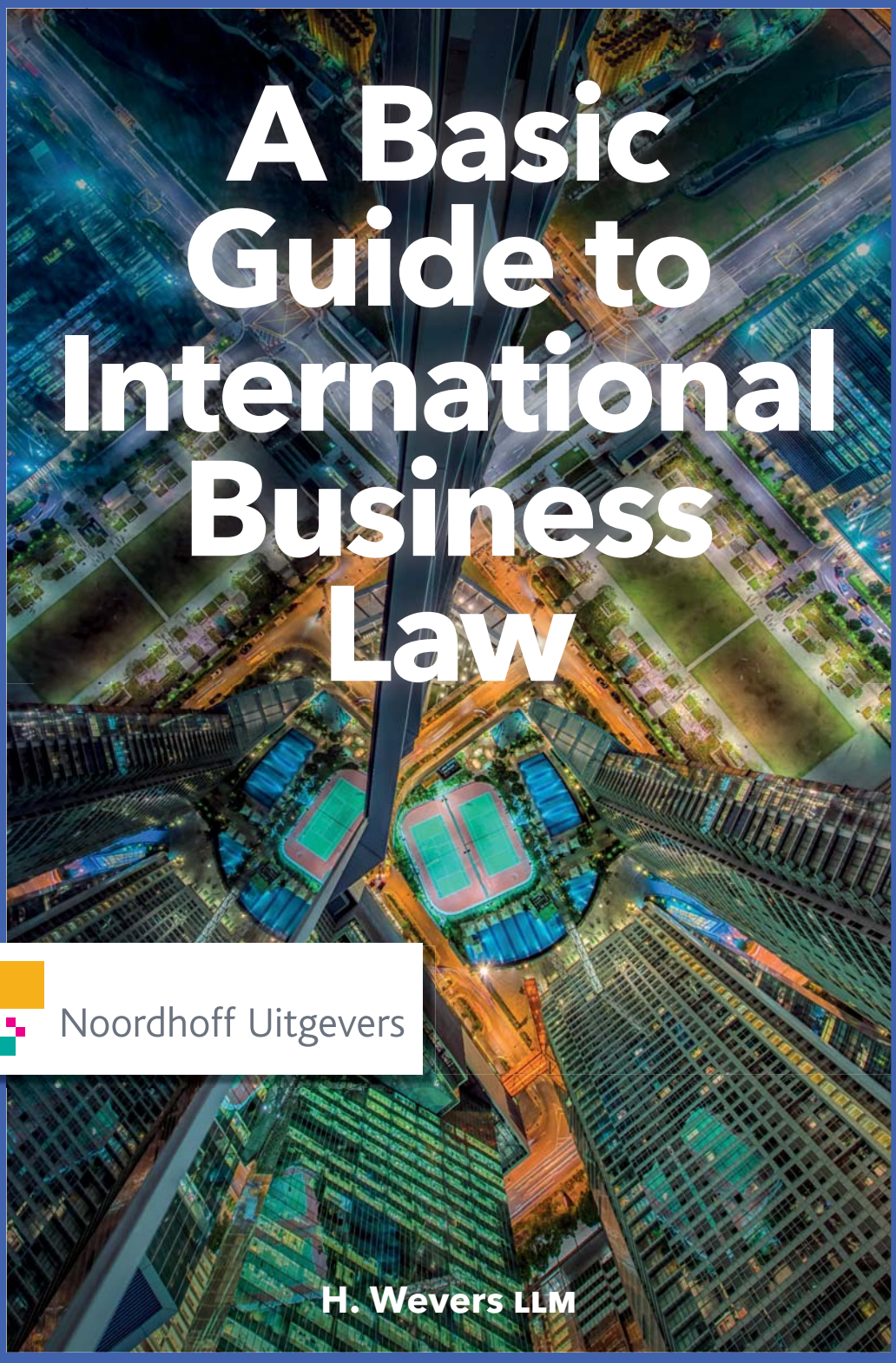
A Basic Guide to International Business Law



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H. Wevers LLM

4th Edition

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Preface

The author would like to thank those who have contributed in one way or the other to this, the fourth edition of the Basic Guide to International Business Law, and those who have supported me in the writing of it.

Special thanks are due to Mr Willem van Oosterom LLM and Mr Ivar Hageman Msc, lecturers at the Saxion University of Applied Sciences in Enschede for their friendship, their kind co-operation and their valuable comments on the third edition of the Basic Guide.

I thank my good friend Mr Jeremy Duncan of Perth (Scotland) for his friendship and for his valuable help in refining the use of English in the text of the Basic Guide.

I dedicate this book to my children, Dirk and Sterre, and to my darling, Esther. Thank you for your support, encouragement and love.

As with the third edition, the author bears sole responsibility for any mistake made in this book.

Enschede/Deventer,
August 2015

Harm Wevers

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International law is laid down in rules referred to as Conventions, Treaties, Regulations and Declarations. Even though such terms might imply that their importance is limited, the international law, which they create, is indeed a part of the national law of many states, or at least those states that adhere to the rule of international law. It is also a part of everyday life for the nationals of those states who enjoy additional rights deriving from international law. The importance of international law is explained with particular regard to the fields of International Private Law, International Business Law and International Public Law. The structure and institutions of the European Union as well as the fundamentals of EU law are also explained in this chapter.

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International Private Law in action

Mulder, a Dutch national living in Arnhem (The Netherlands), buys a new kitchen for his home at Küchen Wunder GmbH, a company established in Oberhausen (Germany). On 1 April 2012, he signs a contract of sale in Oberhausen. The kitchen thus ordered will be delivered and installed on 1 June 2012 in Arnhem. Mulder makes a down payment of 50% of the total selling price of €20.000,–. Klaus Wunder, the owner of the company, explains that a down payment like this is customary in Germany. The terms of sale in the contract – handed to Mulder by Wunder – state that the contract of sale will be governed by German law. In case of litigation, a German court of law will have jurisdiction. On 1 May 2012, Küchen Wunder GmbH files for bankruptcy. Mulder will never see the new kitchen arrive at his home. He wants his money back, but his claims are rejected by both Küchen Wunder GmbH and its owner. Mulder hires a German lawyer to try to get some of his money back. Mr. Schmitt informs Mulder that the EU has issued a Directive in order to protect consumers from a seller's bankruptcy. Mulder wonders what a Directive is and whether he or his lawyer can rely on this Directive in a German court of law. Mulder has heard a colleague of his mention the Convention on the International Sale of Goods (CISG). He wonders, the Directive apart, if this Convention can do him any good.

In this case a German court of law has jurisdiction. German law will govern the contract unless Dutch law offers a more favourable outcome to Mulder. If the Directive has direct effect, Mulder can rely on the Directive in a German court of law. If not, Mulder has to look for a different solution. As Mulder is a consumer, he cannot rely on the provisions of the CISG. The reason for this is that, though The Netherlands and Germany are Contracting States of the CISG, the convention refers to places of business rather than consumers and therefore does not apply. The German court of law must therefore apply either Dutch or German law. Either way it should be possible to nullify Mulder's contract with Küchen Wunder GmbH and uphold his claim. Whether Mulder will get his money back, though, depends on the provisions of the Directive. This verdict of the German court of law is enforceable in Germany.

1.1 Introduction to International Private Law

International law is law agreed by two or more states and is applicable to those states and in most cases their nationals. It is laid down in rules referred to as Treaties, Conventions, Regulations and Declarations. Most states around the world have signed up to several thousand of these rules, each state being referred to as a Contracting State of this Treaty or that Convention. The effects of signing a Treaty or Convention can vary. States that sign a Treaty or Convention agree to be bound by its rules. Sometimes states reserve the right to determine at a later date to what extent a treaty or convention will affect the state or its nationals.

International Public Law

International law can be divided into International Public Law and International Private Law. International Public Law is concerned with such issues as the set-up of international institutions (the United Nations, the European Community, and the European Court of Human Rights), human rights (European Convention on Human Rights) and the extradition of nationals from another country to their home country.

International Private Law

The aim of International Private Law is to solve problems in international legal relationships which arise from different legal systems. As every country has its own legal system, a legal relationship e.g. arising out of a contract of sale may involve at least two national legal systems. If the legal conflict only involves two parties living in the same country, there can be no choice over which legal system to use. International Private Law provides a set of rules either to decide the matter, or to refer the litigating parties to a national legal system where the answer lies. Basically every country has its own International Private Law. However, over the years several Treaties and Regulations have been set up to deal internationally with these legal problems. International Private Law deals with three main issues: jurisdiction in cases of litigation between two parties from different states (including the possibility of executing the verdict given by the court of law that has jurisdiction, in the countries of the litigating parties), the law to be applied in cases of international litigation between two private parties, and solutions to legal problems arising out of an international legal relationship.

Apart from the developments in the field of International Private Law, the law applying to the Member States of the European Union (EU) has become more voluminous and more important over the years. EU law means: the Treaty on the Functioning of the EU and all legislation which is based on it, binding for all Member States of the EU. EU law deals with several aspects of International Private Law.

International Business Law

International Business Law as a part of International Private Law is a specific field in itself. Until recently every country had its own 'international private law'. Various treaties covering wider areas of International Private Law were drawn up to offer guidance to the use and development of International Private Law.

First, here are some examples of topics with which International Private Law is concerned. Every act or conflict under national private law can have an international dimension and give rise to several questions, as demonstrated in the examples below.

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EXAMPLE 1.1

A car driver living in Germany causes a traffic accident with a driver living in France in a car park in Amsterdam (The Netherlands). The accident results in unbearable psychological damage to the Irish setter owned by the German driver, a crushed box of very valuable Cuban cigars and a broken bottle of Scotch whisky. The questions are:

- Does a Dutch court of law have jurisdiction in this case? Or should the parties turn to an English, German, Irish, Cuban, Scottish, UK or French court of law?
- What law must be applied to this case?

As we shall find out, the answer to which court of law has jurisdiction depends on the places where the two parties involved live and where the accident occurred. The law and law courts of Ireland, Cuba, Scotland and the UK obviously have no part to play in this problem.

EXAMPLE 1.2

A Dutch national living in Enschede (The Netherlands) works for a German employer established in Gronau (Germany). At the end of his first year, there his employer decides to fire him for no apparent reason. The relevant questions in this situation are:

- Can a Dutch court of law rule on this conflict between a German employer and a Dutch employee?
- Does Dutch law apply to the individual employment contract?

This legal conflict involves two parties, living in different countries. As we shall find out, in a situation like this the employee is in a better position than his employer, as he is seen as the weaker side in this legal conflict.

EXAMPLE 1.3

A seller, established in the UK, delivers 1,500 pair of ladies' shoes to a buyer who is established in Italy. However, the buyer, despite several reminders, does not pay the price they agreed on. The English seller starts litigation against the Italian buyer, in an attempt to cancel the sales contract and to get back the shoes he delivered. The questions in this case are:

- What court of law has jurisdiction?
- Is English law applicable to the sales contract?
- Is there an international treaty dealing with matters such as these?
- If there is a treaty, does it supersede English law or not?
- Is it possible for the seller – in one way or another – to declare the sales contract null and void, and if so, what would be the effects of such an act? Would the shoes be returned by the buyer?

Again, the two parties to the contract of sale are living in different countries. This enables them to choose which court of law will have jurisdiction over their conflict. They can also choose which law will apply to their contract. As the Convention on the International Sale of Goods (CISG) is applicable to this case, this law only applies to situations to which the CISG does not provide an answer. Either the CISG or the law chosen by the parties provides the solution to the conflict and the answers to the abovementioned questions.

The rules of International Private Law provide answers to such cases by focussing on aspects such as the place of residence of the defendant, the place where the employee usually works, or the place of business of the seller and (sometimes) the nationality of one of the parties.
Most of the questions mentioned in the examples given in this paragraph will be dealt with in Chapters 2 to 5 inclusive, which examine the contents of three relevant international Treaties and Regulations.

Three main issues of International Private Law

Three main issues of International Private Law can be deduced from the above-mentioned examples. These main issues are also referred to as the three 'pillars' of international private law. Hereafter, the three questions raised will have to be linked with the words 'main issues'.

Question 1: What court of law has jurisdiction in a case of litigation? How is the verdict of a court of law that has jurisdiction executed?

EXAMPLE 1.4

A seller established in The Netherlands supplies 1,500 kilos of cheese to a buyer established in Germany. The buyer however, despite several reminders, does not pay the price they agreed on.

What court of law has jurisdiction in this case? A Dutch or a German court of law? If a Dutch court of law has jurisdiction and gives a verdict, how is the verdict going to be effected i.e. executed in (both Holland and) Germany?

To answer questions like these we are going to use the European Communities Regulation on Jurisdiction and Enforcement of Judgements in Commercial and Civil matters, hereafter referred to as the 'Brussels I Regulation'. The Brussels I Regulation will be dealt with in Chapter 3.

Question 2: What law is to be applied in order to resolve the conflict between the – contracting – parties i.e. the parties to the contract?

EXAMPLE 1.5

A man with Dutch nationality, whose home address is in Groningen (The Netherlands), works in Nigeria for his employer Shell Petroleum. At the end of his first year there his employer decides to fire him due to the fact that the employee has accepted bribes.

Does Dutch law apply to this individual employment contract? Or would it still be possible to apply Nigerian law, should this prove to be more favourable to the Dutch employee?

The regulation to be used here is the European Communities Regulation on the Applicable Law on Contractual Obligations, referred to as Rome I Regulation and is dealt with in Chapter 4.

Question 3: Is there a specific treaty that provides an immediate solution to a conflict between contracting parties? As this is the contract used most often in the world, this question will be dealt with by using the contract of sale.

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EXAMPLE 1.6

A seller established in Germany delivers 500 barrels of beer to a buyer established in Belgium. The buyer refuses to pay the price they agreed on, because the beer has gone bad during transport from Offenburg (Germany) to Bruges (Belgium). The Belgian buyer wants to cancel the sales contract and get back the down payment he made. Is it possible for the buyer to declare the sales contract null and void, and if so, what effect will this have?

As the conditions of an international sales contract have been fulfilled, the treaty to use here is the United Nations Convention on the International Sale of Goods, referred to as 'CISG'. The CISG is dealt with in Chapter 5.

Bear in mind that, in this particular case, if the answer to Question 1 is that a Dutch court of law has jurisdiction, this does *not* automatically mean that Dutch law should be applied. It might very well be that a Dutch court of law should apply Belgian, French, English or any law other than Dutch law, according to the regulation mentioned in Question 2. Question 1 and Question 2 are concerned with different topics and are to be found in different international treaties or conventions. Ultimately these two questions are not related. The same applies to Question 3, i.e. another international treaty with its own topics, contracting states and issues. The answer to a problem arising from Question 3 does not provide answers to problems arising from the first two Questions.

1.2 Introduction to European Law

EU law

European Law (or: EU law) in itself is also International Law. One of the main differences is the fact that all EU law is based on one Treaty, the Treaty on the Functioning of the European Union (TFEU), instead of numerous Treaties on various subjects. Another difference is that several institutions and types of legislation are based on this TFEU, and this is unusual in the field of International Private Law.

European i.e. EU Law is more important than we often realise as it takes precedence over the national laws of countries that have signed the Treaty on the Functioning of the European Union (TFEU). However, European Law does not cover every aspect of business competition between Member States or between undertakings that are or are not of the same Member State. So other national and international rules and regulations still have a role to play. The EU, for example, has been working on a European civil code for several years, but until it comes into effect, the Dutch 'Burgerlijk Wetboek' will remain the law for Dutch nationals just as the 'Bundesgesetzbuch' or the 'Code Civil' will remain the law for German or French nationals. To examine the effect EU law has over national laws see the case of Costa vs. ENEL.

EXAMPLE 1.7

The case of Costa v. ENEL exemplifies the relationship between national and European Law and the effect of European Law on (Italian) nationals. In this case the nationalisation of an electricity company was legal under Italian law, but in conflict with EU law. According to the European Court of Justice, Italian law had to be overruled in this case. The text of the case of Costa vs. ENEL can be found in paragraph 1.3.

Undertakings operating within one Member State of the EU, or within several EU countries, have to be aware of the rules of EU Law. They have to operate within the legal bounds set by the Treaty on the Functioning of the European Union (TFEU). The European Commission investigates and decides whether or not the conduct of such an undertaking is, for example, in conflict with the rules of Art. 101 TFEU. Is there an agreement that restricts competition within the EU, or does the undertaking abuse the dominant position (Art. 102 TFEU)? If so the European Commission is known to have imposed heavy fines on several undertakings for breaking the rules on competition law issued by the EU.

The main objective of the EU is to achieve economic integration through the use of a common market where goods, persons, capital and services can circulate freely. A very important condition to make it work is that Member States should give up their sovereignty in those areas governed by the EU Treaty. As a result of this the EU becomes a so-called supranational organisation, a 'State above the Member States', which has the authority to make rules that bind the Member States of the EU, without their specific and prior consent.

Supranational organisation

The starting point here is the supremacy of EU law: EU law takes precedence over national law and is thus applied uniformly throughout the EU. In EU law we can distinguish between directly applicable EU law and directly effective EU law.
EU law that is directly applicable means that the provisions of EU law apply directly within the legal systems of the Member States, without the need for further acts by the governments of these Member States. Member States have no control over what EU law is directly applicable – the Treaty on the Functioning of the EU (TFEU) determines what EU law is to be directly applicable. Article 288 TFEU states that Regulations of the EU are always directly applicable and that a Regulation shall have general application. Direct applicability is therefore a highly relevant issue for Member States. Note that the direct applicability of EU law has no connection with the principle of direct effect of EU law, despite the apparent similarities.

The provisions of directly effective EU law give rights to nationals of the EU who can rely on them in a court in their own country e.g. in a lawsuit against another person or their own national government. Directly effective EU law is therefore only of interest to nationals as it does not in itself affect the Member States. Any provision, such as, for example, a Treaty Article, only has a direct effect if the ECJ has said it does. Only the ECJ can decide if EU law has direct effect, a question on which neither Member States nor their nationals are competent to pronounce. If the ECJ decides a

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Treaty Article should have direct effect, then a national can rely on this Article before a national court of law.
In the case of Van Gend & Loos, the European Court of Justice laid down the conditions for a Treaty Article to have direct effect. In this case Van Gend & Loos, a transport company established in Holland, entered into a lawsuit against the Dutch customs authorities. Van Gend & Loos claimed that, in their view, Dutch customs acted in conflict with Art. 12 of the EC Treaty (now Article 112 TFEU).

Art. 12 EC Treaty (now Article 112 TFEU) prohibits Member States from introducing new taxes between Member States. Van Gend & Loos can only rely on Art. 12 (now Article 112 TFEU) if it is directly effective. Therefore, the Dutch court of law asks the ECJ to give a preliminary ruling under Art. 234 EU Treaty (now Article 267 TFEU) to determine whether or not this Article has a direct effect. Can Van Gend & Loos rely on Art. 12 EC Treaty (now Article 112 TFEU) before a Dutch court of law? In this particular case, the ECJ listed the requirements a Treaty Article must meet in order to have a direct effect:

- The provision must be clear and unambiguous (depending on the interpretation of the text of the provision).
- The provision must be unconditional (there are no additional national measures necessary in order for the provision to be effective).
- The provision must take effect without further acts of the EU or Member States.

These criteria have been interpreted quite liberally in the cases which followed that of Van Gend & Loos. The final conclusion of the ECJ was that Art. 12 (now Article 112 TFEU) was directly effective, so:

- Van Gend & Loos were able to rely on this Article before a Dutch court of law, and
- Van Gend & Loos did not have to pay taxes that were contrary to this Article.

From this moment, therefore, Art. 12 came directly into effect in all Member States of the EU. Other examples of Articles of the TFEU which the ECJ has decided have a direct effect include:

- Free movement of persons (Article 45 TFEU),
- Free movement of goods (Articles 34, 35, 36 TFEU),
- Right to equal pay for men and women (Article 157 TFEU),
- Competition law (Articles 101, 102 TFEU).

All EU nationals can enforce these Articles in a national court.

Through the years the membership of the EU has grown to 28 Member States: Germany, France, Italy, The Netherlands, Belgium, Luxembourg, United Kingdom of Great Britain and Northern Ireland, Ireland, Denmark, Greece, Spain, Portugal, Austria, Finland, Sweden, Poland, Lithuania, Latvia, Estonia, Czech Republic, Slovenia, Malta, Hungary, Cyprus, Slovakia, Bulgaria, Romania and Croatia.

1.2.1 The Institutions of the EU

EU institutions are unique. They do not correspond to any other institutions at either national or international level nor do they have any connection with Treaties other than the Treaty on the Functioning of the European Union (TFEU). The institutions of the EU are:

- European Parliament (Articles 223 – 234 TFEU),
- Council of the EU (Articles 235, 236 TFEU),
- Council of Ministers (Articles 237 – 243 TFEU),
- European Commission (Articles 244 – 250 TFEU),
- European Court of Justice (Articles 251 – 281 TFEU).

The European Parliament

Members of the European Parliament (EP) are directly elected by European citizens. The number of representatives from each country varies according to the size of the country.
The elected members take part in Parliamentary Committees dealing with specific aspects of EU policy such as agriculture, international trade and transport.
The European Parliament has a role in approving the budget of the EU which is submitted in draft form by the Council of Ministers.
The European Parliament also has a role in the legislative process of the EU. Until the Maastricht Treaty, it had been a largely consultative role. However, consulting the European Parliament is compulsory in specific areas such as the implementation of competition rules. If the European Parliament is not consulted, the legislation is annulled.
Under the Lisbon Treaty (2007) the EP is to have a more influential position than ever before. The powers of the Parliament will be strengthened in terms of legislation, budget and also political control, which will mean a real step forwards in terms of the democratisation of the European Union. Under the Lisbon Treaty, a more fundamental role has been given to the EP in order to bring about a more democratic Europe and to bring Europeans closer to the EU.

The European Council of the EU

The moment the TFEU came into effect, the European Council became a new institution of the EU. The European Council supervises certain aspects of the legislative procedures of Member States, such as criminal procedures (Articles 48, 68, 82, 83, 86 and 140 TFEU). The European Council has several other areas of responsibility, ranging from employment in the EU (Article 148 TFEU) to terrorist threats (Article 222 TFEU).

Council of Ministers

The Council of Ministers is also referred to as the Council of the European Union and has a rotating membership of representatives at ministerial level. Each representative is authorised to speak and act for his own government. Membership of the Council therefore depends on the issue under discussion.

EXAMPLE 1.8

The BSE crisis: the Council of Ministers consists of the Ministers of Agriculture of every Member State.

EXAMPLE 1.9

Admission of new Member States to the EU: the Council of Ministers consists of the Prime Ministers of every Member State.

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The functions of the Council are:
- making EU policy in all areas;
- making decisions, based on proposals from the Commission.

Much of the work of the Council is done by COREPER, a permanent body of representatives from the Member States. The function of the COREPER is to examine the Commission's proposals before the Council makes a final decision. Under the Lisbon Treaty the Council will adopt a new decision-making process referred to as the "double majority". This means that a majority of votes (55% of all votes i.e. 15 of 27 Member States) will lead to a decision only if it reflects both the will of the majority of European citizens (i.e. at least 65% of all European citizens) and also the relative weight of Union Member States (the number of votes of each Member State depending on its "importance" within the EU).

The European Commission
The European Commission currently has 28 Members appointed by the agreement of the governments of the Member States. The Commission operates independently of any government, body or person. Every Commissioner has his or her own portfolio, such as cartel issues, defence, international trade, agriculture.
The functions of the Commission are that of:
- Initiator: it initiates EU legislation. All EU laws start with the European Commission.
- Guardian of the Treaties: to investigate whether Member States or undertakings abide by the obligations of the TFEU or those imposed on them by EU institutions. If not, they have to prevent these Member States or undertakings from infringing EU law and they also have the right to take legal action against that Member State or undertaking.
- Executive: implementing the policies decided by the Council.

The European Court of Justice
The European Court of Justice of the EU has jurisdiction in only those cases specifically prescribed by a provision in the TFEU. If the conditions of a Treaty Article dealing with matters of jurisdiction are met, then the European Court of Justice has jurisdiction. As verdicts of the European Court of Justice are very important, it is necessary to know which Articles give jurisdiction to the European Court of Justice most often. This chapter therefore pays special attention to Art. 263 (concerning the action for annulment of decisions of e.g. the Commission) and Art. 267 (preliminary rulings of the European Court of Justice, a ruling requested from the European Court of Justice by a court of law of a Member State on e.g. the interpretation of a Treaty Article relevant to a national lawsuit pending in that court of law).

1.2.2 Sources of EU law
Apart from the TFEU, there are several other types of legislation: Regulations, Directives and Decisions.

Regulations

Regulations

Regulations are general rules that apply uniformly throughout the EU, and no further acts of Member States are necessary. There are Regulations on numerous topics. A Member State can change neither the effect of a Regulation nor the way it applies in its own territory or to its nationals.

Directives

Directives

Directives require each Member State to implement the legislation in a Directive within a certain period of time. They grant Member States discretionary powers as to the means of implementation. Note that a Member State can be penalized if it does not implement the Directive within the prescribed period. In the Francovich case (paragraph 1.3), the Italian government was held liable for damages to a private person. This person sued his own state because he suffered financial loss as a result of the Italian government not implementing a Directive in time. It is therefore important that Member States incorporate Directives into their own national legal systems within the prescribed time limits. Sometimes a Directive is used as a means of legislation if the EU is convinced that a Regulation will not receive sufficient support by Member States for it to be issued.

EXAMPLE 1.10

Rules on product liability have to be incorporated in the national legal system of every EU Member State. This is according to a Directive issued by the European Commission. If the Dutch government does not do so in time, it must pay a heavy fine to the EU. As The Netherlands is a Member State of this supranational organisation, it must implement this Directive in time. As such, it can neither object to nor change these rules and this includes their effect on Dutch nationals.

Decisions

Decisions

Decisions are individual acts, binding on a Member State or an individual or a group of individuals. An example of this is the fine imposed by the Commission in a cartel case.

1.2.3 European Court of Justice and preliminary rulings under Art. 267 TFEU

Preliminary rulings

According to Art. 267 (1) TFEU the ECJ shall have the legal right to give preliminary rulings concerning: (a) the interpretation of this Treaty; and (b) (…) the validity and interpretation of acts of the institutions of the Community (…).

Most of the major verdicts given by the European Court of Justice have been made with reference to Art. 267. Furthermore, most of the cases in this book result from preliminary rulings under Art. 267. As explained earlier, by giving a preliminary ruling the ECJ gives its interpretation of a Treaty Article i.e. what exactly does this Article mean in relation to a particular case? Does the Article have a direct effect or not? Art. 267 enables the European Court of Justice to add new law to already existing EU law. A preliminary ruling given by the European Court of Justice can therefore be regarded as a (fourth) source of EU law.

A national court is entitled to put questions concerning the validity and interpretation of EU law to the ECJ. Proceedings in national courts are suspended during the period of time required by the ECJ to answer their questions. Art. 267 therefore ensures a uniform interpretation of the Articles of the TFEU and uniformity in the application of EU law throughout the EU.

The ECJ does not apply the law in national proceedings. This is still the task of the national court of law. The national court of law will give a verdict in the light of the preliminary ruling given by the ECJ under Art. 267 TFEU. The ECJ does not rule on the conflict between two litigating parties.

Conditions for a preliminary ruling under Art. 267 TFEU

1 'Courts and tribunals' have the right to request a preliminary ruling

Under Art. 267 *'every court or tribunal of a Member State'* may request a preliminary ruling of the ECJ. The type of court or tribunal is irrelevant. Any body, therefore, that exercises a judicial function, makes legally binding decisions on the rights and obligations of individuals and is subject to the control of public authorities is considered to be a court or tribunal under Art. 267.

EXAMPLE 1.11

A normal Dutch court of law such as the 'Rechtbank' or the Dutch Supreme Court (Hoge Raad) meets the above-mentioned conditions concerning a court or tribunal and is therefore entitled to refer the matter to the ECJ under Art. 267.

EXAMPLE 1.12

A privately appointed arbitrator is not a court or tribunal under Art. 267 as no public authority can exercise any control. It is not possible for a case to be referred to the ECJ under Art. 267 if it is subject to arbitration (paragraph 3.5).

2 The necessity of the preliminary ruling

Another condition mentioned in Art. 267 (2) is that a decision by the European Court of Justice on a question raised by a national court is necessary to enable it (i.e. the national court) to give judgement.
In the Cilfit case (paragraph 1.3) the ECJ held that a reference under Art. 267 is unnecessary if:

- the question regarding EU law is irrelevant, or
- the question regarding EU law has already been decided by the ECJ (= a deed clair), or
- the correct interpretation of EU law is so obvious that there is no room for any doubt (= also a deed clair).

These three conditions can be decided by the national courts of law themselves. If a party claims that the national court of law should refer to the European Court of Justice, it is basically up to the national court to come to a decision – based on the criteria from the Cilfit case – on whether or not a reference should be made. It is not up to the parties that are litigating.

3 No judicial remedy under national law

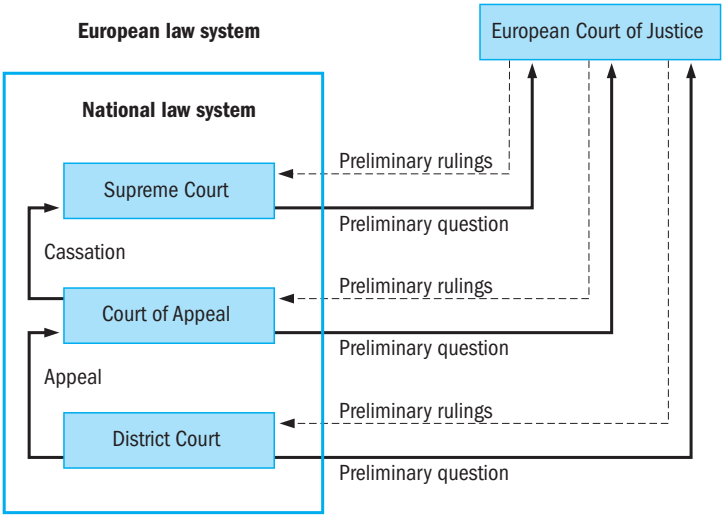
Art. 267, 3 TFEU states that in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy (i.e. no further appeal) under national law, that court or tribunal *shall* bring the matter before the Court of Justice.

What Art. 267, 3 TFEU covers is not clear and has given rise to controversy as to the exact interpretation of the word 'shall' and where it leaves the criteria established by the Cilfit case? There are two issues here:

- Does this section only concern those national courts which are courts of final appeal, such as the House of Lords, the Conseil d'Etat and the Hoge Raad?
  In general, the answer is yes: a court of final appeal shall refer the matter to the ECJ. Moreover, the ECJ has taken the view – when reviewing the case of Costa vs. ENEL –, that lower national courts *must* refer the matter to the ECJ when there is no right of appeal or other judicial remedy under national law.
- Where does the word 'shall' leave the national courts of final appeal?
  A national court of final appeal need not make a reference under Art. 267 where one of the three criteria of the Cilfit case has been satisfied. The national court of final appeal therefore still has the right to decide for itself whether a reference under Art. 267 should be made. However, the lower national court whose decisions offer no right of appeal must make the reference under Art. 267, regardless of the criteria in the Cilfit case.

The relationship between the national court system of a Member State and the ECJ, with reference to Art. 267, is explained in schedule 1.1. The schedule shows that if the conditions of Art. 267 are fulfilled, the national court of law must refer to the ECJ. This can be any national court of law, at any level within the national legal system.

SCHEDULE 1.1 Relationship between the preliminary ruling of the ECJ and national legal proceedings of a Member State



EXAMPLE 1.13

In The Netherlands, in a civil lawsuit, there is no right of appeal against a decision of the Rechtbank (district court) when the plaintiff's claim does not exceed €1,750. If the plaintiff, a private party claiming payment of €1,500, were to ask the Rechtbank to refer the case to the ECJ under Art. 267, then the lower court must do so.

4 Questions put before the European Court of Justice must involve genuine issues of EU law

A question raised by a court or tribunal must involve a genuine issue of EU law raised in that national court. It is not the job of the ECJ to give advisory opinions on general or hypothetical questions. The preliminary ruling has to be applied to a real dispute. This condition is not found in Art. 267 TFEU, but rather derives from the case of Foglia v. Novello (paragraph 1.3).

However, in contemporary case law of the European Court of Justice, it is difficult to establish whether this requirement of Art. 267 is still relevant. Looking at recent ECJ preliminary rulings, one cannot determine whether a legal remedy was available or not and for that reason one cannot determine whether the national court was required to go to the ECJ for a preliminary ruling. Every time a national court of law voluntarily addresses the ECJ it is safe to assume that the fourth condition of Art. 267 is not relevant.

Effects of an Art. 267 TFEU preliminary ruling

A preliminary ruling under Art. 267 binds the national court in that particular case. As we have seen earlier the national court of law decides on this case. It is its duty to give a verdict. Another court could ask the European Court of Justice for a fresh interpretation of the matter under Art. 267 in another case, if all the conditions mentioned above are fulfilled. It is not possible for the European Court of Justice to declare any of the acts of the institutions invalid by means of this preliminary ruling. In order for this to be done, one must follow the correct procedure under Art. 263 TFEU.

Action for annulment under Art. 263 TFEU

Action for annulment

Under Art. 263 TFEU when an action for annulment is raised the ECJ reviews the legality of acts of the institutions of the EU, such as the Commission.

Revisable acts

Under Art. 263 Regulations, Directives and Decisions are revisable acts.

Right to challenge

Under Art. 263 (2) and (4) the right to challenge these acts is given to Member States, the Council, the Commission and to natural or legal persons. The decision must be addressed to this person or if this is not the case, be of direct and individual concern to this person.

Grounds for challenge

The grounds for challenge are mentioned in Art. 263 (2):

- Lack of competence (no legal authority according to the TFEU),
- Infringement of an essential procedural requirement,
- Infringement of this Treaty, or
- Misuse of powers.

Time limits
Under Art. 263 (5) the proceedings referred to under this Article must be instituted within two months of the publication of the measure.

Effects of annulment under Art. 263
Art. 264 states that acts will be nullified as a result of this procedure. The institutions of the EU must take appropriate measures to compensate plaintiffs and produce legislation to replace any act nullified under Art. 263.

EXAMPLE 1.14

The Commission imposes a heavy fine on the Dutch company Tetra for infringing European cartel law as referred to in Art. 101 and 102. If Tetra wants to contest the fine, they should go to the European Court of Justice and have this act of the Commission reviewed under Art. 263. This is a new procedure by Tetra against the Commission brought before the ECJ. It is not a preliminary ruling under Art. 267 as there is no ongoing national legal procedure requiring an explanation of the TFEU by the ECJ.

1.3 Cases of the European Court of Justice

The following cases of Costa vs ENEL, Van Gend vs Loos, Francovich, Foglia vs Novello and Cilfit relate to the topics discussed in this Chapter. Note that the most important parts of the case are printed in bold. At the very least, a thorough study of these parts of the case should be made as they contain the most relevant information. A short summary of these issues is given under Notes.

Notes:

The nationalisation act was in order according to Italian law, but Costa claimed that the nationalisation was in conflict with the EEC-Treaty

Case Costa vs. ENEL

European Court of Justice, Case 6/64, 15 July 1964

Facts
By an act of law, on 6 December 1962 the Italian Republic nationalised electricity production and supply and set up an organisation, named E.N.E.L., to which the assets of the electricity corporation were transferred. Flaminio Costa, solicitor and shareholder of the enterprise Edison Volta, felt badly done by the nationalisation of the electricity production and distribution in his country. He refused to settle a bill for several hundred liras from the new nationalised company ENEL. Summoned to appear in court, he defended himself with the proposition that the nationalisation act was in violation of the EEC-Treaty. Hence, the Italian judge applied to the Court of Justice with a request for an explanation. Meanwhile the Italian constitutional court had passed judgment on the law for founding ENEL. According to this court, the situation at hand was quite simple: the EEC-Treaty had been ratified by common law and therefore the Regulations of a later and conflicting law overruled those of the EEC-Treaty. The Court of Justice was of a different opinion.

Grounds
...
9. In contrast to ordinary international treaties, The EEC-Treaty has created its own legal system which, when the Treaty entered into force, became an integral part of the legal systems of Member States and which their courts are required to apply.

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The EEC has a legal system of its own and this legal system is binding on Member States and its nationals as these States have transferred their sovereignty in this field to the EEC

10. By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation at international level and, more particularly, having real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited areas, and have thus created a body of law which binds both their nationals and themselves.

11. The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system.

12. The executive force of community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardising the attainment of the objectives of the Treaty set out in Art. 5 (2) and giving rise to the discrimination prohibited by Art. 7 (now Articles 2 up to and including 6 TFEU).

16. The precedence of community law is confirmed by Art. 189 (now Article 288 TFEU), whereby a Regulation 'shall be binding' and 'directly applicable in all Member States'.

17. This provision, which is not subject to any reservation, would be quite meaningless if a State could unilaterally nullify its effects by means of a legislative measure, which could prevail over community law.

18. It follows from all these observations that the law stemming from the Treaty, as an independent source of law, could not, owing to its special and original nature, be overridden by domestic legal provisions, no matter how they have been framed, without being deprived of its character as community law and without the legal basis of the Community itself being called into question.

EU law takes precedence over national (Italian) law

19. The transfer by the States of the rights and obligations arising under the Treaty from their domestic legal system to the Community legal system carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the community cannot prevail. Consequently Art. 234 (now Article 267 TFEU) is to be applied regardless of any domestic law, whenever questions relating to the interpretation of the treaty arise.

Notes:

Case Van Gend & Loos

Court of Justice, Case 26/62, 5 February 1963

Facts

Van Gend & Loos, an importer, alleged that an increase in Dutch import duties was contrary to Art. 12 of the Treaty of Rome (now Article 18 TFEU). The Dutch court referred to the Court of Justice (under Art. 234 of the Treaty (now Article 267 TFEU)) the question as to whether a litigant before a national court could rely directly on the Treaty, in particular on Art. 12 (now Article 18 TFEU).

Grounds

Art. 12 EEC-Treaty (now Article 18

... Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights that become part of their legal heritage. These rights arise not only

TFEU) has a direct effect: it gives Van Gend & Loos the right to rely on its provisions before a national court of law

where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.

...

It follows from the foregoing considerations that, according to the spirit, the general scheme and the wording of the Treaty, Art. 12 (now Article 18 TFEU) must be interpreted as having direct effect and creating individual rights that national courts must protect.

Notes:

Case Francovich

Court of Justice, cases C-6/90 and C-9/90, 19 November 1991

Facts

Directive of the Council of Ministers

In Holland: no further acts needed; already been taken care of by the Unemployment Act

In Italy: too late

In 1980, the Council of Ministers of the European Community passed Directive 80/987, concerning the mutual adjustment of the legislation of the Member Countries with regard to the protection of employees in the event of their employer becoming insolvent. This directive protects employees when the enterprise in which they are employed goes bankrupt. This directive leaves a certain measure of choice up to the Member Countries as to the period covered by the security fund as well as to the organisation, financing and functioning of the guarantee funds. The Netherlands did nothing about this as the matter had already been sorted out in the Unemployment Act. The Member Countries were supposed to have had this directive incorporated into their national legislation no later than 23 October 1983. On 2 February 1989, Italy was condemned by the Court for the non-execution of this directive. Some Italian employees – including Francovich –, who had not been paid for several months due to the insolvency of their employers, thereupon decided to lodge their claim for wages with the Italian State and to hold the Italian State responsible for the fact that a security fund to meet their costs had not yet been established. The Italian judge remitted the case to the Court of Justice of the European communities in Luxembourg.

Grounds

Art. 234 (now Article 267 TFEU)

10. The first part of the first question submitted by the national courts seeks to determine whether the provisions of the directive which determine the rights of employees must be interpreted as meaning that the persons concerned can enforce those rights against the State in the national courts, the State having failed to adopt implementing measures within the prescribed period.

11. As the Court has consistently held, a Member State which has not adopted the implementing measures required by a directive within the prescribed period may not plead its own failure to perform the obligations which the directive entails against individuals. Thus wherever the provisions of a directive appear, as far as their subject matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as opposed to any national provision which is incompatible with the directive or in so far as the provisions of the directive define rights which individuals are able to assert against the State. (judgment in Case 8/81 Becker v Finanzamt Muenster-Innenstadt [1982] ECR 53).

A directive did not have a (horizontal) direct effect until now.

26. Accordingly, even though the provisions of the directive in question are sufficiently precise and unconditional as regards identifying those persons entitled to the guarantee and as regards the content of that guarantee, those elements are not sufficient to enable individuals to rely on those provisions before the national courts. Those provisions do not identify the

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person liable to provide the guarantee, and the State cannot be considered liable on the sole ground that it has failed to incorporate the directive within the prescribed period.

Liability of the State for loss and damage resulting from breach of its obligations under Community law

...

30. That issue must be considered in light of the general system of the Treaty and its fundamental principles.

(a) The existence of State liability as a matter of principle

Cases Van Gend & Loos and Costa vs. ENEL

31. It should be borne in mind at the outset that the EEC-Treaty has created its own legal system, which is integrated into the legal systems of the Member States and which their courts are required to apply. The subjects of that legal system are not only the Member States but also their nationals. Just as it imposes burdens on individuals, Community law is also intended to give rise to rights, which become part of their legal patrimony. Those rights arise not only where they are expressly granted by the Treaty but also by virtue of obligations which the Treaty imposes in a clearly defined manner both on individuals and on the Member States and the Community institutions (see the judgements in Case 26/62 Van Gend & Loos [1963] ECR 1 and Case 6/64 Costa v ENEL [1964] ECR 585).

If a Member State breaks EU law, an individual has a right to put in a claim against his Member State

32. Furthermore, it has been consistently held that the national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals (see in particular the judgements in Case 106/77 Amministrazione delle Finanze dello Stato v Simmenthal [1978] ECR 629, paragraph 16, and Case C-213/89 Factortame [1990] ECR I-2433, paragraph 19).

33. The full effectiveness of Community law would be impaired and the protection of the rights, which they grant, would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible.

This is especially the case when an individual suffers loss or damage

34. The possibility of obtaining redress from the Member State is particularly important where, as in this case, the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce the rights conferred upon them by Community law before the national courts.

35. It follows that the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty.

Conditions under which for a Member State may be held liable by an individual

36. A further basis for the obligation of Member States to make good such loss and damage is to be found in Art. 5 of the Treaty, under which the Member States are required to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under Community law. Among these is the obligation to nullify the unlawful consequences of a breach of Community law (see, in relation to the analogous provision of Art. 82 of the ECSC Treaty, the judgement in Case 6/60 Humblet v Belgium [1960] ECR 559).

37. It follows from all of the above that it is a principle of Community law that the Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible.

(b) The conditions for State liability

38. Although State liability is thus required by Community law, the conditions under which that liability gives rise to a right to reparation depend on the nature of the breach of Community law giving rise to the loss and damage.

39. Where, as in this case, a Member State fails to fulfil its obligation under the third paragraph of Art. 189 of the Treaty to take all the measures necessary to achieve the result prescribed by a directive, the full effectiveness of that rule of Community law requires that there should be a right to reparation provided that three conditions are fulfilled.

First condition: Second condition: Third condition:

40 The first of those conditions is that the result prescribed by the directive should entail the grant of rights to individuals. The second condition is that it should be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, the third condition is the existence of a causal link between the breach of the State's obligation and the loss and damage suffered by the injured parties.

41. Those conditions are sufficient to give rise to a right on the part of individuals to obtain reparation, a right founded directly on Community law.

42. Subject to that reservation, it is on the basis of the rules of national law on liability that the State must make reparation for the consequences of the loss and damage caused. In the absence of Community legislation, it is left to the internal legal system of each Member State to designate the competent courts and lay down the detailed procedural rules for legal proceedings that are fully intended to safeguard the rights which individuals derive from Community law (see the judgements in Case 60/75 Russo v AIMA [1976] ECR 45, Case 33/76 Rewe v Landwirstschaftskammer Saarland [1976] ECR 1989 and Case 158/80 Rewe v Hauptzollamt Kiel [1981] ECR 1805).

Do the conditions apply to this case?
1 = right given by the directive to employees,
2 = to a guarantee of payment
3 = as there is a causal link the national court must uphold the claims of the employees against their own State

43. Further, the substantive and procedural conditions for reparation of loss and damage laid down by the national law of the Member States must not be less favourable than those relating to similar domestic claims and must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation (see, in relation to the analogous issue of the repayment of taxes levied in breach of Community law, inter alia the judgement in Case 199/82 Amministrazione delle Finanze dello Stato v San Giorgio [1983] ECR 3595).

44. In this case, the breach of Community law by a Member State by virtue of its failure to incorporate Directive 80/987 within the prescribed period has been confirmed by a judgement of the Court. The result required by that directive entails granting employees a right to a guarantee of payment of their unpaid wage claims. As is clear from the examination of the first part of the first question, the content of that right can be identified on the basis of the provisions of the directive.

45. Consequently, the national court must, in accordance with the national rules on liability, uphold the right of employees to obtain reparation for loss and damage caused to them as a result of failure to incorporate the directive.

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Notes:

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Case of Foglia vs. Novello

Court of Justice, Case 104/79, 11 March 1980

Facts

The French tax department distinguishes three categories of liqueur wines. The first category consists of 'vins doux naturels'. The excise payable is They are taxed with an excise of FRF 22.5 per hectolitre of wine plus a consumer tax of FRF 1790 per hectolitre of added alcohol. With regard to this, the French government, has declared it is prepared to discuss the possibility of Italian liqueur wines also being regarded as 'vin doux naturel'. However, prior to this judgment no such negotiations had ever taken place. The second category is of no importance in this case. The third category includes all other liqueur wines and more particularly, those liqueur wines that are imported into France from Italy. Not only is a consumer tax of FRF 4270 per hectolitre payable but also a production tax of FRF 710 per hectolitre. What it all boils down to is that the tax in this category is considerably higher than in the first category, a fact that the Italians do not exactly appreciate. It is not a matter of import duty but of a national tax, which is (at least in theory) levied equally on all products consumed in France, whether they have been imported or not. Art. 95 of the EEC-Treaty stipulates that Member States are not allowed to levy higher domestic taxes on products from other Member States than on similar national products. By categorising liqueur wines in such a way that Italian wines are, in fact, taxed at a higher rate than French wines the French wine tax could be in violation of this article. The usual way of determining this in a juridical way would be to refuse to pay the French tax or to claim back tax already paid. This would lead to a case before a French administrative judge, who could request a pre-judicial decision from the Court of Justice (under Art. 234 EEC-Treaty (now Article 267 TFEU)) as to whether Art. 95 allows the classification of wines into different categories if this leads to an actual difference in taxation. On the basis of the decision of the Court of Justice the French judge would be able to declare whether or not the French Regulation was void. Not a single Italian exporter or French importer had taken this course of action prior to the judgment.

Italian wines are taxed at a much higher rate than other wines

French tax law could be in violation of Art. 95 EC-Treaty, but the issue was never put before a French tax court

On 1 February 1979, the Italian Mrs. M. Novello ordered a number of cases of Italian liqueur wines from the Italian wine merchant P. Foglia which were to be sent to Mrs. A. Cerutti, a Frenchwoman, as a present. In the agreement between Mrs. Novello and Mr. Foglia a price was agreed upon and it was explicitly stated that the buyer would not be asked to pay any illegal tax 'in violation of the free movement of goods between both countries, or any other unlawful tax'. Mr. Foglia entrusted the transport company Danzas with the shipment of the wine. In the agreement he concluded with Danzas, he made the same stipulation about unlawful levies. Danzas delivered the wine to Mrs. Cerutti and sent a bill for transportation and other costs to Foglia. The bill included entry for 148,300 lira in taxes, which Danzas had had to pay to import the wine into France. Foglia paid the whole amount to Danzas and claimed the same sum back from Mrs. Novello. Mrs. Novello paid the bill less the 148,300 lira, which was, according to her, illegally collected by the French customs and which she therefore did not intend to pay, according to the agreement she had with Mr. Foglia. This presented the Italian judge with a somewhat peculiar disagreement between Foglia and Novello. On the one hand there was Novello, who was of the opinion that the French levy was unlawful and that she therefore should not have to pay the 148.300 lira to Foglia; on the other hand there was Foglia, who was also of the opinion that the 148,300 lira had been wrongly levied and who wanted to have this officially accepted by a judge. Such a conclusion would be very useful for him as a wine merchant and would also allow him to claim the tax back from the carrier Danzas. The judge asked the Court of Justice for a preliminary decision about the legitimacy of the French tax. The French government would make use of the right of all Member States to put forward their point of view in preliminary procedures.

Contract between Novello and Foglia: 'no payment of unlawful taxes'

Contract between Foglia and Danzas (same provision)

Danzas pays taxes at French border; Foglia pays Danzas the full amount, but Novello refuses to pay taxes = lawsuit Foglia vs Novello

Grounds

1. By an order of 6 June 1979, that was received at the Court on 29 June 1979, the *Pretura di Bra* referred to the Court pursuant to Art. 234 of the EEC-Treaty five questions on the interpretation of Art. 92, 95 and 234 (now Article 267 TFEU) of the Treaty.

Plaintiff = Foglia
Defendant = Novello

2. The proceedings before the *Pretura di Bra* concern the costs incurred by the plaintiff, Mr. Foglia a wine-dealer having his place of business at Santa Vittoria d'Alba, in the province of Cuneo, Piedmont, Italy in the dispatch to Menton, France of some cases of Italian liqueur wines which he sold to the defendant, Mrs. Novello.

Contents of the contracts between Novello and Foglia, and between Foglia and Danzas

3. The case file shows that the contract of sale between Foglia and Novello stipulated that Novello should not be held liable for any duty claimed by the Italian or French authorities contrary to the provisions on the free movement of goods between the two countries or any other charge she was not required to pay. Foglia inserted a similar clause in his contract with the Danzas transport company to which he had entrusted the shipment of the cases of liqueur wine to Menton; that clause stipulated that Foglia should not be held liable for any unlawful charges or charges he was not required to pay.

Danzas paid taxes without protest or complaint; the payment made by Foglia included taxes. Only Novello refuses to pay taxes, in accordance with her contract with Foglia

4. The order, with the referral to the ECJ, finds that the subject matter of the dispute is restricted exclusively to the sum paid as a consumption tax when the liqueur wines were imported into French territory. The file and the oral argument before the court of justice have established that that tax was paid by Danzas to the French authorities, without protest or complaint; that the bill for transport which Danzas submitted to Foglia and which was settled included the amount of that tax and that Mrs. Novello refused to reimburse Foglia with the sum paid in tax in accordance with the clause on unlawful duty or charges which were not due which she had expressly included in the contract of sale.

5. In the view of the *Pretura*, the defence put forward by Novello would result in doubts over the validity of French legislation concerning the consumption tax on liqueur wines in relation to Art. 95 of the EEC-Treaty.

6. Foglia's attitude during the proceedings before the Pretura may be described as neutral. Foglia has in fact maintained that, in any event, he could not be held liable for the amount corresponding to the French consumption tax since, if it was lawfully charged, it should have been borne by Novello whilst Danzas would be liable if it were unlawful.

7. This point of view prompted Foglia to request the national court to widen the scope of the proceedings and to summon Danzas as a third party having an interest in the action. The court nevertheless considered that before it could give a ruling on that request it was necessary to settle the problem of whether the imposition of the consumption tax paid by Danzas was in accordance with the provisions of the EEC-Treaty or not.

Foglia has no real interest in the outcome of the lawsuit against Novello, but wants a statement from the ECJ concerning the disputed French tax in future

8. The parties to the main action submitted documents to the *Pretura*, which enabled it to examine the French legislation concerning the taxation of liqueur wines and other comparable products. The court concluded that such legislation resulted in 'serious discrimination' against Italian liqueur wines and natural wines with a high degree of alcoholic content. This was because of special arrangements made for those French liqueur wines termed 'natural sweet wines' and the preferential tax treatment accorded certain French natural wines with a high degree of alcoholic content and bearing a designation of origin. On the basis of that conclusion, the court formulated its questions, which it submitted to the Court of Justice.

9. In their written observations submitted to the Court of Justice the two parties to the main action provided an essentially identical description of the tax discrimination which is a feature

1

of the French legislation concerning the taxation of liqueur wines; the two parties consider that that legislation is incompatible with community law. In the course of the oral procedure before the Court Foglia stated that he was participating in court proceedings because of his own business interests and those of the wider community of Italian wine traders who had a stake as an undertaking belonging to a certain category of Italian traders in the outcome of the legal issues involved in the dispute.

Foglia and Novello do not have a real conflict upon examination of their contract

10. It thus appears that the parties to the main action were intent on obtaining a ruling that the French tax on liqueur wines was unlawful. This was achieved by the expedient of proceedings before an Italian court between two private individuals who were in agreement over the intended result and who inserted a clause in their contract in order to induce the Italian court to give a ruling on the point. The artificial nature of this expedient is underlined by the fact that Danzas did not exercise its rights under French law to institute proceedings over the consumption tax, although it undoubtedly had an interest in doing so in view of the clause in the contract by which it was also bound. It is further underlined by the fact that Foglia paid Danzas' bill, which included a sum paid in respect of that tax, without protest.

If there had been a real conflict over the legitimacy of the French tax, then a French tax court should have been addressed instead of the ECJ

11. The duty of the Court of Justice under Art. 234 of the EEC-Treaty (now Article 267 TFEU) is to supply all courts in the Community with information on the interpretation of community law which is necessary for them to settle genuine disputes which are brought before them. A situation in which the Court was obliged to give a ruling by the expedient of arrangements such as those described above would jeopardise the whole system of legal remedies available to private individuals to enable them to protect themselves against tax provisions which are contrary to the Treaty.

Function of Art. 234 (now Article 267 TFEU); ruling is denied by the ECJ

12. This means that the questions asked by the national court, regarding the circumstances of this case, do not fall within the competence of the Court of Justice under Art. 234 of the Treaty (now Article 267 TFEU).

13. The Court of Justice accordingly has no jurisdiction to give a ruling on the questions asked by the national court.

Notes:

Case of Cilfit

Court of Justice, case 283/81, 6 October 1982

Facts

Payment for an inspection of wool

In September 1974, a group of Italian businesses in the wool trade, which included the Cilfit company, summoned the Italian Public Health Department before the Tribunal in Rome and demanded repayment of the duties on for the sanitary inspection of imported wool, which they felt they had been unjustly forced to pay. These duties were due according to Act no 30 dated 30 January 1968.
Proved to be wrong in the first instance and then on appeal, the plaintiffs finally appealed to the court of cassation. One of the points they made was that the duty on inspection should not have been collected, as it was said to be contrary to Regulation no 827/68 of the Committee of 28 June 1968 which creates a common market for certain products mentioned in annexe II of the Agreement. These products, listed at heading 05.15 of the common customs tariff, included any products animal origin'. The Public Health Department argued that wool was not mentioned in annexe II of the EEC-Treaty and that wool was therefore not covered by the above-mentioned tariff. According to the Department, the scope of Regulation no 827/68 was perfectly clear and so a preliminary referral to the Court of Justice was entirely unnecessary.

The Italian court of law is of the opinion that if the solution to the problem is obvious then it should not refer the case make a reference to the ECJ

The *Corte di Cassazione* was of the opinion that the Public Health Department's defence raised a question about the interpretation of Art. 234 of the EEC-Treaty (now Article 267 TFEU). The Department argued that this arrangement could be understood in this manner, that the Corte – whose decisions are not subject to appeal – was not obliged to refer to The Court of Justice of the EU if the answer to the question concerning the explanation of proceedings of the institutions of the Community was so evident, that even the possibility of doubt concerning the explanation was out of the question.
The Corte di Cassazione therefore decided to postpone its judgement, and to ask the Court of Justice for a preliminary decision as to whether a highest judge should be relieved of his/her obligation to refer a case if he/she thinks the community law is perfectly clear.

Grounds

1. By order of 27 March 1981, which was received at the Court on 31 October 1981, the Corte Suprema di Cassazione (Supreme Court of Cassation) referred to the Court of Justice for a preliminary ruling under Art. 234 of the EEC-Treaty (now Article 267 TFEU) a question on the interpretation of the third paragraph of Article 234 EEC-Treaty (now Article 267 TFEU).

2. That question followed a dispute between wool importers and the Italian Ministry of Health concerning the payment of a fixed health inspection levy on wool imported from outside the Community. The firms concerned based their argument on Regulation (EEC) no 827/68 of 28 June 1968 concerning the common market for certain products listed in annex II to the treaty (official journal, English special edition 1968 (i) p. 209). Art. 2 (2) of that Regulation prohibits Member States from levying any charge having an effect equivalent to a customs duty on imported 'animal products', not specified or included elsewhere, classified under heading 05.15 of the common customs tariff. Against that argument the Ministry for Health contended that wool is not included in annex II to the Treaty and is therefore not included in the common market for agricultural products.

3. The Ministry of Health infers from those circumstances that the answer to the question concerning the interpretation of the measure adopted by the community institutions is so obvious as to rule out the possibility of there being any interpretative doubt and thus obviates the need to refer the matter to the Court of Justice for a preliminary ruling. However, the companies concerned maintain that since a question concerning the interpretation of a Regulation has been raised before the Corte Suprema di Cassazione, against whose decision there is no judicial remedy under national law, that Court cannot, according to the terms of the third paragraph of Art. 234 (now Article 267 TFEU), escape the obligation to bring the matter before the Court of Justice.

4. Faced with those conflicting arguments, the Corte Suprema di Cassazione referred to the Court the following question for a preliminary ruling:

Content of the question brought before the ECJ by the Italian court of law

> 'Does the third paragraph of Art. 234 of the EEC-Treaty (now Article 267 TFEU) – which provides that where any question of the same kind as those listed in the first paragraph of that article is raised in a case pending before a national court or tribunal against whose decisions there is no judicial remedy under national law that that court or tribunal must bring the matter before the Court of Justice – therefore lay down an obligation to submit the case which precludes the national court from determining whether the question raised is justified or does it, and if so within what limits, make that obligation conditional on the prior finding of a reasonable interpretative doubt?'

5. In order to answer that question it is necessary to take into account the system established by Art. 234 (now Article 267 TFEU), which confers jurisdiction on the Court of Justice to give

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preliminary rulings on, inter alia, the interpretation of the Treaty and the measures adopted by the institutions of the Community.

6. The second paragraph of that article provides that any court or tribunal of a Member State *may*, if it considers that a decision on a question of interpretation is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. The third paragraph of that article provides that, where a question of interpretation is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal *shall*, bring the matter before the Court of Justice.

7. That obligation to refer a matter to the Court of Justice is based on co-operation, established with a view to ensuring the proper application and uniform interpretation of community law in all the Member States, between national courts, in their capacity as courts responsible for the application of community law, and the Court of Justice. More particularly, the third paragraph of Art. 234 (now Article 267 TFEU) seeks to prevent the occurrence within the Community of divergences in judicial decisions on questions of community law. The scope of that obligation must therefore be assessed, in view of those objectives, by reference to the powers of the national courts, on the one hand, and those of the Court of Justice, on the other, where such a question of interpretation is raised within the meaning of Art. 234 (now Article 267 TFEU).

8. In this connection, it is necessary to define the meaning of the expression 'where any such question is raised' for the purposes of community law in order to determine the circumstances in which a national court or tribunal against whose decisions there is no judicial remedy under national law is obliged to bring a matter before the Court of Justice.

If a question on the interpretation of EU law has been raised, then this does not automatically mean that Art. 234 should be used

9. First of all, in this regard, it must be pointed out that Art. 234 (now Article 267 TFEU) does not constitute a means of redress available to the parties in a case pending before a national court or tribunal. Therefore the mere fact that a party contends that the dispute gives rise to a question concerning the interpretation of community law does not mean that the court or tribunal concerned is compelled to consider that a question has been raised within the meaning of Art. 234 (now Article 267 TFEU). On the other hand, a national court or tribunal may, in an appropriate case, refer a matter to the Court of Justice of its own motion.

10. Secondly, it follows from the relationship between the second and third paragraphs of Art. 234 (now Article 267 TFEU) that the courts or tribunals referred to in the third paragraph have the same discretion as any other national court or tribunal to ascertain whether a decision on a question of community law is necessary to enable them to give judgment. Accordingly, those courts or tribunals are not obliged to refer to the Court of Justice a question concerning the interpretation of community law raised before them if that question is not relevant, that is to say, if the answer to that question, regardless of what it may be, can in no way affect the outcome of the case.

'Necessary or not' (part I)

11. If, however, those courts or tribunals consider that recourse to community law is necessary to enable them to decide a case, Art. 234 (now Article 267 TFEU) imposes an obligation on them to refer to the Court of Justice any question of interpretation which may arise.

12. The question submitted by the *Corte di Cassazione* seeks to ascertain whether, under certain circumstances, the obligation laid down by the third paragraph of Art. 234 (now Article 267 TFEU) might nonetheless be subject to certain restrictions.

13. It must be remembered in this connection that in its judgment of 27 March 1963 in joined cases 28 to 30/62 (da Costa vs *Nederlandse belastingadministratie* (Dutch tax authority) (1963) ECR 31) the Court ruled that: 'although the third paragraph of Art. 234 (now

Article 267 TFEU) unreservedly requires courts or tribunals of a Member State against whose decisions there is no judicial remedy under national law ... to refer to the Court every question of interpretation raised before them, the authority of an interpretation under Art. 234 (now Article 267 TFEU) already given by the Court may deprive the obligation of its purpose and thus empty it of its substance. Such is the case especially when the question raised is materially identical to a question which has already been the subject of a preliminary ruling in a similar case.'

'Necessary or not' (part II)

14. The same effect, as regards the limits set to the obligation laid down by the third paragraph of Art. 234 (now Article 267 TFEU) may be produced where previous decisions of the Court have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions, even though the questions at issue are not strictly identical.

15. However, it must not be forgotten that in all such circumstances national courts and tribunals, including those referred to in the third paragraph of Art. 234 (now Article 267 TFEU), remain entirely at liberty to bring a matter before the Court of Justice if they consider it appropriate to do so.

'Necessary or not' (part III)

16. Finally, the correct application of community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. Only if those conditions are satisfied, may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it.

17. However, the existence of such a possibility must be assessed on the basis of the characteristic features of community law and the particular difficulties to which its interpretation gives rise.

18. To begin with, it must be borne in mind that community legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of community law thus involves a comparison of the different language versions.

19. It must also be borne in mind, even where the different language versions are entirely in accord with one another, that community law uses terminology, which is peculiar to it. Furthermore, it must be emphasised that legal concepts do not necessarily have the same meaning in community law and in the law of the various Member States.

20. Finally, every provision of community law must be placed in its context and interpreted in light of the provisions of community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.

Summary of the verdict given by the ECJ

21. In light of all those considerations, the answer to the question submitted by the *Corte Suprema di Cassazione* must be that the third paragraph of Art. 234 of the EEC-Treaty (now Article 267 TFEU) is to be interpreted as meaning, that a court or tribunal against whose decisions there is no judicial remedy under national law, is required, where a question of community law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, unless it has established that the question raised is irrelevant or that the community provision in question has already been interpreted by the Court or that the correct application of community law is so obvious as to leave no scope for any reasonable doubt. The existence of such a possibility must be assessed in light of the specific characteristics of community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community.

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Summary

- International Law consists of International Public Law, International Private Law and International Business Law.
- EU law is the legal system of the EU. It consists of the TFEU and all the Regulations, Directives and Decisions based on that Treaty together with the case law of the European Court of Justice.
- The EU Member States have transferred a part of their sovereignty in legal jurisdiction and the passing of legislation to the EU, making the EU an organisation close to a supranational organisation: the EU is a State above its Member States.
- EU law takes precedence over the laws of the Member States. Depending on the type of legislation, EU law can be directly applicable in the Member States.
  If EU law has direct effect, it is possible for nationals of Member States to use EU law in their own national court of law.
- The EU has several, unique institutions: the European Parliament, the Council of Ministers, the European Commission and the European Court of Justice (ECJ).
- Under Art. 267 TFEU the ECJ is competent to give preliminary rulings.
- Under Art. 263 TFEU the ECJ is competent to annul acts and decisions of institutions of the EU.
- In the case of Costa vs. ENEL, it has been established that EU law takes precedence over the laws of the Member States.
- In the case of Van Gend & Loos it has been shown that if the ECJ decides that a Treaty Article has direct effect, it is possible for a national of a Member State to use EU law in a national court of law.
- The details of the Francovich case show how a national can hold his own Member State liable for a breach of EU law.
- The case of Foglia vs. Novello states that the litigating parties should have a genuine interest in the outcome of the preliminary ruling of the ECJ.
  This case thus imposes a further condition on a national court of law before asking for a preliminary ruling under Art. 267 TFEU.
- The case of Cilfit shows how it may be established if a preliminary ruling under Art. 267 TFEU of the ECJ is necessary before a national court can give judgment.

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Glossary

Action for annulment	Legal option under Art. 263 TFEU to challenge a decision of an EU institution before the ECJ.
Convention	A written agreement between two or more states, or between states and international organisations.
Decision	Act of an EU institution that affects only the party to which the decision is addressed.
Direct applicability	EU law is directly applicable when it takes effect in the Member States without any further action by these States.
Direct effect	EU law has direct effect when the ECJ decides that a national is allowed to use EU law in a national court of law.
Directive	EU law binding on Member States: the content of the Directive has to be incorporated into national legislation within a prescribed period of time.
EU law	The TFEU, together with all the Regulations, Directives and Decisions based on the TFEU and, in addition, the case law of the European Court of Justice should be regarded as EU law.
International Business Law	International private law concerning the activities and organisation of multi-national businesses.
International Private Law	Law which deals with legal problems arising from legal relationships between parties domiciled in different countries to which different legal systems apply.
International Public Law	Public law is enforceable by states only and deals with legal problems of citizens domiciled in different states and involving the laws of different states.

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Preliminary ruling	A court of law of a Member State has the option of asking for advice on the interpretation of a point of EU law under Art. 267 TFEU. If the conditions of Art. 267 TFEU are the court of law may address the European Court of Justice. The advice given by the European Court of Justice has to be taken by the court of law of the Member State (the advice is referred to as a 'ruling'). The court of law of the Member State is responsible for the final verdict (for that reason the 'advice' i.e. ruling of the European Court of Justice is referred to as being 'preliminary' i.e. prior to the final verdict).
Regulation	A type of EU legislation which takes effect in the Member States, without the States being able to change its effect on their national legal systems
Supremacy of EU law	Resulting from case law of the European Court of Justice, EU law is higher than the laws of Member States.
Supranational	The EU is the only example in the world of what could be referred to as a supranational organisation, i.e. an organisation that is higher than the states that created it, due to the voluntary transfer of sovereignty to that organisation.
Treaty	A written agreement between two or more states, or between states and international organisations.
Three main issues	The three main issues of international private law concern jurisdiction, applicable law and specific treaties for specific cases.

Exercises

Exercise 1.1
In 2004 the EU issued a Directive concerning the position of workers who work under a fixed term contract. The objective of Directive 04/123 was to improve the position of these workers. For instance, the Directive prohibits the employer from terminating the fixed term contract unilaterally, unless employer and employee agreed to this option when they concluded the contract of employment. The Directive was supposed to be incorporated into the national laws of the Member States before 1 January 2006.

Mr Hellenberg works as an employee of Porsche A.G. in Stuttgart. He received an employment contract for one year as a computer engineer. However, Porsche A.G. terminates his employment contract after 6 months on 1 July 2006, as they are allowed to do under the rules of the Bundesgesetzbuch (BGB i.e. the German Civil Code). At this time the BGB makes no distinction between contracts of an indefinite period and fixed term contracts, such as the one Hellenberg has. Both contracts can be terminated unilaterally by the employer, without a provision on this point being necessary in the employment contract.

It is obvious that the BGB is in conflict with the Directive 04/123 over this point. It is also clear that the German authorities did not incorporate the Directive into German law in time. Hellenberg's contract could not have been terminated like this had Directive 04/123 been brought into the German legal system in time. Hellenberg starts litigation against Porsche AG and the German State in the German court of first resort, the Labour Court of Stuttgart.

1 Is Directive 04/123 directly applicable, according to the TFEU?
2 What issue has to be settled first before Hellenberg can rely on the provisions of Directive 04/123 in a German court of law? Use relevant case law in your answer to this question!
3 In what case did the European Court of Justice first point out that EU law takes precedence over the laws of the Member States?
4 Is it possible for Hellenberg to claim damages from the German State because of the fact that it did not implement Directive 04/123 in time? Use relevant case law in your answer to this question!

Exercise 1.2
Basketball is organised at international level by the International Basketball Federation (FIBA). The FIBA rules govern international transfers of players; the national federations must follow its guidelines when drawing up their own transfer rules. FIBA rules prohibit clubs in the European zone from

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fielding foreign players in national championships who have played in another country in the European zone and have been transferred after 28 February. After that date it is still possible, however, for players from non-European clubs to be transferred and to play.

Mr Lehtonen is a Finnish basketball player. At the end of the 2009/2010 season he was engaged by Castors Braine, a Belgian basketball club, to take part in the final stage of the Belgian championship. Mr Lehtonen concluded a contract of employment as a professional sportsman with that Belgian basketball club on 3 April 2010. After that Castors Braine were twice penalised by the Belgian basketball association because they had fielded Mr Lehtonen. By a decision of the Federation Royale Belge des Sociétés de Basketball (FRBSB) both matches played by Castors Braine were declared lost. The opposing teams objected to Castors Braine fielding Lehtonen, as he had been transferred after 28 February, and they complained to the Belgian basketball association that this was a breach of the FIBA rules concerning the transfer of players within the European zone.

Lehtonen started legal proceedings against the FRBSB before the Court of First Instance in Brussels demanding that the penalties imposed on the basketball club Castors Braine be lifted and that Lehtonen himself be allowed to play in the Belgian championship. The Court of First Instance in Brussels decided to ask the European Court of Justice whether the FIBA rules on the transfer of players within the European zone were in conflict with the principle of free movement for workers as described in article 45 TFEU.

1 What matter must first be investigated, prior to Lehtonen being able to rely on the Article of the TFEU concerning the free movement of workers, in a Belgian court of law? Mention relevant case law in your answer to this question.
2 What conditions have to be met to allow the Belgian court of law to ask for a preliminary ruling from the European Court of Justice? Mention relevant case law in your answer to this question.
3 Suppose that there is an EU directive on the free movement of professional sportsmen and women, but this Directive was not incorporated into national legislation by the Belgian government in time and as a result Lehtonen suffers financial loss. Can Lehtonen hold the Belgian state liable for this loss? Mention relevant case law in your answer to this question.