My subject is the relationship between, on the one hand, secondary Community law (that is to say the directives, regulations and in some cases decisions of the Community institutions) and, on the other, treaty law and the general principles of law. By way of introduction it is as well to begin from article 164 of the treaty which provides that: “The Court of Justice shall ensure that in the interpretation and application of this treaty the law is observed.” In German: Der Gerichtshof sichert die Wahrung des Rechts. Use of the word “Recht” implies that all sources of law are relevant. So in that connection, we are concerned with treaty law and also general principles of law.

These general principles are derived from various sources. Since we are talking about treaty law, the principles of public international law are part of the principles to be applied by the Court, especially, as the Court said in 1974; “international treaties for the protection of human rights on which the member states have collaborated or of which they are signatories”. That is an indirect reference to the European Convention on Human Rights. The reason why it was phrased in that oblique way is because in 1974 France had not fully acceded or allowed the Convention to operate vis-à-vis French citizens. Earlier in 1970 the court had asserted that general principles of law could be derived from the constitutional traditions common to the member states. And, of course, the treaties themselves at the beginning and in particular the EC treaty at the beginning lays down certain principles (Grundsätze).

In the treaty on European Union (the Maastricht treaty), the obligation of the Union is now specific. “The Union shall respect fundamental rights” (Die Union achtet die Grundrechte) as guaranteed – and here you find the two previous ideas put together – “as guaranteed by the European Convention on Human Rights and as their result from the constitutional traditions common to the member states, as general principles of Community law” (als allgemeine Grundsätze des Gemeinschaftsrechts). It follows therefore that these principles are brought into the law of the Community and of the Union as general principles which will be applied in some cases directly and in some cases as a method or tool of interpretation.

So you find in the AM&S case in 1982 a situation where regulation 17 – that is the regulation on competition – expressly authorized the Commission to undertake all necessary investigations into undertakings and empowered the Commission to examine the business records and take copies of business records of the undertakings they investigated. The Commission, applying those words literally, said that they were entitled to look at copies of letters and opinions in which AM&S sought the advice of lawyers and in which lawyers gave them their advice. The court accepted that the general principle that a client is entitled to conduct his relationship with his lawyer in conditions of confidence overrides the express terms of regulation 17. So rules of secondary Community law may have to be interpreted in the light of principles and concepts common to the laws of the member states.

1 Case 4/73, Nold
2 Case 11/70, Internationale Handelsgesellschaft
3 Case 155/79, AM + S
More recently you have two statements of the court in agricultural cases. The first statement coming from a series of cases Neu, Klench and Rauh. The court says that when it is necessary to interpret a provision of secondary Community law, preference should as far as possible be given to the interpretation which renders the provision consistent with the provisions of the treaty and the general principles of Community law. The general principles in question in those cases were in the case of Neu – freedom to choose the persons with whom one will do business, in Klench – non-discrimination between agricultural producers and in Rauh – the principle of legitimate expectation.

In the next case, Wachauf, the Court said not only that the Court of Justice in Luxembourg is bound to give an interpretation consistent with general principles but that the same applies to the member states. The member states must apply Community rules consistently with the general principles of Community law.

What are these principles? I think they fall into two categories basically. First of all there are the fundamental rights: essentially the fundamental rights guaranteed by the constitutions of the member states and by the Convention on Human Rights. In the ERT-case, which concerned Greek television, the question was whether the television monopoly could be maintained in spite of the treaty provisions on provision of services. But the other question was whether the provisions of the European Convention on freedom of speech would override the provisions of the treaty dealing with public policy (what is called in French “ordre public”). The Court said (and this is perhaps the first time it has said it) that in interpreting and applying Community law, account must be taken specifically of the provisions of the Convention on Human Rights.

However while that has been said now very clearly and it appears in the Court’s statements and also in the treaty on European Union, far more important have been the principles which I go on to discuss. First of all the procedural rights associated with fundamental rights. The rule that a deciding authority before taking a decision must hear the other party was asserted by the court in 1974 in the Trans Ocean Marine Paint Case. The rule non bis in idem, the rule of what the Americans call double jeopardy, and the right to legal assistance were asserted in two cases concerning community officials, Gutmann and Demont. The right to legal assistance is also implied in the AM&S case. You can’t have a right to confidential relationship with a lawyer unless you have a right to a lawyer in the first place. The privilege against selfincrimination was asserted in Orkem.

Then you have a set of principles which come under the broad heading of the principle of legal certainty, the principle that the law must as far as possible be clear and definite and certain. It also has certain other aspects such as the principle of non retroactivity (the law can’t be applied retroactively), the principle of legitimate expectation (people have a legitimate expectation that the law will continue to be applied in the way in which it has been applied up to now) and the principle that cases must be judged in the light of the law as it stood of the time of the events giving rise to the case.
Legitimate expectation in particular is a principle derived most directly from German administrative law, as is the other principle of proportionality – see, for example, Case 66/82, Fromançais.

Then you have the other principles, which are becoming almost as important as any of the others, which come under the general heading of non-discrimination or equality. The treaty itself contains a provision on non-discrimination in article 119 (discrimination based on sex) but the Court has said that is an expression of the more general fundamental principle of equal treatment of men and women\(^5\), and equal treatment of nationals of other member states, as in the case of Cowan\(^6\). A British citizen goes to France, he is injured in the Metro in Paris. Can he get compensation from France for the injuries he has sustained in the same way as a Frenchman? Answer: Yes.

Now, those are the general principles and one can spend many hours giving lectures on the general principles. How do they apply in the field of social law? I propose to look at a few examples. First of all freedom of movement of workers. This is an example of a principle which has been developed by the court from the treaty. You will remember that article 48 of the treaty provides for freedom of movement of wage and salary earners, workers. That part of the treaty, article 48, comes within a more general part called “freedom of movement of persons” and that comes within a more general part which used to be called until Maastricht “the Foundations of the Community”. For reasons completely beyond me, the Maastricht treaty makers removed that phrase from the treaty. But the Court has said that freedom of movement of workers, complete freedom of movement of workers, is one of the foundations of the Community and so is a general principle. Thus in the Hessische Knappschaft case\(^7\) a worker was entitled to social security from the authorities of another member state when he was in that other member state not as a worker but on holiday.

In Commission v. Germany\(^8\), Germany had implemented or given effect to the regulation 1612/68 on freedom of movement of workers by providing that a worker could have his residence permit renewed provided he was living in acceptable or appropriate housing. The court said that that condition when applied to nationals of other member states was, amongst other things, a violation of the respect for family life. These words seem to me to be very typical and important since they recognise the importance for the worker from a human point of view of having his entire family with him, and the importance from all points of view of the integration of the worker and his family into the host state without any difference in treatment in relation to nationals of that state.

Kraus\(^9\) has the distinction of having a master of laws degree from the University of Edinburgh and for that reason I was not able to sit in the case. The question was, could he use the title “LLM Edinburgh” in Land Baden-Württemberg? The Court said, perhaps not quite as strongly as I would have liked, that, Yes, he could and that this was part of the general idea that freedom of movement of workers means, amongst other things, freedom of movement to be trained for work. Similarly you must protect people who are looking for work and Kempf and Antonissen\(^20\) assert that, even when looking for work, workers must be protected and have a basic right to freedom of movement. Here you see provisions of the treaty and of secondary legislation given a broad interpretation.

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15 Case 149/77, Defrenne III
16 Case 186/87, Cowan
17 Case 44/65
18 Case 249/86
19 Case C-19/92
20 Cases 139/85 and 292/89
The next set of cases relate to equality for migrant workers and their families, e.g. Christini. French railways offer special terms to workers and their families. Was an Italian worker entitled to the same terms from S.N.C.F. as a French family? Yes. Regulation 1612/68 provides that migrant workers are entitled to the same social and tax advantages as national workers. That means all social advantages including special fares on the national railway company. Again, you have the same assertion about access to vocational training in Forcheri: the right not only of the worker but of the worker’s family because there is no point in saying that workers must be free to move if they cannot take their families with them. And once again in Commission v. Germany, the case about housing requirements I referred to before, the Court said that regulation 1612 must be interpreted in the light of article 8 of the Convention.

Then a case on proportionality: Rutili had - as so many people had - been active in the year 1968 asserting trade union rights and when he came as a worker to France the French restricted his freedom of movement in four departments of France. The court asserted that the right to control freedom of movement of workers on the limited grounds set out in article 48 must be exercised in accordance with the principles of proportionality. Proportionality in this context is simply another way of saying what already appears in the Convention on Human Rights. You can’t restrict basic rights more than is necessary for the proper order of the state.

Legal certainty is illustrated by the power which the Court has taken to itself, although it is not in the treaty, of limiting the application of judgements saying “This is the law but it is only the law from today and it is not retrospective”. That has been done in particular in two very important sex equality cases: the case, Defrenne III and Barber on the subject of equality of pension rights.

Then let’s come directly to equal treatment of men and women. The first example concerns article 1 of directive 75/117 which simply restates what is already in the treaty. The treaty says in article 119 that the member states shall ensure that the principle is applied of equal pay for equal work. Article 1 of the directive restates that. The argument put forward in Jenkins was that in some fashion the way in which article 1 of the directive was formulated, and the way it related to the other articles, limited the application of the principle laid down in Article 119. The Court said No, the principle is clear. Similarly in the Commission v. Germany in 1985 the German legislator in applying directives 75/117 and 76/207 had made a distinction between people in the public service and people employed by private undertakings. The Court condemned this as a new form of discrimination.

In the field of social security, which is extremely technical and there are a vast number of rules laid down, principally in regulation 1408/71, one finds a number of different examples of unequal treatment of men and women, or of married women and unmarried women, or of men being treated unequally depending on whether their wife is working or not.

The case of Pruyl (Case 284/84) from the Netherlands concerned the discriminatory treatment of married women in the case of old age pensions. The court condemned that
as being contrary to the fundamental principle of freedom of movement since, for a married woman, unequal treatment may constitute an obstacle to her accompanying her husband when he moves to another member state. The next case Pinna\textsuperscript{29} illustrates what we saw before in the case Commission v. Germany. But in this case it was Community legislation that was in issue. Article 73 of regulation 1408 had expressly laid down a different rule for workers subject to French social security legislation and workers subject to the legislation of other member states. The Court condemned that on the ground that “the objective of securing free movement to workers will be imperilled and made more difficult if unnecessary differences in social security rules are introduced by Community law”. So there you have a series of illustrations of the Court condemning the Community legislator and the national legislator, striking down discriminatory provisions, and also insisting that legislative provisions must be read in the light of general principles derived from the treaty, from the constitutions of the member states and from the European Convention.

As a last example in the field of social security, Testa\textsuperscript{30}, where the Court held that, when member states are exercising a discretionary power they must take account of the principle of proportionality which is a general principle of Community law.

And finally a very recent case at the very end of 1992 concerning the transfer of undertakings directive, Katsikas\textsuperscript{31}. The transfer of undertakings directive is basically conceived in favour of workers. The principle is that when an undertaking is transferred from one enterprise to another, from one company to another, then that does not automatically mean the end of the contract of employment. But the argument in Katsikas was that if the worker moves with the undertaking, he would be forced to work for a new employer even if he didn't want to. The Court asserted, as a general principle of human liberty if you like, that an employee cannot be obliged to work for an employer whom he has not freely chosen.

Let me therefore sum up: The general principles of Community law come from a variety of sources: from public international law, from national law and from the treaties. They are in a sense a judicial invention. Nevertheless the Court in Luxembourg is in this respect doing what all courts do every day, which is looking beyond the texts that they are applying and finding a principle in the light of which that text can be interpreted. That applies whether the court is an administrative court or a civil court or a penal court. The Court of Justice is doing nothing that other courts have not been accustomed to do for hundreds of years. The unusual feature in this case is that the Court is relatively young, so people are able to observe the Court creating the conditions in which the law operates rather than accepting those conditions as part of their general understanding of the way the law works.

\textsuperscript{29} Case 41184
\textsuperscript{30} Case 41179
\textsuperscript{31} Case C-132/91
Art. 164 EC:
The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed.

The law = Treaty law, secondary Community law and "general principles of law"

General principles of law = general principles derived from:
- public international law, especially "international treaties for the protection of Human Rights on which the Member States have collaborated or of which they are signatories" – *Nold*, 4/73, 1974 ECR 491;
- the law of the Member States, especially "the constitutional traditions common to the Member States" – *Internationale Handelsgesellschaft*, 11/70, 1970 ECR I 1125;
- the Treaties, especially Part One of EC Treaty (arts. 1–7): "Principles".

Art. E2 TEU:
- The Union shall respect fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

Rules of secondary Community law may have to be interpreted in the light of principles and concepts common to the laws of the Member States (in casu, the confidentiality of communications between lawyer and client) – *AM&S*, 155/79, 1982 ECR 1575, pt. 18.

When it is necessary to interpret a provision of secondary Community law, preference should as far as possible be given to the interpretation which renders the provision consistent with the provisions of the Treaty and the general principles of Community law – *Neu*, C-90 & 91/90, 1991 ECR I-3633, pt. 10; cp. *Klensch*, 201 & 202/85, 1986 ECR 3503, pt. 21, and *Rauch*, C-314/89, 1991 ECR I-1667, pt. 7.

Since the requirements of the protection of fundamental rights are binding on the Member States when they implement Community rules, the Member States must, as far as possible, apply those rules in accordance with those requirements – *Wachauf*, 5/88, 1989 ECR 2633, pt. 19.

**General principles of Community Law**

**Fundamental rights** – Where national rules fall within the scope of Community law, and reference is made to the Court for a preliminary ruling, it must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental rights the observance of which the Court ensures and which derive in particular from the ECHR – *ERT*, C-260/89, 1991 ECR I-2951, pt. 42.

**Associated procedural rights:**
- Audi alteram partem – *Transocean Marine Paint*, 17/74, 1974 ECR 1063;
- Non bis in idem – *Gutmann*, 35/65, 1966 ECR 103;

**Legal certainty**
- Non-retroactiveness – *Kirk*, 63/83, 1984 ECR 2689;
- Cases must be judged in the light of the law as it stood at the time – *Henck*, 12/71, 1971 ECR 743.

Non-discrimination/Equality — The elimination of discrimination based on sex forms part of the fundamental personal Human Rights, respect for which is one of the general principles of Community law — Defrenne III, 149/77, 1978 ECR 1365, pts. 26–7.

Although in principle criminal legislation and the rules of criminal procedure are matters for which the Member States are responsible, such legislative provisions may not discriminate against persons to whom Community law gives the right to equal treatment or restrict the fundamental freedoms guaranteed by Community law — Cowan, 186/87, 1988 ECR 195, pt. 19.

General Principles applied

Freedom of movement of workers as a general principle:

“The establishment of as complete freedom of movement for workers as possible forms part of the ‘foundations’ of the Community”, so a worker is entitled to social security in respect of an accident sustained while on holiday in another Member State — Hessische Knappschaft, 44/65, 1965 ECR 965.

Regulation 1612/68 (on freedom of movement for workers) must be interpreted in the light of the requirement of respect for family life (art. 8 ECHR) and the overall purpose of the regulation, including “the importance for the worker, from a human point of view, of having his entire family with him and the importance, from all points of view, of the integration of the worker and his family into the host Member State without any difference in treatment in relation to nationals of that State” — Commission v. Germany, 249/86, 1989 ECR 1263, pts. 10–11.

Free movement of workers and the right of establishment, guaranteed by articles 48 and 52 of the Treaty, constitute fundamental freedoms (grundlegende Freiheiten) within the Community system — Kraus, C-19/92, 1993 ECR I-1663, pt. 16.

Freedom of movement for workers forms one of the foundations of the Community and, consequently, the provisions laying down that freedom must be given a broad interpretation — Kempf, 139/85, 1986 ECR 1741, pt. 13; Antonissen, 292/89, 1991 ECR I-745, pt. 11.

Equality for migrant workers and their families:

Article 7(2) of Regulation 1612/68, which provides that the migrant worker is to enjoy “the same social and tax advantages as national workers” must be interpreted so as to include all social and tax advantages, whether or not attached to the contract of employment, such as reductions in fares for large families — Christini, 32/75, 1975 ECR 1085, pt. 13.

According to the legislative practice of the Community and the established case law of the Court, the right to free movement must not be interpreted narrowly. The preamble to Reg. 1612/68 states that it constitutes a fundamental right of workers and their families since mobility of labour within the Community must be one of the means by which the worker is guaranteed the possibility of improving his living and working conditions and promoting his social advancement. So vocational training courses must be available to migrant workers and their families on the same terms as for national workers — Forcheri, 152/82, 1983 ECR 2323, pt. 11 and dispositif.

Regulation 1612/68 must be interpreted in the light of Article 8 ECHR: once the family has been brought together, the position of the migrant worker cannot be different in regard to housing requirements from that of a worker who is a national of the Member State concerned — Commission v. Germany, 249/86, supra, pts. 10 & 12.
Proportionality
The limitations (of proportionality) placed by Reg. 1612/68 on the powers of Member States to control aliens are a specific manifestation of the more general principle enshrined in Articles 8, 9, 10 and 11 ECHR – Rutilli, 36/75, 1975 ECR 1219, pt. 32.

Legal Certainty
Legal certainty justifies temporal limitation of judgments applying article 119 – Defréenne III, supra; Barber, 262/88, 1990 ECR I-1944, pt. 44.

Equal treatment of men and women
Article 1 of Directive 75/117, which restates the principle of equal pay, cannot alter the content or scope of that principle as defined in the Treaty – Jenkins, 96/80, 1981 ECR 911. Directives 76/207 and 75/117 are of general application, “a factor which is inherent in the very nature of the principle which they lay down. New cases of discrimination may not be created by exempting certain groups from the provisions intended to guarantee equal treatment of men and women in working life as a whole” – Commission v. Germany, 248/83, 1985 ECR 1459, pt. 16.

Social security
“There is no justification, under a general old-age insurance scheme, in which residence is the sole qualification for insurance, for refusing to take such periods of residence into account as insurance periods in the case of a married woman when they are so treated in the case of a man and an unmarried woman. Such difference in treatment must be regarded as discriminatory and contrary to the fundamental principle of freedom of movement, since for a married woman it may constitute an obstacle to her accompanying her husband when he moves to another Member State” – Spruyt, 284/84, 1986 ECR 685, pt. 25.

The objective of securing free movement of workers will be imperilled and made more difficult if unnecessary differences in social security rules are introduced by Community law. So, Article 73 of Reg. 1408/71 was declared invalid in so far as it creates two different systems for migrant workers depending on whether they are subject to French legislation or to the legislation of another Member State – Pinna, 41/84, 1986 ECR 1, pts. 21–22.

In exercising the discretionary power conferred by Article 69 of Regulation 1408/71, the competent authorities of the Member States must take account of the principle of proportionality which is a general principle of Community law – Testa, 41/79, 1980 ECR 1979.

Transfer of Undertakings
The worker must be free to choose his employer and cannot be obliged to work for an employer whom he has not freely chosen – Katsikas, 132/91, 1992 ECR I-6577, pt. 32.