

GENERAL PRINCIPLES OF EU CIVIL LAW

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Norbert REICH



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Cambridge – Antwerp – Portland

Intersentia Publishing Ltd.
Trinity House | Cambridge Business Park | Cowley Road
Cambridge | CB4 0WZ | United Kingdom
Tel.: +44 1223 393 753 | Email: mail@intersentia.co.uk

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Distribution for Austria:
Neuer Wissenschaftlicher Verlag
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Austria
Tel.: +43 1 535 61 03 24
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Distribution for other countries:
Intersentia Publishing nv
Groenstraat 31
2640 Mortsel
Belgium
Tel.: +32 3 680 15 50
Email: mail@intersentia.be

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Cambridge – Antwerp – Portland
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Artwork on cover: La Ville n° 2, Delaunay Robert (1885-1941) © Paris, Musée national d'Art moderne – Centre Georges Pompidou, MNAM-CCI, Dist. RMN-Grand Palais / Philippe Migea

ISBN 978-1-78068-176-4
D/2014/7849/11
NUR 820

British Library Cataloguing in Publication Data. A catalogue record for this book is available from the British Library.

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PREFACE

This book takes up a continuing, controversial and to some extent rather confusing debate in EU law – in both academia and in ECJ (the Court of Justice of the EU as it will be abbreviated in the following) case law – on the discovery, shaping and perhaps defence of general principles which may unite its rather heterogeneous involvement in private law, or, as I prefer to call it, civil law relations. The study is not meant to “open” the route to some type of codification, consolidation or restatement of EU civil law, but more modestly to explain its present status, thus making any “optional instruments” nugatory. The debate on EU law principles is much more advanced in EU constitutional and administrative law. EU civil law seems to be lagging behind, but will certainly gather steam the more EU law takes an interest in – some call it “invades” – “horizontal” relations between private persons, and shapes remedies, both substantive and procedural, of its own.

The seven principles, explained in the introduction and treated in detail in the seven following chapters, have an impact on substantive, procedural and methodological matters which have traditionally belonged to the law of Member States but which have seen a shift in competence and legitimacy towards the EU – a shift welcomed by many, but also feared by others. This study does not take a stand in this debate, but simply analyses the remarkable competence “creep” promoted and to some extent provoked by the abundant case law of the ECJ which forms the basis for the “bottom-up” approach used in this study.

The study covers many areas of EU civil law, such as free movement and competition issues, employment relations, consumer law, non-discrimination issues, services in the general economic interest, EU attempts to create a Common European Sales Law (CESL), as well related procedural matters within the scope of EU law. Last but not least, reference to fundamental rights is made continuously, namely to those enshrined in the EU Charter of Fundamental Rights, but also to those in the European Convention of Human Rights (ECHR) and earlier case law of the ECJ. A caveat should be added: the study never tries to exhaustively discuss any of the areas referred to. It takes them rather as examples of the horizontal approach to finding general principles in EU civil law. Several areas of EU civil law had to be completely left out of this book, in particular conflict of laws, company law and intellectual property law.

As basis for this study I used many of my prior publications, which are mentioned in the bibliography preceding every chapter. Chapter 1 on “the

Principle of “Framed Autonomy” is based on section 17 of the second edition of my *Understanding EU Law* of 2005, to be updated by Annette Nordhausen Scholes, Manchester University, in the third edition of the joint publication *Understanding EU Internal Market Law* (forthcoming).

The development of this book further owes thanks to four places where parts had been prepared, presented and debated. First, the European University Institute, Florence, under the guidance of Hans Micklitz who initiated several conferences and publications on various aspects of the topic. I was able to use my contribution to the book edited by Hans Micklitz with R. Brownsword et al. (eds.), *The Foundations of European Private Law*, 2011, pp. 185–220 on “Balancing in Private Law and the Imperatives of the Public Interest” for Chapter 5 of this book. The Law Faculty of Oxford, with Dorota Leczykiewicz and Stephen Weatherill, was responsible for organising a stimulating workshop published as *The Involvement of EU Law in Private Law Relationship*, 2012, where I gave a paper on “The Impact of Non-discrimination Principle on Private Autonomy” (at pp. 253–278), which has an updated sequel in Chapter 3 of this book. The Stockholm University EU Law Institute headed by Ulf Bernitz hosted a conference on “General Principles of EU Law and Private Law” in the beginning of 2013 where I presented a paper on “The Principle of Effectiveness and in EU Private Law” to be published with the proceedings of this conference; this is the basis for a more extensive discussion in Chapter 4. Groningen University, with Laurence Gormley, Aurelia Ciacchi and Bart Krans, gave me the chance to spend time for research and debate as a visiting professor in spring 2013, where I was able to present the introduction to this book for critical assessment. I owe many thanks to the debates in these institutions which encouraged me to put my somewhat inchoate ideas together in a comprehensive work on “General Principles of EU Civil Law”. Of course, I have sole responsibility for any remaining mistakes, misconceptions and misunderstandings.

Hamburg, summer 2013

CONTENTS

<i>Preface</i>	v
<i>Table of ECJ cases: alphabetical</i>	xi
<i>Table of ECJ cases: chronological</i>	xvii
<i>Table of EU legislation</i>	xxiii
<i>List of abbreviations</i>	xxvii

Introduction. What are General Principles of EU Civil Law?

1. An ongoing debate: “principles” vs. “rules”	2
2. Some preliminary suggestions	6
3. The express recognition of general principles by the Charter	8
4. What do we mean by EU civil law: <i>acquis communautaire</i> vs. <i>acquis commun</i>	11
5. The competence dilemma of EU civil law	14
6. Why seven principles?	16

Chapter 1. The Principle of “Framed” Autonomy

1. Freedoms framed by law	18
2. Fundamental freedoms, autonomy and public interest restrictions	21
3. Freedom of contract as fundamental yet limited right and principle	28
4. Competition law and autonomy	30
5. Conclusion: framing of autonomy under welfarism aspects – going beyond the traditional approach?	34

Chapter 2. The Principle of Protection of the Weaker Party

1. Elements of protection of the weaker party	38
2. Minimum standards of working hours and paid annual leave	41
3. EU consumer law: information vs. protection	47
4. Conclusion: generalising the protection of weaker parties and its limits	56

Chapter 3. The Principle of Non-Discrimination

1. “Spill-over” effects of non-discrimination on civil law?	60
2. Non-discrimination in employment law relations: overview	64

3. Citizenship: extending the scope of the principle of non-discrimination by primary law	72
4. Extension of the non-discrimination principle to business-consumer relations by EU secondary law	74
5. A controversy: unisex tariffs in insurance and conflicts with private autonomy	76
6. Non-discrimination in access to and treatment in services of general economic interest and in network services: framed autonomy	81
7. Equal treatment beyond non-discrimination?	84
8. Conclusion: the varied impact of the non-discrimination principle on civil law relations	87
Chapter 4. The Principle of Effectiveness	89
1. Article 47 of the Charter and Article 19 TEU: anything new?	90
2. The “eliminary” function of the effectiveness principle.	91
3. Effectiveness as a “hermeneutical” principle	95
4. Effectiveness as a “remedial” principle: “upgrading” national remedies . . .	97
5. Some examples applying the effectiveness test in EU civil law	99
6. Primary Union law: rules on competition	112
7. Compensation for violations of directly applicable provisions of primary Union law	117
8. The importance of Article 47 of the Charter and Article 19(1) TEU for EU civil law revisited.	120
9. Conclusion: how effective is the effectiveness principle?	129
Chapter 5. The Principle of Balancing	131
1. Introduction: a dialogue on balancing in EU civil law	132
2. Balancing in unfair term jurisprudence: transparency, “core terms” and the unfairness test	134
3. Balancing to avoid “over-protection”	141
4. Role of Balancing in social conflicts: fundamental rights vs. fundamental freedoms?	146
5. Conclusion	153
Chapter 6. The Principle of Proportionality	155
1. Importance of the principle of proportionality for EU civil law: some general remarks	157
2. The Draft Common Frame of Reference	162
3. The “feasibility study” and draft Common European Sales Law	169
4. Open method of coordination, convergence and improved law-making in reflexive contract governance in the EU.	180

5. The “positive proportionality” principle in EU civil legislation: two examples	182
6. Conclusions on the principle of proportionality as an instrument of legal control and support of EU measures	187
Chapter 7. An Emerging Principle of Good Faith and of a Prohibition of Abuse of Rights?	189
1. Some misunderstandings about good faith in contract law: elements of a duty of loyal cooperation in contracting	190
2. Good faith in commercial law settings	193
3. Directive 93/13 on unfair terms	195
4. Absence of good faith obligations for the bank in B2C financial services	202
5. “Co-responsibility” as an indirect good faith-obligation: some examples	203
6. Elements of good faith in recent soft law initiatives.	206
7. Relevance of Article 54 of the Charter to an EU concept of abuse of rights?	208
8. Conclusion: good faith on the move?	211
Summary. Seven Theses and a Conclusion	213
<i>Index</i>	215

TABLE OF ECJ CASES: ALPHABETICAL

<i>ABSL v Bosman</i> (C-415/93) [1995] ECR I-4921	1.7, 3.3, 4.28
<i>AGM-COSMET</i> (C-470/03) [2007] ECR I-2749	3.8
<i>Aklagaren v H.A. Fransson</i> (C-617/10) [2013] ECR I-(26.03.2013)	3.2
<i>Albany Int. BV v Stichting Bedrijfspensioenfonds Textielindustrie</i> (C-67/96)	
[1999] ECR I-5751	1.18
<i>Albore</i> (C-423/98) [2000] ECR I-5965	1.6
<i>Aldona Malgorzata Jany et al v Staatssecretaris van Justitie</i> (C-268/99)	
[2001] ECR-8615	4.28
<i>Alsthom Atlantique v Compagnie de construction mécanique Sulzer SA</i>	
(C-339/89) [1991] ECR I-107	1.4
<i>Andrew Owusu v NB Jackson et al</i> (C-281/02) [2005] ECR I-1383	5.12
<i>Annelore Hamilton v Volksbank Filder</i> (C-412/06) [2008] ECR I-2383	0.3, 5.9, 6.11
<i>Anton Cas v PSA Antwerp</i> (C-202/11) [2013] ECR I-(16.04.2013)	1.10
<i>AOK-Bundesverband v Ichthyol-Gesellschaft Cordes et al</i> (C-264/01 etc.)	
[2004] ECR I-2493	4.28
<i>Arblade</i> (C-369 + 376/96) [1999] ECR I-8453	6.13
<i>Arcelor Atlantique and Lorraine et al</i> (C-127/07) [2008] ECR I-9835	3.1
<i>Asociatia ACCEPT v CNPCD</i> (C-81/12) [2-13] ECR I-(25.04.2013)	3.8
<i>Association de médiation sociale v CGT</i> (C-176/12) (opinion of AG Cruz Villalón of 18.07.2013)	0.3
<i>Ass. Belge Test-Achats et al</i> (C-236/09) [2011] ECR I-773	3.15, 6.19
<i>Asturcom v Christina Rodrigues Nogueira</i> (C-40/08) [2009] ECR I-9579	4.15
<i>Audiolux</i> (C-101/08) [2010] ECR I-9823	0.3, 3.22
<i>Banco Español de Credito v Camino</i> (C-618/10) [2012] ECR I-(14.06.2012)	4.18
<i>Bayr. Hypotheken und Wechselbank v Dietzinger</i> (C-45/96) [1998] ECR I-1199	2.9
<i>BECTU v Secretary of State for Trade and Industry</i> (C-173/99) [2001] ECR I-4881	2.1
<i>Belov v CHEZ</i> (C-394/11) [2013] ECR I-(31.01.2013) (opinion of AG Kokott of 20.09.2012)	3.13
<i>Benincasa</i> (C-269/95) [1997] ECR I-3767	2.9
<i>Berliner Kindl Brauerei v A. Siepert</i> (C-208/98) [2000] ECR I-1741	2.9
<i>Bond van Adverteerders v The Netherlands State</i> (352/88) [1988] ECR I-2085	1.5
<i>Brasserie du Pêcheur v Germany and R v Secretary of State for Transport, ex parte Factortame Ltd</i> (C-46 and C-48/93) [1996] ECR I-1029	4.24
<i>Brennet v Paletta</i> (C-206/94) [1996] ECR I-2357	5.11
<i>BRT v SV SABAM</i> (127/73) [1974] ECR 314	4.24

<i>Caixa Bank France v Ministère de Finances</i> (C-442/02) [2004] ECR I-8961	1.11
<i>Caja de Ahorros y Monte de Piedad de Madrid v Asociación de Usuarios de servicios bancarios (Ausbanc)</i> (C-484/08) [2010] ECR I-4785	5.8
<i>Carmen Media</i> (C-46/08) [2010] ECR I-8149	1.5, 6.1
<i>Car Trim v Key Safety</i> (C-381/08) [2010] ECR I-1255	6.15
<i>Casati</i> (203/80) [1981] ECR 2595	1.6
<i>Centrum voor gelijkheid van kansen en voor racismebestrijding (CGKR) v Firma Feryn NV</i> (C-54/07) [2008] ECR I-5187	3.4, 4.36
<i>CIA Security International SA v Signalson SA and Securitel SPRL</i> (C-194/94) [1996] ECR I-2201	0.8
<i>CIVS v Receveur des Douanes de Roubaix</i> (C-533/10) [2012] ECR I-(14.06.2012)	4.5
<i>CMC Motorradcenter v P.B.</i> (C-93/92) [1993] ECR I-5009	1.4
<i>Codorniú Sa v Council</i> (C-309/89) [1994] ECR I-1853	3.1
<i>Comet</i> (45/76) [1976] ECR 2043	4.1, 4.3
<i>Commission v Anic</i> (C-49/92P) [1999] I-4125	4.27
<i>Commission v Belgium</i> (C-478/98) [2000] ECR I-7587	1.6
<i>Commission v France</i> (C-381/93) [1994] ECR I-5145	5.14
<i>Commission v Italy</i> (C-518/06) [2009] ECR I-3491	1.10
<i>Commission v Italy</i> (C-565/08) [2011] ECR I-2101	1.10
<i>Commission v Netherlands</i> (C-144/99) [2001] I-3541	4.10
<i>Coote v Granada Hospitality</i> (C-185/97) [1998] ECR I-5199	4.13
<i>Courage Ltd v Crehan</i> (C-453/99) [2001] ECR I-6297	4.5, 4.25, 7.12
<i>Crailsheimer Volksbank</i> (C-229/04) [2005] ECR I-9294	4.21
<i>Danske-Slagterier</i> (C-445/06) [2009] ECR I-2119	4.5, 7.11
<i>DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland</i> (C-279/09) [2010] ECR I-13849	3.2, 4.30
<i>Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus</i> (177/88) [1990] ECR I-3941	4.13
<i>Delimitis v Henninger-Bräu</i> (C-234/89) [1991] ECR I-935	1.15
<i>Dellas</i> (C-14/04) [2005] ECR I-10253	2.3
<i>Deutscher Handballbund eV v Maros Kolpak</i> (C-438/00) [2003] ECR I-4135	4.28
<i>di Pinto</i> (C-361/89) [1991] ECR I-1189	2.9
<i>D. McDonagh v Ryanair</i> (C-12/11) [2013] ECR I-(31.01.2013)	2.1, 5.10
<i>Dominguez v CICOA</i> (C-282/10) [2012] ECR I-(24.01.2012)	2.1, 2.4
<i>Draempaehl v Urania</i> (C-180/95) [1997] ECR I-2195	4.13
<i>Driancourt v M. Cagnet</i> (355/85) [1986] ECR 3231	1.8
<i>Dynamik Medien Vertriebs GmbH v Avides Media AG</i> (C-244/06) [2008] ECR I-505	5.18
<i>EARL de Kerlast v Union régionale de coopératives agricoles (Unicopa) and Coopérative du Trieux</i> (C-15/95) [1997] ECR I-1961	3.1
<i>Eco Swiss China Time v Benetton International NV</i> (C-126/97) [1999] ECR I-3055	4.23
<i>E.M.M. Claro v Centro Movil Milenium</i> (C-168/05) [2006] ECR I-10421	4.15
<i>EP v Council</i> (C-436/03) [2006] ECR I-3733	6.13
<i>EP v Council</i> (C-540/03) [2006] ECR I-5769	2.4, 3.1

<i>Eric Libert et al v Gouvernement flamand</i> (Joined Cases C-197 + C-203/11)	
[2013] ECR I-(05.05.2013)	1.6
<i>Eugen Schmidberger v Austria</i> (C-112/00) [2003] ECR I-5659	5.14
<i>Europese Gemeenschap v Otis et al</i> (C-199/11) [2012] ECR I-(06.11.2012)	4.26
<i>Fachverband der Buch- und Medienwirtschaft v LIBRO Handelsgesellschaft</i>	
(C-531/07) [2009] ECR I-3717	1.4
<i>Football Association Premier League Ltd v QC Leisure et al</i> (C-403 + 429/08)	
[2011] ECR I-9086	1.11
<i>Francovich et al v Italy</i> (C-6 + 9/90) [1991] ECR I-5357	4.24
<i>Frederico Cipolla et al v Rosaria Fazari, née Portolese et al</i> (C-94 + 202/04)	
[2006] ECR I-1142	1.10
<i>Freiburger Kommunalbauten v Hofstetter</i> (C-237/02) [2004] ECR I-3403	7.4
<i>Friz</i> (C-215/08) [2010] ECR I-2749	0.3, 5.9, 6.11
<i>Garcia Avello</i> (C-148/02) [2003] ECR I-11613	3.11
<i>Gebhard v Consiglio dell'Ordine degli Avvocati e procuratori di Milano</i>	
(C-55/94) [1995] ECR I-4165	1.9, 6.1
<i>Gebrüder Weber + Putz v Wittmer + Medianess El.</i> (C-65 + 89/09)	
[2011] ECR I-5257	2.5, 4.18 , 6.17, 7.10
<i>Genil et al v Bankinter et al</i> (C-604/11) [2013] ECR I-(30.05.2013)	7.10
<i>G. Defrenne v SABENA</i> (43/75) [1976] ECR 455	3.4
<i>Germany v Parliament and Council</i> (C-376/98) [2000] ECR I-8419	0.11, 6.4
<i>Groener v Minister for education and City of Dublin Vocational Committee</i>	
(379/87) [1989] ECR 3967	3.3
<i>Grunkin and Paul</i> (C-353/06) [2008] ECR I-7639	3.11
<i>Günaydin v Freistaat Bayern</i> (C-36/96) [1997] ECR I-5143	5.11
<i>Günter Fuß v Stadt Halle</i> (C-243/09) [2010] ECR I-9849	2.3
<i>Gysbrechts</i> (C-205/07) [2008] ECR I-9947	1.9, 5.8, 7.19
<i>Hartlauer Handelsgesellschaft v Wiener Landesregierung et al</i> (C-169/07)	
[2009] ECR I-1721	5.4
<i>Heininger v Bayr. Hypo und Vereinsbank</i> (C-481/99) [2001] ECR I-9945	4.20
<i>H.J. Banks & Co. Ltd v British Coal Corporation</i> (C-128/92) [1994] ECR I-1209	4.25
<i>Hoffmann-La Roche v Commission</i> (85/76) [1979] ECR 461	1.17
<i>Honyvem Informazioni Commerciali v Mariealla de Zoti</i> (C-465/04)	
[2006] ECR I-2879	7.3
<i>IATA and ELFAA v Department for Transport</i> (C-344/04) [2006] ECR I-403	6.4
<i>Idealservice</i> (C-541 + 542/99) [2001] ECR I-9049	2.9
<i>Ingmar GB Ltd v Eaton Leonard Technologies Inc.</i> (C-381/9)8 [2000] ECR I-9305	7.3
<i>International Transport Workers Federation (ITW) and Finnish Seamans</i>	
<i>Union (FSU) v Viking Line</i> (C-438/05) [2007] ECR I-10779	3.3, 4.28, 5.12
<i>J.C.J. Wouters et al v Algemene Raad von de Nederlandse Ordre van Advocaaten</i>	
(C-309/99) [2002] ECR I-1577	3.3, 4.28

<i>Johann Gruber v Bay Wa AG</i> (C-464/01) [2005] ECR I-439	2.9
<i>Jürgen Römer v Freie und Hansestadt Hamburg</i> (C-147/08) [2011] ECR I-359	3.8
<i>Kadi et al v Council of the EU</i> (C-402 + 415/05P) [2008] ECR I-6351	4.30
<i>Katharina Rinke v Ärztekammer Hamburg</i> (C-25/02) [2003] ECR I-8349	3.4
<i>Kefalas et al v Greece</i> (C-367/96) [1998] ECR I-2843	5.11
<i>KHS v Winfrid Schulte</i> (C-214/10) [2011] ECR I-(22.11.2011).	2.4
<i>Kiel v Jaeger</i> (C-151/02) [2003] ECR I-8389	2.1, 2.3
<i>Ladbrokes Betting & Gaming Ltd et al v Stichting de Nationale Sporttotalisator</i> (C-238/08) [2010] ECR I-4757	6.4
<i>Land Nordrhein-Westfalen v Beata-Pokrzepowicz-Meyer</i> (C-162/00) [2002] ECR I-1049	4.28
<i>Laserdisken</i> (C-479/04) [2006] ECR I-8089	1.6
<i>Laval & partneri v Bygnadds</i> (C-341/05) [2007] ECR I-11767	3.3, 4.28, 5.12
<i>Levez v Harlow Pools</i> (C-326/96) [1998] I-7835	4.5
<i>Lisa Jacqueline Grant v South-West Trains</i> (C-249/96) [1998] ECR I-621	3.6
<i>Luisi and Carbone v Ministero del Tesoro</i> (326 + 286/83) [1984] ECR 377	1.6
<i>Mohamed Aziz v Catalunyaacaixa</i> (C-415/11) [2013] ECR I-(14.04.2013)	4.5, 4.15
<i>Mangold v Helm</i> (C-144/04) [2005] ECR I-9981	0.3, 3.6, 4.14
<i>Maria Chiara Spotti v Freistaat Bayern</i> (C-272/92) [1993] ECR I-5185	3.3
<i>Markus Stoß</i> (C-316/07) [2010] ECR I-8099	1.5
<i>Marshall (II) v Southampton Health Authority</i> (C-271/91) [1993] ECR I-4367	4.13, 7.11
<i>Masdar v Commission</i> (C-47/07P) [2008] ECR I-9761	0.8
<i>Mietz v Intership Yachting</i> (C-99/06) [1999] ECR I-2277	2.9
<i>Mono Car Styling</i> (C-12/08) [2009] ECR I-6653	4.30
<i>Nelson et al v Lufthansa et al</i> (C-528 + 619/10) [2012] ECR I-(24.10.2012)	0.6, 4.8
<i>Nemzeti Fogyasztróvédelni Hatóság v Invitel</i> (C-472/10) [2012] ECR I-(26.04.2012)	4.15, 4.30, 7.5
<i>Océano Grupo ed. v Quintero et al</i> (C-240–244/98) [2000] ECR I-4941	4.15
<i>Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn</i> (C-36/02) [2004] ECR I-9609	5.14
<i>Öst. Gewerkschaftsbund, Gewerkschaft öffentlicher Dienst/ Republik Österreich</i> (C-195/98) [2000] ECR I-10497	4.30
<i>Palacios de la Villa</i> (C-411/05) [2007] ECR I-8531	3.6
<i>Pannon v Erzsébet Sustikné Györfi</i> (C-243/08) [2009] ECR I-4713	4.15, 5.5
<i>Pavel Pavlov et al v Stichting Pensioenfonds Medische Specialisten</i> (C-180–185/98) [2000] ECR I-6451	1.18
<i>Pereničová and Perenič v SOS financ</i> (C-453/10) [2012] ECR I-(15.03.2012)	4.30, 6.16, 7.5
<i>Pfeiffer et al v DRK</i> (C-397–403/01) [2004] ECR I-8835	2.3
<i>Pia Messner v Firma Stefan Krüger</i> (C-489/07) [2009] ECR I-7315	0.3, 5.9, 6.11, 7.10

<i>Pilar Allué and Carmel Mary Coonan et al v Università degli studi di Venezia and Università degli studi di Parma</i> (C-259, 331 + 332/91) [1993] ECR I-4309	3.3
<i>Poseidon Chartering NV v Marianne Zeeship et al</i> (C-3/04) [2006] ECR I-2505	7.3
<i>Productores de Música de España (Promusicae) v Telefónica de España SAU</i> (C-275/06) [2008] ECR I-271	1.6, 3.1., 5.1
<i>Quelle v Bundesverband der Verbraucherzentralen</i> (C-404/06) [2008] ECR I-2685	5.8, 6.17
<i>Raccanelli</i> (C-94/07) [2008] ECR I-5939	3.3, 4.28
<i>REWE Central Finanz</i> (33/76) [1976] ECR 1989	4.1, 4.3
<i>Robinson-Steele et al v Retail Services et al</i> (C-131 and C-257/04) [2006] ECR I-2531	2.4
<i>Roman Angonese v Casa di Risparmio di Bolzano</i> (C-281/98) [2000] I-4139	1.7, 3.3, 4.28
<i>Rosalba Alassini et al v Telecom Italia</i> (C-317/08) [2010] ECR I-2214	4.5, 6.21
<i>R. Prigge et al v Lufthansa</i> (C-447/09) [2011] ECR I-(13.09.2011)	3.6
<i>R v Secretary of State for the Home Department, ex parte Wieslaw and Elzbieta Gloszczuk</i> (C-63/99) [2001] ECR I-6369	4.28
<i>R v Secretary of State for the Home Department, ex parte Eleanora Ivanova Kondova</i> (C-235/99) [2001] ECR I-6427	4.28
<i>R v Secretary of State for the Home Department, ex parte Julius Barkoci and Marcel Malik</i> (C-257/99) [2001] ECR I-6557	4.28
<i>R v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd et al</i> (C-491/01) [2002] ECR I-11453	6.4
<i>RWE Vertrieb v Verbraucherzentrale NRW</i> (C -92/11) [2013] ECR I-(21.03.2013)	5.8, 7.4
<i>Ruckdeschel</i> (117/76 + 16/77) [1977] ECR 1753	3.1
<i>San Giorgio</i> (199/82) [1983] ECR 3595	4.1
<i>S. Bulicke v DBS</i> (C-249/09) [2010] ECR I-7003	4.5
<i>Schulte</i> (C-350/03) [2005] ECR I-9215	4.21
<i>Schulze-Hoff et al v DRB</i> (C-350 + 520/06) [2009] ECR I-179	2.4
<i>S. Coleman v Attridge Law et al</i> (C-303/06) [2008] ECR I-5603	3.9
<i>Seda Küçükdevici v Swedex</i> (C-555/07) [2010] ECR I-365	0.7, 3.6, 4.14
<i>Shearson Lehmann Hutton v TVB Treuhandgesellschaft</i> (C-89/91) [1993] ECR I-139	2.9
<i>Sky Österreich v Österreichischer Rundfunk</i> (C-283/11) [2013] ECR I-(22.01.2013)	1.13, 3.21, 5.1
<i>Simap</i> (C-303/98) [2000] ECR I-7963	2.3
<i>Simone Leitner v TUI Deutschland</i> (C-168/00) [2002] ECR I-2631	4.12, 7.13
<i>Société de Vente de Ciments et Bétons v Kerpen & Kerpen</i> (319/82) [1983] ECR 417	1.15
<i>Société Technique Minière v Maschinenbau Ulm</i> (56/65) [1966] ECR 235	1.15
<i>Société thermique d'Eugénie-les-Bains v Ministère de l'Économie, des Finances et de l'Industrie</i> (C-277/05) [2007] ECR I-6428	1.2
<i>Sonja Chacón Navas v Eurest Colectividades</i> (C-13/05) [2006] ECR I-6467	3.9

<i>Steen v Deutsche Bundespost</i> (C-332/90) [1992] ECR I-341	1.8
<i>Sturgeon et al</i> (C-402/07 and C-432/07) [2009] ECR I-10923	0.6
<i>The Society for the Protection of Unborn Children v Grogan</i> (C-159/90)	
[1991] ECR I-4685	1.5
<i>TV10 v Commissariaat v.d. Media</i> (C-23/93) [1994] ECR I-4795	5.11
<i>Unibet v Justiekanslern</i> (C-432/05) [2007] ECR I-2271	4.30
<i>Unilever Italia v Central Food</i> (C-443/98) [2000] ECR I-7535	0.8
<i>Union Syndicale Solidaires Isère</i> (C-428/09) [2010] ECR I-9961	2.2
<i>UK v Council</i> (C-84/94) [1996] ECR I-5755	0.11, 2.2
<i>Van Binsbergen v Bestuur von de Bedrijfsvereniging voor de Metaalnijverheid</i>	
(33/74) [1974] ECR 1299	5.11
<i>Van Schijndel and Van Veen v Stichting Pensioenfonds</i> (C-430–432/93)	
[1995] ECR I-4705	4.15
<i>VB Penzügji Lizing v Schneider</i> (C-137/08) [2010] ECR I-10847	2.5, 4.15, 6.11, 7.5
<i>Vicenzo Manfredi et al v Lloyd Adriatico Assicurazioni SpA et al</i>	
(C-295–298/04) [2006] ECR I-6619	4.5, 4.25
<i>Vodafone</i> (C-58/08) [2010] ECR I-4999	6.3
<i>Volvo</i> (C-203/09) [2010] ECR I-10721	7.3
<i>Von Colson and Kamann v Land Nordrhein-Westfalen</i> (14/83) [1984] ECR 1891	4.12
<i>VZ HH v O2</i> (C-19/03) [2004] ECR I-8183	1.2
<i>Wachauf v Bundesamt für Ernährung</i> (5/88) [1989] ECR I-2609	3.2
<i>Walt Wilhelm et al v Bundeskartellamt</i> (14/68) [1969] ECR I	1.8

TABLE OF ECJ CASES: CHRONOLOGICAL

56/65 <i>Société Technique Minière v Maschinenbau Ulm</i> [1966] ECR 235	1.15
14/68 <i>Walt Wilhelm and others v Bundeskartellamt</i> [1969] ECR 1	1.8
127/73 <i>BRT v SV SABAM</i> [1974] ECR 314	4.24
33/74 <i>Van Binsbergen v Bestuur von de Bedrijfsvereniging voor de Metaalnijverheid</i> [1974] ECR 1299	5.11
43/75 <i>G. Defrenne v SABENA</i> [1976] ECR 455	3.4
33/76 <i>REWE Central Finanz</i> [1976] ECR 1989	4.1, 4.3
45/76 <i>Comet</i> [1976] ECR 2043	4.1, 4.3
85/76 <i>Hoffmann-La Roche v Commission</i> [1979] ECR 461	1.17
117/76 + 16/77 <i>Ruckdeschel</i> [1977] ECR 1753	3.1
203/80 <i>Casati</i> [1981] ECR 2595	1.6
199/82 <i>San Giorgio</i> [1983] ECR 3595	4.1
319/82 <i>Société de Vente de Ciments et Bétons v Kerpen & Kerpen</i> [1983] ECR 417	1.15
14/83 <i>Von Colson and Kamann v Land Nordrhein-Westfalen</i> [1984] ECR 1891	4.12
326 + 286/83 <i>Luisi and Carbone v Ministero del Tesoro</i> [1984] ECR 377	1.6
355/85 <i>Driancourt v M. Cagnet</i> [1986] ECR 3231	1.8
379/87 <i>Groener v Minister for Education and City of Dublin Vocational</i> <i>Committee</i> [1989] ECR 3967	3.3
5/88 <i>Wachauf v Bundesamt für Ernährung</i> [1989] ECR I-2609	3.2
177/88 <i>Dekker v Stichting Vormingscentrum voor Jong Volwassenen</i> <i>(VJV-Centrum) Plus</i> [1990] ECR I-3941	4.13
352/88 <i>Bond van Adverteerders v The Netherlands State</i> [1988] ECR I-2085	1.5
C-234/89 <i>Delimitis v Henninger-Bräu</i> [1991] ECR I-935	1.15
C-309/89 <i>Codorniu SA v Council</i> [1994] ECR I-1853	3.1
C-361/89 <i>di Pinto</i> [1991] ECR I-1189	2.9
C-339/89 <i>Alsthom Atlantique v Compagnie de construction mécanique Sulzer SA</i> [1991] ECR I-107	1.4
C-6 + 9/90 <i>Francovich et al v Italy</i> [1991] ECR I-5357	4.24
C-159/90 <i>The Society for the Protection of Unborn Children v Grogan</i> [1991] ECR I-4685	1.5
C-332/90 <i>Steen v Deutsche Bundespost</i> [1992] ECR I-341	1.8
C-89/91 <i>Shearson Lehmann Hutton v TVB Treuhandgesellschaft</i> [1993] ECR I-139	2.9
C-259, 331 + 332/91 <i>Pilar Allué and Carmel Mary Coonan et al v Università degli</i> <i>studi di Venezia and Università degli studi di Parma</i> [1993] ECR I-4309	3.3
C-271/91 <i>Marshall (II) v Southampton Health Authority</i> [1993] ECR I-4367	4.13, 7.11
C-49/92P <i>Commission v Anic</i> [1999] ECR I-4125	4.27
C-93/92 <i>CMC Motorradcenter v P.B.</i> [1993] ECR I-5009	1.4

C-128/92 <i>H.J. Banks & Co. Ltd v British Coal Corporation</i> [1994] ECR I-1209	4.25
C-272/92 <i>Maria Chiara Spotti v Freistaat Bayern</i> [1993] ECR I-5185	3.3
C-23/93 <i>TV10 v Commissariaat v.d. Media</i> [1994] ECR I-4795	5.11
C-46 + 48/93 <i>Brasserie du Pêcheur v Germany and R v Secretary of State for Transport, ex parte Factortame Ltd</i> [1996] ECR I-1029	4.24, 7.11
C-381/93 <i>Commission v France</i> [1994] ECR I-5145	5.14
C-415/93 <i>ABSL v Bosman</i> [1995] ECR I-4921	1.7, 3.3, 4.28
C-430–432/93 <i>Van Schijndel and Van Veen v Stichting Pensioenfonds</i> [1995] ECR I-4705	4.15
C-55/94 <i>Gebhard v Consiglio dell'Ordine degli Avvocati e procuratori di Milano</i> [1995] ECR I-4165	1.9, 6.1
C-84/94 <i>UK v Council</i> [1996] ECR I-5755	0.11, 2.2
C-194/94 <i>CIA Security International SA v Signalson SA and Securitel SPRL</i> [1996] ECR I-2201	0.8
C-206/94 <i>Brennet v Paletta</i> [1996] ECR I-2357	5.11
C-15/95 <i>EARL de Kerlast v Union régionale de coopératives agricoles (Unicopa) and Coopérative du Trieux</i> [1997] ECR I-1961	3.1
C-180/95 <i>Draempaehl v Urania</i> [1997] ECR I-2195	4.13
C-269/95 <i>Benincasa</i> [1997] ECR I-3767	2.9
C-36/96 <i>Günaydin v Freistaat Bayern</i> [1997] ECR I-5143	5.11
C-45/96 <i>Bayr. Hypotheken und Wechselbank v Dietzinger</i> [1998] ECR I-1199	2.9
C-67/96 <i>Albany Int. BV v Stichting Bedrijfspensioenfonds Textielindustrie</i> [1999] ECR I-5751	1.18
C-249/96 <i>Lisa Jacqueline Grant v South-West Trains</i> [1998] ECR I-621	3.6
C-326/96 <i>Levez v Harlow Pools</i> [1998] ECR I-7835	4.5
C-367/96 <i>Kefalas et al v Greece</i> [1998] ECR I-2843	5.11
C-369 + 376/96 <i>Arblade</i> [1999] ECR I-8453	6.13
C-126/97 <i>Eco Swiss China Time v Benetton International NV</i> [1999] ECR I-3055	4.23
C-185/97 <i>Coote v Granada Hospitality</i> [1998] ECR I-5199	4.13
C-180–185/98 <i>Pavel Pavlov et al v Stichting Pensioenfonds Medische Specialisten</i> [2000] ECR I-6451	1.18
C-195/98 <i>Öst. Gewerkschaftsbund, Gewerkschaft öffentlicher Dienst v Republik Österreich</i> [2000] ECR I-10497	4.30
C-208/98 <i>Berliner Kindl Brauerei v A. Siepert</i> [2000] ECR I-1741	2.9
C-240–244/98 <i>Océano Grupo ed. et al v Quintero et al</i> [2000] ECR I-4941	4.15, 7.5
C-281/98 <i>Roman Angonese v Casa di Risparmio di Bolzano</i> [2000] ECR I-4139	1.7, 3.3, 4.28
C-303/98 <i>Simap</i> [2000] ECR I-7963	2.3
C-376/98 <i>Germany v Parliament and Council</i> [2000] ECR I-8419	0.11, 6.4
C-381/98 <i>Ingmar GB Ltd v Eaton Leonard Technologies Inc.</i> [2000] ECR I-9305	7.3
C-423/98 <i>Albore</i> [2000] ECR I-5965	1.6
C-443/98 <i>Unilever Italia v Central Foods</i> [2000] ECR I-7535	0.8
C-478/98 <i>Commission v Belgium</i> [2000] ECR I-7587	1.6
C-63/99 <i>R v Secretary of State for the Home Department, ex parte Wieslaw and Elzbieta Gloszczuk</i> [2001] I-6369	4.28
C-144/99 <i>Commission v Netherlands</i> [2001] I-3541	4.10

C-173/99 <i>BECTU v Secretary of State for Trade and Industry</i> [2001] ECR I-4881	2.1
C-235/99 <i>R v Secretary of State for the Home Department, ex parte Eleanora Ivanova Kondova</i> [2001] ECR I-6427	4.28
C-257/99 <i>R v Secretary of State for the Home Department, ex parte Julius Barkoci and Marcel Malik</i> [2001] ECR I-6557	4.28
C-268/99 <i>Aldona Malgorzata Jany et al v Staatssecretaris van Justitie</i> [2001] ECR I-8615	4.28
C-309/99 <i>J.C.J. Wouters et al v Algemene Raad von de Nederlandse Orde van Advocaaten</i> [2002] ECR I-1577	3.3, 4.28
C-453/99 <i>Courage Ltd v Crehan</i> [2001] ECR I-6297	4.5, 4.25, 7.12
C-481/99 <i>Heininger v Bayr. Hypo und Vereinsbank</i> [2001] ECR I-9945	4.20
C-541 + 542/99 <i>Idealservice</i> [2001] ECR I-9049	2.9
C-112/00 <i>Eugen Schmidberger v Austria</i> [2003] ECR I-5659	5.14
C-162/00 <i>Land Nordrhein-Westfalen v Beata-Pokrzepowicz-Meyer</i> [2002] ECR I-1049	4.28
C-168/00 <i>Simone Leitner v TUI Deutschland</i> [2002] ECR I-2631	4.12, 7.13
C-438/00 <i>Deutscher Handballbund eV v Maros Kolpak</i> [2003] ECR I-4135	4.28
C-264/01 etc. <i>AOK-Bundesverband v Ichthyol-Gesellschaft Cordes et al</i> [2004] ECR I-2493	4.28
C-464/01 <i>Johann Gruber v Bay Wa AG</i> [2005] ECR I-439	2.9
C-397–403/01 <i>Pfeiffer et al v DRK</i> [2004] ECR I-8835	2.3
C-491/01 <i>R v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd et al</i> [2002] ECR I-11453	6.4
C-25/02 <i>Katharina Rinke v Ärztekammer Hamburg</i> [2003] ECR I-8349	3.4
C-36/02 <i>Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn</i> [2004] ECR I-9609	5.14
C-148/02 <i>Garcia Avello</i> [2003] ECR I-11613	3.11
C-151/02 <i>Kiel v Jaeger</i> [2003] ECR I-8389	2.1, 2.3
C-237/02 <i>Freiburger Kommunalbauten v Hofstetter</i> [2004] ECR I-3403	7.4
C-281/02 <i>Andrew Owusu v NB Jackson et al</i> [2005] ECR I-1383	5.12
C-442/02 <i>Caixa Bank France v Ministère de Finances</i> [2004] ECR I-8961	1.11
C-19/03 <i>VZ HH v O2</i> [2004] ECR I-8183	1.2
C-350/03 <i>Schulte</i> [2005] ECR I-9215	4.21.
C-436/03 <i>EP v Council</i> [2006] ECR I-3733	6.13
C-470/03 <i>AGM-COSMET</i> [2007] ECR I-2749	3.8
C-540/03 <i>EP v Council</i> [2006] ECR I-5769	2.4, 3.1
C-3/04 <i>Poseidon Chartering NV v Marianne Zeeship et al</i> [2006] ECR I-2505	7.3
C-14/04 <i>Dellas</i> [2005] ECR I-10253	2.3
C-94 + 202/04 <i>Frederico Cipolla et al v Rosaria Fazari, née Portolese et al</i> [2006] ECR I-1142	1.10
C-131 + 257/04 <i>Robinson-Steele et al v Retail Services et al</i> [2006] ECR I-2531	2.4
C-144/04 <i>Mangold v Helm</i> [2005] ECR I-9981	0.3, 3.6, 4.14
C-229/04 <i>Crailsheimer Volksbank</i> [2005] ECR I-9294	4.21
C-295–298/04 <i>Vicenzo Manfredi et al v Lloyd Adriatico Assicurazioni SpA et al</i> [2006] ECR I-6619	4.5, 4.25
C-344/04 <i>IATA and ELFAA v Department for Transport</i> [2006] ECR I-403	6.4

C-465/04 <i>Honeyvem Informazioni Commerciali v Marieaalla de Zoti</i>	
[2006] ECR I-2879	7.3
C-479/04 <i>Laserdisken</i> [2006] ECR I-8089	1.6
C-13/05 <i>Sonja Chacón Navas v Eurest Colectividades</i> [2006] ECR I-6467.	3.9
C-168/05 <i>E.M.M. Claro v Centro Movil Milenium</i> [2006] ECR I-10421	4.15
C-277/05 <i>Société thermale d'Eugénie-les-Bains v Ministère de l'Économie,</i> <i>des Finances et de l'Industrie</i> [2007] ECR I-6428.	1.2
C-341/05 <i>Laval & partneri v Bygnadds</i> [2007] ECR I-11767.	3.3, 4.28, 5.12
C-402 + 415/05P <i>Kadi et al v Council of the EU</i> [2008] ECR I-6351	4.30
C-411/05 <i>Palacios de la Villa</i> [2007] ECR I-8531	3.6
C-432/05 <i>Unibet v Justiekanslern</i> [2007] ECR I-2271	4.30
C-438/05 <i>International Transport Workers Federation (ITW) and Finnish</i> <i>Seamans Union (FSU) v Viking Line</i> [2007] ECR I-10779.	3.3, 4.28, 5.12
C-99/06 <i>Mietz v Intership Yachting</i> [1999] ECR I-2277	2.9
C-244/06 <i>Dynamik Medien Vertriebs GmbH v Avides Media AG</i> [2008] ECR I-505	5.18
C-275/06 <i>Productores de Música de España (Promusicae) v Telefónica</i> <i>de España SAU</i> [2008] ECR I-271	1.6, 3.1., 5.1
C-303/06 <i>S. Coleman v Attridge Law et al</i> [2008] ECR I-5603.	3.9
C-350 + 520/06 <i>Schulze-Hoff et al v DRB</i> [2009] ECR I-179.	2.4
C-353/06 <i>Grunkin and Paul</i> [2008] ECR I-7639	3.11
C-404/06 <i>Quelle v Bundesverband der Verbraucherzentralen</i> [2008] ECR I-2685	5.8, 6.17
C-412/06 <i>Annelore Hamilton v Volksbank Filder</i> [2008] ECR I-2383	0.3, 5.9, 6.11
C-445/06 <i>Danske-Slagterier</i> [2009] ECR I-2119.	4.5, 7.11
C-47/07P <i>Masdar v Commission</i> [2008] ECR I-9761	0.8
C-54/07 <i>Centrum voor gelijkheid van kansen en voor racismebestrijding</i> <i>(CGKR) v Firma Feryn NV</i> [2008] ECR I-5187.	3.4, 4.36
C-94/07 <i>Raccanelli</i> [2008] ECR I-5939.	3.3, 4.28
C-127/07 <i>Arcelor Atlantique and Lorraine et al</i> [2008] ECR I-9835	3.1
C-169/07 <i>Hartlauer Handelsgesellschaft v Wiener Landesregierung et al</i> [2009] ECR I-1721	5.4
C-205/07 <i>Gysbrechts</i> [2008] ECR I-9947	1.9, 5.8, 7.19
C-518/06 <i>Commission v Italy</i> [2009] ECR I-3491	1.10
C-316/07 <i>Markus Stoß</i> [2010] ECR I-8099.	1.5
C-402 + 432/07 <i>Sturgeon et al</i> [2009] ECR I-10923	0.6
C-489/07 <i>Pia Messner v Firma Stefan Krüger</i> [2009] ECR I-7315	0.3, 5.9, 6.11, 7.10
C-531/07 <i>Fachverband der Buch- und Medienwirtschaft v LIBRO</i> <i>Handelsgesellschaft</i> [2009] ECR I-3717	1.4
C-555/07 <i>Seda Küçükdevici v Swedex</i> [2010] ECR I-365	0.7, 3.6, 4.14
C-12/08 <i>Mono Car Styling</i> [2009] ECR I-6653	4.30
C-40/08 <i>Asturcom v Christina Rodrigues Nogueira</i> [2009] ECR I-9579.	4.15
C-46/08 <i>Carmen Media</i> [2010] ECR I-8149.	1.5, 6.1
C-58/08 <i>Vodafone</i> [2010] ECR I-4999	6.3
C-101/08 <i>Audiolux</i> [2010] ECR I-9823	0.3, 3.22
C-137/08 <i>VB Penzÿggi Lizing v Schneider</i> [2010] ECR I-10847.	2.5, 4.15, 6.11, 7.5
C-147/08 <i>Jürgen Römer v Freie und Hansestadt Hamburg</i> [2011] ECR I-359.	3.8

C-215/08 <i>Friz</i> [2010] ECR I-2749	0.3, 5.9, 6.11
C-238/08 <i>Ladbrokes Betting & Gaming Ltd et al v Stichting de Nationale Sporttotalisator</i> [2010] ECR I-4757	6.4
C-243/08 <i>Pannon v Erzsébet Sustikné Gyórfi</i> [2009] ECR I-4713	4.15, 5.5
C-317/08 <i>Rosalba Alassini et al v Telecom Italia</i> [2010] ECR I-2214	4.5, 6.21
C-381/08 <i>Car Trim v Key Safety</i> [2010] ECR I-1255	6.15
C-403 + 429/08 <i>Football Association Premier League Ltd v QC Leisure et al</i> [2011] ECR I-9086	1.11
C-484/08 <i>Caja de Ahorros y Monte de Piedad de Madrid v Asociación de Usuarios de servicios bancarios (Ausbanc)</i> [2010] ECR I-4785	5.8
C-565/08 <i>Commission v Italy</i> [2011] ECR I-2101	1.10
C-65 + 89/09 <i>Gebrüder Weber + Putz v Wittmer + Medianess El.</i> [2011] ECR I-5257	2.5, 4.18 , 6.17, 7.10
C-203/09 <i>Volvo</i> [2010] ECR-10721	7.3
C-236/09 <i>Ass. Belge Test-Achats et al</i> [2011] ECR I-773	3.15 , 6.19
C-243/09 <i>Günter Fuß v Stadt Halle</i> [2010] ECR I-9849	2.3
C-249/09 <i>S. Bulicke v DBS</i> [2010] ECR I-7003	4.5
C-279/09 <i>DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland</i> [2010] ECR I-13849	3.2, 4.30
C-428/09 <i>Union Syndicale Solidaires Isère</i> [2010] ECR I-9961	2.2
C-447/09 <i>R. Prigge et al v Lufthansa</i> [2011] ECR I-(13.09.2011)	3.6
C-214/10 <i>KHS v Winfrid Schulte</i> [2011] ECR I-(22.11.2011)	2.4
C-282/10 <i>Dominguez v CICOA</i> [2012] ECR I-(24.01.2012)	2.1, 2.4
C-453/10 <i>Pereničová and Perenič v SOS financ</i> [2012] ECR I-(15.03.2012)	4.30, 6.16, 7.5
C-472/10 <i>Nemzeti Fogyaszróvédelmi Hatóság v Invitel</i> [2012] ECR I-(26.04.2012)	4.15 , 4.30, 7.5
C-533/10 <i>CIVS v Receveur des Douanes de Roubaix</i> [2012] ECR I-(14.06.2012)	4.5
C-528 + 619/10 <i>Nelson et al v Lufthansa et al</i> [2012] ECR I-(24.10.2012)	0.6, 4.8
C-617/10 <i>Aklagaren v H.A. Fransson</i> [2013] ECR I-(26.03.2013)	3.2
C-618/10 <i>Banco Español de Credito v Camino</i> [2012] ECR I-(14.06.2012)	4.18
C-12/11 <i>D. McDonagh v Ryanair</i> [2013] ECR I-(31.01.2013)	2.1, 5.10
C-92/11 <i>RWE Vertrieb v Verbraucherzentrale NRW</i> [2013] ECR I-(21.03.2013)	5.8, 7.4
C-197 + C-203/11 <i>E. Libert et al v Gouvernement flamand</i> [2013] ECR I-(05.05.2013)	1.6
C-199/11 <i>Europese Gemeenschap v Otis et al</i> [2012] ECR I-(06.11.2012)	4.26, 4.30
C-202/11 <i>Anton Cas v PSA Antwerp</i> [2013] ECR I-(16.04.2013)	1.10
C-283/11 <i>Sky Österreich v Österreichischer Rundfunk</i> [2013] ECR I-(22.01.2013)	1.13, 3.21, 5.1
C-394/11 <i>Belov v CHEZ</i> [2013] ECR I-(31.01.2013) (opinion of AG Kokott of 20.09.2012)	3.13
C-415/11 <i>Mohamed Aziz v Catalunyaacaixa</i> [2013] ECR I-(14.04.2013)	4.5
C-604/11 <i>Genil et al v Bankinter et al</i> [2013] ECR I-(30.05.2013)	7.10
C-81/12 <i>Asociatia ACCEPT v CNPCD</i> [2013] ECR I-(25.04.2013)	3.8 , 4.36
C-176/21 <i>Association de médiation sociale v CGT</i> (opinion of AG Cruz Villalón of 18.07.2013)	0.3

TABLE OF EU LEGISLATION

REGULATIONS

- Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12/1, 1. 2.9
- Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1. 1.14, 4.23
- Regulation (EC) No 261/2004 of the EP and the Council of 11 February 2004 on compensation and assistance to passengers in the event of denied boarding and of cancellation and long delays of flights [2004] OJ L 46/1 4.8, 5.10
- Regulation (EC) No 864/2007 of the EP and the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199/1 4.12, 6.3
- Regulation (EC) No 593/2008 of the EP and the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 176/6. 1.15, 4.12, 6.3, 6.13–6.19
- Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) TFEU to categories of vertical agreements and practices [2010] OJ L 102/1. 1.16
- Regulation (EU) No 1215/2012 of the EP and the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L 351/1. 2.9

DIRECTIVES

- Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L 039/40 3.4, 4.12

Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1985] OJ L 210/29	7.14
Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises [1985] OJ L 372/31 (repealed by Directive 2011/83/EU)	2.9, 4.21, 5.9
Council Directive 86/653/EEC of 18 December 1986 on commercial agents [1986] OJ L 382/17	7.3, 7.21
Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours [1990] OJ L 158/59	7.14
Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 95/29	2.5, 4.5, 4.15–4.17, 5.3–5.8, 7.5–7.8
Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time [1993] OJ L 307/18	2.1 ff
Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts [1997] OJ L 144/19 (repealed by Directive 2011/83/EU)	5.9
Directive 1999/44/EC of the EP and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L 171/12	2.8, 4.18, 6.17, 6.23
Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22	3.2, 3.5, 3.12–3.13, 4.37
Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16	3.2, 3.6–3.9, 4.14, 4.37
Directive 2001/29/EC of the EP and the Council of 22 May 2001 on copyright in the information society [2001] OJ L 167/10	6.23
Directive 2002/22/EC of the EP and the Council of 2002 on universal service and user's rights relating to electronic communications, networks and services (Universal Services Directive) [2002] OJ L 108/51, amended by Directive 2009/136/EC of 19 December 2009 [2009] OJ L 337	2.11, 3.19, 4.5

Directive 2002/65/EC of the EP and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC [2002] OJ L 271/16	2.7
Directive 2002/73/EC of the EP and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [2002] OJ L 269/15	4.34
Directive 2003/54/EC of the European Parliament and the Council of 26 June 2003 concerning common rules for the internal market for electricity [2003] OJ L 176/37; for gas [2003] OJ L 176/57	2.11, 3.19
Working Time Directive 2003/88/EC of the EP and the Council of 4 November 2003 (recast) [2003] OJ L 299/9	2.1 ff
Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2004] OJ L 16/44	3.12
Directive 2004/39/EC of the EP and the Council of 21 April 2004 on markets for financial instruments (MIFID) [2008] OJ L 145/1	7.10
Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between women and men in the access to and supply of goods and services [2004] OJ L 373/37	3.2, 3.12, 3.15–3.18, 4.37
Directive 2005/29/EC of the EP and the Council of 11 May 2001 on unfair commercial practices [2005] OJ L 149/22	2.11
Recast Directive 2006/54/EC of the EP and the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment [2006] OJ L 204/23	3.4, 4.12
Commission Directive 2006/73/EC of 10 August 2006 (implementing the MIFID) [2006] OJ L 241/26	7.10
Directive 2007/64/EC of the EP and the Council of 12 December 2007 on payment services in the internal market [2007] OJ L 319/36	3.19a
Directive 2008/48/EC of the EP and the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC [2008] OJ 122/66	2.7, 5.4, 7.9, 7.20

Directive 2008/122/EC of the EP and the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange contracts [2009] OJ L 33/10 2.7

Directives 2009/72/EC and 2009/73/EC of the EP and the Council of 13 July 2009 concerning common rules for the internal market of electricity and gas and repealing Directives 2003/54/EC and 2003/55/EC 2.11, 3.19

Directive 2010/13/EU of the European Parliament and the Council of 10 March 2010 (Audiovisual Media Service Directive) [2010] OJ L 95/1 3.21

Directive 2011/7/EU of the EP and the Council of 16 February 2011 combating late payment in commercial transactions (recast) [2011] OJ L 48/1 ... 6.22, 7.4, 7.21

Consumer Rights Directive 2011/83/EU of the EP and the Council of 25 October 2011 [2011] OJ L 304/64 2.1, 2.6, 4.21, 5.9, 6.12–6.13, 6.16, 6.23, 7.1.

LIST OF ABBREVIATIONS

AcP	Archiv für die civilistische Praxis
AmericanJCompL	American Journal of Comparative Law
BGH(Z)	Bundesgerichtshof (German Federal Court), Zivilsachen (civil law reports)
BVerfG(E)	Bundesverfassungsgericht (Federal Constitutional Court, reports of cases)
CESL	Common European Sales Law
CISG	Convention on the International Sale of Goods
CMLR	Common Market Law Reports
CMLRev	Common Market Law Review
CRD	Consumer Rights Directive (2011/83/EU)
DCFR	Draft Common Frame of Reference
DJT	Deutscher Juristentag/German Law Associations Meeting
EBLRev	European Business Law Review
ECHR	European Convention of Human Rights
ECJ	Court of Justice of the EU
ECR	European Court Reports
ed(s)	Editor(s)
ELJ	European Law Journal
ELRev	European Law Review
EP	European Parliament
ERCL	European Review of Contract Law
ERPrL	European Review of Private Law
EuR	Europarecht
EWS	Europäisches Wirtschaftsrecht
EUI	European University Institute, Florence
EUVR	Zeitschrift für Europäisches Unternehmens- und Verbraucherrecht Journal of European Consumer and Market Law
EuZA	Europäische Zeitschrift für Arbeitsrecht
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
GPR	Gemeinschaftsprivatrecht
JCP	Journal of Consumer Policy
Juridica Int.	Juridica International (Tartu, Estonia)
JZ	Juristenzeitung

KritJ	Kritische Justiz
ModLR	Modern Law Review
NJW	Neue Juristische Wochenschrift
OFT	Office of Fair Trading
OJ L/C	Official Journal of the EU, legislation or communication series
OJLS	Oxford Journal of Legal Studies
PECL	Principles of European Contract Law
PICL	Principles of International Contract Law
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
RTDEur	Revue Trimestrielle du droit européen
S.I.	Statutory Instrument (UK)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the EU
UKHL	UK House of Lords cases
UKSC	UK Supreme Court cases
VuR	Verbraucher und Recht
WiscIntLJ	Wisconsin International Law Journal
YEL	(Oxford) Yearbook of European Law
ZEuP	Zeitschrift für Europäisches Privatrecht
ZIP	Zeitschrift für Wirtschaftsrecht