

UNDERSTANDING EU INTERNAL MARKET LAW

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Norbert Reich, Annette Nordhausen Scholes and Jeremy Scholes

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PREFACE

This book is not an introduction to EU law. Those already exist in plenty, and this book does not wish simply to add to the weight of literature. Nor does this book deal with the complex interrelation between the various EU institutions involved in making and implementing the law. Indeed, it takes these for granted. And if the approach might be criticised as positivistic, it would be preferable to call it realistic. Its focus is on the substantive law of the internal market in a functional sense – the strongest, most developed and most original part of EU law.

For this book is concerned with EU internal market law in terms of its objectives, principles and methods. Its starting point is the famous wording of the European Court of Justice (ECJ), now Court of Justice of the EU (CJEU – both abbreviations to be used interchangeably), in *Costa v ENEL*,¹ that the “EEC Treaty has created its own legal system which ... became an integral part of the legal systems of the Member States and which their courts are bound to apply”. Was the Court being overly optimistic in pronouncing these words 50 years ago in a somewhat trifling setting?

Perhaps that is the case, but with hindsight it seems that in the meantime they have been accepted by the “old” Member States, although not without some difficulty. Moreover, the acceding 13 “new” Member States (the accession of Croatia in July 2013 being the latest) had to integrate this important statement into their own legal orders. That is certainly no easy task. And so, this book aims to contribute to the process of *Europeanisation* in applying the law.

Understanding EU Internal Market Law means a number of things. It means, first of all, comprehending its legal peculiarities. These include its sources, instruments, methods of interpretation, effects, and the relationship between Union (formerly Community) and national law (*Introductory Chapter*). It also means always respecting what the case law of the ECJ (now CJEU) and the General Court (called the “Court of First Instance” before the entry of force of the Lisbon Treaty (TEU) on 1 December 2009) and secondary legislation have already achieved, because these can only be modified and avoided at the EU, not at a national, level. This is the so-called *acquis communautaire*.

But that is only the starting point. For beyond it lies the field of personal application of EU law, now considerably widened. That is, from simply a law for market citizens, EU law has become the law for *all citizens and residents* living in

¹ Case 6/64 Flaminco *Costa v Enel* [1964] ECR 585.

Member States. Thus, EU law determines their everyday rights and duties beyond existing national law (*Chapter I*). This is based on the principle of *equal treatment*.

The next step consists of the original liberal *esprit des lois* of EU law. This is about the opening of and regulating markets through the free movement (*Chapter II*) and competition rules (*Chapter III*). However, the liberalising process has now become *two-sided*, in that it is supplemented by an ever-growing set of what will be called *adequate standards* (*Chapter IV*). This process includes rules on non-discrimination, and a concept of fundamental rights both with regard to substance and procedure.

In addition, the generous grant of autonomy (*Chapter V*) is part of the *liberalising yet regulated* force of EU law which provoked substantial changes in legal application and thinking in all Member States. It has been extended to cover EU rules on intellectual property, an area gaining ever more importance, both with regard to property and to user rights in the information society.

To complete the picture, we have the elements of governance and liability (*Chapter VI*), developed mostly by the case law of the ECJ, but increasingly now also by legislation. However, this field remains incomplete and certainly subject to change in the future as legal integration continues. It is closely linked to Member States and their courts of law under the principle of sincere cooperation (Article 4 (3) TEU).

Why is it, then, that the EU depends so heavily on its legal structures, principles and methods, particularly in a context of political crisis, distrust between Member States, and scepticism of citizens vis-à-vis the very ideas behind the EU project? The short answer is that European integration is *integration by law* – indeed, law plays the leading role. This is because the EU is not and may never be a federal state with sovereign powers to extend its constitutional mandate and to implement the law by itself. Its effectiveness depends crucially on cooperation with Member States, and notably with their courts of law. Indeed, it is in these very courts that the true *European judges* sit, in that it is they who must understand what EU law is all about – linked in the judicial network of the reference procedure of Article 267 TFEU with the ECJ. And it is lawyers, legal experts, and law students who must help them to fulfil this role or, even better, fulfil it themselves.

In doing so, they will keep in mind the main characteristic of European internal market law. It consists not just of economic but also of social and to a great extent of constitutional law. That is, the more it becomes an *integral part* of national law, the less it is visible as a distinct legal order. This, in turn, aids more effective integration of national law and European law. In this way, EU law is like the blueprint for a new house: the more the final building conforms to the blueprint, the less one needs to refer to it, but in some cases one must take a hard look at the blueprint to make sure the final building conforms.

This book introduces that blueprint both meaningfully and clearly. To achieve this aim, it deliberately avoids a complete description of all areas of EU internal market law in detail. It therefore excludes such policy areas as agriculture and transportation despite their importance for the internal market. Such other important yet highly specialised areas like taxation (whether its relation to the free movement principles or its legislative enactments), state aid and merger control also had to be omitted.

Rather, this book paints a comprehensive picture through characteristic examples. These consist of distinct concepts, methods and principles that EU internal market law has developed, and that need to be kept in mind when working with questions of its application and interpretation. The examples chosen demonstrate the aspects of EU internal market law that have often led to friction with existing national law. Indeed, the interfaces between national and EU internal market law should always be remembered when working on the fault lines between these two distinct yet interdependent legal orders.

It should also be kept in mind that EU internal market law, despite being a cornerstone of the entire EU legal order, is still an *incomplete legal order*, in that sometimes it only proposes broad principles without telling us how these should be implemented. This is particularly true with regard to judicial protection as a mere *obligation de moyens* on the one hand, and a (still missing) theory of *legal duties* of citizens on the other. The effort to fill the gaps is central to understanding EU internal market law. Hopefully, this book will contribute to the never-ending task of making EU internal market law truly a system of its own, thus fulfilling the ambitious *Costa* pronouncement, and also secure its acceptance in new Member countries which, after accession to the EU, fully participate in the European integration process.

The book, now a joint work by three authors from different jurisdictions, but still continuing the general approach of the first two editions of 2003 and 2005, refers to new Union Treaties adopted by the Lisbon Council. The “Lisbon Treaty” (TEU) of 13 December 2007² entered into force on 1 December 2009, and was taken over by Croatia when it became a Member State on 1 July 2013. The Charter of Fundamental Rights of the EU has become an integral part of EU law and has the same value as the Treaties. The EC Treaty was renamed the Treaty on the Functioning of the European Union (TFEU); the substantive internal market law, which underwent only minor changes, must therefore be applied and interpreted under the already existing *acquis*. The law is stated as of the end of 2014; sometimes later developments could only briefly be referred to. The extensive case law of the ECJ has been documented with its most important decisions. Judgments of the General Court and Commission practice have been cited mostly with regard to competition law in Chapter III; their role in the

² OJ C 306 of 17.12.2007; consolidated version in C 115 of 09.05.2008.

other parts of the book is rather limited. The abundant secondary EU law, in particular directives, has been referred to quite selectively where it is the expression of particular orientations of internal market law. This did not prevent the authors from sometimes taking a critical stand against prevailing opinions in legal writing or case law and making proposals for change or reform.

The present publication is a completely revised, extended and updated version of its predecessor versions by Norbert Reich, *Understanding EU Law: Objectives, Principles and Methods of Community Law*, 2003/2005, profiting from the inclusion of two new authors working in the UK, namely Jeremy Scholes on Chapter III: Competition Law and Annette Nordhausen Scholes on Chapter V: Autonomy with a special §17 on Intellectual Property Law in the EU: Autonomy Revisited. Norbert Reich has completely rewritten his Introduction and Chapter I on Citizenship and Free Movement, Chapter II on Open Markets, Chapter IV on Adequate Standards, and Chapter VI on Liability and Judicial Governance in the EU. Jeremy Scholes cooperated with Norbert Reich in drafting parts of 20.4–20.10 on competition damages.

Norbert Reich wishes to acknowledge the encouragement by his colleague and friend Hans Micklitz, European University Institute Florence, during the entire process of writing the relevant chapters of the book. His comments, particularly on the introduction, helped clarify the role of EU law as an autonomous, mostly judge-made legal order in its sometimes complex and controversial relationship to national law.

We also acknowledge with very deep gratitude our considerable debts to two friends and former students of Annette's and Jeremy's at the University of Sheffield, both of them winners of the Prix Joggerst: Mark English (of Shearman & Sterling LLP in Brussels) who made exceptionally helpful comment on abuse of dominant position and competition law and the state in §11; and Nick Aries (of Bird & Bird LLP in London) who made extremely helpful comments on §17 (intellectual property). Jeremy Scholes would also like to thank his colleagues Trudy Feaster-Gee and Shaukat Ali at Walker Morris LLP and colleagues at Walker Morris LLP more generally for asking him interesting questions over the years. We all wish to thank Theodosia Stavroulaki of EUI Florence for preparing the index.

Each author is of course fully responsible for his/her own arguments and sections. We have endeavoured to state and discuss the legislation and case law as at the end of 2014 and occasionally beyond that date.

March 2015

Norbert Reich
Annette Nordhausen Scholes
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- Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property [2006] OJ L 376/28; codifying Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property [1992] OJ 346/61 and its various amendments [2006] OJ L 376/28: **17.36**
- Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version) [2006] OJ L 372/12 as amended by Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2011/116/EC on the term of protection of copyright and certain legal rights [2011] OJ L 265/1: **17.34**, **17.35**, **17.37**

- Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L 376/36: 7.4, **8.13**, **20.16**
- Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 on audio-visual media services [2007] OJ L 332/27: **8.10**
- Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 improving the review procedures concerning the award of public contracts [2008] OJ L 335/31: 8.15
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- Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys [2009] OJ L 170/1: 8.4
- Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment [2009] OJ L 155/17: 6.1, **6.24**
- Directive 2010/13/EU of the European Parliament and the Council of 10 March 2010 [2010] OJ L 95/1: 8.10
- Directive 2010/41/EU of the European Parliament and the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EC [2010] OJ L 180/1: 12.9
- Directive 2011/24/EU of the European Parliament and the Council of 9 March 2011 on the application of patient's rights in cross-border healthcare [2011] OJ 88/45: 7.4, 7.18
- Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection [2011] OJ L 132/1: 6.1
- Directive 2011/61/EU of the European Parliament and the Council of 8 June 2011 on alternative investment fund managers [2011] OJ L 174/1: 20.16
- Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights [2011] OJ L 265/1: 17.34, 17.35
- Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L 304/64: 16.40, **16.44**, 16.48, 16.49, 21.3
- Directive 2014/23/EU of the European Parliament and the Council of 26 February 2014 on the award of concession contracts [2014] OJ L 94/1: 8.19
- Directive 2014/24/EU of the European Parliament and the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L 94/96: **8.19**
- Directive 2014/25/EU of the European Parliament and the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC [2014] OJ L 94/243: 8.19
- Directive 2014/65/EU of the European Parliament and the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and 2011/61/EU [2014] OJ L 173/349: **20.19**

- Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features [2014] OJ L 257/214: **12.32**
- Directive 2014/104/EU of the European Parliament and the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L 349/1: **20.10**

LIST OF ABBREVIATIONS

AcP	Archiv für die civilistische Praxis
ADR	alternative dispute resolution
AG	Advocate General at the Court of Justice
All ER (EC)	All England Law Reports (EC)
AmJCompL	American Journal of Comparative Law
Art.	Article
B2B	business-to-business
B2C	business-to-consumer
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BGH(Z)	Bundesgerichtshof (German Federal Court), Zivilsachen (civil law reports)
BR Drucks.	Bundesrats-Drucksache (Second Chamber of German Parliament, printed matter)
BT Drucks.	Bundestags-Drucksache (First Chamber)
BVerfG(E)	Bundesverfassungsgericht (Federal Constitutional Court, reports of cases)
CESL	Common European Sales Law
CFR	Common Frame of Reference
CIPAJ	Chartered Institute of Patent Agents Journal
CISG	Convention on the International Sale of Goods
CJEU	Court of Justice of the European Union
CJQ	Civil Justice Quarterly
CLJ	Cambridge Law Journal
CMLR	Common Market Law Reports
CMLRev	Common Market Law Review
COM	(EU) Commission document
CRD	Consumer Rights Directive (2011/83/EU)
CTM	Community Trade Mark
DCFR	Draft Common Frame of Reference
DJT	Deutscher Juristentag/German Law Associations Meeting
EBLRev	European Business Law Review
EC	European Community
ECHR	European Convention of Human Rights
ECJ	Court of Justice of the EU
ECLR	European Competition Law Review

ECR	European Court Reports
ECTHR	European Court of Human Rights
ed(s)	editor(s)
edn	edition
EdinLR	Edinburgh Law Review
EEC	European Economic Community
EFTA	European Free Trade Area
e.g.	exempli gratia (for example)
EIPR	European Intellectual Property Review
EJL&E	European Journal of Law and Economics
ELJ	European Law Journal
ELRev	European Law Review
EP	European Parliament
ERA	Europäische Rechtsakademie (European Legal Academy)
ERCL	European Review of Contract Law
ERPL	European Review of Private Law
EuR	Europarecht
EWS	Europäisches Wirtschaftsrecht
EU	European Union
EUI	European University Institute, Florence
EUVR	Zeitschrift für Europäisches Unternehmens- und Wirtschaftsrecht/Journal of European Consumer and Market Law
EuZA	Europäische Zeitschrift für Arbeitsrecht
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
EWCA	Court of Appeal of England and Wales
EWHC	High Court of England and Wales
GermLJ	German Law Journal
GPR	Gemeinschaftsprivatrecht
Ibid	ibidem (in the same place)
IBLR	International Business Law Journal
ICLQ	International Law Quarterly
IIC	International Review of Intellectual Property and Competition Law
IJPL	International Journal of Private Law
IP	intellectual property
IPQ	Intellectual Property Quarterly
ICCLR	International Company and Commercial Law Review
JCP	Journal of Consumer Policy
JECL & Pract	Journal of European Competition Law and Practice
Juridica Int.	Juridica International (Tartu/Estonia)
JZ	Juristenzeitung

KritJ	Kritische Justiz
LQR	Law Quarterly Review
MiFID I/II	Markets in Financial Instruments Directive (2004/39 + 2014/65)
MJ	Maastricht Journal of European and Comparative Law
MLR	Modern Law Review
MPI	Max-Planck-Institut
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
para(s)	paragraph(s)
PECL	Principles of European Contract Law
PICL	Principles of International Contract Law
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
RIDE	Revue internationale de droit économique
RIW	Recht der Internationalen Wirtschaft
RTDEur	Revue trimestrielle du droit européen
SI	Statutory Instrument (UK)
SLT	Scots Law Times
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
WLR	Weekly Law Reports
YEL	(Oxford) Yearbook of European Law
ZEuP	Zeitschrift für Europäisches Privatrecht
ZIP	Zeitschrift für Wirtschaftsrecht
ZVerglRWiss	Zeitschrift für vergleichende Rechtswissenschaft