2018


Lloyd Bonfield

Follow this and additional works at: https://digitalcommons.nyls.edu/fac_books
SUMMARY OF CONTENTS

INTRODUCTION ................................................................................................................. V

TABLE OF CASES ............................................................................................................... XV

Chapter 1. European Integration: From the Treaty of Rome to the Treaty of Lisbon ................................................................. 1

Chapter 2. The Institutional Structure of the European Union .......... 21

Chapter 3. ‘Constitutional’ Principles Underlying European Union Law ................................................................................ 43

Chapter 4. Actions and Remedies Under Community Law Available in National Courts .............................................................. 83

Chapter 5. The European Union as an Internal Market .......................... 103


Chapter 8. Free Movement of Persons: The Circulation of Workers Amongst the Member States ...................................................... 239

Chapter 9. Free Movement of the Self-Employed: The Right of Establishment and to Provide Services Across Borders ............... 319

Chapter 10. The Right of Establishment for Corporations and Select Issues on the Harmonization of Corporate Law ............... 377

Chapter 11. The Free Movement of Capital: Intra-Community Flows of Capital and the Monetary Union and Its Impact upon Business ......................................................................................... 403

Chapter 12. A Basic Primer on Competition Law ................................. 421

Chapter 13. Article 101—Competition Law: Multi-Firm Conduct Agreements Between Business Entities That ‘Distort Competition Within the Internal Market’ ......................................................... 435
Chapter 15. Merger Control Under European Union Law .......... 473
INDEX ............................................................................. 519
# TABLE OF CONTENTS

INTRODUCTION ....................................................................................... V

TABLE OF CASES .................................................................................. XV

Chapter 1. European Integration: From the Treaty of Rome to the Treaty of Lisbon ........................................ 1
  Introduction ....................................................................................... 1
  A Basic Primer on International Law .................................................. 2
  The Place of European Union in the Scheme of International Law .......... 5
  The EEC's Most Ambitious Goal ......................................................... 5
  Movin' On: From Community to Union .............................................. 6
  The Union as a Federal System .......................................................... 8
  A Page of History Is Worth a Volume of Logic ..................................... 10
  The 'Club's' Byelaws: The Treaty of Rome ........................................ 15
  Conclusion ....................................................................................... 19

Chapter 2. The Institutional Structure of the European Union ....... 21
  Introduction ....................................................................................... 21
  Branches of Government: Poli Sci 101 ................................................. 22
  The Commission: A Watchful Eye Cast over (and an Active, Multi-Faceted Role in Implementing) the Union's Agenda ........................................ 24
  The Council of the European Union: The Member State's Counterbalance to the Commission ......................................................... 28
  The European Council: The Exclusive Club of Heads of Government ...... 29
  European Parliament: Almost a Legislature ....................................... 30
  Court of Justice of the European Union: The Least Dangerous Branch? .... 33
  Conclusion ....................................................................................... 42

Chapter 3. 'Constitutional' Principles Underlying European Union Law ........................................................................ 43
  Introduction ....................................................................................... 43
  Competence: A Delicate Balance with a Movement Towards Some Clarity ................................................................. 45
  Supremacy: But Without a Clause ...................................................... 51
  Direct Effect of Treaty Articles: Bringing Community Law to the 'Peoples of Europe' ......................................................... 58
  Direct Effect of Community Secondary Legislation: Bringing Even More Community Law to the 'Peoples of Europe' .......... 67
  Conclusion ....................................................................................... 81

Chapter 4. Actions and Remedies Under Community Law Available in National Courts ...................................... 83
  Introduction ....................................................................................... 83
# Table of Contents

Procedural Autonomy Versus Equivalence and Practical Possibility ........... 85
Remedies: Effectiveness Trumps Equivalence and Procedural Autonomy .... 90
The Application of National Rules on Procedures and Remedies: Raising
Community Law by Member State Courts on Their Own Motion and
Burden of Proof ......................................................... 97
Conclusion ................................................................. 100

**Chapter 5. The European Union as an Internal Market .................. 103**
Introduction .......................................................... 103
The Economic Logic of an Internal Market ................................ 107
Internal Market: Treaty Provisions .................................... 109
Transitions: From Rome Through to the Single European Act ........... 113
The Completion of the Internal Market: An Ongoing Project .......... 125
Conclusion .................................................................. 127

**Chapter 6. Free Movement of Goods: The Ability of Businesses to**
**Sell Goods Across Borders—Customs Duties and**
**Discriminatory Taxation ............................................ 129**
Introduction .......................................................... 129
Customs Duties and Charges Having Equivalent Effect ................. 130
Discriminatory Indirect Taxation ...................................... 137
Conclusion .................................................................. 160

**Chapter 7. Free Movement of Goods: Selling Goods Across**
**Borders—Quantitative Restrictions .................................. 161**
Introduction .......................................................... 161
QRs and MEQRs ....................................................... 162
MEQRs: The Commission’s Formulation .................................. 163
MEQRs: ECJ Jurisprudence—Dassonville ............................. 165
MEQRs: Beyond Dassonville .......................................... 168
Derogations from the Restrictions on QRs and MEQRs: Article 36 .... 179
Article 36 Unpackaged: Derogations on the Grounds of Public Morality,
Public Policy and Public Security ..................................... 181
Derogations for the Protection of the Health and Life of Humans and
Animals .................................................................... 190
The Protection of National Treasures and the Protection of Intellectual
Property Rights ....................................................... 203
Indistinctly Applicable Rules ............................................ 203
Back to Cassis: Mandatory Requirements ............................... 211
Article 30 (34 TFEU) and Selling Arrangements ....................... 215
Keck and Mithouard’s Progeny ......................................... 223
The Fault Line: Market Access and Advertising to Penetrate New
Markets .................................................................... 232
Conclusion .................................................................... 236
# TABLE OF CONTENTS

## Chapter 8. Free Movement of Persons: The Circulation of Workers Amongst the Member States

- Introduction.................................................................................................................. 239
- The Underlying Logic in Support of Free Movement of Persons................................. 240
- The Treaty Framework: Article 45 .............................................................................. 242
- Direct Effect of Article 45 .......................................................................................... 245
- Definition of a Worker ................................................................................................ 250
- Nondiscrimination Principle for Workers from a Sister Member State ......................... 264
- Rights of Family Members of Workers ...................................................................... 282
- Benefits for Family Members .................................................................................... 293
- Derogations: Public Service Exception ...................................................................... 302
- Derogations: Public Policy, Public Security or Public Health ....................................... 309
- Conclusion .................................................................................................................. 316

## Chapter 9. Free Movement of the Self-Employed: The Right of Establishment and to Provide Services Across Borders

- Introduction .................................................................................................................. 319
- The Treaty Articles: 52 (TFEU 49) and 59 (56 TFEU) .................................................. 321
- The Direct Effect of Articles 49 and 56: The Distinction Between Establishment and Services .................................................................................................................. 323
- The Substantive Distinctions Between Establishment and Services ............................. 325
- Derogations from the Right of Establishment: Those Who Exercise Official Authority and Public Policy, Public Security or Public Health Exceptions .................................................................................................................. 330
- Freedom to Provide Services: The Need for a Base in the Host Member State ............ 334
- Freedom to Provide Services: Commercial Enterprises with a Community Element .................................................................................................................. 334
- Free Movement of Services: The Right to Receive Services ........................................ 339
- The Mutual Recognition Principle as Applied to Free Movement of Services and the Right of Establishment .................................................................................................................. 351
- Secondary Legislation: Mutual Recognition of Degrees and Qualifications for the Practice of Law .................................................................................................................. 361
- Secondary Legislation: The Services Directive 2006/123 ............................................ 369
- Conclusion .................................................................................................................. 375

## Chapter 10. The Right of Establishment for Corporations and Select Issues on the Harmonization of Corporate Law

- Introduction .................................................................................................................. 377
- Corporate Establishment: Relevant Articles ................................................................ 378
- Primary Establishment in a Member State .................................................................. 379
- Migrating Business Entities: Transferring Establishment .............................................. 384
- Mutual Recognition: The Application of Member State Law to Branches .................... 388
- Shareholder Rights: An Emerging Area of EU Corporate Law ..................................... 395
- Conclusion .................................................................................................................. 401
# Table of Contents

Chapter 11. The Free Movement of Capital: Intra-Community Flows of Capital and the Monetary Union and Its Impact upon Business.................................................. 403

Introduction............................................................................. 403
Free Movement of Capital: Treaty Provisions.......................... 404
Difference Between the Articles: Capital/Payments............... 404
Historical Development......................................................... 406
Basic Goals of Free Movement of Capital.............................. 407
Permissible Restrictions: Exceptions to Free Movement of Capital........ 409
Payments............................................................................ 411
Restrictions on Free Movement of Payments.......................... 412
Economic and Monetary Union............................................ 412
Coordination of Economic, Tax and Deficit Policies................. 413
European Stability Mechanism............................................. 414
Monetary Union.................................................................. 415
Institutional Setting (European Central Bank)......................... 418
Conclusion ......................................................................... 420

Chapter 12. A Basic Primer on Competition Law.................. 421
Introduction............................................................................. 421
The Beginnings of Federal Antitrust Law................................. 422
The Standard Oil Litigation...................................................... 424
The Rule of Reason............................................................... 428
Per Se Treatment................................................................. 430
Conclusion ......................................................................... 433

Chapter 13. Article 101—Competition Law: Multi-Firm Conduct Agreements Between Business Entities That ‘Distort Competition Within the Internal Market’........................................ 435
Introduction............................................................................. 435
Multi-Firm Conduct.............................................................. 438
Concerted Practices.............................................................. 439
Exemptions Under Article 101(3)........................................... 441
Early Cases: STM and Consten............................................. 442
Object or Effect................................................................. 444
Inter- v. Intra-Brand Competition.......................................... 446
Pro-Competitive Aspects of Vertical Restraints....................... 447
Revisiting STM and Consten: The ECJ’s Judgment in Völk........ 448
Violations by Object: A Form of Per Se Liability?..................... 450
Cartes Bancaires: A Change in Approach to Violations ‘By Object’... 453
Conclusion ......................................................................... 456

Introduction............................................................................. 457
Differences Between Articles 101 and 102............................. 459
Determining Dominance....................................................... 460
# TABLE OF CONTENTS

The Relevant Market Under Article 102 Analysis ......................................................... 462
General Points Regarding Abuse ................................................................................. 465
Appreciabiliy .................................................................................................................. 465
Likelihood ....................................................................................................................... 466
Intent ............................................................................................................................... 466
Examples of Abuse: Tying and Exclusivity ................................................................. 466
Discounts and Rebates: A Source of Much Litigation ................................................. 467
Conclusion ...................................................................................................................... 470

Chapter 15. Merger Control Under European Union Law .............................................. 473
Introduction .................................................................................................................... 473
Merger Control’s Legal Framework .............................................................................. 475
Scope of Application ..................................................................................................... 477
EU Merger Control Regulation .................................................................................... 478
EU Dimension—Concentration and Thresholds ......................................................... 480
Notification and Procedural Timetable ....................................................................... 486
Assessment of the Planned Merger’s Impact ............................................................... 488
Statement of Objections and Remedies ...................................................................... 491
Decision ......................................................................................................................... 492
Fines ............................................................................................................................... 492
Referrals Between Member States and the Commission ............................................. 493
Judicial Review .............................................................................................................. 494
‘Gun-Jumping’ Issues ................................................................................................. 495
International Cooperation ............................................................................................ 496
Conclusion ...................................................................................................................... 497

Chapter 16. Cross-Border Investments: The US and the EU .................................... 499
Introduction .................................................................................................................... 499
Legal Framework of Cross-Border Investing .............................................................. 500
Free Trade Agreements and Bilateral Investment Treaties ......................................... 506
Capital Markets Union .................................................................................................. 512
The EU and the US—Cross-Border Investments ......................................................... 514
EU-US Trade Relations in a Nutshell .......................................................................... 515
Conclusion ...................................................................................................................... 517

INDEX ............................................................................................................................. 519