that action by the courts – for example the enforcement of a contract or the granting of an injunction or interdict for the protection of a property right – may, in Treaty terms, be action by the member state and involve a breach of the Treaty. Similarly, action by a regional or district authority, or by any public body, may constitute a breach of the Treaty by the member state.

(A) FREE MOVEMENT OF GOODS: THE CUSTOMS UNION

176. Goods. The EC Treaty provides that ‘the Community shall be based upon a customs union which shall cover all trade in goods. . .’1. ‘Goods’ are

1 EC Treaty, art 9(1).
not defined in the Treaty\textsuperscript{1}, but the Court of Justice has established that 'by goods ... there must be understood products which can be valued in money and which are capable as such of forming the subject of commercial transactions\textsuperscript{2}. The category is therefore of very broad application. It is not restricted to consumer goods, articles of general use or ordinary merchandise, and may extend, to cite only two examples, to coinage which is no longer legal tender\textsuperscript{3} and to non-recyclable waste which has negative economic value\textsuperscript{4}. It does not however extend to physical objects which fall properly within other of the Four Freedoms. Thus banknotes which are legal tender\textsuperscript{5} and lottery tickets\textsuperscript{6} are not 'goods', but fall within the chapters on capital and services respectively. Sound records, film apparatus and other products used for the diffusion of television signals, in so far as they consist of tangible objects, are goods, but television broadcasting itself is a service\textsuperscript{7}.

177. Territory of the customs union. The territory of the customs union is set out in the Treaty\textsuperscript{8} and in legislation\textsuperscript{9}. Generally, the customs union incorporates the territory, the territorial sea and the air space of all the member states, including those European territories for whose external relations a member state is responsible. There are however significant anomalies. The customs territory does not include the Færøe Islands or the sovereign base areas in Cyprus, all of which are outside the territorial scope of the Treaty\textsuperscript{10}. It does include the Canary Islands (but not Ceuta and Melilla), the Åland islands (with some derogations)\textsuperscript{11} and the French overseas départements\textsuperscript{12}, which are fully part of the Community, but not the French overseas territories\textsuperscript{13}. San Marino and Monaco, both independent states, are also part of the customs territory\textsuperscript{14}. The Channel Islands and the Isle of Man are not part of the Community but are part of its customs territory\textsuperscript{15}, whilst Gibraltar is part of

\textsuperscript{1} Confusingly, the English text refers in some instances to 'goods' (art 9(1)) and in others to 'products' (arts 9(2), 10(1)). A similar distinction may be found in the other language texts except German, Danish and Swedish, which adopt the same word (Waren, varer and varor) throughout.

\textsuperscript{2} Case 7/68 Commission v Italy (First Art Treasures Case) [1968] ECR 423 at 428, [1969] CMLR 1 at 8.


\textsuperscript{7} Case 155/73 Giuseppe Sacchi [1974] ECR 409, [1974] 2 CMLR 177; Case C-23/93 TV 10 v Commissariat pour de Media, judgment of 5 October 1994, not yet reported.

\textsuperscript{8} EC Treaty, art 227 as amended.

\textsuperscript{9} Regulation 2913/92, OJ L302, 19.10.92, p 1 (the Community Customs Code), art 3 as amended.

\textsuperscript{10} EC Treaty, arts 227(5)(a) and (b).

\textsuperscript{11} Ibid, art 227(5)(d) and Protocol No 2 to the Corfu Accession Treaty on the Åland islands.

\textsuperscript{12} EC Treaty, art 227(2). The départements d'outre mer are Guadeloupe, Guyane, Martinique and Réunion.

\textsuperscript{13} Including Mayotte and St Pierre et Miquelon.

\textsuperscript{14} Regulation 2913/92, art 3(2).

\textsuperscript{15} EC Treaty, art 227(5)(c) and Protocol concerning the Channel Islands and the Isle of Man. On the application of the Treaty in the Isle of Man, and implicitly in the Channel Islands, see Case C-355/89 Department of Health and Social Security v Barr and Montrose Holdings Ltd [1991] ECR I-3479, [1991] 3 CMLR 325.
the Community but is treated as being outside the customs territory1.

178. Free circulation. Article 9 of the Treaty applies the Treaty provisions relating to the elimination of customs duties and quantitative restrictions between member states2 to

- products originating in member states and
- products coming from third countries which are in ‘free circulation’ in member states.

Article 10 provides in effect that goods coming from third countries are in free circulation as soon as they are subject to no further control by the customs authorities. Once in free circulation, they are to be accorded treatment identical to that of goods produced within the Community3. This is the essence of a customs union, as compared with a free trade area. The purpose of the Chapter on the Customs Union is therefore, first, to abolish all customs and other charges on the movement of goods across an internal Community frontier, and second, to establish a uniform customs tariff for goods from a third country entering the Community via any member state.

179. Tariff and non-tariff barriers. The Treaty goes on to deal with the market in goods under two chapters: the Customs Union (articles 12-29), and the Elimination of Quantitative Restrictions between Member States (articles 30-37). The Chapter on the Customs Union deals with restrictions on the movement of goods created by the requirement to pay money when goods cross a frontier. The Chapter on Quantitative Restrictions goes beyond the customs union and deals with ‘non-tariff barriers’ – restrictions upon the volume of goods which may cross a frontier. The most obvious of such restrictions are import and export quotas, but restrictions may also arise in relation to a single article or category of articles. For example, export may be prohibited on the ground that the article in question forms part of the national heritage; import or sale may be prohibited on the grounds that the article does not meet national safety standards or (to an extent4) that it bears a trade mark protected in the receiving country.

180. Customs duties and charges of equivalent effect. Articles 12 and 13 of the Treaty provide for the elimination of customs duties and charges having equivalent effect upon imports within the Community. This prohibition is rigorously applied, and has been directly effective since 1969 (the end of the

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1 On these and other peculiarities of the territory of the customs union see Special Report No 2/93 of the Court of Auditors on the customs territory of the Community and related trading arrangements, OJ C347, 27.12.93, p 1.
2 See paras 180-192 below.
4 See para 196 below.
transitional period). A charge having equivalent effect to a customs duty has been defined by the Court of Justice as:

'any pecuniary charge, however small, and whatever its designation and mode of application, which is imposed unilaterally on domestic or foreign goods by reason of the fact that they cross a frontier, and which is not a customs duty in the strict sense, ... even if it is not imposed for the benefit of the State, is not discriminatory or protective in effect and if the product on which the charge is imposed is not in competition with any domestic product'.

Article 16 provides a like prohibition of duties and equivalent charges upon exports.

181. Customs duties and internal taxation. A charge imposed by national law upon imported goods which appears to have an effect equivalent to a customs duty may in fact be a facet of a member state's system of internal taxation, if taxes are also imposed upon a like domestic product at a similar stage of production. If so, the charge does not fall under article 12 but must be considered under article 95, which deals with internal taxation and is discussed below. The two categories are mutually exclusive: a charge levied upon a good crossing a frontier may fall under article 12 or article 95, but cannot fall under both.

182. The Common Customs Tariff. As a customs union requires the creation of a uniform tariff wall applied to goods from third countries, the Treaty provides for the progressive establishment of the Common Customs Tariff (CCT), which was fully implemented by 1969. The CCT, which was reorganised in 1987, is amended from time to time by the Council and published annually in the Official Journal in updated and consolidated form. Since its coming into force, member states are no longer competent to impose any autonomous duties upon goods from third countries. Other Community legislation has been adopted in order to provide for common customs rules so that goods from third countries undergo uniform valuation and procedures upon entry into the Community. The legislation was consolidated in 1992 in the Community Customs Code.

1 See eg Case 33/70 SACE v Ministero delle Finanze [1970] ECR 1213, [1971] CMLR 123; as to the transitional period see para 169 above.
3 EC Treaty, art 17.
4 See paras 257-260.
6 EC Treaty, arts 18-29; Regulation 950/68, JO L172, 22.7.68, p 1 (S Edn 1968 (I) p 275).
7 Regulation 2658/87, OJ L256, 7.9.87, p 1. The CCT is classified now by means of the Integrated Community Tariff ('Taric'), which is based upon a Combined Nomenclature ('CN').
8 For the most recent version see OJ C141A, 24.5.94, p 1.
10 Regulation 2913/92, OJ L302, 19.10.92, p 1.
183. The Common Commercial Policy. The Treaty also provides for the gradual adoption of a common policy in commercial relations with third countries. Unlike the Common Customs Tariff, the Common Commercial Policy has not yet been fully achieved. It is the subject of a separate, subsequent title and is discussed below¹.

(B) FREE MOVEMENT OF GOODS: NON-TARIFF BARRIERS

184. The internal market in goods. Having established a common tariff wall vis-à-vis goods coming from countries outside the Community, the Treaty goes on to deal with national measures which limit trade in goods within the Community. The aim is:

'the elimination of all obstacles to intra-Community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market'².

185. Imports and exports: Prohibition of quantitative restrictions and measures of equivalent effect. The Treaty declares that quantitative restrictions upon imports (article 30) and exports (article 34) and all measures having equivalent effect are prohibited between member states. By 'quantitative restrictions' is meant quotas – measures which prescribe the number or quantity of goods of a particular type which may enter the domestic market. 'Measures of equivalent effect' include all forms of action which may be taken by, or with the authority of, the state. So legislation, bye-laws, the administrative practice of any public authority, injunctions or interdicts pronounced by courts, rules promulgated by professional regulatory bodies, are 'measures' struck at by articles 30 and 34. The prohibition has direct effect³.

186. 'Distinctly' and 'indistinctly' applicable measures. Non-tariff barriers to trade take a variety of forms. Some are overtly protectionist, discriminating directly against imported products by prescribing rules which apply only to them. Others have no protectionist intent and apply without distinction to imported and domestic products, but nevertheless constitute barriers to the entry of imported goods to the domestic market. For example, differences in national rules on additives to foodstuffs may make it more difficult to market imported goods. A distinction is made between:

- 'distinctly applicable measures', measures which make an explicit distinction between imported and domestic products, and
- 'indistinctly applicable measures', measures which apply without distinction to imported and domestic products alike.

¹ See paras 268-270.
Distinctly applicable measures fall directly under articles 30 and 34 and are prohibited unless they can be justified under article 36. Indistinctly applicable measures require to be analysed more closely to see whether they are struck at.

187. Restrictions upon imports: the Dassonville test. In 1974 the Court of Justice declared that:

‘All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.’

The Dassonville test, which is cited frequently by the Court, is comprehensive and applies whether the national measures in question are distinctly or indistinctly applicable. There is no de minimis rule: it need not be shown that a national rule inhibits the importation of goods to an appreciable extent. But there must be a genuine (albeit only potential or indirect) hindrance to trade in imported goods, in law or in fact.

188. Cassis de Dijon. In 1979 in Cassis de Dijon the Court of Justice laid down the general principle that where a product has been lawfully produced and marketed in one member state, it must be allowed to be traded freely throughout the Community. The effect of this judgment, which lies at the heart of the 1992 programme, was summarised subsequently by the Court thus:

It is established by the case-law beginning with Cassis de Dijon ... that, in the absence of harmonization of legislation, obstacles to free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods (such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging) constitute

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1 See para 191 below.
6 This is perhaps a misleading formulation, as goods need not be produced in a member state to fall within the field of art 30, they need only be in free circulation (see para 178 above).
measures of equivalent effect prohibited by Article 30. This is so even if those rules apply without distinction to all products unless their application can be justified by a public-interest objective taking precedence over the free movement of goods.\(^1\)

189. The ‘mandatory requirements’ or ‘rule of reason’. The Court expressly recognised in *Cassis de Dijon* that some disparities in national rules have to be accepted even if their effect constitutes a barrier to trade. This is so where the rules are necessary to satisfy ‘mandatory requirements’ (a clumsy translation of ‘*exigences impératives*’ – imperative/overriding needs) such as the effectiveness of fiscal supervision, public health, the fairness of commercial dealings, consumer protection\(^2\), promotion of national culture\(^3\) or protection of the environment\(^4\). To escape the reach of article 30, such rules must be:

- indistinctly applicable\(^5\);
- objectively justified; and
- proportionate.

190. Restrictions upon exports. Article 34 of the Treaty prohibits quantitative restrictions and all measures having equivalent effect on exports. However, in contradistinction to article 30, the Court of Justice has held that national measures which impede exports will fall foul of article 34 only if they are distinctly applicable\(^6\).

191. Exceptions: article 36. Article 36 is the only basis upon which distinctly applicable restrictions upon imports and exports can be justified\(^7\). It applies only to a strictly defined category of measures dealing with:

- public morality, public policy or public security;
- the protection of health and life of humans, animals or plants;
- the protection of national treasures possessing artistic, historic or archaeological value; and
- the protection of industrial or commercial property (including intellectual property).

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2 These four ‘mandatory requirements’ were expressly cited in *Cassis de Dijon*, but it was clear that the Court did not intend to provide an exhaustive list.
Further, article 36 saves national measures only so long as they:

- are not 'a means of arbitrary discrimination or a disguised restriction on trade between Member States';
- are not pre-empted by Community legislation;
- are objectively justified; and
- are proportionate.

192. Arbitrary discrimination, objective justification and proportionality. Since article 36 constitutes an exception to a basic principle of the Treaty, the Court of Justice has said that it must be interpreted restrictively. So, for example, a national rule constitutes arbitrary discrimination when it has the effect of excluding goods alleged to endanger public morality but the law does not at the same time provide rules which effectively inhibit domestic production of the goods in question. It is not enough to escape the reach of article 30, or to bring a measure within the scope of article 36, that the national rule-making body thinks the rule is necessary; it must be shown to be necessary for the purpose it purports to achieve. And it must be proportionate, ie, it will be justified only if there are no other means less disruptive to trade which will achieve the same legitimate ends of the measure in question.

193. Harmonisation of technical barriers to trade. Where national measures which impede trade can be justified by recourse to article 36 or to the mandatory requirements, the impediment to trade can be resolved only by harmonisation of the national rules and standards at issue. Article 100 of the Treaty therefore empowers the Council to adopt directives in order to 'harmonise' (or 'approximate') national rules so as to eliminate 'technical barriers' to trade which affect the establishment or functioning of the common market. However, harmonisation of national law under article 100 requires unanimity in the Council. The Single European Act amended the Treaty so as to enable the Council, by qualified majority vote, to adopt harmonisation measures necessary for the completion of the internal market. It is frequently important to determine whether a given measure harmonises the law minimally, partially or exhaustively. Where harmonisation is

1 Article 36, final sentence.
2 See para 193 below.
4 Case 121/85 Conegate v HM Customs and Excise [1986] ECR 1007, [1986] 1 CMLR 739. For a less than rigorous English approach to this principle see R v Bow Street Magistrates Court, ex parte Noncyp [1988] 3 CMLR 44 (QBD).
7 EC Treaty, art 100a; see para 170 above.
exhaustive, the directive occupies the field and pre-empts the adoption of any autonomous national rules, so excluding any possibility of invoking article 36 or mandatory requirements. Where a directive harmonises the law only partially, there is a strong presumption that it precludes recourse to article 36 or the mandatory requirements in order to justify restrictions to inter-state trade, but it leaves member states free to adopt rules which continue to govern domestic production. The Treaty provides that notwithstanding harmonisation measures adopted under article 100a (but not article 100), member states retain a right to protect 'major needs' (exigences importantes) such as those of article 36 or protection of the environment or the working environment by maintaining higher standards and excluding goods which do not meet them, unless the measure harmonises national law exhaustively. New technical requirements are required to be notified to the Commission and cannot be introduced for a certain period.

194. Reverse discrimination. Application of Cassis de Dijon may have the effect of discriminating against home producers. Thus, where national rules regulate the production of goods in a manner more stringent than the rules which obtain in other member states, Cassis de Dijon will normally require that goods produced in those other member states must have access to the home market but the home producer, bound by the domestic rules, will be operating at a cost or other comparative disadvantage. It was argued that this offends the general Community principle of non-discrimination, so that a home producer ought to be exempt from the national rules to the same extent as competitors who have access to the home market. The Court of Justice held that such reverse discrimination is not prohibited by the Treaty, as such a prohibition would result in reducing all national rules to their lowest common denominator. So national rules (where there has been no exhaustive harmonisation) remain applicable to domestic production.

195. Public procurement. The Cockfield White Paper identified the continued partitioning of national markets in public procurement, and the universal tendency to 'buy national', as one of the most evident barriers to the achievement of a genuine internal market. Public procurement is therefore

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2 See para 194 above.
3 EC Treaty, art 100a(4); see also art 130t. On the one judicial consideration of art 100a(4) see Case C-41/93 France v Commission [1994] ECR I-1829. For an example of the Commission endorsing a national derogation by authority of art 100a(4) see Decision 94/783, OJ L316, 9.12.94, p 43.
5 Ibid; Case C-139/92 Commission v Italy [1993] ECR I-4707.
6 See para 168 above.
8 Completing the Internal Market, COM(85) 310, para 81.
now governed by a series of directives regulating public works contracts\(^1\), public supplies contracts\(^2\) and utilities contracts\(^3\), combined with other directives seeking to co-ordinate procedures for the award of contracts\(^4\) and to ensure transparency\(^5\) and compliance\(^6\). Very generally, they impose upon national, regional and local authorities, when acting as ‘contracting authorities’ in all but minor contracts for building or civil engineering work (public works) or the purchase, lease, rental or hire purchase of products from a supplier (public supplies), an obligation to give notice of a contract they intend to award\(^7\) and then award the contract in accordance with the procedures provided in the directives. Reservation of a proportion of contracts to tenders from a particular geographic area of a member state is a breach of article 30\(^8\), even if the implementation of such a policy only deters or might deter imports from other member states\(^9\). Technical specifications which favour or eliminate certain makes or sources of contract goods or services are in principle prohibited\(^10\). A contract awarded in a manner inconsistent with these rules is voidable. Alternatively, the Commission may raise an enforcement action under article 169\(^11\), and the Court of Justice has not been slow to order the interim suspension of a contract shown *prima facie* to contravene the directives owing to the irreparable loss to contractors unable to tender or supply\(^12\).

196. **Industrial property rights.** Another area in which the application of national rules may fragment the Community market is the protection of industrial and intellectual property rights. National rules governing property ownership are safeguarded by article 222 of the Treaty, whilst article 36 specifically mentions the protection of industrial or commercial property as a permitted exception to articles 30 and 34. However, the Court of Justice has held that whilst the *existence* of such rights is not affected by the Treaty, their *exercise* may infringe the rules on free movement\(^13\). The question therefore is not whether it is compatible with the Treaty for national law to confer exclusive rights upon inventors or manufacturers, but whether the proprietors of such rights should be entitled to enforce them in such a way as to restrict the free movement of goods. As a general rule, the power conferred by national law to restrict the importation of goods protected by the right is said to be ‘exhausted’ once the

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1 Directive 71/305, JO L185, 16.8.71, p 5 (as amended).
4 Directives 93/36, 93/37 and 93/38, OJ L199, 9.8.93, pp 1, 54 and 84.
7 The notice is submitted to the Community’s office for Official Publications and then published in a special series of the Official Journal.
10 See eg Case 45/87 *Commission v Ireland* [1988] ECR 4929.
12 See eg Case 45/87R *Commission v Ireland* [1987] ECR 783; Case 194/88R *Commission v Italy* [1988] ECR 5647. On the power of the Court to order interim relief see para 113 above.
good has been put into free circulation in a member state by the proprietor of the right or with his consent\(^1\). Enforcement of an industrial property right in pursuance of a restrictive practice or of market dominance may also infringe the Community rules on competition\(^2\). There has been some harmonisation in the field – for example, the creation of the Community trade mark in 1994\(^3\) – but generally it has proved a difficult process.

197. State monopolies of a commercial character. Article 37 of the Treaty deals with the special situation of ‘state monopolies of a commercial character’, ie, those enjoying exclusive rights under national law in the procurement and distribution of goods. Such monopolies must be ‘adjusted’ to the extent necessary to conform with Treaty rules on the free movement of goods, which requires the abolition of any exclusive right of import\(^4\). Article 37 applies only to those activities connected intrinsically with the functioning of the monopoly and not other severable national rules\(^5\), and is directly effective\(^6\). It must be read with later provisions of the Treaty relating to the application of the competition rules to public undertakings, to state aids and to discriminatory taxation\(^7\).

\(\text{(C)} \quad \text{AGRICULTURE}\)

198. Agriculture. The Treaty provides special and very complex rules governing trade in agricultural products. Agriculture is an important part of the economy of some, and enjoyed subsidies in all, member states. Further, in the aftermath of the 1939-45 war self-sufficiency in food was regarded as an important and praiseworthy objective. The Treaty therefore made special provisions for agriculture in Title II of Part Three (articles 38 to 47), in two ways: first, by making special rules for trade in agricultural products, and second, by providing for the development of a Common Agricultural Policy. The workings of the CAP are beyond the scope of this book. Three general points should be noted.

First, ‘agricultural products’ are defined as ‘the products of the soil, of stock-farming and of fisheries and products of first-stage processing directly related to these products’\(^8\). The fisheries policy is therefore an aspect of the CAP.


\(^2\) See para 237 below.

\(^3\) Regulation 40/94, OJ L11, 14.1.94, p 1.


\(^7\) See paras 249-260 below.

\(^8\) EC Treaty, art 38(1). An exhaustive list of products subject to the rules of the CAP are contained in Annex II and in Regulation 7a, JO 1961 p 71 (5 Edn 1959-62 p 68).
Second, the Treaty provides that 'save as otherwise provided ..., the rules laid down for the establishment of the common market shall apply to agricultural products'. This means that agricultural goods are isolated from the application of general Treaty rules, but only in so far as required by special provisions of the CAP. In particular, the competition rules apply virtually unhindered.

Third, the Treaty provides for the organisation of agricultural markets in three possible ways, one of which is the creation of 'European market organisations'. This is the method which was in fact adopted, and detailed systems have been developed for the organisation of the market, including intervention and price support, in virtually all agricultural goods. The rules vary depending upon the instrument regulating the particular sector. The Court of Justice has held that products not specified in Annex II or products which have not been made subject to a market organisation are subject to the application of the normal rules of the Treaty, and that the creation of a market organisation has the effect of depriving the member states of the power to take any measure which might undermine or create exceptions to it.

(D) FREE MOVEMENT OF PERSONS AND SERVICES

199. The distinction between persons and services. The Treaty deals with persons and services in the three Chapters of Title III of Part Three, which address: 'Workers' (articles 48-51) – the right of wage and salary earners to work in other member states; 'Right of Establishment' (articles 52-58) – the right of self-employed individuals and companies or firms to establish a permanent base in another member state and there pursue economic activities in their own names; and 'Services' (articles 59-66) – the right to cross frontiers in order to provide or receive services without establishing a permanent base in another member state. The distinction is confusing since 'free movement of persons' would normally be taken to imply the right of individuals to move from one country to another, whether temporarily or permanently, whilst 'free movement of services' would be taken to imply the more abstract concept of an unrestricted right to provide or receive services in any part of the Community. But that is not how the Treaty approaches the matter.

1 EC Treaty, art 38(2).
3 EC Treaty, art 40(2).
200. Clarification of the distinction: Workers. The Chapter on workers is concerned with enabling individual wage or salary earners ('travailleurs') to find employment within the context of the economic operations of actual or potential employers. It applies therefore only to individuals who are, or wish to be, in a contract of employment and is not concerned with the freedom of employers to conduct their operations. Although not defined in the Treaty or in Community legislation, the term 'worker' has a specific Community law meaning. It covers anyone pursuing or wishing to pursue effective and genuine employment (ie, under the direction of and remunerated by an employer), even if part time, so long as the work is not so infinitesimal as to be disregarded as such, and even if reimbursement is at a rate lower than a minimum guaranteed wage. A person seeking to exercise economic activity under the Treaty in any other capacity must rely upon the Chapters on establishment and services.

201. Clarification of the distinction: Establishment and services. The Chapters on establishment and services apply to independent economic operators, whether individuals or other legal persons ('personnes non-salariees'), pursuing economic activities in their own names beyond the frontiers of their home member state. The difference between establishment and services is not always clear-cut. Establishment entails 'the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period' and suggests domiciliation and permanent or at least durable integration into the economy of another member state. Services entails the provision or enjoyment of economic activity in another member state upon a temporary basis. Generally, the Chapter on Services will apply where the provider and the recipient of a service (in its colloquial sense) are established ('domiciled'), or deemed to be established, in two separate member states.

202. Scheme. Subject to this framework, the rules governing workers, establishment and services follow the same general pattern. The Court of Justice tends to treat them as particular aspects of a uniform system and, unless concerned with the specific rules of a particular chapter, to construe them in the same manner. Essentially, the Treaty deals with three types of obstacle to the free movement of persons and services: (1) restrictions on grounds of nationality; (2) other unjustifiable restrictions which can be abolished altogether; and (3) restrictions which cannot be abolished altogether but whose adverse effects upon free movement can be removed by harmonisation or regulation

4 This is strongly implied by the German term for establishment Niederlassung.
co-ordinating legislation. Most of the basic rules have direct effect and can be enforced in national courts without further legislation.

**203. Beneficiaries.** The primary beneficiaries of the Treaty provisions on the free movement of persons and services are nationals of a member state as defined by the nationality laws of that state (or, now, citizens of the Union)\(^1\) and companies or firms formed in accordance with the laws of a member state\(^2\). There is no concept of ‘free circulation’ of third country nationals equivalent to that required by the customs union for goods\(^3\). Thus, a national of a third country lawfully resident in one member state enjoys no right of free movement – indeed, virtually no rights at all\(^4\) – under Community law. The lack of uniform rules in this area is the chief obstacle to completion of the internal market\(^5\). The Treaty does however provide an option (not yet exercised fully) to extend the Chapter on Services to nationals of third countries\(^6\). Nationals of third countries may also enjoy ‘parasitic’ rights by virtue of Treaty rights conferred upon their spouses and families\(^7\) or by virtue of being employees of a Community firm providing services in another member state\(^8\). Certain aspects of the treatment of third country nationals are now pursued by the European Union under Title VI of the Treaty on European Union\(^9\).

**204. Families.** Persons entitled to free movement within the Community would be less inclined to exercise that freedom if they were unable to bring their families with them. Community legislation\(^10\) therefore provides that the rules on entry and residence for persons seeking to work, establish themselves or provide or receive a service apply, irrespective of nationality\(^11\), also to:

1. their spouses, and their own and their spouses’ descendants who are either under 21 years of age or are dependants; and
2. dependant relatives in the ascending (and descending\(^12\)) line of both spouses.

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1. See para 171 above.
2. EC Treaty, art 58.
3. See para 178 above.
4. A national of a third country resident in the Community may petition the European Parliament and the Parliament’s Ombudsman; see para 54 above.
5. See para 170 above.
7. See para 204 below.
9. See paras 295-298 below.
11. Non-Community nationals may be required to obtain visas.
12. Directive 68/360 provides only for the ascending line; Directive 73/148 provides for both.
A ‘spouse’ exists only by virtue of a lawfully contracted marriage. Admission of family members who do not fall within heads (1) or (2) but who are dependent upon the holder of the primary right must be ‘facilitated’ (workers) or ‘favoured’ (establishment and services). The meaning of these terms has not yet been tested. Family members of a worker or of a person established in another member state have the right to work there (an important advantage for family members who are not Community nationals), even in a regulated profession, provided they have the necessary qualifications. They also have a right to education and to vocational training in the member state upon an equal footing with home nationals.

205. Right of entry. The Treaty gives migrant workers (the term used to describe a Community national exercising rights as a worker) the right to move freely throughout the territory of the member states in order to accept ‘offers of employment actually made’, to stay within a member state for the purpose of employment and to remain there after employment. The provisions on the Chapters on establishment and services are less explicit but have been construed as involving the same rights mutatis mutandis. Detailed rules applying equally to migrant workers and natural persons exercising their rights in relation to establishment and services confer the right to be issued with an identity card or passport, to leave the national territory and enter the territory of another member state merely upon the production of the identity card or passport. A migrant worker may enter a member state in order to look for employment, even if unemployed and without an offer of work, so long as the intention to look for work is genuine. The period for which he may do so, though not defined, is generally understood to be a minimum of three months. The United Kingdom, which allows six months, was held to be entitled to expel a Belgian migrant worker who had failed to find work during that six-month period, unless he could prove that he was continuing to look for work and had a genuine chance of being engaged.

206. Right of residence. The right of residence in another member state depends upon whether the individual is exercising an economic activity by
virtue of a right conferred by the Treaty. Once a migrant worker is in work, or a Community national is established in another member state, he is entitled to reside in the territory of that state and to have a residence permit valid for at least five years and automatically renewable. An individual providing or receiving a service has a right of residence for as long as is necessary; if the period is longer than three months he is entitled to a certificate of ‘right of abode’ as proof of his right of residence. A migrant worker or a person established in another member state has the ‘right to remain’ in residence following completion of employment or activity, for example upon retirement. Until 1992 an ‘economic nexus’, or some economic activity, however generously defined, was necessary in order to give rise to a right of residence. In 1990 the Council adopted three directives (required to be implemented by July 1992) which confer a right of residence upon all Community nationals and their families who do not enjoy the right by virtue of any other provision of Community law. The directives apply expressly to pensioners, students and to all others who can show they have adequate medical insurance and sufficient resources to avoid becoming a burden upon social assistance for the duration of their residence.

207. Equal treatment: Regulation 1612/68. The Treaty lays down a general prohibition against discrimination based upon nationality. The purpose is to ensure ‘equal treatment’ of the nationals of all member states (including companies and firms) wherever they may be within the Community and whatever the nature of the economic activity they wish to pursue. So any rule which makes it more difficult for a Community national to find work, establish himself or provide a service in another member state is prima facie contrary to the Treaty. This includes rules created by legislation, but also administrative rules and practices and rules made by autonomous professional bodies. The Treaty is concerned with the practical effect of the rule, rather than its theoretical nature or source. Under Regulation 1612/68, migrant workers have, in principle, the same priority and employment law

1 Directive 68/360, arts 4-7; Directive 73/148, art 4(1).
2 Ibid. In order to obtain the permit workers and persons may be required to furnish proof of employment or of economic activity. The first residence permit may be restricted to one year.
7 Directive 90/366, OJ L180, 13.7.90, p 30. This directive was annulled by the Court of Justice in Case C-295/90 European Parliament v Council (Students) (1992) ECR I-4193, (1992) 3 CMLR 281 for want of correct legal basis in the Treaty; its legal effects were declared to be operative by the Court (see para 102 above) and it is now replaced by Directive 93/96, OJ L317, 18.12.93, p 50. On students, see further para 218 below.
9 The effect of art 8a(1), added by the TEU (see para 171 above), is raised in Case C-229/94 R v Secretary of State for the Home Department, ex parte Adams (pending).
10 EC Treaty, art 6 and, more specifically for workers, art 48(2).
protection as home nationals, as the Regulation seeks to guarantee the right to take up employment with the same priority and protection as home nationals. Thus any form of limitation of employment to home nationals, recruitment procedures designed specifically for them, restrictive advertising and eligibility limited to conditions which other Community nationals cannot reasonably meet are prohibited. The prohibition applies not only to direct discrimination but also to rules and practices which produce a similar effect (ie covert or indirect discrimination). The only exceptions are language requirements where, given the nature of the employment, there is objective justification for the requirement, and discriminatory tax rules for which there is objective justification. Migrant workers have, on the same footing as home nationals, a right to vocational training, to trade union membership and activities, and to housing and social and tax advantages.

Equal treatment for those exercising rights under the chapters on establishment and services is secured upon a different basis.

208. Social security: article 51 and Regulation 1408/71. Persons entitled to free movement within the Community would also be disinclined to exercise that freedom if by so doing they jeopardised any accrued entitlements to social security benefits – the most obvious example being pension rights. Regulation 1408/71 coordinates existing national social security schemes so as to ensure fair entitlement to Community nationals exercising their rights under the Treaty. The regulation applies to anyone affiliated with a social security scheme, thus including those exercising a right of establishment and, where appropriate, those providing or receiving a service. Families, as defined by the applicable national legislation, also fall within the ambit of the regulation. The general scheme of the regulation is that benefits accrued anywhere within the Community are ‘aggregated’, so that affiliation in

1 Regulation 1612/68, arts 3-4.
3 Regulation 1612/68, art 3(1); see Case 379/87 Groener v Minister for Education [1989] ECR 3967, [1990] 1 CMLR 401.
4 In Case C-204/90 Bachmann v Belgian State [1992] ECR I-249 the Court of Justice held that national legislation which makes the deductibility of sickness and invalidity insurance contributions or pension and life assurance contributions conditional upon the contributions being paid in the state is contrary to arts 48 and 49 but could be justified by the need to safeguard the cohesion of the applicable tax system. But cf Case C-279/93 Finanzamt Köln-Alsstadt v Schumacker, judgment of 14 February 1995, not yet reported.
5 See para 218 below.
8 See paras 212-217 below.
9 Regulation 1408/71, JO L149, 5.7.71, p 1 (S Edn 1971 (II) p 416), implemented by Regulation 574/72, JO L74, 27.3.72, p 1 (S Edn 1972 (I) p 159), both updated and consolidated in OJ C325, 10.12.92, p 3.
10 Regulation 1408/71, art 2.
11 Ibid, art 1(f).
another member state must be taken into account in the disbursement of benefits by the 'competent state'. The regulation covers sickness and maternity benefits, invalidity benefits, old age benefits; survivors' benefits, accident or occupational disease benefits, death grants, unemployment benefits and family benefits. Both the regulation and national law are to be interpreted in such a way that claimants receive their full entitlement.

209. Matters purely internal to a member state. A person can claim rights under the Treaty only by seeking genuinely to exercise them. Where there is no 'appreciable Community element' the matter is purely internal to the member state and Community rules will not apply. Thus a British citizen cannot argue that a judicial order restricting her movements within the United Kingdom infringes any Treaty right. A non-Community national cannot claim right of residence with family members who are Community nationals but have never resided outside their own member state. The fundamental rights recognised as part of Community law cannot, as such, be invoked in a British court in the absence of a Community law element. And a firm cannot seek to avoid planning rules in its own member state on the ground that they infringe Community rules on right of establishment.

210. Restrictions. The Treaty recognises certain permissible restrictions to the free movement of persons. They are:

(1) restrictions on entry or movement justified upon grounds of public policy, public security or public health; and

(2) restrictions on employment in the public service or the exercise of public authority.

Like the exceptions to the rules governing the free movement of goods, they must be interpreted restrictively and be 'objectively justified' and proportionate. So, member states may define their own public policy but they may invoke it to deny a Community national the exercise of his Treaty rights.

1 As to the determination of the competent state (and therefore the applicable schemes and legislation) see ibid, arts 12-15.
2 See eg Case 7/75 Mr and Mrs F v Belgium [1975] ECR 679, [1975] 2 CMLR 442; Case 24/75 Petroni v ONPTS [1975] ECR 1149; Case C-165/91 Van Munster v Rijksdienst voor Pensioenen, judgment of 5 October 1994, not yet reported.
3 Case C-229/94 R v Secretary of State for the Home Department, ex parte Adams (pending) raises the question whether this rule has to be modified in light of art 8a(1), added by the TEU (see para 171 above).
6 Kaur v Lord Advocate 1981 SLT 322, [1980] 3 CMLR 79 (OH); on fundamental rights see para 153 above.
8 EC Treaty, arts 48(3), 56(1), 66.
10 See paras 191ff above.
only if his presence would constitute ‘a genuine and sufficiently serious threat to public policy’ affecting one of the fundamental interests of the state. A member state may not rely upon grounds of public policy where it has adopted no measures effectively to combat the activities in question amongst its own nationals. Nor may it take a broad view of what constitutes ‘public service’ or ‘public authority’ so as to restrict employment in those fields to its own nationals. Such restriction is justified only in areas in which powers are conferred to safeguard the interests of the state. If a post requires previous experience in the public service, experience acquired in the public service of another member state must be taken into account.

211. Directive 64/221. Directive 64/221 lays down procedural safeguards in relation to restriction of Treaty rights on grounds of public policy, public security and public health. The directive is directly effective. The permitted grounds may not be invoked to serve economic ends. The only diseases or disabilities which may justify refusal of entry (but not expulsion) on grounds of public health are listed. Member states may not add unilaterally to the list. Measures adopted upon grounds of public policy or public security must be based exclusively upon an individual’s ‘personal conduct’. A criminal record is not in itself sufficient justification for exclusion or expulsion. A person has the right to be informed of the reasons for refusal of entry or expulsion, the right of appeal to a court of law and the right, except in cases of urgency, to remain for at least fifteen days (entry) or a month (expulsion). In the United Kingdom the provisions of the directive are incorporated into the Immigration Rules, which must, of course, be read and applied in the light of the directive.

1 Case 36/75 Rutili v Minister of the Interior [1975] ECR 1219 at 1231, [1976] 1 CMLR 140 at 155. The original French (une menace réelle et suffisamment grave pour l’ordre public) is clearer. It also illustrates the linguistic and cultural difficulties inherent in Community law. ‘Public policy’ is a very unsatisfactory translation of ordre public; öffentliche Ordnung; openbare orde and ordine pubblico, all of which have well-established and specific meanings in the national law of other member states which are neither rendered by ‘public policy’ nor necessarily equivalent to the meaning to be given to the term in Community law. In this context ‘public order’ would probably be better than ‘public policy’.


3 Cases 115 & 116/81 Adoui and Cornuaille v Belgium [1982] ECR 1665, [1982] 3 CMLR 631; on a similar principle applied to the free movement of goods see para 192 above.


7 Directive 64/221 applied originally only to workers and their families, but was extended by Directive 75/35, OJ L14, 20.1.75, p 14 to apply also to persons exercising rights of establishment and services and their families, and by the three general residence directives (see para 206 above) to persons exercising rights thereunder and their families.

212. Right of establishment. As mentioned above, the Chapter on Establishment applies to both natural and legal persons. Its scope therefore extends to 'the setting up of agencies, branches and subsidiaries', although it does not (yet) extend to a right to transfer the central management and control of a company to a member state other than that of incorporation. The Treaty recognises that obstacles may exist (other than those connected with public policy, public security, public health and the public service) which are justified, as in the case of goods, for protection of the consumer or of the public generally. Obvious examples are the rules regulating the medical and allied professions, banking and insurance. The Chapter on right of establishment therefore has four distinct elements or phases:

(1) the prohibition of any new restrictions on the right of establishment of nationals of other member states ('the standstill'; article 53);
(2) the abolition of any restriction on the ground of nationality by the end of the transitional period and the prohibition of any such restriction after that date (article 52);
(3) the implementation of a 'General Programme for the abolition of existing restrictions on freedom of establishment within the Community' (article 54); and
(4) the adoption of directives 'in order to make it easier for persons to take up and pursue activities as self-employed persons' (article 57).

Phases (1) and (2) relate solely to the removal of restrictions which amount, directly or indirectly, to restrictions on grounds of nationality. The relevant provisions are directly effective. They impose a duty to recognise the qualifications held by nationals of other member states and a prohibition of restrictions whose effect is to discriminate against them. Generally the Treaty is concerned with 'activities' - what people actually do and the practical restrictions upon whether or how they may do it - rather than the way in which member states happen to organise the performance of those activities. This is particularly important when considering professional activities, since the lines of demarcation between different professions in the member states are not always the same.

Phases (3) and (4) require the Community institutions to act. Phase (3), as

1 See para 201.
2 EC Treaty, art 53.
5 Such a programme was adopted in 1961; see JO 1962 p 36 (S Edn (2nd series) XI, p 7).
6 'Self-employed persons' is a bad translation of personnes non-salariees, which includes, in this context, companies and firms as well as self-employed individuals.
8 See paras 214-215 below.
the language of article 54 makes clear, is concerned with the abolition of restrictions. As to Phase (4), the language of article 57 (‘making it easier to take up and pursue activities’) shows that it is concerned not so much with abolition of restrictions as with positive measures to secure mutual recognition and co-ordination of the national regulatory regimes. The Treaty does not call for or require the creation of a market for professional or other services which is ‘free’ in the sense of being unregulated. Nor is it a manifesto for deregulation. Some of the measures adopted may have that effect, but that is in part a matter of political choice, and in part a consequence of the developed rules on competition which complement the rules on the common market.

213. Harmonisation of qualifications. A significant barrier to the right of establishment consists in national requirements that access to certain ‘regulated’ trades or professions depends upon qualifications, which nationals of other member states are unlikely to possess. The Council therefore adopted directives in a number of sectors harmonising national rules on educational or professional qualifications, so enabling a person duly qualified in one member state to establish himself or provide a service in any other member state. These ‘co-ordination’ and/or ‘mutual recognition’ directives cover, amongst others, wholesale trade, retail trade, commercial agents, veterinarians, dentists, nurses, midwives, pharmacists and architects. The ‘Lawyers’ Services Directive’ grants to lawyers qualified in one member state a limited right of audience in the courts of another, but not a right of establishment.

214. Equivalence. The process of sectoral harmonisation proved to be excessively time-consuming, and, in the more difficult sectors in which national traditions vary widely, impossible. The Court of Justice had in the meanwhile developed the principle of ‘equivalence’ of qualifications. This means that, whilst the member states may still regulate qualifications and professional or academic titles, a person seeking to establish himself in a ‘regulated’ trade or profession in another member state has the right to have his existing qualifications taken into account. The competent authorities of the

1 See paras 223–260 below.
13 See Case C-55/94 Gebhard v Consiglio dell’ Ordine degli Avvocati e Procuratori di Milano (pending). The Commission has now put forward a draft directive on establishment of lawyers, not yet published.
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host member state must consider whether those qualifications, even if different, are 'equivalent' to those required of home nationals, and may refuse him authorisation only if they decide on reasonable grounds that they are insufficient. The refusal must be reasoned, and it must be subject to judicial review. Where the existing qualifications are equivalent in some aspects but not in others, the person is entitled to pursue further training to make up the difference, and can be required to do no more. The broad effect is that a requirement of educational, technical or professional qualifications can inhibit the right of a Community national to establish himself or provide a service in another member state only where he has no qualifications from his own state or where they are demonstrably deficient or demonstrably different compared to those required of nationals of the host state.

215. Mutual recognition. The case law of the Court of Justice led a policy shift from harmonisation to equivalence as part of the single market programme. Directive 89/48 creates a general system for 'mutual recognition' of higher education diplomas. Equivalence is presumed, and (very broadly) member states must give the fullest possible recognition to university and similar qualifications gained in other member states. Directive 92/51 implements the same scheme for post-secondary training or education of one to three years' duration. These directives apply in all areas not subject to harmonisation by specific sectoral directives; Directive 89/48 therefore applies to lawyers' qualifications.

(e) SERVICES

216. Scope of the free movement of services. The Chapter on Services applies where the provider and the recipient are established in different member states. It applies in the increasingly important area of inter-state broadcasting and other services provided by electronic or similar means.


2 Directive 89/48, OJ L19, 24.1.89, p 16. A higher education diploma is, in principle, one which requires at least three years' tertiary education evidenced by a degree or comparable award; art 1(a).


4 Although Directive 89/48 has no bearing upon recognition of legal qualifications as amongst the three jurisdictions within the UK (this being 'wholly internal' to a member state; see para 209 above), it served as inspiration for Parliament to adopt a similar scheme for transferability of UK legal qualifications; see the Courts and Legal Services Act 1990, c 41, s 60 (for England and Wales); and the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, c 40, s 30. No equivalent legislation has been adopted for Northern Ireland.

The concept of services (in its Treaty sense) includes the right to receive a service as well as the right to provide it, and the Court of Justice has taken a liberal view of what may constitute a ‘service’. Thus the provisions of the Chapter apply, for example, to tourism and health care, to the procurement of abortions and, indeed, virtually any lawful but temporary presence of a Community national in another member state. They may also be relied upon as against the state by any person (natural or legal) resident or established there wishing to provide a service to a recipient established in another member state. Any national legislation which, without objective justification, impedes or makes more difficult a provider of a service from exercising the right to do so infringes article 59.

217. Services and imperative reasons of public interest. As in the case of establishment, freedom to provide services raises the problem of qualifications. Further, the provider of ‘services’ is, ex hypothesi, domiciled outwith the jurisdiction of regulatory bodies of the host state. Legitimate barriers to the provision of services (other than those expressly permitted on grounds of public policy, public security, public health and work in the public service) may therefore arise in the interests of ‘prudential supervision’. The Court of Justice has developed principles, analogous to the Cassis de Dijon mandatory requirements, which permit member states to inhibit the provision of services for ‘imperative reasons of public interest’. These cannot in principle result in discrimination as between ‘home’ and ‘foreign’ providers of services and apply where, and only where, (a) there is objective justification for the restrictive national rule, (b) due account is taken of the standards and rules to which the provider of the service is subject in his home state, and (c) the restriction is proportionate. But a person may not, in order to evade the professional rules of conduct in one member state, establish himself in another and then rely upon the Treaty in order to provide ‘services’ in the

5 See para 217 below.
6 Case C-288/89 Stichting Collectieve Antennevoorziening Gouda v Commissariaat voor de Media [1991] ECR I-4007; Case C-76/90 Sager v Dennemeyer [1991] ECR I-4221; Case C-381/93 Commission v France (Maritime Transport), judgment of 5 October 1994, not yet reported. This is analogous to the Dassonville test developed in the context of free movement of goods; see para 187.
7 See paras 189ff above.
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former; in such cases he will be deemed to be established in the former state and subject to its supervisory rules.

218. Students. Except in so far as it is ancillary to other Treaty rights – for example, schooling for the families of workers – education falls largely outside the meaning of the Treaty. Publicly-funded education is not a ‘service’ within the meaning of the Treaty. Nevertheless, higher (i.e. tertiary and technical) education is closely bound to vocational training, which is a concern of the Treaty. So, a student in higher education has a right of residence for the duration of his studies and article 6 of the Treaty prevents a member state from imposing higher fees upon students from other member states. The Treaty does not (yet) require that subsistence grants paid to home students be provided to students from another member state, unless the student concerned has been a migrant worker in the member state where he wishes to study and is thereafter unintentionally unemployed, or there is a link between his former work and the course of education he wishes to pursue, or the purpose of further study is to improve his prospects in the labour market.

219. Financial services; company law. Banks, insurance companies and other providers of financial services are ‘persons’ enjoying right of free movement under the Treaty. But the Court of Justice has recognised that special rules are necessary in this field for the protection of the consumer. There are a number of directives designed to ease the process of mutual

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2 See para 204 above.

3 But see paras 281ff below.

4 Case 263/86 Belgium v Humbel [1988] ECR 5365, [1999] 1 CMLR 393; Case C-109/92 Wirth v Landeshauptstadt Hannover [1993] ECR I-6447. However, education provided for fees at the full market rate might constitute a service.

5 EC Treaty, art 127. Higher education pursued for the sole purpose of an improvement in general knowledge may be different; see Case 293/85 Commission v Belgium [1988] ECR 305, [1989] 2 CMLR 527 at 3355ff and 538ff per Advocate General Slynn.

6 Case C-357/89 Raulin v Minister for Education and Science [1992] ECR I-1027, [1994] 1 CMLR 227. This right derives directly from the Treaty; the directive which grants a right of residence to students (see para 206 above) therefore has utility only in that it also grants a right of residence to their families.

7 See para 168 above.


recognition\(^1\), and others dealing with the structure, capitalisation and management of companies in order to ensure that companies incorporated in one member state can operate freely in another\(^2\). Regulation 2137/85 provides for the ‘European Economic Interest Grouping’ (EEIG), the first corporate structure created by Community law, which enables firms in various member states to undertake joint ancillary activities without need for capitalisation\(^3\). In 1968 the member states entered into a convention on the mutual recognition of companies\(^4\), but it has not yet entered into force. In 1989 the Commission published a draft regulation on the formation of the ‘European Company’ (Societas Europaea)\(^5\), but the Council has shown no enthusiasm to adopt it into law.

(F) FREE MOVEMENT OF CAPITAL

220. Capital. Unlike the provisions on the free movement of goods, persons and services, the original Chapter of the Treaty on Capital (articles 67-73) did not, for practical purposes, have any direct effect. Current payments connected specifically with the free movement of goods, persons or services fell under a later provision of the Treaty which was directly effective\(^6\) and so could not be impeded by exchange controls\(^7\). Two directives adopted in 1988 and 1989\(^8\) required the liberalisation of a wide range of capital movements, so giving broad effect to the free movement of capital\(^9\). However, this

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2 Eg, the company law directives on safeguards for the protection of company members (68/151, JO L65, 14.3.68, p 8 (6 Edn 1968 (I) p 41)); safeguards for members in the formation of public limited companies and their capital (77/91, OJ L26, 31.1.77, p 1); mergers (78/855, OJ L295, 20.10.78, p 36); annual accounts (78/660, OJ L222, 14.8.78, p 11); consolidated accounts (83/349, OJ L193, 18.7.83, p 1); scission or ‘de-merger’ (82/89, OJ L378, 31.12.82, p 47); accountancy laws (83/349, OJ L193, 18.7.83, p 1); audits (84/253, OJ L126, 12.5.84, p 20); disclosure requirements for branches (89/666, OJ L395, 30.12.89, p 36); single member private limited companies (89/667, OJ L395, 30.12.89, p 40); taxation of mergers (90/434, OJ L225, 20.8.90, p 1); taxation of parents and subsidiaries (90/435, OJ L225, 20.8.90, p 6). These directives have been implemented in the UK by amendment of the Companies Acts.
4 Convention of 29 February 1968 on the Mutual Recognition of Companies, Firms and Legal Persons.
5 COM(89)268 final; see also the Commission proposal for employee participation in the European Company, OJ C263, 16.10.89, p 69.
6 EEC Treaty, art 106; now subsumed within EC Treaty, art 73b(2).
9 See Cases C-358 & 416/93 Ministerio Fiscal v Bordessa, judgment of 23 February 1995, not yet reported.
Chapter of the Treaty was replaced completely by the Treaty on European Union. The Treaty now provides that all restrictions upon the movement of capital and payments between member states are prohibited. The language of the prohibition is such as to create direct effect. There is also a general prohibition of restrictions upon the movement of capital and payments between member states and third countries. National restrictions continue in force for capital movement to and from third countries involving direct investment, financial services and admission of securities to capital markets. The Council may introduce regulatory measures. Member states remain entitled (a) to differentiate in tax law regarding place of residence or place of investment, to provide for prudential supervision of financial institutions and to take measures justified on grounds of public policy or public security, so long as these measures do not constitute arbitrary discrimination or a disguised restriction to the free movement of capital; and (b) to adopt unilateral safeguard measures regarding capital movements or payments from a third country for serious political reasons and upon grounds of urgency. Otherwise, control of capital movements and payments now falls within the exclusive competence of the Community, and is intimately bound up with the drive towards economic and monetary union.

(G) TRANSPORT

221. Transport. Transport is governed by Title IV of the Treaty, comprising articles 74 to 84. Like agriculture, the Treaty envisaged not a free market but a regulated market in transport, and it was to be implemented by a Common Transport Policy. In 1985 the Court of Justice condemned the Council’s failure to agree upon a common policy. Notwithstanding the absence of rules, the Court has held that the Chapter on provision of services applies fully to transport services with an inter-state dimension and that the treaty rules on competition apply to some transport sectors.

1 EC Treaty, arts 73a-g.
2 EC Treaty, art 73b(1) and (2). A right of temporary derogation is provided to some member states (not the United Kingdom) until 31 December 1995; Ibid, art 73e.
3 Ibid, art 73b(1) and (2).
4 Ibid, art 73c(1).
5 Ibid, arts 73c(2), 73f and 73g(1).
6 Ibid, art 73d.
7 Ibid, art 73g(2).
8 See paras 262-267 below.
9 See para 198 above.
10 EC Treaty, art 74.
Nevertheless, legislative process towards a true common policy remains patchy and slow. There is Community legislation dealing, *inter alia*, with the following aspects of transport: market access; user tariffs; cabotage; structural harmonisation; mutual recognition of qualifications; driving licences; social conditions; and technical and safety standards.

**(b) Common Rules on Competition, Taxation and Approximation of Laws**

**222. General.** Title V of the Treaty is entitled ‘Common Rules on Competition, Taxation and Approximation of Laws’, and is divided into three Chapters:

1. Rules on competition (articles 85-94);
2. Tax provisions (articles 95-99); and
3. Approximation of laws (articles 100-102).

The chapter on approximation (or harmonisation) of laws prescribes the procedure for legislation to eliminate differences in the laws of the member states which impede the functioning of the common market (article 100) and the internal market (article 100a). The Treaty on European Union added a provision which empowers the Community to adopt rules regarding visas for third country nationals entering the Community. Otherwise, whilst the harmonisation procedures are clearly of great importance in achieving the internal market and ‘fine tuning’ the common market, and the directives

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9. See para 193 above. **On the breadth of art 100a as a legal base see Case C-359/92 Germany v Council [1994] ECR I-3681.**
10. EC Treaty, art 100c; see para 297 below.
adopted under it may have relevance for the interpretation of national legislation¹, Chapter 3 does not of itself enact any substantive rules of law.

(A) THE RULES ON COMPETITION

(i) Introduction

223. General. Article 3(g) (formerly article 3(f)) of the Treaty prescribes as one of the ‘activities’ of the Community ‘a system ensuring that competition in the internal market is not distorted’. The concept of ‘distortion of competition’ is fundamental to Community competition law, implying that the norm should be a situation where the market is allowed to operate freely. The aim set out in article 3(g) is implemented by the ‘rules on competition’ which are divided into three sections:

1. **Rules applying to undertakings** (articles 85–90);
2. **Dumping** (article 91); and
3. **Aids granted by States** (articles 92–94).

The section on dumping is concerned only with dumping as between member states, and with the end of the transitional period is now spent (except transitively for Austria, Finland and Sweden). Measures taken by the Community against the dumping of products from third countries on the Community market are taken under the provisions implementing the Common Commercial Policy².

The rules applying to undertakings follow the pattern established by the Sherman Act 1890 in the United States which prohibits, first, ‘every contract, combination or conspiracy in restraint of trade’, and second, the ‘monopolization of trade and commerce’ – in other words, distortion of free competition which results, in the first case, from the collusive action or conduct of two or more economic operators and, in the second, from the predominant market power of one. This has become a standard approach to competition law and has been adopted in a number of countries³. But the Treaty is concerned not just to ensure a ‘level playing field’ amongst competitors, but also to ensure that the barriers which the earlier provisions of the Treaty have abolished are not replaced by barriers created by the economic operators themselves and to promote interpenetration of national markets.

The rules on state aids complement the rules applying to undertakings by preventing member states from distorting competition by subsidising the operation and activities of domestic producers or suppliers of services. The rules on competition are then further complemented by the rules relating to taxation which prevent member states from adopting the other

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¹ See para 148 above.
² See para 270 below.
³ For recent examples see the (Canadian) Competition Act, RSC 1985, c C-34 as amended by SC 1986, c 26; the (Irish) Competition Act of 1990; the (Italian) Anti-Trust Law, Legge 287/1990; the Swedish Competition Laws of 1 July 1993.
possible method of providing financial assistance – by taxing domestic products in a manner different from imported products.

224. Complementarity of Treaty rules. Just as the common rules of this Title complement one another, so, together, they reinforce and complement the provisions on the free movement of goods, persons, services and capital. Indeed, the Court of Justice has recognised that the competition rules of the Treaty are ‘so essential that without [them] numerous provisions of the Treaty would be pointless’.

(ii) The Rules Relating to Undertakings

(1) The Operative Provisions: Articles 85 and 86

225. General. Articles 85 and 86 are the main operative provisions of this section of the Treaty. Article 85(1) prohibits:

‘All agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market’.

Article 86, unlike the Sherman Act, does not outlaw monopolies as such. Rather it prohibits:

‘Any abuse by one or more undertakings of a dominant position’,
or (using words which more faithfully reflect the original language texts of the Treaty) ‘the abusive exploitation of a dominant position’. Articles 85 and 86 state principles and should not be construed as if they were statutory provisions. They are not mutually exclusive and an agreement or business practice may be caught by both. The rules of Community law and of national law are likewise not mutually exclusive and, again, an agreement or business practice may be caught by both. Subsequent articles provide for Community legislation to give effect to the principles of articles 85 and 86 (article 87); pending the adoption of such legislation, for their enforcement by national and Community authorities (articles 88 and 89); and special provisions for applying the competition rules to public and ‘privileged’ undertakings (article 90).

226. Undertakings. Articles 85 and 86 are concerned with the conduct of ‘undertakings’. The word ‘undertaking’ (entreprise; Unternehmer) is not

2 EC Treaty, arts 87(1) and 89(1).
4 See para 232 below.
defined in the Treaty, but it is very wide, covering every type of entity, regardless of its legal status, from a single individual to a multinational corporation, provided he or it has legal capacity and is engaged in economic activity of some sort. So, an opera singer, a sports federation, a public agency and anything in between are undertakings in so far as they carry on economic or commercial activities.

227. Obligations of the member states. The competition rules are concerned with the conduct of undertakings, not with national legislation. However, member states have an obligation under articles 85 and 86, in conjunction with article 54, not to introduce or maintain in force any national rules which might render their application ineffective.

228. The prohibitions (articles 85(1) and 86). Both article 85(1) and article 86 expressly prohibit certain specific types of restrictive practice:

1. practices relating to the fixing of purchasing or selling prices or other trading conditions (for example conditions of sale);
2. practices which limit or control production, markets (outlets) or technical development;
3. the application of dissimilar conditions to equivalent transactions, thereby placing other trading parties at a comparative disadvantage; and
4. making the conclusion of contracts subject to acceptance of supplementary or unconnected obligations.

Article 85 further prohibits agreements to share markets or sources of supply. But these lists of prohibited practices are not exhaustive. The Treaty is concerned, as always, with the practical economic effect of what is done, and any conduct falling within the general prohibitions of articles 85(1) and 86 is illegal.

229. Nullity of contracts (article 85(2)). According to article 85(2), any agreement or decision which infringes article 85(1) is ‘automatically void’. Unlike the scheme of national law in some countries, no previous decision to that effect is required.

4 See para 167 above.
6 EC Treaty, arts 85(1) (a), (b), (d), (e) and 86 (a)-(d).
7 Ibid, art 85(1)(c).
and their enforcement is a matter for the national courts. It is also a matter for the Commission. The enforcement powers of each are discussed below.

230. Exemption (article 85(3)). Because some agreements or practices which fall within the prohibition of article 85(1) may nonetheless produce beneficial effects, article 85(3) provides authority for exempting certain types of agreements from the prohibition of article 85(1) (but not article 86). Exemption is discussed below.

231. The relevant market. The compatibility of any agreement or business practice with articles 85 and 86 must be assessed in the context of 'the relevant market', which is a function essentially of two characteristics, the 'relevant product or service market' and the 'relevant geographic market'.

1. The relevant product or service market includes any products or services which are identical or equivalent to those in question. The products or services must be 'interchangeable' or 'substitutable'. Whether or not this is the case must be judged from the vantage point of the user or consumer, normally taking the characteristics, price and intended uses of the product or service together. In other words, can one product or service be replaced with another whilst satisfying the same technical or consumer demands? If it can, they form part of a product or service market comprising all the products or services which are interchangeable with, or capable of substitution for, one another. If it cannot, the produce or service in question forms its own market. For example, bananas have been held to constitute a single product market because of special characteristics which distinguish them from fresh fruit generally, whilst port services for ferries on the Holyhead-Dun Laoghaire route were held to constitute a single service market owing to the inconvenience for a number of passengers of using the other British-Irish ferry routes. The market need not be a large one; it is sufficient that there be an identifiable market in which the substitution of one product or service for another is burdensome or less attractive to the customer.

2. The relevant geographic market is defined by reference to a geographic territory throughout which the product or service in question moves freely.

1 See paras 238-239.
2 See paras 240ff.
3 A third characteristic may be a 'temporal' consideration since markets may change over time (eg with technological development) or there may be seasonal variations; see eg Case 27/76 United Brands v Commission [1978] ECR 207, [1978] 1 CMLR 429.
4 Case 27/76 United Brands v Commission, above.
6 See eg Case 22/78 Hugin Kassaregister v Commission [1979] ECR 1869, [1979] 3 CMLR 345, in which the relevant product market was found to be that in spare parts for a particular make of cash register.
The market may be the global market where the relevant product (for example, a type of aeroplane) is available without hindrance throughout the world. It may be the whole of Europe, or the whole of the Community, if those areas constitute a geographically homogeneous area for the availability of a particular product or service. It may be narrower where the product or service is not available, or is available in limited quantities or at irregular intervals, in parts of the Community, where the nature of the product or service restricts mobility, or where there are other barriers, physical or legal, to entry into particular national markets.

232. Scope of article 85(1). The terms of article 85(1) must be analysed very carefully in order to determine its scope and application. The following points should particularly be noted.

(1) Although article 85(1) seems to apply to any anticompetitive co-operation between any two or more undertakings, the Court of Justice has held that it does not apply where the undertakings form a single economic unit, such as a group in which subsidiaries have no real freedom to determine their course of action, or where the agreement or practices in question are concerned merely with the internal allocation of tasks as between members of the same corporate family (the ‘economic entity doctrine’). Whether this is the case is a matter of fact. In any event, article 86 may still apply.

(2) Prima facie, article 85(1) strikes at all agreements and practices falling within its terms, both ‘horizontal’ (agreements between competitors) and ‘vertical’ (agreements between a manufacturer and a distributor/retailer or between any of these and a customer), however innocuous or even beneficial they may be from the point of view of competition. The Court of Justice has recognised a ‘de minimis rule’ which excludes from the scope of article 85(1) agreements and practices whose effect upon competition between member states is not ‘appreciable’. The Commission has issued a series of notices which seek to define the scope of this rule. In practice, the rule has limited application. The Court has also indicated that an agreement may fall outwith the scope of article 85(1) where it constitutes no real threat to competition or to the functioning of the common market and where its anticompetitive effects are a

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2 Eg. linguistic barriers; Case C-360/92P Publishers Association v Commission, judgment of 17 January 1995, not yet reported.
4 The application of art 85(1) to vertical agreements was first recognised in Cases 56 & 58/64 Consten & Grundig v EEC Commission [1966] ECR 299, [1966] CMLR 418, which repays careful reading as it lays a foundation for much of the Court’s thinking on art 85.
5 The benefits of an otherwise illegal agreement are taken into account in considering whether an exemption from the prohibition ought to be granted it under art 85(3); see para 241 below.
7 Notice on agreements of minor importance which do not fall under art 85(1), OJ C231, 12.9.86, p 2. The notice is a second revision (the first being in 1977) of an original 1970 notice.
necessary incident of the proper functioning of an agreement which is not, in its essence, anticompetitive. But the existence of any rule to that effect - sometimes called the 'rule of reason' - has been expressly recognised by the Court only once in a (dated) opinion of an Advocate General, has never been recognised by the Commission, is on any view of more limited scope than its United States progenitor, and will require further elaboration from the Court before it may be relied upon with any degree of certainty.

(3) The reference in article 85(1) to 'agreements between undertakings, decisions by associations of undertakings and concerted practices' does not mean that a restrictive practice must be fitted into one of three mutually exclusive categories in order to fall foul of the Treaty prohibition. The phrase ought rather to be taken as a comprehensive description of the ways in which independent undertakings can get together to prevent, restrict or distort competition - by making written, oral or gentlemen's agreements, through trade or professional associations, or simply by informal concerted conduct or practices, the latter defined by the Court of Justice as parallel behaviour not corresponding to normal market conditions by which undertakings 'knowingly substitute practical co-operation between them for the risks of competition'. Latterly the Commission has not concerned itself with identifying the existence of a formal agreement, but has simply adduced evidence that an agreement and/or a concerted practice exists. All are prohibited, no matter how the objectionable result has been achieved.

(4) Article 85(1) refers to 'object or effect'. Thus, a restrictive agreement is prohibited if its object is prohibited, even if it has not yet taken effect or has ceased to have effect. Equally, an agreement which has the effect, actual or potential, of preventing, restricting or distorting competition, is prohibited whatever its objects may be. This is why article 85(3) is needed to exempt agreements designed to achieve economically desirable objectives.

(5) The references in article 85(1) to 'trade between Member States' and 'competition within the common market' are of significance more in relation to jurisdiction than to substance. An agreement or practice all of

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2 Case 56/65 Technique Minière, above, at 257 (ECR) and 368 (CMLR) per Advocate General Roemer.


6 See paras 240ff below.
whose actual or potential effects are confined within a single member state falls within the exclusive jurisdiction of the competition authorities (if any) of that state. If its effects are wider, and appreciable, it will fall within the jurisdiction of the national and of the Community authorities. An agreement or practice which is implemented within the Community and has the effect of preventing, restricting or distorting competition within the common market is prohibited even if it is made, and the parties to it are domiciled, outside the Community.

233. Abuse of a dominant position. Article 86 of the Treaty prohibits abuse of a dominant position. The concept is, however, difficult to define. It has two components: market dominance, which is not of itself prohibited by article 86, and abusive exploitation of that dominance, which is. The abuse need not occur in the market in which the undertaking is dominant: using market power in one market in order to protect or strengthen the undertaking's position in another, but related, market is enough.

234. Dominance. Dominance can exist both in the supply and in the purchase of goods or services. In order to determine whether an undertaking occupies a dominant position it is necessary first to identify the relevant markets – ie the relevant product or service market and the relevant geographic market. Application of article 86 requires dominance within the common market or a substantial part of it. A 'substantial part' of the common market may be the territory of a single member state or even part of a member state. Having identified the relevant markets, it must then be shown that an undertaking (or group of undertakings) is dominant in those markets. A very high market share – more than 85 per cent – is determinative of itself of a dominant position; a market share of 50 per cent constitutes a dominant position except in exceptional circumstances. Whether dominance can exist

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5 See para 231 above.
6 See eg Case 322/81 Michelin v Commission [1983] ECR 3461, [1985] 1 CMLR 282, in which the relevant geographic market was the Netherlands.
7 Eg Cases 40 etc/73 Coöperative Vereniging 'Suiker Unie' v Commission [1975] ECR 1663, [1976] 1 CMLR 295, in which a relevant geographic market was Bavaria, Baden-Württemberg and parts of Hesse. In Case C-179/90 Merci Convenzionali Porto di Genova v Siderurgica Gabrielli [1991] ECR 1-5889, [1994] 4 CMLR 422 and Case C-18/93 Corsica Ferries Italia v Corpo dei Piloti del Porto di Genova [1994] ECR 1-1783 an undertaking was dominant in the provision of services in the port of Genoa and was held subject to the discipline of art 86 owing to the volume of trade processed in the port which affected a significant part of the common market.
8 See para 236 below.
with a lower market share depends upon the respective market shares of the undertaking and its competitors\(^1\), their respective technical, financial or other resources (such as intellectual property rights) and the undertaking’s conduct in the market. A statutory monopoly in the territory of a member state constitutes of itself a dominant position\(^2\). Essentially, the question is whether the undertaking is subject to the normal constraints of competition or can behave to an appreciable extent without regard to its competitors and its customers\(^3\). Two or more undertakings may, together, be dominant\(^4\).

235. Abuse. Once the existence of a dominant position is established, the next question is whether the dominant undertaking has abused that dominance, and has done so in a manner which affects trade between member states. Apart from the list in article 86 itself\(^5\), the most common examples of abusive conduct have included predatory pricing\(^6\), refusing without objective justification to deal or supply\(^7\) or dealing or supplying on less favourable\(^8\) or discriminatory\(^9\) terms, tying\(^10\) and giving loyalty rebates\(^11\). But so wide is the application of the prohibition that the simplest, and perhaps the best, test is this: since the very presence of a dominant undertaking in the market weakens the structure of competition\(^12\), such an undertaking has a special responsibility not to allow its conduct further to impair genuine undistorted competition\(^13\) or hinder the growth of competition\(^14\). If it does so by any means, that constitutes an abuse of its dominant position.

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1 See Case 27/76 United Brands v Commission [1978] ECR 207, [1978] 1 CMLR 429; Case 322/81 Michelin v Commission [1983] ECR 3461, [1985] 1 CMLR 282. So, where one undertaking has, say, 30 per cent of the market and none of its competitors has more than 10 per cent, the first undertaking may have a dominant position; but this would not be so where, for example, one undertaking had 30 per cent, two others 25 per cent and others 10 per cent and less.


4 See para 236 below.

5 See para 228 above.


9 Case 311/84 CBEM v CLT and IPB (Telemarketing) [1985] ECR 3261.


236. Oligopolies. In order to infringe article 85(1) there must be conscious conduct which does not correspond to normal market conditions. In the absence of a formal agreement, parallel behaviour, especially price parallelism, is normally strong evidence of the existence of a concerted practice. But oligopolistic markets are not normal market conditions since price parallelism is the natural state of such a market. So difficulties arise in the application of article 85(1) to such a market. Article 86 however refers to ‘abuse by one or more undertakings of a dominant position’. The combined position of two or more undertakings in an oligopolistic market could constitute ‘collective’ or ‘joint’ dominance so that their conduct would be subject to the discipline of article 86. The Court of First Instance has suggested circumstances in which this might be so. The Court of Justice found that a combination of local statutory monopolies covering the whole territory of a member state constitutes a dominant position, which might be termed ‘shared’ dominance.

237. Intellectual property. The exercise of intellectual property rights is curtailed significantly by the exhaustion of rights principle under article 30. An attempt to exercise or protect such a right may also be an infringement of article 85(1) if it is the object, means or consequence of an agreement or concerted practice which partitions the market. Further, whilst ownership of intellectual property rights does not of itself constitute dominance and the exercise of such a right does not of itself constitute abuse, the manner of its exercise by a dominant undertaking – for example, refusal to supply, limiting production, arbitrary prices or royalties, tying, acquisition of rights to competing technology – may constitute an infringement of article 86.

(2) Enforcement

238. Enforcement by the Commission: Regulation 17. Regulation 17, the principal regulation implementing articles 85 and 86, gives the Commission wide powers of investigation and enforcement.

1 See para 232 above.
2 Cases T-68 & 77-78/89 Società Italiana Vetro v Commission (Flat Glass) [1992] ECR II-1403 at 1548, [1992] 5 CMLR 302 at 404. However, the Court annulled the Decision of the Commission (Decision 89/93 (Flat Glass), OJ L33, 4.2.89, p 44, [1990] 4 CMLR 535), which found that there had been collective dominance in that case.
3 Case C-323/93 Société civile agricole de Centre d’insémination de la Crespelette v Co-operative d'élevage et d’insémination artificielle du département de la Mayenne, judgment of 5 October 1994, not yet reported.
4 See para 196 above.
**Investigation.** Upon a complaint (‘application’) from a member state or an undertaking with legitimate interest or upon its own initiative\(^1\), the Commission may commence an investigation. It may require undertakings to provide information\(^2\). Authorised Commission officials may enter the premises of any undertaking, examine books and business records, take copies therefrom, and ask for oral explanations on the spot\(^3\). The Commission may, in some circumstances must\(^4\), and in all cases invariably does, seek assistance from and co-operate with the appropriate national authorities\(^5\) – in the United Kingdom, the Office of Fair Trading. Failure to provide the information called for or refusal to submit to an investigation may result in a fine\(^6\).

**Termination and fines.** Where the Commission finds that a breach of articles 85(1) or 86 has occurred it may issue an order requiring the breach to be brought to an end\(^7\), including the power to order any positive action necessary to cure the breach\(^8\). It may, and frequently does, issue a decision declaring the existence of an infraction, even if it has been brought to an end, in order to clarify a point of law and so prevent future infractions. This practice has been endorsed by the Court of Justice\(^9\). If it finds that the breach has been intentional or negligent, the Commission may impose a fine of up to one million ECU or 10 per cent of an undertaking’s annual turnover, whichever is the higher\(^10\). It may also impose a liquidate penalty (known as a ‘periodic

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1 Regulation 17, art 3. The Commission has no duty to pursue a complaint but it has a duty to consider the issues raised in order to determine whether there is conduct which infringes arts 85(1) or 86 and justify any decision not to proceed; see Case T-24/90 Automec v Commission [1992] ECR II-2223; Case T-28/90 Asia Motor France v Commission [1992] ECR II-2285; Case T-37/92 Bureau Européen des Unions des Consommateurs v Commission [1994] ECR II-285; Case T-74/92 Ladbrooke Racing (Deutschland) Gmbh v Commission, judgment of 24 January 1995, not yet reported.

2 Regulation 17, art 11. However, owing to the general principle of privilege against self-incrimination, an undertaking is not obliged to provide answers which would of themselves constitute an admission of unlawful conduct; see Case 374/87 Orkem v Commission [1989] ECR 3283; [1991] 4 CMLR 502 and para 153 above.

3 Regulation 17, art 14; an undertaking is protected to an extent from abuse of this power of search by a general principle of the inviolability of its premises; see Cases 46/87 and 227/88 Hoechst v Commission [1989] ECR 2859; [1991] 4 CMLR 410 and para 153 above.

4 Cases 46/87 and 227/88 Hoechst, above.

5 Regulation 17, arts 11, 13, 14(4)-(6).

6 Ibid, art 15(1).

7 Ibid, art 3.

8 Cases 6 & 7/72 Commercial Solvents v Commission [1974] ECR 223, [1974] 1 CMLR 309. The power of positive compulsion, although not fully explored, is most appropriate where an undertaking has infringed art 86; the Commission has in principle no power to order a party to enter into contractual agreements in order to cure a breach of art 85(1); see Case T-24/90 Automec v Commission [1992] ECR II-2223, [1992] 5 CMLR 431. To date, the highest fine imposed has been 248 million ECU (about £200 million), imposed upon eight associations and thirty-three companies wilfully engaged in a longstanding and serious cartel in the cement market; see Decision 94/815 (Cement), OJ L343, 30.12.94, p 1 (appeal pending). The highest fine imposed upon a single undertaking has been 75 million ECU (£60 million) for serious, persistent and deliberate breach of art 86; see Decision 92/163 (Tetrapak II), OJ L72, 18.3.92, p 1, [1992] 4 CMLR 551, upheld by the Court of First Instance in Case T-83/91 Tetrapak v Commission, judgment of 6 October 1994, not yet reported.
penalty payment') of up to 1,000 ECU per day for each day on which an undertaking, having been ordered to do so, fails to put an end to an infringement, fails to comply with a request for information, or refuses to submit to an investigation. Such a fine is, in the view of Community law, an administrative, not criminal, penalty, but certain guarantees of the 'rights of defence' nevertheless apply. In the United Kingdom, a Commission decision imposing a financial penalty is registered by the High Court or the Court of Session as a 'European Community judgment' and enforced by civil process.

Interim measures. The Commission may also order interim measures in the course of an investigation where there is a prima facie breach of articles 85(1) or 86, urgency, and either a likelihood of serious and irreparable injury or a situation intolerable for the public interest. Interim measures are most likely to be adopted in cases involving injury through abuse of a dominant position. The Commission may, and frequently does, accept an undertaking rather than pronounce a formal order.

Judicial control of the Commission. Any decision adopted by the Commission under Regulation 17, including a decision imposing financial penalties or adopting interim measures is a decision within the meaning of article 189 of the Treaty and so subject to judicial review by the Court of First Instance or the Court of Justice.

239. Enforcement: National courts. As noted above, articles 85 and 86 are directly effective and so create rights which national courts must protect. The remedies by which these rights are to be protected vary with the substance of the issue. Article 85(2) declares that an agreement or decision which infringes article 85(1) is 'automatically void' and so, unless the offending

1 Regulation 17, art 16.
2 Ibid, art 15(4); confirmed by the Court of Justice is Case 45/69 Boehringer Mannheim v Commission [1970] ECR 769. Although the distinction between 'administrative' and 'criminal' penalties is obscure to the common lawyer, it is of great importance in some other jurisdictions where a criminal record may seriously affect the right to pursue economic activities.
5 EC Treaty, art 192 and RSC, Ord 71, rr 15-24 (England and Wales); RC 62.18-62.25 (Scotland).
7 Regulation 17, art 17.
9 See paras 142, 146 above.
provisions are severable (severance being permissible\(^1\) and a matter for national, not Community, law\(^2\)), they cannot be enforced by the courts. This would apply even if the proper law of the contract is that of a non-Community country since a court of the Community cannot give effect to such an agreement. Article 86 contains no equivalent provision, but conduct infringing it cannot give rise to enforceable rights for the defaulting undertaking. Third parties affected by an infringement of articles 85 or 86 may seek appropriate remedies from their national courts such as damages\(^3\) or injunction/interdict\(^4\). But the lawfulness of a Commission decision, even where it is to be registered and enforced as a European Community judgment, is, in principle, subject to judicial review only before the Community courts. Where a competition case arising before a national court appears to raise a question of the application of articles 85 or 86, the Court of Justice is often asked to rule on the question in a reference under article 177\(^5\).

240. Exemption (article 85(3)). There is an important difference between articles 85 and 86 in that conduct prohibited by article 86 is always illegal\(^6\), whereas a restrictive agreement can, under article 85(3), be exempted from the prohibition provided it meets certain strict criteria. The procedure for obtaining exemption is laid down in Regulation 17. Exemption may be granted only by the Commission\(^7\). A national court which is called upon to consider an agreement which has not been formally exempted by the Commission cannot presume that it should or will be exempted simply because it appears to the national court to satisfy the criteria for exemption\(^8\).

241. Conditions for exemption. The conditions for exemption set out in article 85(3) are both positive and negative. The agreement must both:

4. See eg Argyll v Distillers 1987 SLT 514, [1986] 1 CMLR 764 (OH); Holleran v Thwaites [1989] 2 CMLR 917 (Ch D); Leyland DAF v Automotive Products [1994] 1 BCLC 245 (Ch D and CA).
5. See paras 106ff above.
7. Regulation 17, art 9.
8. See para 241 below. The exception to this rule is an ‘old’ or ‘accession’ agreement which benefits from ‘provisional validity’ - that is, an agreement which pre-dates the entry into force of the competition rules (ie, March 1962 or the date of accession for new member states; as to Austrian, Finnish and Swedish accession agreements see Corfu Accession Treaty, Annex I, III) and was duly notified to the Commission is deemed to be exempted from the prohibition of article 85(1), and so is enforceable in national courts, until such time as the Commission adopts a formal decision; see Case 48/72 Brasserie de Haecht v Wilkin-Janssen (No 2) [1973] ECR 77, [1973] CMLR 287; Case 99/79 Lancome v Epcs [1980] ECR 2511, [1981] 2 CMLR 264; Case C-39/92 Petrogal v Correia Simoes [1993] ECR I-5659. The exact renewal of a standard contract enjoying provisional validity keeps the provisional validity alive; see Case 1/70 Marcel Rochas v Bitsch [1970] ECR 515, [1971] CMLR 104.
(1) **positively**, contribute to ‘improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit’; and

(2) **negatively**, neither ‘impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives’ nor ‘afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question’.

Both sets of conditions must be satisfied before exemption can be granted, and an assessment of whether they are satisfied depends upon economic as well as legal considerations.

### 242. Notification

Exemption from the prohibition of article 85(1) can be granted only if the agreement has been ‘notified’ to the Commission. The procedures and forms (‘Form A/B’) are laid down by the Council. There is a right to be heard, and a procedure for exercising it, prior to a final decision being adopted by the Commission. Information provided in a notification enjoys a degree of privilege; it cannot be used in national proceedings as proof of infringement of national competition rules. Proper notification provides immunity from the Commission’s power to impose fines in respect of any act occurring after notification, the immunity being operative from the date of notification until the Commission adopts a formal decision refusing to grant exemption or, following a preliminary examination, issues a preliminary notice withdrawing immunity. It does not affect the power and duty of a national court, under article 85(2), to strike down a prohibited agreement.

### 243. Negative clearance

Application may also be made, in a like manner and on the same forms, for ‘negative clearance’. Negative clearance is a declaration by the Commission that the agreement or conduct in question falls outside the prohibitions of the competition rules altogether. Two points ought therefore to be observed. First, whilst there can be no exemption from conduct which infringes article 86, an undertaking which is, or may be, in a

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1 Regulation 17, arts 4, 5; Regulation 27/62, JO 1962 p 1118 (5 Edn 1959-62 p 132). Regulation 17, art 4(2) relaxes the requirement to notify certain types of agreement, which may but need not be notified. The exact status of art 4(2) agreements remains unclear; they are not immune from Commission fines under Regulation 17 (Case 240/82 Stichting Sigarettenindustrie v Commission [1985] ECR 3831), and except in the case of old or accession agreements (see previous note) art 4(2) ought to be treated with great caution. In the United Kingdom, SI 1973/950 provides that notification is required also to be made to the Registrar of Restrictive Trade Agreements.

2 Regulation 17, art 19; Regulation 99/63, JO 1963 p 2268 (5 Edn 1959-62 p 47).

3 Regulation 17, art 20.


5 It is very important that notification comply with all procedural requirements, otherwise it will not be recognised; see Case 30/78 Distillers v Commission [1980] ECR 2229, [1980] 3 CMLR 121.

6 Regulation 17, art 15(2), (6).

7 See para 239 above.

8 Regulation 17, art 2.
dominant position may ask the Commission to rule whether a certain course of conduct would constitute an abuse of its (possible) dominance. Negative clearance may therefore, unlike exemption, be applied for in the context of article 86. Second, negative clearance is a declaration by the Commission that, in the light of the information available to it, and in the view of the Commission, the agreement or conduct falls outside the provisions of articles 85 and 86. The declaration does not in the same way as an exemption bind the national court, which may take a different view as to whether an agreement or conduct infringes articles 85 or 86, though it would be likely to accord great weight to the Commission view.

244. 'Comfort letters'. Formal exemption or negative clearance for a notified agreement can be granted only by a Commission decision. In practice, such decisions are rare, and response to a notification often results in a 'comfort letter' (or 'administrative letter'). Most cases are now resolved by 'closing the file' in this way, and Form A/B asks whether the applicant(s) would be satisfied with a comfort letter in lieu of a formal decision. A comfort letter will be issued where the Directorate General for competition (DG IV) is satisfied upon the information before it that the agreement does not infringe article 85(1) or, if it does, would qualify for an exemption. It will state that the Commission feels there is no reason to intervene in the matter or to proceed to a final decision. Before issuing a comfort letter the Commission frequently publishes a summary of the contents of a notified agreement in the Official Journal and invites interested parties to submit observations. A comfort letter, which can be issued only in respect of a properly notified agreement or practice, does not constitute exemption or negative clearance. The agreement is immune from Commission fines unless the Commission re-opens the file. But national courts are not precluded from holding that article 85(1) or 86 applies and that the agreement or conduct is illegal. The views expressed by the Commission may be taken into account in determining whether this is so. However, the terms of a comfort letter issued in response to an application for an exemption (as opposed to an application for negative clearance) may be such as to imply that the agreement is prima facie inconsistent with article 85(1), and so afford little comfort in a national court.

245. 'Block exemptions'. The Commission is empowered by article 85(3) to grant exemptions not only to individual agreements but also to categories of agreements. Such 'block exemptions' constitute an important mechanism for the implementation of Commission policy in the competition field. The exemptions are set out in regulations which, like article 85(3) itself, lay down positive ('white list') and negative ('black list') criteria for exemption. An
agreement which satisfies all the criteria is, without need for notification, automatically exempt from article 85(1). Some block exemption regulations further provide that agreements which do not fall entirely within the stated criteria may be notified to the Commission and will be automatically exempt unless the Commission has started 'opposition procedure' within six months. Otherwise, agreements are exempt only if they fall wholly within the four corners of the relevant regulation. (Application can always be made for individual exemption of an agreement whose subject matter falls within the scope of a block exemption regulation, but whose terms do not or may not comply with the block exemption criteria.) As at 1 January 1995 the Commission has adopted block exemptions in the following fields: exclusive distribution agreements; exclusive purchasing agreements (with special provisions on petrol and beer purchasing); motor vehicle distribution and servicing agreements; patent licensing agreements; specialisation agreements; research and development agreements; franchising; know-how agreements; agreements in the insurance sector; and commercial air transport agreements. The block exemptions allow for a high degree of legal certainty, but they are sometimes criticised for discouraging innovation in commercial dealing.

246. Problems of co-enforcement; Delimitis. It will be apparent that the present scheme for the enforcement of article 85 leaves open the question as to the proper course for a national court to take when seized of a question involving a new agreement which appears to be prohibited by article 85(1), which does not fall within one of the block exemptions, which has been notified to the Commission, and which might be, but has not yet been, granted an individual exemption. In Delimitis, the Court of Justice said that in such circumstances a national court ought first to determine, in the light of case law and previous Commission decisions, whether article 85(1) applies. If it does, the court ought then to determine, again in the light of previous case law and Commission decisions, whether the agreement is unlikely to be granted an exemption. If it so concludes, it should proceed to exercise its power under article 85(2). If it concludes that exemption of the agreement is

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4 Regulation 2349/84, OJ L219, 16.8.84, p 15.
5 Regulation 417/85, OJ L53, 22.2.85, p 1.
6 Regulation 418/85, OJ L53, 22.2.85, p 5.
8 Regulation 556/89, OJ L61, 4.3.89, p 1.
10 Regulation 1617/93, OJ L155, 26.6.93, p 18 (schedules, joint operation, tariff consultation and slot allocation at airports); Regulation 3652/93, OJ L333, 31.12.93, p 37 (computer reservation systems). Both regulations replace earlier block exemptions in the area.
a possibility, it ought to stay (sist) proceedings, supplying any appropriate national interim remedy, until such time as the Commission has reached a decision. In the meanwhile, the Commission has a duty to co-operate fully with the national court, for example, by letting the national court know of the state of play with the notification, giving priority to it and providing information on factual data. These considerations were subsequently set out, and essentially codified, in a 1993 Commission Notice. More recently the Court reconfirmed that a national court is competent to rule upon the legality of a notified (but not yet exempted) agreement if it finds that the conditions for application of article 85(1) are clearly not joined.

(3) Mergers and Concentrations

247. Mergers and concentrations. Mergers and concentrations are not addressed specifically in the EC Treaty. It was not at first clear which, if any, of the competition provisions of the Treaty applied to them. The Court of Justice held in 1973 that the acquisition of a competitor by an already dominant undertaking, thereby diminishing competition still further, could constitute an abuse of its dominant position. So, article 86 applies to mergers, but only in a situation where an undertaking which is already dominant seeks further to reinforce that dominance. The view of the Commission was that article 85 could not apply to mergers, since the end product of a merger is a single undertaking. However in 1987 the Court of Justice found that certain forms of concentration (in casu a company acquiring an equity interest in a competitor) can in some circumstances fall within the prohibition of article 85(1). The effect of that judgment has not yet been fully explored, but it gave new life to a Commission draft regulation on merger control, first proposed in 1973 and finally adopted by the Council in 1989.

248. The merger regulation. The merger regulation, which addresses ‘concentrations’, imposes a requirement of prior notification to and approval by the Commission before concentrations ‘with a Community dimension’ may proceed. If a merger has no Community dimension – if it is, for example,
below the (very high) threshold set by the regulation – it is presumed to be solely of national concern. Unlike article 86, the regulation applies not only to the strengthening but also to the creation of a dominant position through concentration, and the Commission has asserted the right to control even creation of joint dominance. The regulation disapplies Regulation 17 to concentrations, provides specific means of enforcement more appropriate to the field, and seeks more clearly to define the division of jurisdiction between national and Community competition authorities. The rights and obligations of the Commission and of undertakings notifying proposed mergers are laid down in an implementing regulation. There is a form for notification (‘Form CO’) and there are two Commission notices offering guidelines. Upon notification, the Commission is required to determine, first, whether it is a concentration within the meaning of the regulation and second, if so, whether it is ‘compatible with the common market’. The criteria provided for determining compatibility with the common market are those of competition only; the Commission may not, for example, take into account industrial or social policy considerations. The regulation provides very short time periods in which the Commission must act; if it fails to act, the concentration may proceed. The Commission may, and frequently does, allow a concentration to proceed only upon prescribed modifications to the original agreement. It has refused permission outright only once. All decisions adopted under the merger regulation are subject to judicial review by the Court of First Instance or the Court of Justice.

(4) Public Undertakings and Monopolies

249. Public undertakings and monopolies (article 90). Article 90 applies the competition rules to two special categories of undertaking:

1 A concentration has a Community dimension only if the annual turnover of all participating undertakings exceeds 5 thousand million ECU (about £4 thousand million), the Community turnover is more than 250 million ECU, and more than a third of that turnover arises in more than one member state; see Regulation 4064/89, art 1(2). The threshold was to be revised in 1993 (art 1(3)) but the Council failed to act to do so.

2 Although a concentration with no Community dimension may be referred to the Commission at the instance of a member state in which it does have a significant impact (art 22(3), the ‘Dutch clause’); equally, a concentration which technically has a Community dimension but has disproportionate impact in one member state may be referred by the Commission to the competition authorities of the state (art 9, the ‘German clause’).

3 Regulation 4064/89, art 2(2)-(3).
5 Regulation 2367/90, OJ L219, 25.7.90, p 5; [1990] 4 CMLR 683.
6 Regulation 2367/90, Annex 1.
8 Regulation 4064/89, art 2(1).
9 Ibid, art 10.
10 Ibid, art 10(6).
• public undertakings and undertakings to which member states grant special or exclusive rights\(^1\), and
• undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly\(^2\).

Article 90(1) is concerned with the duties of member states in relation to measures taken by them, article 90(2) with the conduct of the undertakings themselves. Article 90(3) empowers the Commission to address directives or decisions to member states to ensure compliance with article 90. This power, though limited, has been used, for example, to require member states to separate the commercial and regulatory activities of public telecommunications undertakings\(^3\). Article 90 has assumed particular importance in the context of recent trends towards privatisation and deregulation.

250. State measures (article 90(1)). In relation to public and ‘privileged’ undertakings, member states may ‘neither enact nor maintain in force any measures contrary to the rules contained in [the] Treaty\(^4\), especially the rule against discrimination upon grounds of nationality and the rules on competition, including state aids. Article 90(1) is therefore to be read with other articles of the Treaty, the issue being whether the state measure in question brings about a situation in conflict with another Treaty rule\(^5\). The grant or maintenance of monopoly or special rights must be justified by considerations of general interest (eg the need for universal supply at reasonable cost) and the scope of the rights conferred must be limited to what is necessary and proportionate to achieve that objective\(^6\).

251. Conduct of undertakings (article 90(2)). Undertakings to which special tasks have been assigned must comply with the rules of the Treaty, especially the competition rules, except ‘in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an

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1 EC Treaty, art 90(1). This category covers essentially state monopolies, nationalised undertakings and private or privatised undertakings which have been granted, or have retained, a privileged position in the market.

2 Ibid, art 90(2). This category covers universal suppliers (water, gas, electricity, etc) and undertakings charged with running monopolies from which the state derives revenue (eg, national lotteries or tobacco monopolies).


4 EC Treaty, art 90(1).

5 In Case C-41/90 Höfner v Macroton [1991] ECR I-1979 and Case C-323/93 Société Civile Agricole du Centre d’Insémination de la Crespelle v Co-operative d’Elevage et d’Insémination Artificielle du Département de la Mayenne, judgment of 5 October 1994, not yet reported, the test applied was whether the rights conferred were such as necessarily to cause the privileged undertaking to breach the rules on competition. In Case C-260/89 Elliniki Radiophonias Tiltosanis v Dimotiki Etairia Pliroforissis [1991] ECR I-2925 and Case C-179/90 Merci Convenzionali Porto di Genova SpA v Siderurgica Gabrielli SpA [1991] ECR I-5889, it was whether the undertaking was ‘led’ or ‘induced’ to do so.

extent as would be contrary to the interests of the Community.\textsuperscript{1} The test is whether the restriction of competition is necessary to enable the undertaking to perform its particular task, having regard to the economic conditions in which it must operate, the costs it must bear and the legislation, especially environmental legislation, with which it must comply\textsuperscript{2}.

252. **Competition rules and the EEA.** The Treaty establishing the European Economic Area (EEA) contains provisions identical \textit{mutatis mutandis} to articles 85 and 86 of the EC Treaty. Undertakings ought to be aware that their conduct is now susceptible to the application of the competition rules of both treaties. Those of the EEA Treaty are discussed below\textsuperscript{3}.

**(B) STATE AIDS**

253. **State aids (articles 92-94).** The section of the Treaty on state aids opens with a general prohibition of ‘any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods’\textsuperscript{4}. Thus, assistance provided by, for example, a local authority or a public development agency may constitute a prohibited state aid. The aid must affect trade between member states in order to fall within the prohibition\textsuperscript{5}; the effect must be real but need not be appreciable\textsuperscript{6}. Having stated the general prohibition, the Treaty then specifies types of aid which are always permissible\textsuperscript{7} and other types of aid which may be permissible\textsuperscript{8}.

254. **Commission supervision of state aids.** Like the competition rules of articles 85 and 86, the Treaty provides for the adoption of legislation in order to give effect to the rules on state aids\textsuperscript{9}. No such legislation has been adopted. The monitoring of state aids continues to rest upon Treaty authority in article 93, and depends upon whether the aid in question is an existing aid or a new aid.

\textit{Existing aids.} The Commission is required to keep under constant review any existing state aids\textsuperscript{10}. If it determines that an existing state aid is incompatible with the criteria of article 92 it may require that the member state abolishes or alters it\textsuperscript{11}. As this is an adversarial procedure, the member state

\begin{itemize}
  \item \textsuperscript{1} EC Treaty, art 90(2).
  \item \textsuperscript{2} Case C-393/92 Municipality of Almelo v Energiebedrijf Ijsselmij NV [1994] ECR 1-1477.
  \item \textsuperscript{3} See Appendix I.
  \item \textsuperscript{4} EC Treaty, art 92(1); emphasis added.
  \item \textsuperscript{5} Ibid, art 92(1).
  \item \textsuperscript{7} EC Treaty, art 92(2).
  \item \textsuperscript{8} Ibid, art 92(3).
  \item \textsuperscript{9} Ibid, art 94.
  \item \textsuperscript{10} Ibid, art 93(1).
  \item \textsuperscript{11} Ibid, art 93(2).
\end{itemize}
has a right to be heard. If a member state fails to comply with an order to terminate or alter a state aid, the Commission may raise enforcement proceedings before the Court of Justice without having to comply with the procedural requirements of article 169.

*New aids.* Any new aid (which includes alteration to an existing aid) must be notified to the Commission. The Treaty provides that a member state may not introduce the aid until the Commission has decided upon its compatibility with article 92. However, the Commission is required to respond to a notification ‘without delay’, and the Court of Justice has said that this means within a two-month period; otherwise the member state may grant it, and it becomes an existing aid subject to the supervision of article 93(1).

255. Direct effect of articles 92 and 93. In the absence of implementing legislation, the enforcement of the state aid rules remains a matter for Commission discretion. There is no provision governing state aids equivalent to article 85(2), and articles 92 and 93 are not directly effective. The one exception is the requirement that new state aids be notified to the Commission. Failure to comply with the procedure of article 93(3), and *a fortiori* failure to notify the Commission at all of a proposed aid, will render that aid unlawful with direct effect. The Commission may also require that it be repaid. In present practice the Commission also requires repayment of the interest deemed to have been earned since disbursement of the unlawful aid.

256. Judicial review and state aids. Whilst it is in general very difficult for a natural or legal person to challenge a Community act under article 173 of the Treaty, the Court of Justice adopts a lenient view of ‘direct and individual concern’ in the area of state aids. So, where the Commission adopts a decision approving or refusing to approve the grant of an aid, the intended recipient of the aid and even third (competitor) parties have been held to have title and interest to raise an action of annulment of the decision directly before the Court of First Instance. This may be the only avenue of judicial review: where the intended recipient of a state aid was informed in writing by its government of a Commission decision refusing to authorise it and that

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1 EC Treaty, art 93(2); on art 169 see paras 97ff above.
2 Ibid, art 93(3).
3 Ibid, art 93(3), final sentence.
4 Case 120/73 *Lorenz v Germany* [1973] ECR 1471; Case 84/82 *Germany v Commission* [1984] ECR 1505.
5 The requirement of repayment was approved by the Court of Justice in Case 70/72 *Commission v Germany* (Kohlegesetz) [1973] ECR 813, [1973] CMLR 741. For an example see Decision 93/359, OJ L143, 15.6.93, p 7, requiring British Aerospace to repay the £44.4 million in unlawful ‘sweeteners’ by which the United Kingdom government had persuaded it to buy the Rover Group. This was a re-adoption of an earlier Decision which was annulled by the Court of Justice for procedural impropriety; Case C-294/90 *British Aerospace & Rover Group Holdings v Commission* [1992] ECR I-493.
6 See para 101 above.
7 See eg Case C-313/90 *CIRFS v Commission* [1993] ECR I-1125, also recognising the *locus standi* of a trade association.
it could seek annulment under article 173 but failed to do so, it could not sub­sequently plead the invalidity of the decision in national proceedings.

(C) TAXATION

257. Rules as to taxation (articles 95–98). The Treaty does not seek to deprive the member states of power to levy taxes for the purpose of raising public revenues. However, Community trade could clearly be affected if a national taxation scheme favoured domestic production at the expense of imported goods. The first paragraph of article 95 of the Treaty therefore prohibits the imposition ‘directly or indirectly, on the products of other Member States, [of] any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products’. The second paragraph of article 95 extends this prohibition to taxation which affords ‘indirect protection’ to domestic production. Notwithstanding the apparent limitation of article 95 to ‘products of other Member States’, the Court of Justice has held that it applies its application to discriminatory taxation upon any products, whatever their origin, which are in free circulation.

258. Application of rules as to taxation. Clearly there may be argument, in any particular case, whether products are ‘similar’ or whether a difference in the rate of tax constitutes ‘indirect protection’. The product need not be the same, and the best test is probably whether the ordinary consumer, faced with a free choice, might choose one product or the other for the particular purpose he or she has in mind. Thus, for example, British excise duties upon wine were held by the Court of Justice to be unfairly high in comparison with those imposed upon a more typically, and competing, British product (beer) and therefore constituted a breach of article 95(2). Care is also necessary in considering article 95 alongside article 12, as application of the two are mutually exclusive; a charge upon an imported good at point of entry may in fact be part of a non-discriminatory (and hence permissible) tax scheme, whilst, conversely, under certain conditions a measure which is on its face one of internal taxation may constitute a charge having equivalent effect to a customs duty.

259. Harmonisation of tax law (article 99). The Cockfield White Paper identified tax disequilibrium and the frontier controls and equalisation charges necessary to deal with it as a fiscal barrier to trade and a serious impediment to the completion of the internal market. Article 99 provides for the
harmonisation of legislation regarding turnover taxes, excise duties and other forms of indirect taxation to the extent necessary to ensure the establishment and functioning of the internal market. Such harmonisation measures require unanimity in the Council. Much of the work necessary in approximating national law, particularly on turnover taxes, capital duty and (to a lesser extent) excise duties, was achieved by 1993, and only limited problems remain.

260. Direct taxation. The Treaty is almost silent as to direct taxation, and the area continues to be governed largely by bilateral double taxation agreements between member states. The Treaty requires only that the member states should negotiate with a view to concluding such agreements and prohibits arbitrary discrimination when taxing the movement of capital and payments. Some directives in the field of company law have a bearing upon direct taxation but that is not their primary purpose. The Commission has adopted a recommendation on taxation of foreign income. Discrimination in the taxation of companies based upon residence of the company is inconsistent with articles 52 and 58 of the Treaty.

(c) Other Common Policies

261. General. Titles VI to XVII of the Treaty cover a number of areas in which the member states are bound to pursue common policies. Many of them were added to the Treaty and/or refined by the Single European Act and the Treaty on European Union. Some of them are of great significance.

(A) ECONOMIC AND MONETARY POLICY

262. General. As discussed above, the Treaty now provides that the achievement of economic and monetary union (EMU) is a ‘task’ (article 2) and an ‘activity’ (article 3a) of the Community. The general principles are laid down in article 3a and given flesh by subsequent provisions. EMU is to be achieved, over a transitional period of three stages, in accordance with the ‘Delors Plan’ by 1999 at the latest. The Treaty provisions addressing EMU

1 EC Treaty, art 220.
2 Ibid, art 73d(3).
3 See eg Directive 90/434 (the mergers directive), OJ L225, 20.8.90, p 1; Directive 90/435 (the parent-subsidiary directive), OJ L225, 20.8.90, p 6; Directive 90/463 (arbitration convention), OJ L225, 20.8.90, p 10. See also the 1992 Report of the Ruding Committee which recommended further steps to be taken in order to eliminate remaining distortions to competition resulting from variations in direct taxation.
and the institutional machinery intended to achieve it are extraordinarily complex, and they will be considered here only briefly.

263. Economic and monetary union. Economic and monetary union is not a common economic policy. Rather it requires the 'close coordination of Member States' economic policies'¹, which are 'a matter of common concern'², within the framework of broad guidelines established by the Council upon the basis of a 'conclusion' established by the European Council³. It envisages the irrevocable fixing of exchange rates leading to the introduction of a single currency (the ECU) and of a single monetary and exchange rate policy⁴. Both the Community and the member states are required to conduct their policies in a manner which complies with the 'guiding principles' of stable prices, sound public finances and monetary conditions and a sustainable balance of payments⁵. Member states are obliged to avoid excessive government deficits, and the Community institutions may intervene with significant powers of sanction to correct a failure to do so⁶.

264. The three stages. The first stage required member states simply to comply with the Treaty provisions on the free movement of capital⁷, to open up (if necessary) their financial institutions⁸ and to work towards lasting convergence in economic policy⁹. The second stage started on 1 January 1994¹⁰. During it the member states are required to adopt financial discipline¹¹ and ensure by the end of the second stage (if necessary) that national legislation relating to central banks is compatible with the Treaty and the ESCB/ECB Statute¹². The European Monetary Institute (EMI) was established and is required to assist in and monitor the development of and progress towards a high degree of sustainable convergence as defined by the Treaty¹³. The Council meeting as heads of State and government is required before the end of December 1996 to decide whether a majority of member states fulfil the necessary conditions for the adoption of a single currency, whether it is appropriate to enter the third stage, and, if so, to set a date for the beginning of the third stage¹⁴. The third stage is in any event to start by 1 January 1999¹⁵.

¹ EC Treaty, art 3a(1).
² Ibid, art 103.
³ Ibid, arts 102a and 103(2); guidelines have now been established by Recommendation 94/480, OJ L200, 3.8.94, p 38.
⁴ EC Treaty, art 3a(2).
⁵ Ibid, art 3a(3).
⁷ See para 220 above.
⁹ EC Treaty, art 109e(1).
¹⁰ Ibid, art 109e(2).
¹¹ Ibid, art 104c.
¹² Ibid, art 108.
¹³ Ibid, art 109(1) and Protocol on Convergence Criteria Referred to in Article 109j.
¹⁴ Ibid, art 109(3).
¹⁵ Ibid, art 109(4).
265. The third stage. Immediately upon the setting of the date for the third stage the European Central Bank and the European System of Central Banks are to be established and exercise their powers, in accordance with procedures established by the Council, from the first day of the third stage. At the start of the third stage the Council is to adopt by unanimity of participating states the conversion rates at which the ECU is to replace the national currencies at an irrevocably fixed rate and become a currency in its own right. Thereafter the financial institutions (the ESCB and the ECB) will, through their legislative and enforcement powers, direct and control EMU in accordance with the Treaty and their Statute. Like the German Bundesbank, the primary objective of the ESCB is price stability, within which it is to contribute to the achievement of the objectives of EMU and define and implement monetary policy, foreign exchange and payment systems. The ECB is to enjoy the exclusive right to authorise the issue of banknotes; the minting and issue of coinage will be for the member states but is subject to ECB approval of the volume.

266. Derogation. The third stage applies automatically but only to those member states which fulfil the necessary convergence criteria. Other member states – ‘member states with a derogation’ – will not take part. They and their national central banks are excluded from rights and obligations within the ESCB and their voting rights within the Council on third stage matters are suspended. How many member states will meet the rigorous criteria remains to be seen. The Council will ‘abrogate’ the derogation of a ‘member state with a derogation’ which subsequently fulfils the criteria for sustainable economic convergence and will fix the rate at which the ECU is to be substituted for its currency, after which that member state will assume full rights and obligations of EMU.

267. United Kingdom and Danish exemption. By virtue of a Protocol attached to the Treaty, even if it fulfils the necessary convergence criteria the United Kingdom is not bound to enter the third stage. It may do so, and is obliged to notify the Council if it intends to do so – ie, unlike the Social

1 EC Treaty, art 109(1).
2 See para 266 above.
3 EC Treaty, arts 109g and 109(4).
4 See para 122 above.
5 EC Treaty, art 105(1) and ESCB/ECB Statute, art 2.
6 EC Treaty, art 105(1)-(2) and ESCB/ECB Statute, art 3.
7 EC Treaty, art 105a(1) and ESCB/ECB Statute, art 16.
8 EC Treaty, art 105a(2).
9 Ibid, art 109k(1).
10 Ibid, art 109k(3)-(5).
11 Ibid, art 109k(2). For these purposes the Council is required to meet as heads of State and government.
12 Ibid, art 109(5).
Agreement it may ‘opt in’ to EMU – but there is no obligation. If it does not, it will be accorded in effect the status of a permanent ‘member state with a derogation’. In giving effect to the Treaty on European Union within the United Kingdom, Parliament enacted a statutory bar restraining the government from submitting notification without the approval of an Act of Parliament. Denmark enjoys a similar right under the Treaty, and although it was drafted in a manner which permits Denmark to ‘opt out’ of the third stage (as opposed to the drafting of the United Kingdom Protocol which presumes non-participation but permits ‘opting in’), the Danish government has already submitted notification that Denmark will not participate in the third stage. Whilst it is not envisaged in the Treaty, the German Federal Constitutional Court said that it would be unconstitutional for Germany to proceed to the third stage without further approval from the German parliament.

(B) COMMERCIAL POLICY

268. The Common Commercial Policy (articles 110–115). The creation of a single market requires not only a Common Customs Tariff but also a common commercial policy in trade with third states. The Common Commercial Policy (CCP) is one of the ‘activities’ of the Community. It is closely bound to, and needs to be considered in conjunction with, the rules on the customs union. It is based upon ‘uniform principles’ in external Community trade. Unlike the Common Customs Tariff, the CCP is not yet complete. Under article 113 the Community has sole competence to enter into bilateral or multilateral agreements regulating trade in all goods, including those subject to the ECSC and Euratom Treaties. Cross-frontier services not involving the movement of natural or legal persons fall within the CCP, otherwise the Community shares competence with the member states in trade in services. But as it is evolutionary the CCP may come to cover more in the future. Where trade agreements have been negotiated the Community rules occupy the field. Where they have not, the member states enjoy residual competence, which can be exercised only in accordance with framework legislation concerning common rules for imports.

269. Agreements between the Community and third countries. The Community has entered into a number of multilateral and bilateral

1 See para 273 below.
2 European Communities (Amendment) Act 1993, s 2.
6 See para 182 above.
7 EC Treaty, art 3(b).
8 Ibid, art 113(1).
9 Opinion 1/94 re the World Trade Organisation, opinion of 15 November 1994, not yet reported.
agreements with third countries which regulate trade amongst or between them. Some (‘association agreements’) are comprehensive, involving the participation of both the Community and the member states, and implied is a gradual move towards eventual accession to the Community; others are less so. They may be grouped as follows:

(a) the agreement on the European Economic Area (EEA) with Iceland, Liechtenstein, Norway, Austria, Finland and Sweden;

(b) the Lomé Agreement with 68 African, Caribbean and Pacific (ACP) countries, most of them erstwhile colonies of the various member states;

(c) the ‘Europe Agreements’ with Poland, Hungary, the Czech Republic, Slovakia (the ‘Visegrad countries’), Romania and Bulgaria, which provide for the progressive development of free trade and envisage (distant) accession to the Community;

(d) other association agreements with individual third countries;

(e) other agreements with individual third countries;

(f) agreements with international organisations, such as the GATT 1994 agreement and the agreement creating the World Trade Organisation. All these agreements are capable of conferring direct effect depending upon their terms.

270. Safeguard measures (anti-dumping). Safeguard and retaliatory measures taken against imports from third countries which benefit from unfair subsidies or are dumped on the Community market fall within the Common Commercial Policy and are governed by Community legislation, not by article 91. The Commission and/or Council may impose upon imported goods countervailing or anti-dumping duties designed to eliminate or equalise the unfair advantage. It is an area of highly complex economic analysis and political sensitivity, and was the last subject area in which power of judicial supervision was transferred from the Court of Justice to the Court of First Instance.

(C) SOCIAL POLICY

271. General. The Treaty numbers amongst Community activities a policy in the social sphere and the strengthening of economic and social cohesion.
Social policy is now addressed in Title VIII of the Treaty, which also includes provisions on education, vocational training and youth. The Treaty considers the harmonisation of social systems "to promote improved working conditions and an improved standard of living for workers" as a necessary component of, or complement to, the common and internal markets. It charges the Commission with the task of promoting "close co-operation between Member States in the fields of employment, labour law and working conditions, vocational training, social security, prevention of occupational accidents and diseases, occupational hygiene and collective bargaining." The Commission is also to "endeavour to develop the dialogue between management and labour." Harmonisation directives may be adopted in relation to the working environment and health and safety of workers. The Treaty also established a European Social Fund to assist in worker mobility, and adaptation to industrial change and training. Implicit throughout is a presumption of the pre-eminence of national policies, which may in any event now be a Treaty requirement in the light of subsidiarity. However, one area included in the Chapter on social provisions - the rules on sex discrimination - has had a very substantial impact within the national legal systems.

272. The Social Charter. In 1989 the heads of state and government of all member states but the United Kingdom adopted the Community Charter of the Fundamental Social Rights of Workers, commonly called the Social Charter, in the belief that "social consensus ... is an essential condition for ensuring sustained economic development" and that "in the context of the establishment of the single European market, the same importance must be attached to the social aspects as to the economic aspects." The Social Charter is not a legislative act, but a blueprint for the development of social legislation within the Community. At the same time the Commission adopted an Action Programme containing more specific guidelines and draft proposals for legislation. The Social Charter and the Action Programme address areas such as freedom of movement, rights in employment, living and working

1 EC Treaty, art 117, 1st para.
2 Ibid, art 118, 1st para.
3 Ibid, art 118b. This provision grew out of the "social dialogue" begun in 1985 at Val Duchesse between the "social partners" represented by the Union des Industries de la Communauté Européenne (UNICE) and the European Trade Union Confederation (ETUC), and led in turn to certain provisions of the Social Agreement, as to which see para 274 below.
4 EC Treaty, art 118a. An example of a measure adopted by authority of art 118a is Directive 93/104, OJ L307, 13.12.93, p 20 (the "working time" Directive), which was challenged immediately by the United Kingdom for lack of competence; see Case C-84/94 United Kingdom v Council (pending).
5 EC Treaty, arts 123-125.
7 See para 157 above.
8 See paras 275-280 below.
9 For the text see Social Europe 1/90.
10 Social Charter, Preamble, recitals 5 and 2.
11 COM(89)568 fin.
conditions, social protection, freedom of association and collective bargain-
ing, training, worker participation, health and safety and protection of chil-
dren, adolescents, the elderly and the disabled. But both stress the
pre-eminence of the member states rather than collective Community pol-
icy1, and here again subsidiarity plays an important role.

273. The Social Protocol. At the intergovernmental conference which led to
the adoption of the Treaty on European Union, eleven (of the then twelve)
member states signalled a willingness to agree to more far-reaching provi-
sions in the social sphere. Since the United Kingdom government did not
agree, they could not be incorporated into the general social provisions of the
Treaty. The result was the adoption of a Protocol on Social Policy attached
to the EC Treaty, sometimes (wrongly) referred to as the ‘Social Chapter’. The
Protocol authorised the member states other than the United Kingdom to
pursue a social policy and to use Community institutions and procedures to
adopt legislation to that end, but the measures adopted are not to apply to or
in the United Kingdom. The substantive rules to be pursued by means of this
framework are laid down in an Agreement annexed to the Protocol (hence
occasional reference to ‘the Social Protocol and Agreement’). The United
Kingdom was (necessarily) a party to the Social Protocol but is not a party to
the Agreement. It does not take part in Council deliberations within the
sphere of the Agreement2, where there is a special system of weighted voting
in the Council3, and any financial consequences other than administrative
costs entailed for the institutions do not apply to the United Kingdom4. The
Social Protocol and Agreement are phrased in such a way that the United
Kingdom is permanently outside the structure: there is no possibility, in the
absence of treaty amendment, of ‘opting in’ to the Agreement. The Social
Protocol is not recognised, and has no force, in British law5. There may how-
ever be legal difficulties in differentiating between the Treaty chapter on
social provisions and the Social Agreement.

274. The Agreement on Social Policy. The Agreement on Social Policy pro-
vides a framework for substantive rules following the objectives of the Social
Charter but including also adequate social protection6, dialogue between
management and labour (the ‘social dialogue’) and the development of
human resources7. The member states acting under the Agreement are to
support and complement national activities, and may adopt directives for

1 Social Charter, Preamble, recital 15 and point 27.
2 But UK MEPs take part in debates and in voting in the European Parliament in the sphere.
3 The Corfu Accession Treaty amends the system of weighted voting under the Protocol, pre-
sumably to take account of the accession to the Agreement of Austria, Finland and Sweden. But
there seems to have been no formal act of accession by these three states to the Agreement.
4 Protocol on Social Policy, arts 2-3.
5 European Communities Act 1972, s 1(2)(k) as amended.
6 The English text reads ‘proper social protection’, which is a poor translation of protection
sociale adéquate.
7 Agreement on Social Policy, art 1.
minimum standards in the fields of working environment and health and safety, working conditions, worker participation, sex equality, integration into the labour market, social security and protection, redundancy, collective representation, employment of non-Community citizens and financial subvention. The most innovative provisions address arrangements for collective bargaining at European level and toleration of positive discrimination in favour of women in the vocational and professional spheres. An example of a measure enacted under the Social Protocol is the Directive establishing a European Works Council to promote worker information and participation. In 1994 the Commission adopted a (not very ambitious) White Paper on the future development of social policy.

275. Sex discrimination. As a facet of social policy, article 119 of the Treaty prohibits discrimination upon the basis of sex in the area of pay. The original purpose of the rule was to ensure that undertakings in those member states (particularly France) which already had equal pay rules did not suffer through being required to compete with undertakings in other member states which permitted pay differential based upon sex. The effect of article 119 has however gone well beyond this original purpose.

276. Article 119. Article 119(1) of the Treaty provides, in the English text, that:

'Each Member State shall during the first [transitional] stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work'.

Unfortunately, the word 'pay' is too narrow a translation of terms used in the original language texts (Entgelt, rémunérations, retribuzioni, beloning) and has given rise to much misunderstanding. 'Pay' is defined by article 119 in very broad terms. It means: 'the ordinary or basic minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer'. 'Consideration' is also too narrow a translation of the original language texts which use words meaning advantage or recompense. This explains why favourable rates for railway travel for family employees, pensions paid under a contracted-out private occupational scheme and any benefits paid by an employer to an employee in connection with his compulsory redundancy have been held to be 'pay'.

277. Implementing legislation. The basic rule of the Treaty, which relates only to the consideration received from an employer in respect of employment, has
been refined and expanded by a number of directives, each of which requires that there be adequate judicial protection for the rights conferred:

- Directive 75/117 on equal pay for men and women. This directive defines the scope of article 119 and introduces the principle of equal pay for work of equal value.

- Directive 76/207 on equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. This directive prohibits discrimination, both direct or indirect, based upon sex unless the sex of the employee constitutes a ‘determining factor’ in employment. Discrimination based upon pregnancy constitutes direct discrimination.

- Directive 79/7 on equal treatment for men and women in matters of social security.

- Directive 86/378 on equal treatment in occupational social security schemes. This directive has had far reaching effects upon social security schemes, particularly in the United Kingdom, Ireland and the Netherlands. It was required to be implemented by mid-1989 but it was ‘frozen’ by controversy resulting from the Barber judgment.

- Directive 86/613 on equal treatment in self-employed occupations.

278. Application of the sex discrimination rules. Article 119 prohibits both direct and indirect discrimination in the field of pay. Direct discrimination is never justified. Where there is pay differential to the disadvantage of one sex disproportionately (e.g. as between full and part-time workers), a prima facie case of discrimination is established and the onus shifts to the employer to show that there are objective grounds for the scheme unrelated to sex. Article 119 has both vertical and horizontal direct effect. So, rights arising from article 119 are enforceable before any competent national court or

2 OJ L45, 19.2.75, p 19.
3 OJ L39, 9.2.76, p 40.
6 OJ L6, 10.1.79, p 24.
7 OJ L225, 12.8.86, p 40.
8 See paras 279-80 below.
12 Case 170/84 Bilia-Kaufhaus, above; Case C-127/92 Enderby v Frenchay Health Authority [1993] ECR I-5535. Where the differential is a product of legislation the onus is borne by the member state to justify it; Case 171/88 Rinner-Kühn v FWW Spezial-Gebäudeereinigung [1989] ECR 2743.
tribunal and against any public or private person. Directive 75/117 on equal pay merely restates the principles of article 119 and in no way alters its content or scope. The practical effect is that the provisions of the directive, including the principle of equal pay for work of equal value, also have vertical and horizontal direct effect. The other directives do not have horizontal direct effect; an employee of a public authority or an ‘emanation of the state’ may invoke them but an employee of a private undertaking may not. As against a private employer the employee must rely upon the national legislation implementing the directives – in the United Kingdom primarily the Equal Pay Act 1970, the Sex Discrimination Act 1975 and the Employment Protection (Consolidation) Act 1978, all as amended – although national courts and tribunals must, ‘if at all possible’, interpret and apply them in the light of the directives. If it is not possible, a remedy for injury may, by applying Francovich, lie in damages against the state.

279. Pensions: application of article 119. A distinction is drawn between pensions paid under statutory social security schemes and those paid under occupational pension schemes. Social security pensions do not fall under article 119. They are governed by Directive 79/7, which permits member states to maintain differential retirement ages for men and women, together with consequential discriminatory elements. By contrast, pension payments under occupational schemes, whether contributory or non-contributory, fall under article 119. The decisive test is, in terms of article 119 itself, whether the pension is paid directly or indirectly by the employer (ie funded wholly or partly by the employer) as part of the consideration in respect of the employment relationship.

280. Occupational pension schemes. Men and women must have equal access to occupational pension schemes. They must be treated equally in relation to retirement ages and pension benefits (but only in relation to

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2 See para 148 above.
3 Case 152/84 Marshall v Southampton and Southwest Hampshire Area Health Authority (No 1) [1986] ECR 723, [1986] 1 CMLR 768, which confirmed that the state is bound by unimplemented directives not only in discharging its public functions but also in its private law relations as an employer.
4 See para 148 above. For an example of how far uniform interpretation may apply in this area see Case 177/88 Dekker v Stichting Vormingencentrum voor Jong Volkswassen Plus [1990] ECR I-3941.
5 See paras 141, 148 above.
periods of service after 17 May 1990\(^1\)). It is the prospective periodic pension payments that constitute ‘pay’ for the purposes of article 119, not the employer’s contributions (actuarially calculated according to the needs of the scheme) nor the employee’s transfer benefits or lump-sum options (actuarially calculated upon the basis of accrued rights)\(^2\). Article 119 applies to pensions paid to the spouses of deceased employees\(^3\), to ‘top-up’ schemes (supplementing the state pension)\(^4\) and to ‘contracted-out’ schemes (in substitution for the state pension)\(^5\), but not to single sex schemes\(^6\). Pension scheme trustees must, so far as is possible, administer their scheme in compliance with article 119 and, if necessary, have recourse to the employer and/or the courts in order to do so\(^6\). Employees and the surviving spouses and representatives of deceased employees can invoke the direct effect of article 119 against employers and trustees\(^6\).

**281. The policies.** The Single European Act introduced into the Treaty provisions authorising Community activities in a number of new fields. The Treaty on European Union amended some of these and introduced still more, not all of which are primarily economic. They are now included amongst the activities of the Community in article 3 and addressed in greater detail in subsequent provisions. These are:

- education, vocational training and youth\(^7\);
- culture\(^8\);
- public health\(^9\);
- consumer protection\(^10\);

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7. EC Treaty, arts 126, 127.

8. Ibid, art 128.


10. Ibid, art 129a.
• trans-European networks¹;
• industry²;
• economic and social cohesion³;
• research and technological development⁴;
• environment⁵;
• development co-operation⁶.

Article 3 also mentions measures in the spheres of energy, civil protection and tourism⁷, but there are no subsequent operative provisions in the EC Treaty addressing these areas⁸. A declaration attached to the Treaty⁹ states that, in the view of the Commission, action in these spheres may be pursued under other Treaty provisions.

282. Community competences. Article 3 provides that under the foregoing new heads of competence the Community is, variably, to adopt policies, to strengthen, to promote and/or to contribute to the field in question. In all of them the Community shares competence with the member states, necessitating close co-operation between national and Community authorities. The extent of the Community’s powers varies widely. It is, for example, given substantial competences in the field of the environment, whilst in education and culture, Community action is restricted to incentive measures and recommendations¹⁰, and even then only ‘if necessary’ in support of and supplementing national action whilst ‘fully respecting’ the responsibilities of the member states¹¹. Harmonisation legislation in the fields of education, vocational training, culture and public health is expressly excluded¹². The parameters of these new or amended competences are still to be worked out. Their importance lies in establishing a legal basis for Community interest and action and providing express authority to treat with third countries in these areas¹³. Where the Community acts in some of these areas (education, public health, consumer protection and the environment) it is required to be mindful of a ‘high level’ of protection¹⁴. The Treaty prescribes a variety of

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¹ EC Treaty, arts 129b-129d.
² Ibid, art 130.
³ Ibid, arts 130a-130e.
⁴ Ibid, arts 130f-130p.
⁵ Ibid, arts 130r-130t.
⁶ Ibid, arts 130u-130y.
⁷ Ibid, art 30.
⁸ Energy is of course a prime concern of the ECSC and Euratom Treaties.
⁹ Declaration on Civil Protection, Energy and Tourism.
¹⁰ EC Treaty, arts 126(4) and 128(5).
¹¹ Ibid, arts 126(1) and 128(1).
¹² Ibid, arts 126(2), 127(4), 128(5) and 129(4).
¹³ Ibid, arts 126(3), 127(3), 128(3), 129(3), 129c(3), 130r(4), 130x-y. These provisions merely codify for sake of certainty an international personality which exists in any event by virtue of the judgment of the Court of Justice in Case 22/70 Commission v Council (ERTA) [1971] ECR 263, [1973] CMLR 335; see para 284 below.
¹⁴ EC Treaty, arts 126(1) (‘quality’ education), 129(1), 129a(1) and 130r(2). Single market legislation adopted by authority of art 100a (see para 193 above) is subject to a similar constraint by virtue of art 100a(3), the purpose of which is to ensure that standards are not whittled down by qualified majority vote.
legislative procedures\textsuperscript{1}, and there has already been a significant rise in litigation before the Court of Justice challenging the legal base of legislation\textsuperscript{2}.

283. Integration clauses. In six of these subject areas (culture, public health, industry, economic and social cohesion, environment and development cooperation) the Treaty provides 'integration clauses', which require, in varying terms, that the interests of these areas must be taken into account when the Community acts under other provisions of the Treaty\textsuperscript{3}. So, for example, agricultural legislation which fails to take sufficient account of the interests of public health, the environment or development cooperation may be liable to annulment or invalidation as an infringement of the Treaty within the meaning of article 173\textsuperscript{4}. However, these integration clauses are a new device not yet considered by the Court of Justice\textsuperscript{5}; their meaning, breadth, application and justiciability have therefore yet to be tested.

\section*{(5) THE GENERAL AND FINAL PROVISIONS OF THE EC TREATY}

284. International personality and external competence of the Community. Article 210 of the Treaty provides simply:

The Community shall have legal personality.

Article 238 of the Treaty explicitly accords to the Community the authority to enter into treaties with third states, groups of states or other international organisations with a view to creating association agreements with the Community. It was under this provision that the Community entered into the Agreement establishing the European Economic Area, the Lomé Agreement and other international agreements\textsuperscript{6}. It is also expressly and exclusively competent to conclude tariff and trade agreements as a function of the Common Commercial Policy\textsuperscript{7} and formal agreements on an exchange rate system for the ECU with non-Community currencies as a function of economic and monetary union\textsuperscript{8}. The Community can also enter into international agreements with third states in any area in which it enjoys rule-making competences within the Community\textsuperscript{9}. A special 'treaty making power' is

\begin{itemize}
\item \textsuperscript{1} The article conferring legislative authority in the field of the environment, for example, contains no fewer than four different legislative procedures; see EC Treaty, art 130s.
\item \textsuperscript{2} See para 144 above.
\item \textsuperscript{3} EC Treaty, arts 128(4), 129, 130(3), 130b, 130r(2) and 130v.
\item \textsuperscript{4} See para 100 above.
\item \textsuperscript{5} The first integration clause was incorporated into the Treaty by the Single European Act in 1987 in the field of the environment (EEC Treaty, art 130r(2)), all the others were introduced into the Treaty (and the provisions on the environment were significantly amended) only with the entry into force of the TEU in 1993.
\item \textsuperscript{6} See para 269 above.
\item \textsuperscript{7} See para 268 above.
\item \textsuperscript{8} EC Treaty, art 109(1).
\end{itemize}
now written into the Treaty in a number of areas. In some areas Community competence may be exclusive. In 'mixed agreements' whose subject matter falls partly within Community competence and partly within that of the member states, the Community and the member states must collaborate, each within their respective spheres, in order to arrive at a mutually acceptable result. The Court of Justice has held that international agreements into which the Community has entered, as well as acts of autonomous institutions created by such agreements and charged with their implementation, can of themselves be relied upon before national courts provided that their provisions are such as to confer direct effect. If they are not they must be implemented by appropriate Community legislation.

285. Contractual liability of the Community. The non-contractual liability of the Community is discussed above. The Treaty provides that the contractual liability of the Community is to be governed by the law applicable to the contract in question. The Court of Justice may be awarded jurisdiction to give judgment pursuant to an arbitration clause contained in such a contract.

286. Extraordinary derogation from the Treaty. Member states are permitted to adopt measures derogating from Treaty rules which are necessary for the protection of the essential interests of their security connected with production and trade in arms, munitions and war materials, in the event of serious internal disturbance affecting the maintenance of law and order or of serious international tension constituting a threat of war or in the event of a sudden balance of payments crisis. In each such case a member state is required to operate closely with the Community institutions so as to ensure that it cannot make improper use of these powers, and the Commission may bring before the Court of Justice a member state it alleges is so doing.

1 See para 282 above.
3 See eg Opinion 1/94 re the World Trade Organisation, opinion of 15 November 1994, not yet reported.
5 See para 105 above.
6 EC Treaty, art 215(1).
7 Ibid, art 181.
8 Ibid, art 223(1).
9 Ibid, art 224.
10 See para 220 above.
11 EC Treaty, art 225, 2nd para. At the time of writing such a case is before the Court regarding Greece's closing of its frontier with the former Yugoslav Republic of Macedonia; see Case C-120/94 Commission v Greece (pending). Uncertainty as to the interpretation of these provisions was cited by the Court as a ground for refusing the Commission's application for interim measures; see Case C-120/94 R Commission v Greece [1994] ECR I-3037.
The general power: article 235. The Treaty could not provide for all eventualities in which it would be appropriate for the Community to act. It therefore provided in article 235 a general or residual power for the Council, acting by unanimity, to adopt measures in the event that

\[ \ldots \text{action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers.} \ldots \]

Article 235 confers a very broad legislative competence: all that is necessary is that Community action is 'necessary to attain [an] objective of the Community'. Article 235 was used extensively in the early days as the Community institutions came to adopt legislation in areas not clearly within other Treaty authority but which was nevertheless deemed 'necessary'. Its use has decreased with express extension of Community legislative authority under the Single European Act and the Treaty on European Union. The legislative authority of article 235 is residual only: an act based upon article 235 either alone or in tandem with another legal base for which a sufficient legal base exists elsewhere in the Treaty is liable to annulment or invalidation by the Court of Justice\(^1\).

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