

EU Internal Market

Law

2



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C. Substantive Law of the EU

The Four Freedoms

Goods

Customs duties
(Arts 28-30 TFEU)

Internal taxation
(Art. 110 TFEU)

Free movement of imports
(Art. 34 TFEU)

Free movement of exports
(Art. 35 TFEU)

Free movement of citizens
(Art. 20-21 TFEU)

Free movement of workers
(Art. 45 TFEU)

Freedom of establishment
(Art. 49 TFEU)

Freedom to provide, receive services
(Art. 56 TFEU)

Free movement of capital
(Art. 63(1) TFEU)

Free movement of payments
(Art. 63(2) TFEU)

Persons

Services

Capital

C. TFEU: Internal Market

PART THREE - UNION POLICIES AND INTERNAL ACTIONS

TITLE I - THE INTERNAL MARKET

Article 26 (ex Article 14 TEC)

1. The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties.
2. The internal market shall comprise **an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured** in accordance with the provisions of the Treaties.
3. The Council, on a proposal from the Commission, shall determine the guidelines and conditions necessary to ensure balanced progress in all the sectors concerned.

Article 27 (ex Article 15 TEC)

When drawing up its proposals with a view to achieving the objectives set out in Article 26, the Commission shall take into account the extent of the effort that certain economies showing differences in development will have to sustain for the establishment of the internal market and it may propose appropriate provisions. If these provisions take the form of derogations, they must be of a temporary nature and must cause the least possible disturbance to the functioning of the internal market.

Article 345 (ex Article 295 TEC)

The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.

C. Economic Integration

- Benefits of free trade - allows specialisation, therefore comparative advantage, cheaper products, greater choice, consumer welfare and efficient use of resources, more jobs, better social guarantees, more investments and innovation, maximum productivity. And finally peace between nations.
- Countries have absolute advantage in producing specific goods. In autarky case productivity is limited. In cosmopolitan case, each trading country can specialise and produce more in total.

Adam Smith 1776, David Ricardo 1819

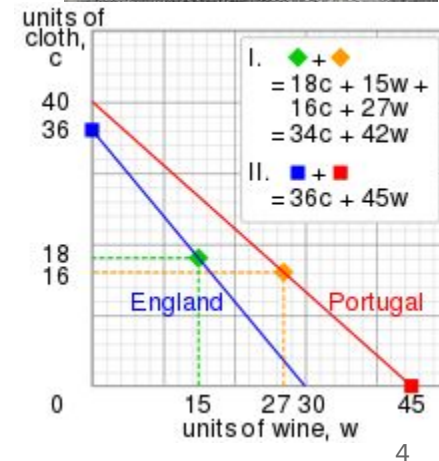
https://en.wikipedia.org/wiki/Comparative_advantage

WTO, Leutwiler Report

<https://docs.wto.org/gattdocs/q/GG/GATTFOCUS/33.pdf>

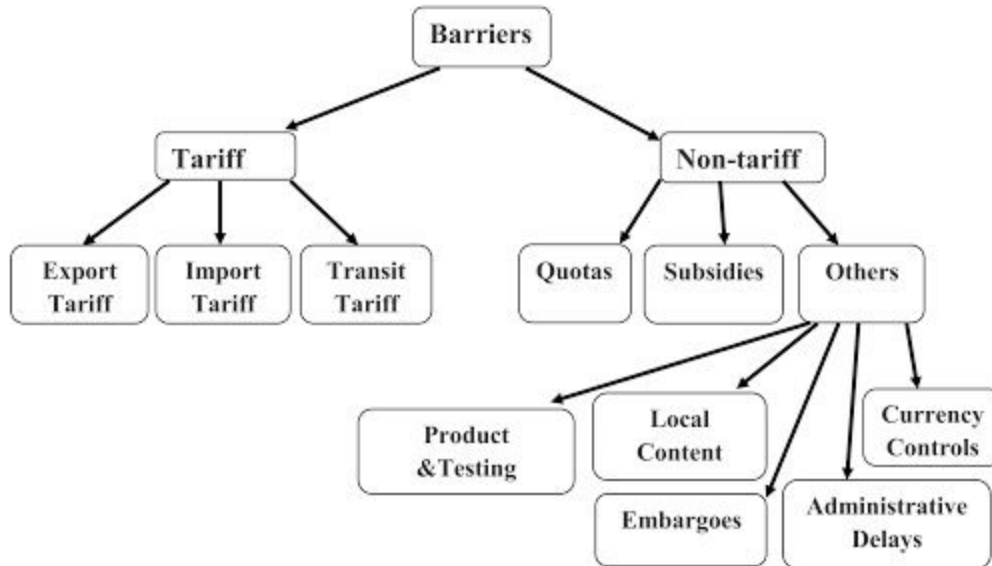
EEC, Spaak Report

http://aei.pitt.edu/995/1/Spaak_report.pdf



C. Economic Integration

Barriers to Trade



- Economic theory vs. reality
 - Not all consumers or producers are well informed, rational, free to use resources, or willing to transact.
 - Political interests: preserving employment, traditional areas of industry – to be re-elected
- Barriers
 - Non-tariff barriers (Quantitative Restrictions, Measures w/ Equivalent Effect)
 - Tariff barriers (Customs Duties, Charges w/ EE)
 - State subsidia and procurement preferences (payed by taxpayers)
 - Non-competitive practices among enterprises
- Protectionist purposes
- Legitimate purposes (protecting consumers, environment, health, workers...)

C. Economic Integration and beyond

- Bilateral, regional (EU, NAFTA...), and global (GATT/WTO) trade agreements
 - International vs. supranational
 - Legal certainty - more integrated legal system, more trust, safe trade climate
- Stages of integration (B. Balassa 1961)
 - Free Trade Area - no internal barriers; e.g EEA, Canada - EU (CETA; limited)
 - Customs Union - common customs policy towards third countries; e.g EU, but also w/ Turkey 1995 lim
 - Common Market - free movement of services, persons, and capital, free competition, no NTB-s
 - Physical barriers (queues), technical barriers (standards), fiscal barriers (VAT etc.)
 - Approximation of laws (minimal or higher standards)
 - Non-discrimination > market access > hindering exercise of fundamental freedoms (Cassis de Dijon 1979, Gebhard 1995)
 - No internal frontiers (Schengen), area of freedom, security and justice
 - Monetary Union - single currency
 - Economic Union - single monetary and fiscal policy
 - Political Union - common rules in all areas
 - Full Union - similar conditions inside, including common taxation and social security

C. Free Movement of Goods

- Products which **can be valued in money** and which are **capable, as such, of forming the subject of commercial transactions** (Com v IT 1968 art treasures).
 - Animals, works of art, coins out of trade, waste, electricity are goods
 - Lottery tickets are no goods (Schindler 1994) so other freedoms apply. Movable property of migrants – no goods (Weigel 2004)
 - Limiting goods and their installation service
- **Fiscal barriers: customs** (crossing frontiers/borders, incl internal ones: Legros 1992) **vs taxation**
 - No **customs duties** (30 TFEU), no discriminatory taxation (110 TFEU)
 - **CEE**: any pecuniary charge, however small (Com v IT 1969 statistical levy)
 - By altering its price, has the same effect on the free movement as customs duty (Deutschmann 1965)
 - Cf: NFB: no export barriers (35), no import barriers (34), but exceptions available (36)
- **Dynamics in time (FTA 1968, CU 1969)**
 - 12 TEEC - no new customs duties, no increasing (Van Gend en Loos 1963 reclassifying goods)
 - Amsterdam Treaty - absolute prohibition
 - Irrelevant for whose benefit collected (Diamantarbeiders 1969), protective (Gingerbread 1962) or not
- **Permissible fees for service** (Com v BE 1983 warehousing), **inspection under EU law** (Com v DE 1988 veterinary inspection)

C1. TFEU: Customs Union

TITLE II – FREE MOVEMENT OF GOODS

Article 28 (ex Article 23 TEC)

1. The Union shall comprise a **customs union** which shall cover all trade in goods and which shall involve the **prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect**, and the adoption of a **common customs tariff in their relations with third countries**.
2. The provisions of Article 30 and of Chapter 3 of this Title shall apply to products originating in Member States and to products coming from third countries which are in free circulation in Member States.

Article 29 (ex Article 24 TEC)

Products coming from a third country shall be considered to be in free circulation in a Member State if the import formalities have been complied with and any customs duties or charges having equivalent effect which are payable have been levied in that Member State, and if they have not benefited from a total or partial drawback of such duties or charges.

CHAPTER 1 - THE CUSTOMS UNION

Article 30 (ex Article 25 TEC)

Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature.

C1. TFEU: Customs Union

Article 31 (ex Article 26 TEC)

Common Customs Tariff duties shall be fixed by the Council on a proposal from the Commission.

Article 32 (ex Article 27 TEC)

In carrying out the tasks entrusted to it under this Chapter the Commission shall be guided by:

- (a) the need to promote trade between Member States and third countries;
- (b) developments in conditions of competition within the Union in so far as they lead to an improvement in the competitive capacity of undertakings;
- (c) the requirements of the Union as regards the supply of raw materials and semi-finished goods; in this connection the Commission shall take care to avoid distorting conditions of competition between Member States in respect of finished goods;
- (d) the need to avoid serious disturbances in the economies of Member States and to ensure rational development of production and an expansion of consumption within the Union.

Protocol 31 TEU on tariff preferences (NL Antilles). Protocol 34 TEU on Greenland fishery products.

C1. TFEU: Customs Cooperation

CHAPTER 2 - CUSTOMS COOPERATION

Article 33 (ex Article 135 TEC)

Within the scope of application of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall take measures in order to strengthen customs cooperation between Member States and between the latter and the Commission.

Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code

<http://data.europa.eu/eli/reg/2013/952/2019-05-15>

C2. TFEU: Taxation

CHAPTER 2 - TAX PROVISIONS

Article 110 (ex Article 90 TEC)

No Member State shall impose, directly or indirectly, on the products of **other Member States** any internal taxation of any kind **in excess of that imposed directly or indirectly on similar domestic products**.

Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford **indirect protection to other products**.

Article 111 (ex Article 91 TEC)

Where products are exported to the territory of any Member State, any repayment of internal taxation shall not exceed the internal taxation imposed on them whether directly or indirectly.

Article 112 (ex Article 92 TEC)

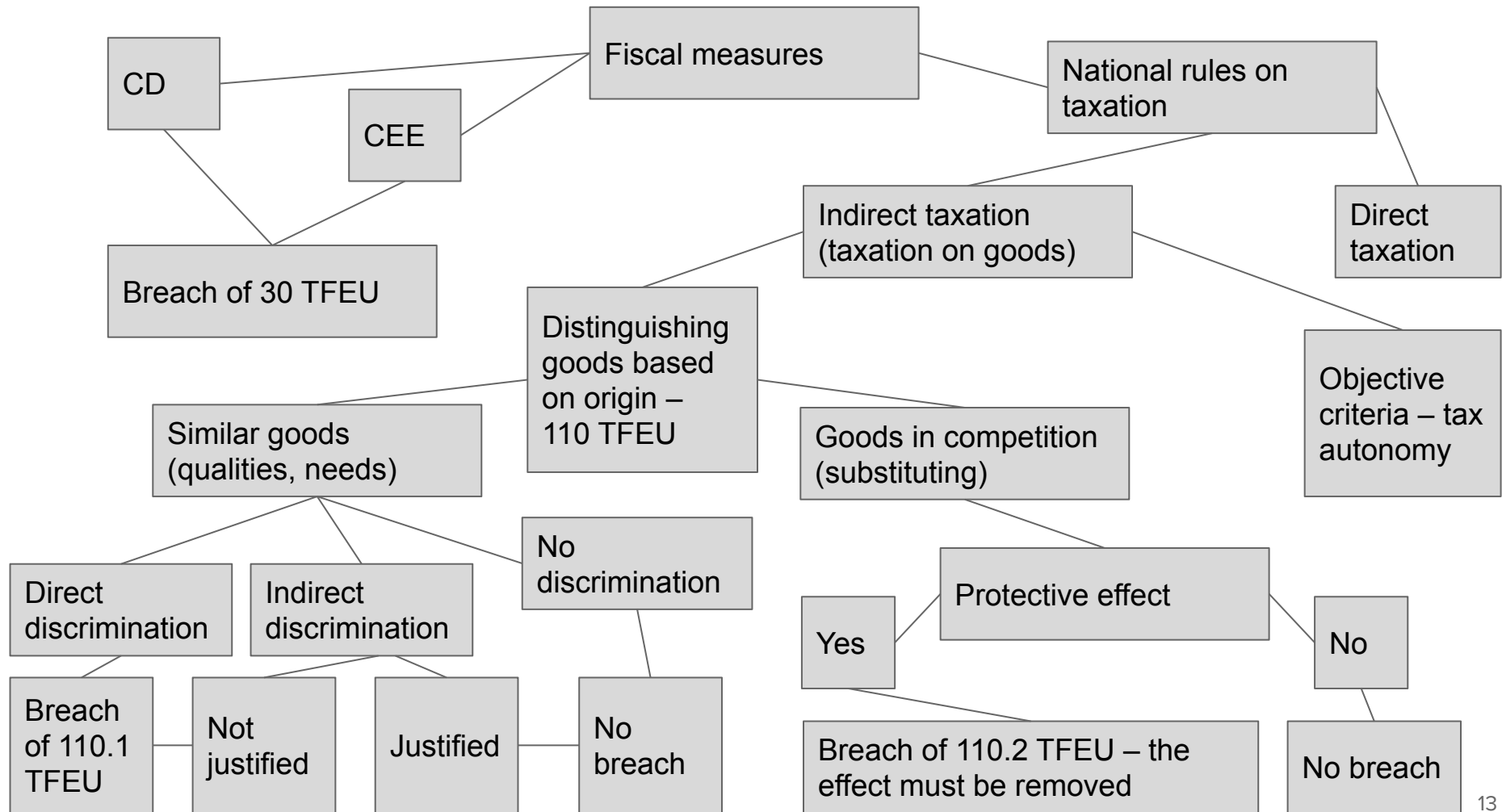
In the case of charges other than turnover taxes, excise duties and other forms of indirect taxation, remissions and repayments in respect of exports to other Member States may not be granted and countervailing charges in respect of imports from Member States may not be imposed unless the measures contemplated have been previously approved for a limited period by the Council on a proposal from the Commission.

Article 113 (ex Article 93 TEC)

The Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, adopt provisions for the **harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation** to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition.

C2. Taxation

- Only taxation (in broad sense, Schloh 1986; also how collected, Com v IE 1980) on goods and their use (indirect tax) – likely to discourage imports –, except on frontiers (customs or CEE)
 - Discriminatory direct taxation may affect other freedoms (Bachmann 1992)
- Whether depending on origin or else (Bergandi 1988, Com v FR 1987 sweet wine)
 - If objectively distinctive on else than origin, tax autonomy prevails (Johnnie Walker 1986 whiskey and fruit wine)
 - Local production habits (Com v FR 1980 taxation of fruit based vs grain based alcohol; Com v UK 1980/1983 wine and beer) should not prevail over similar nature and use of products
- a) Similarity of products (110.1 TFEU)
 - Qualities of products; same need of consumers (Com v DK 1986 fruit wine vs grape wine)
 - Discrimination of similar goods (Lütticke 1966 milk powder from LU) is prohibited, indiscriminate tax is not.
 - Indirect discrimination (Humblot 1985 cars produced in FR) justified if objectively justified and proportionate (e.g for environment protection, consumers)
 - Reverse discrimination is allowed (Peureux 1979)
- b) Products in competition (110.2) – protective effect is prohibited, else is not
 - Wine and beer – Com 1980: if not similar then at least potentially substituting goods; CJ 1983: protective to domestic beer production
 - Com v SE 2008 same issue – no influence on consumer behaviour



C3. Remedies

- Direct effect vertically (Van Gend en Loos 1963), horizontally (Dubois v Garonor 1995), also in tax matters (Lütticke 1966)
- Abolishing customs duties and CEEs
 - Restitutionary claims for customs (San Giorgio 1983)
 - By trader against state, except if unjust enrichment (Comateb 1997)
 - By final consumer against trader
 - By final consumer against state
 - Damages claim (Brasserie du Pêcheur, Factortame III 1996)
- Similar goods should be taxed in a similar way (Hansen 1978) - levelling up or down.
- Protective effect of taxation should be removed (Wine and beer), no equality required.
 - Restitutionary claims for taxes (Hans Just 1980)
 - Damages claim

C4. TFEU: Quantitative restrictions

CHAPTER 3 - PROHIBITION OF QUANTITATIVE RESTRICTIONS BETWEEN MEMBER STATES

Article 34 (ex Article 28 TEC)

Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.

Article 35 (ex Article 29 TEC)

Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States.

Article 36 (ex Article 30 TEC)

The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

C4. Quantitative restrictions

- Non-fiscal barriers: QR, MEE
 - Imports (distinctly and indistinctly applicable MEEs) and exports (distinctly applicable MEEs only up to Gysbrechts 2008)
 - New: market access approach for import (Com vs IT 2009 trailers: *any other measure which hinders access of products originating in other MS to the market of a MS.*)
- **QR** – measures which amount to a total or partial restraint of imports, exports, or goods in transit (Geddo 1973); includes ban (Henn and Darby 1972 pornographic material)
 - Exceptions allowed under 36 TFEU (initially exhaustive list)
- **MEE** – encumbrances having the same effect as QRs, whatever the description or technique employed (Geddo); **all trading rules enacted by MSS which are capable of hindering, directly or indirectly, actually or potentially, intra-Union trade** (**Dassonville 1974** authentication certificate of whisky)
 - Limited by Keck 1993 - non-discriminatory restrictions on **certain selling arrangements** (CSA) are no MEEs
- Vague ‘Trading rules’ – marketing stage; production stage not included (Kramer 1976 fishing limitations)
 - Includes non-binding measures/practices/policies (Com v IE 1982 Buy Irish) and consistent and general administrative practice (Com v FR 1985 postal franking machines)

C4. MEEs: direct hindering of trade

- Vague ‘Enacted by MSS’ – rather by a body the MS is responsible for
 - (Buy Irish: company supported by government; Fra.bo 2012 private body issuing marketing certificates; Viking 2007 Trade Union)
 - Vertical direct effect. Horizontal effect is questionable, competition law applies. Indirect responsibility by state (AGM v FI and Tarmo Lehtinen 2007 safety of lifts produced by AGM; Com v FR 1997 Spanish strawberries and lack of action by state).
- Actually or potentially: effects, not intention, that matter
 - Dassonville – actual; Com v FR 1998 composition of foie gras – potential; Ligur Carni 1993 local slaughtering rules – no de minimis exception; Krantz 1990 seizure by tax collector – not potential
- Distinctly applicable measures of **direct discrimination**
 - Inspection requirements (Schloh 1986 roadworthiness test), licence or approval (Com v FR 1985 postal franking machines), composition (Weinvertriebs 1983 vermouth alcohol content), channels (De Pijper 1976 import channels; Inter-Huiles 1983 waste export), buy national (Apple and Pear 1983, Du Pont de Nemours 1990), origin marking (Com v UK 1985, Com v DE 1975 Weinbrand), etc
 - Exclusion: Art 36; sometimes other mandatory requirements (cf environmental protection, road safety)
 - Discrimination by treating domestic and imported goods in the same way (price fixing) (Tasca 1976 maximum price, Danis 1979 freezing of price)
 - Reverse discrimination is allowed (Mathot 1987 butter content marking)

C4. MEEs: indirect hindering of trade

- Indistinctly applicable measures – **indiscriminate** but *different burden in fact*
 - Current scope – product requirements (Boermans 1994): rules relating to designation, form, size, weight, composition, presentation, labelling, and packaging.
 - **Cassis de Dijon 1979** composition of fruit liqueur, insufficient alcohol strength:

Obstacles to movement in the Union resulting from disparities between the national laws relating to the marketing of products in question must be accepted in so far as those provisions may be recognised as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.

- Proportionality test (Rau 1982 margarine): means which least restricts the free movement of goods.

There is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the MSS, alcoholic beverages should not be introduced into any other MS (Cassis de Dijon) - equivalence or mutual recognition.

- Mutual recognition of product requirements replaces the need for total harmonisation
 - Regulation (EU) 2019/515 of the European Parliament and of the Council of 19 March 2019 on the mutual recognition of goods lawfully marketed in another Member State and repealing Regulation (EC) No 764/2008 <http://data.europa.eu/eli/reg/2019/515/oj>
 - Cases Rau; Prantl 1984 wine bottles; Mars 1995 advertising rules; Miro 1985 jenever alcohol strength; Com v IT 2003 pure chocolate; Dynamic Medien 2008 age limit on DVDs etc.

Art 35: Groenveld 1979 horsemeat exports – only discriminatory measures prohibited for export; reversed by Gysbrechts 2008 and Com v IT 2009 trailers

C4. MEEs: market access approach

- Hindering inter-state trade & lack of defences (art 36 or mandatory requirement)
 - Monsees 1999. Distinctly or indistinctly applicable measure issue not relevant.
 - **Com vs IT 2009** trailers pulled by motorcycles – matter of use rather than trade, but preventing demand for such products. MEE redefined:
 - Measures adopted by a MS the object or effect of which is to treat product coming from other MSS less favourably (distinctly applicable measures);
 - Measures that apply to all products alike, to which Cassis de Dijon applies (indistinctly applicable product requirements);
 - Any other measure which hinders access of products originating in other MSS to the market of a MS.
 - De minimis rule may be applied (considerable influence – Leclerc-Siplec 1995)
 - Additional costs as a hindrance (Franzén 1997 alcohol import license) ?
 - Facilitating market access: information on standards of MSS
 - Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services <http://data.europa.eu/eli/dir/2015/1535/oj>
 - CIA 1996 failure to notify Belgian law on security systems: breach of the obligation to notify constitutes a substantial procedural defect such as to render the technical regulations in question inapplicable to individuals. (Unilever 2000 olive oil labelling law; Lemmens 1998 breathalyser)

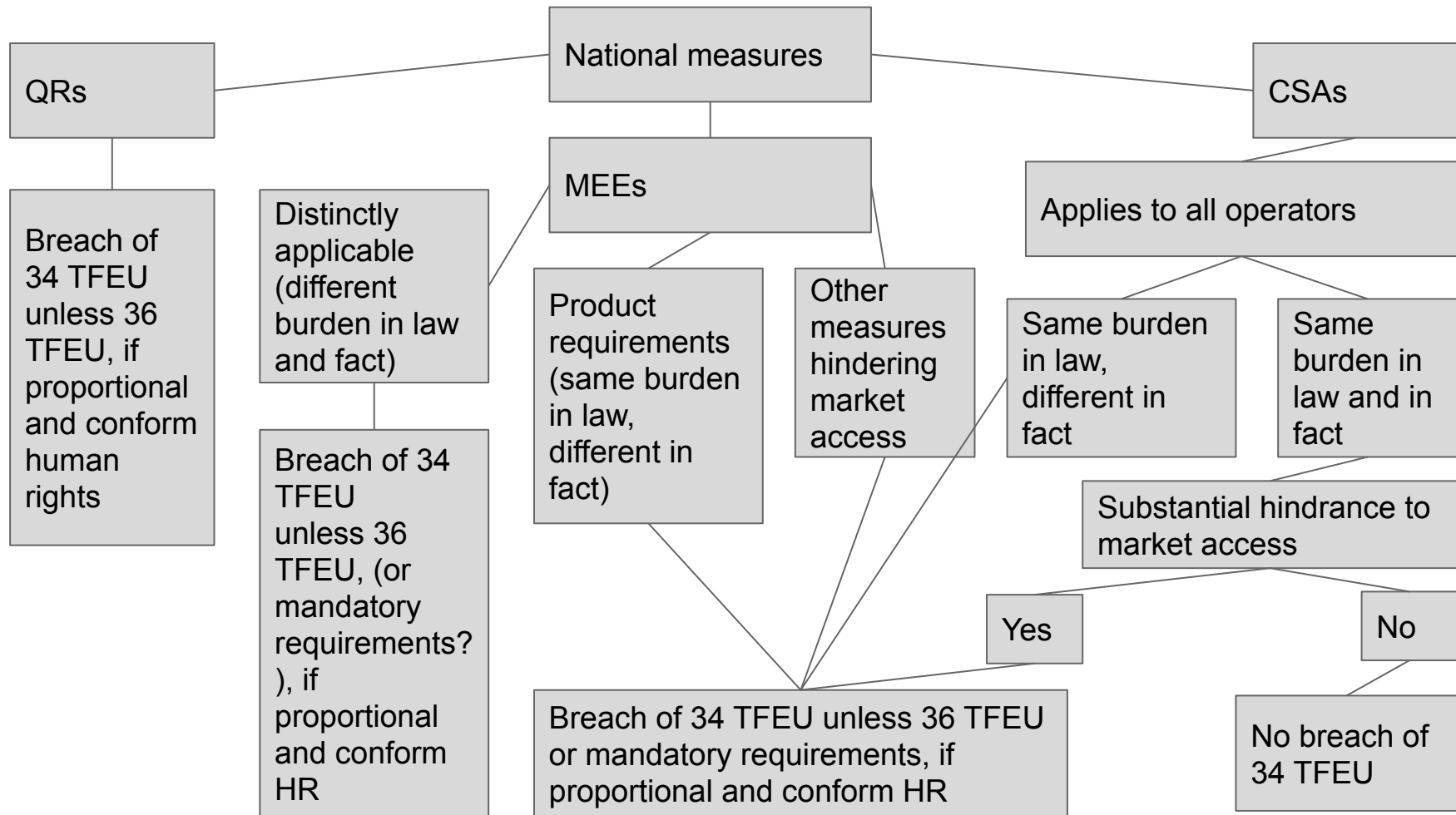
C4. Selling arrangements

- Time, place, and manner of marketing products. Or, **who, when, where, and how** sells the product?
 - There is no protective object or effect, no discrimination. It does not affect importer, but retailer.
 - Whether Cassis applies (Oosthoek 1982 promotional gift), or no MEE at all (Oebel 1981 bakery working hours, no breach)? Sunday trading (Torfaen 1989, Conforama 1991, Stoke-on-Trent 1992)...

- **Keck 1993** sale at a price below wholesale price:

national provisions restricting CSA did not fall within the Dassonville formula and so, unlike QRs, distinctly applicable MEEs and product requirements, did not breach Art 34 where the two conditions were satisfied: the provisions apply to all affected traders operating in the territory; the provisions are non-discriminatory (same burden in law and in fact).

- Visnapuu 2015: alcohol resale license not required from Alko, so not all operators affected
- De Agostini 1997: restrictions to advertising directed at children are discriminatory
- R vs Attorney General 2007 fox hunting: ban on hunting affects import of horses from Ireland
- Commercial practices that should be abolished –
 - Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market <http://data.europa.eu/eli/dir/2005/29/oj>



C5. Justifications

- Article 36 derogations (wording from GATT 1948)
- Interpreted strictly (Com v IE 1981 souvenirs); no economic objectives (Com v IT 1961 pig ban)
 - Public **morality** (Henn & Darby 1979 pornography; Conegate 1986 sex dolls produced also in UK)
 - Public **policy** (Thompson 1978 silver coins; Van Gennip 2018 fireworks; Ringelhan 1984 consumer protection not public policy; Schmidberger 2003 protests on roads; Com v FR 1997 strawberries)
 - Council Regulation (EC) No 2679/98 of 7 December 1998 on the functioning of the internal market in relation to the free movement of goods among the Member States <http://data.europa.eu/eli/reg/1998/2679/oj>
 - Public **security** (Campus Oil 1984; Com v GR 2001 oil reserve; Richardt 1991 transit license)
 - Human **health** (Com v DE 1987 Reinheitsgebot; DocMorris 2003 net sales; Sandoz 1983 vitamin muesli; Evans Medical 1995 narcotic drugs import; Decker 1998 export permit for glasses)
 - Animal and plant health (Bluhme 1998 Laesoe bees; PreussenElektra 2001 renewable energy; Com v AT 2011 lorries over 7.5 tonnes)
 - National **treasures** (Com v IT 1968 art treasures; LIBRO 2009 cultural diversity too broad)
 - Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State <http://data.europa.eu/eli/dir/2014/60/oj>
 - **Industrial and commercial property** – private interest, territoriality, exclusivity; exhaustion of rights
- Abuse of justification (Com v UK 1984 turkeys); proportionality and human rights

C5. Justifications

- Mandatory or **public-interest** requirements (CoJ)
 - Initially only for indistinctly applicable MEEs. The practice has changed.
 - Cassis de Dijon list: fiscal supervision, fairness of transactions, consumer protection, public health
 - Further: environment, cinema as a form of cultural expression (Cinéthèque 1985), national or regional socio-cultural characteristics (Torfaen 1989), press diversity (Familiapress 1997), books as cultural objects (LIBRO 2009), animal welfare, official languages (New Valmar 2016), working conditions (Oebel 1981), protection of children (Dynamic Medien 2008), road safety (Com v FI 2007), preventing the risk of undermining the financial balance of the social security system (Decker 1998), fundamental rights (Schmidberger 2003), order in society (Com v GR 2006 computer games), fight against crime (Com v PT 2008), preventing fraud (Kakavetsos-Fragkopulos 2011) etc.
 - Consumer protection (Springenheide 1998 concept of consumer; Clinique 1994; Mars 1995; Buet 1989 vulnerable consumer; Graffione 1996 Cottonelle toilet paper)
 - Environmental protection (Com v DK 1988 recyclable bottles; Mickelsson 2009 jet skis; Aalands vindkraft 2014 green energy certificates)
- Proportionality: suitability and necessity (United Foods 1981); less restrictive means, excessive effect (Rosengren 2007 alcohol import; Com v PT 2008 tinted car windows)
- Human rights may also limit MS action under a justification (Elliniki Radiophonia 1991)
- Not evokable if the EU law has harmonised the rules

C6. Exceptions

TITLE III AGRICULTURE AND FISHERIES

Art 38...44 TFEU

https://eur-lex.europa.eu/summary/glossary/agricultural_policy.html

<https://eur-lex.europa.eu/summary/glossary/fisheries.html>

C7. TFEU: State monopolies

Article 37 (ex Article 31 TEC)

1. Member States shall adjust any State monopolies of a commercial character so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States.

The provisions of this Article shall apply to any body through which a Member State, in law or in fact, either directly or indirectly supervises, determines or appreciably influences imports or exports between Member States. These provisions shall likewise apply to monopolies delegated by the State to others.

2. Member States shall refrain from introducing any new measure which is contrary to the principles laid down in paragraph 1 or which restricts the scope of the articles dealing with the prohibition of customs duties and quantitative restrictions between Member States.

3. If a State monopoly of a commercial character has rules which are designed to make it easier to dispose of agricultural products or obtain for them the best return, steps should be taken in applying the rules contained in this Article to ensure equivalent safeguards for the employment and standard of living of the producers concerned.

Protocol 29 TEU on public broadcasting.

D. Free Movement of Services and Persons

- Free movement
 - Dynamics: former Art 3(1)(c) TEEC: abolition of obstacles to freedom of movement
 - Motive: employment, access to customers in other MSS
 - Social, economic, cultural and linguistic barriers in addition to legal ones
- Crucial: **economic** activity (worker, establishment, or services) and nationality of **another MS**
 - Older case law: minimum of non-discrimination, national treatment
 - Recently, back to abolition of obstacles (including non-discriminatory)
- Secondary legislation
 - Workers – Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for **workers** within the Union, <http://data.europa.eu/eli/reg/2011/492/2019-07-31>
 - Residence rights of retired, students, persons of independent means (PIMs); now replaced by “**Citizens Rights Directive**” (= **CRD**) / Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC <http://data.europa.eu/eli/dir/2004/38/2011-06-16>
- Union citizenship vs economic activity (required by CRD from 3 months to 5 years of residence in another MS). Issues:
 - Third Country Nationals (=TCN)
 - Schengen
 - Enlargements in 2004/07 (only UK, IE, SW opened their labour markets at once, others in 2011/13), thence Brexit narrative on millions of migrant workers

D. Services and Persons in general

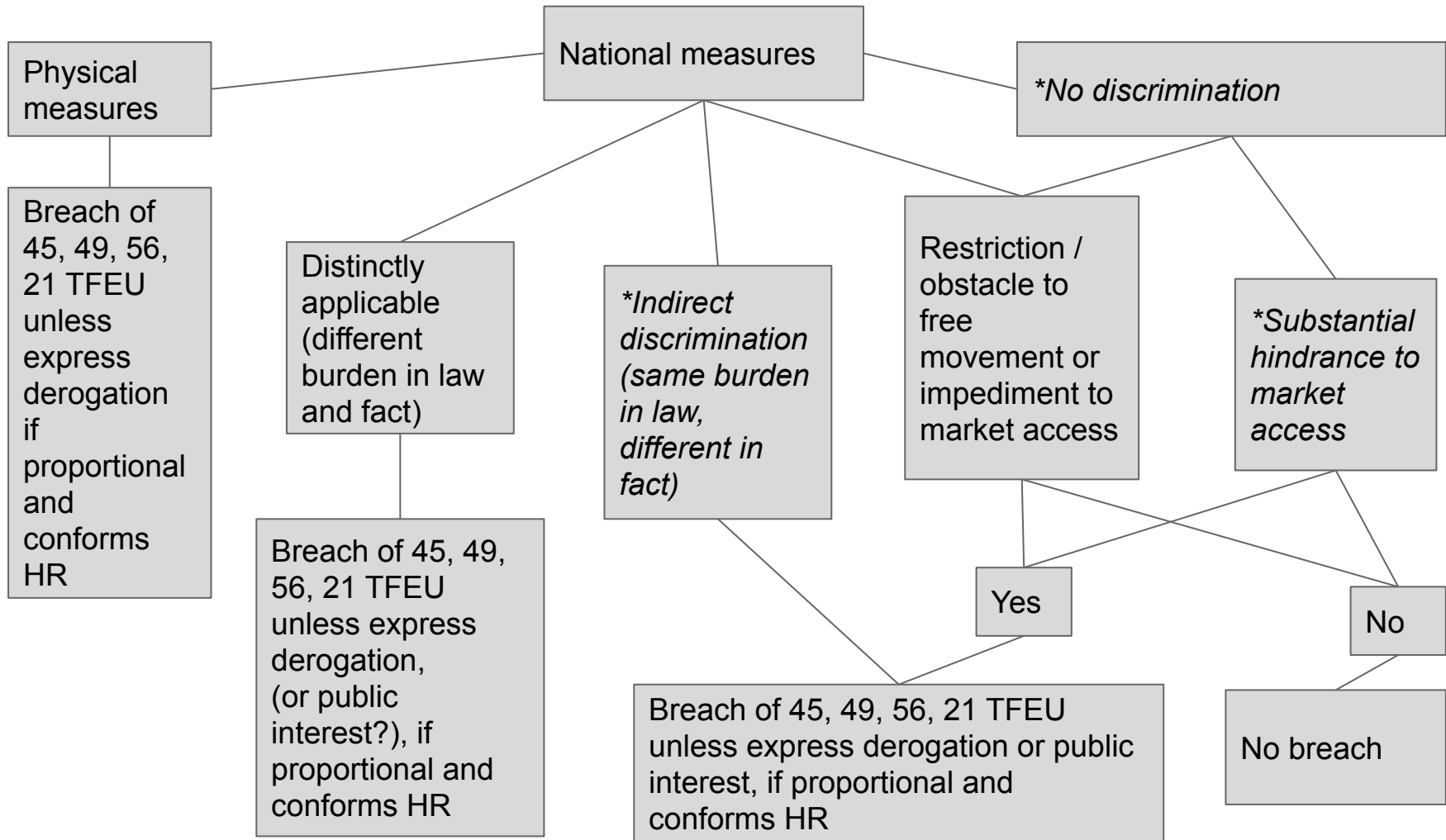
- Common conditions of free movement of services/persons:
 - Nationality of a MS, for legal persons – seat in a MS
 - Determined according the **law of the MS**, a sovereign matter (Chen 2004)
 - Seat of a LP - where the company formed in accordance with the law of a MS, has its registered office, central administration, or principal place of business (Commerzbank 1993)
 - EU law may however be relevant (Rottman 2010)
 - Economic activity (if necessary) (45, 49, 56 TFEU; Jundt 2007 decisive factor)
 - Presumed if the person is **remunerated** (Betray 1989 voluntary activity, rehab programme)
 - **Not necessary** under 21(1) TFEU (Baumbast 2002) but CRD applies
 - Classification (worker, self-employed/company, service provider, citizen)
 - Territorial scope (inter-state element; Grzelczyk 2001); applies to EEA
 - Moving to another MS (Levin 1982) or employed in another MS (Geven 2007; Renneberg 2008)
 - Employed by another MS in a facility in a third country (Boukhalfa 1996)
 - Services provided in another MS without going there (Alpine Investments 1995)
 - Not applied to “**wholly internal situations**” (Saunders 1979 Northern Ireland; Gauchard 1987 extending supermarket against FR law) even if hypothetically European (Moser 1984 no access to training course; Kremzow 1997 murderer convicted for lifetime; cf Carpenter 2002 Filipino wife of a man working for another MS)
 - May be applied against own MS if the person **has exercised free movement before** (Surinder Singh 1992, had worked in DE; Knors 1979 Dutch plumber qualified in BE could work in NE)
 - No abuse considered if sufficiently genuine (Akrich 2003; O&B 2014)

D. Services and persons: breaches

- Determining the Article of TFEU: Art 45, 49, 56 TFEU mutually exclusive but have same principles (Royer 1976)
- **Physical measures** on border
 - Refusal to allow a national to leave (Jipa 2008; Byankov 2012)
 - Refusal to allow a EU citizen to enter (Van Duyn 1974; Com v ES 1998)
 - Deportation of a EU citizen (Bouchereau 1977; Calfa 1999)
 - May be justified by express derogations applied proportionally and respecting HR
- Discrimination on the grounds of nationality (Art 45(2), 49(2), 57(2); subsidiarily Art 18 TFEU – Data Delecta 1996 requirement to lodge security if not national of SE)
 - Irrelevant whether the situation is less or more advantageous, but it should not discriminate on the ground of nationality (Erzberger 1917); EU rule does not interfere in the substantive rule
 - **Direct/overt discrimination** (Reyners 1974 nationality required from lawyers)
 - May be justified by express derogations if proportionate; maybe also other (Placanica 2007)
 - **Indirect/covert discrimination** (same burden in law, different in fact) (Biehl 1990; Sotgiu 1974)
 - Residence (Clean Car 1998; Giersch 2013) and language requirements (Groener 1989), qualifications and licences (Vlassopoulou 1991, Gullung 1988; double burden for service providers Sodemare 1997)
 - Burial costs compensation (O’Flynn 1996 residency requirement is unjustified indirect discrimination if it is intrinsically liable to affect migrant workers more, and if there is a risk to place them at a disadvantage)
 - May be justified by express derogations and objective justifications / general interest, if proportionate
- Non-discriminatory measures – no breach (Com v BE 1987 Clinical Biology Lab)

D. Services and persons: market access

- Keck analogy not fully applied because market access in other MSS affected also by non-discriminatory rules
 - Alpine Investments 1995: selling financial services by phone, NL prohibition **in breach** but proportionally justified
 - Graf 2000: AT rule on workers' dismissal compensation genuinely non-discriminatory; **non-discriminatory measures which do not substantially hinder access to the (labour) market or whose effect on free movement is too remote, fall outside Art 45 TFEU** (cf Viacom 2005, Com v IT 2011 lawyers' fees)
- Dynamics: simplification of the test – instead of asking for the discriminatory nature, it is asked if there is a **restriction to market access**
 - *Not only the elimination of all discrimination against a person providing services on the ground of his nationality [is required] but also the **abolition of any restriction**, even if it applies without distinction to national providers of services and to those of other MSS, when **it is liable to [i.e potentially] prohibit or otherwise impede the activities** of a provider of services established in another MS where he lawfully provides similar services* (Säger 1991)
 - Restrictions may be justified by imperative reasons relating to public interest, if proportional
 - Kraus 1993: DE LLM graduated in UK could not use his title; the rule was found **liable to hamper fundamental freedoms** but justified
- From “market access” to “restriction / obstacle to free movement”
 - Restriction relates to measures by which the **exercise of the freedom** to provide services **is prohibited, impeded or rendered less attractive** (Volksbank Romania 2012; cf Kranemann 2005 on *disadvantage*)
 - Concerns regarding broad interpretation: hypothesis of speed limits on roads
- Direct vertical effect; extended to professional bodies (Thieffry 1977, Walrave & Koch 1974). Horizontal (Clean Car 1998, Angonese 2000) at least Art 45. Damages claim under Factortame III (1996, clear rights, serious breach).



D1. TFEU: Free Movement of Services

TITLE IV - FREE MOVEMENT OF PERSONS, SERVICES AND CAPITAL

CHAPTER 3 - SERVICES

Article 56 (ex Article 49 TEC)

Within the framework of the provisions set out below, **restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.**

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may **extend** the provisions of the Chapter **to nationals of a third country** who provide services and who are established within the Union.

Article 57 (ex Article 50 TEC)

Services shall be considered to be 'services' within the meaning of the Treaties where they are **normally provided for remuneration**, in so far as they are **not governed by the provisions relating to freedom of movement for goods, capital and persons.**

'Services' shall in particular include:

- (a) activities of an industrial character;
- (b) activities of a commercial character;
- (c) activities of craftsmen;
- (d) activities of the professions.

Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, **temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals.**

D1. TFEU: Free Movement of Services

Article 58 (ex Article 51 TEC)

1. Freedom to provide services in the field of **transport** shall be governed by the provisions of the Title relating to transport.
2. The liberalisation of **banking and insurance** services connected with movements of capital shall be effected in step with the liberalisation of movement of capital.

Article 59 (ex Article 52 TEC)

1. In order to achieve the liberalisation of a specific service, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall issue **directives**.
2. As regards the directives referred to in paragraph 1, priority shall as a general rule be given to those services which directly affect production costs or the liberalisation of which helps to promote trade in goods.

Article 60 (ex Article 53 TEC)

The Member States shall endeavour to undertake the **liberalisation of services beyond the extent required by the directives** issued pursuant to Article 59(1), if their general economic situation and the situation of the economic sector concerned so permit.

To this end, the Commission shall make recommendations to the Member States concerned.

Article 61 (ex Article 54 TEC)

As long as restrictions on freedom to provide services have not been abolished, each Member State shall apply such **restrictions without distinction on grounds of nationality or residence** to all persons providing services within the meaning of the first paragraph of Article 56.

Article 62 (ex Article 55 TEC)

The provisions of Articles 51 to 54 shall apply to the matters covered by this Chapter.

D1. Free Movement of Services

- Services account 70% of EU GDP. Rules on services as **general rule** (Art 57).
- Overlap with other freedoms, distinction from e.g. establishment
 - **Temporary service normally provided for remuneration**
 - Profit not needed (Jundt 2007 minimal fee for course, Grogan 1991 information about abortion clinics no service)
 - Education provided by state no service (Humbel 1988; cf Wirth 1993 privately funded is service), insurance-funded hospital services are service (Geraets-Smits & Peerbooms 2001)
 - Not only duration but regularity, periodicity or continuity are used **to distinguish service from establishment** (Gebhard 1995), on case-by-case basis (Schnitzer 2003). Activities without foreseeable time limit are not service (Trojani 2004). Seat in host state is not necessarily establishment; such requirement by host state would be breach of Art 56 (Com vs IT 2007)
- **Home state** rules vs **host state** rules vs nationality state rules (Art 56)
 - Van Binsbergen 1974 NL rule that lawyer has to reside in NL - host state rule
 - Carpenter 2002 UK rule to deport Filipino wife of UK national providing services in other MSS
- **Models: either the provider or customer or the service crosses the border**
 - Travelling to receive services (Luisi & Carbone 1984 cash offence by medical tourists – home state rule; Com v FR 2006 salaried status of performing artists – host state rule; Com v FR 1991 tour guides – many possibilities)
 - Trans-border services (Alpine Investments 1995 – home state rule; Bond 1988 NL prohibition of broadcasts advertising for NL audience – host state rule)

D1. Free Movement of Services

- Physical barrier: **rights of departure, entry, and residence**
 - Art 6 CRD up to 3 months, Art 7(1) over 3 months (PIM or sickness insurance)
 - Service recipient without ID or passport may not be deported (Oulane 2005)
- **Discriminatory** measures (service provider is not established in host state, so establishment analogy is not to be used while comparing applicable rules, Säger 1991)
 - Host state cannot require service providers to comply with labour standards as they have to comply to the rules of their home country already (Laval 2007)
 - Discriminating is direct on the basis that service provider is established in another MS (Gouda 1991). Requiring provider to be established or reside in host state is indirect discrimination (Coenen 1975; Van Binsbergen 1974 - address for service sufficient; Navileme 2014 boating licence not related to residence requirement in PT)
- **Non-discriminatory** measures
 - Ban on advertising in cable network allowed (Debauve 1981)
 - Freedom to provide services clause (Schindler 1994 ban on advertising lotteries may impede market access but justified by several considerations; Säger 1991 license requirement for patent monitors in DE; Com vs IT 2003 residency for patent attorneys registry), otherwise Konstadinides 2013 (calculation of doctor's fees in DE – no restriction but measures have to be proportionate)
- Home state rules have to be taken into account when assessing justifications of the host state rules (Guiot 1996); home state is the primary regulator (not for persons!)
- Proportionality of restrictions (Säger 1991 no necessity for licencing, Com v IT 1991 unwanted side effects of licence requirement of tour guides)

D1. Free Movement of Services

- Social and tax advantages
 - Victim benefits (Cowan 1989 UK resident robbed in Paris, national treatment), admission to museums (Com vs ES 1994, national treatment required)
 - Winnings from foreign casinos to have same tax benefits (Blanco 2014)
 - Healthcare cost reimbursement (Kohll 1998 no discriminatory pre-authorisation allowed), payments to non-contracted hospitals from sickness funds (Geraets-Smits & Peerbooms 2001 access, without pre-authorisation, to services not available domestically, or available sooner abroad Müller-Fauré & van Riet 2003): in non-hospitalisation cases compensated in domestic scope, pre-authorisation in a contracted hospitals system justified, but the assessment has to be substantial (cf Watts 2006)
 - Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare <http://data.europa.eu/eli/dir/2011/24/2014-01-01>

TITLE VI - TRANSPORT

Art 90...100 TFEU

D2. Legal persons and services

- Rules by home state are as important as those of host state, just the impact on freedom of services counts
- **Direct discrimination** (Federación de Distribuidores Cinematográficos 1993 preference on ES film makers; Svensson & Gustafsson 1995 denial of loan benefits if from a foreign bank)
- **Indirect discrimination** (Com v DE 1986 insurance required establishment and authorisation)
- **Market access** (Com v NL 2004 private security firms; translation requirement Com v DE 2007; oath, guarantee lodging, minimum fees and minimum staffing requirement Com v IT 2007 private security; Murphy 2011 broadcasting rights; Bacardi 2004 advertising alcohol)
 - Gambling cases (Com v GR 2006; Placanica 2007 betting; Berlington 2015 HU tax on slot machines; Unibet 2017; Global Starnet 2017 proportionality assessed, even strict liability acceptable if proportional; Lindman 2003 income tax on foreign lotteries in FI; Zenatti 1999 betting monopoly)
- Service provider may bring its own employees, including TCNs (Rush Portuguesa 1990) - no work permit required, duty to return; host state labour laws apply
 - Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services <http://data.europa.eu/eli/dir/1996/71/oj>
 - Host state labour laws apply in scope defined by the directive (Laval 2007)
 - Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services <http://data.europa.eu/eli/dir/2018/957/oj>; If posting exceeds 12 months, host state rules start to apply
 - Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') <http://data.europa.eu/eli/dir/2014/67/oj>
- Justified requirements (Jyske Gibraltar 2013 AML rules for banks not established are proportional)

D2. The services directive

- **Directive** 2006/123/EC of the European Parliament and of the Council of 12 December 2006 **on services in the internal market** <http://data.europa.eu/eli/dir/2006/123/oj>
- Methodology:
 - **Service – requirement** which affects access to, or the exercise of, a service activity – not **excluded** from the directive (exclusion, limitation, derogation)
 - Establishment provisions of the directive
 - Authorisation (licence, registration etc) requirements - unlawful unless non-discriminatorily justified by overriding reason relating to the public interest, proportionate, clear, objective, published in advance, and accessible (good governance)
 - Enlisted other requirements may be prohibited or suspect (need evaluation)
 - Else TFEU applies directly (Art 49 TFEU)
 - Service provisions of the directive
 - Particularly suspect requirements - unlawful unless expressly derogated Art 17-18, narrow justifications
 - Other requirements - unlawful unless expressly derogated Art 16, narrow justifications
 - If not covered by the directive, the TFEU applies directly
 - Service recipient rights Art 20

D3. TFEU: Establishment

CHAPTER 2 - RIGHT OF ESTABLISHMENT

Article 49 (ex Article 43 TEC)

Within the framework of the provisions set out below, **restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited**. Such prohibition shall also apply to restrictions on the **setting-up of agencies, branches or subsidiaries by nationals of any Member State** established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities **as self-employed persons and** to set up and manage **undertakings**, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

Article 50 (ex Article 44 TEC)

1. In order to attain freedom of establishment as regards a particular activity, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall act by means of directives.

D3. TFEU: Establishment

2. The European Parliament, the Council and the Commission shall carry out the duties devolving upon them under the preceding provisions, in particular:

- (a) by according, as a general rule, priority treatment to activities where freedom of establishment makes a particularly valuable contribution to the development of production and trade;
- (b) by ensuring close cooperation between the competent authorities in the Member States in order to ascertain the particular situation within the Union of the various activities concerned;
- (c) by abolishing those administrative procedures and practices, whether resulting from national legislation or from agreements previously concluded between Member States, the maintenance of which would form an obstacle to freedom of establishment;
- (d) by ensuring that workers of one Member State employed in the territory of another Member State may remain in that territory for the purpose of taking up activities therein as self-employed persons, where they satisfy the conditions which they would be required to satisfy if they were entering that State at the time when they intended to take up such activities;
- (e) by enabling a national of one Member State to acquire and use land and buildings situated in the territory of another Member State, in so far as this does not conflict with the principles laid down in Article 39(2);
- (f) by effecting the progressive abolition of restrictions on freedom of establishment in every branch of activity under consideration, both as regards the conditions for setting up agencies, branches or subsidiaries in the territory of a Member State and as regards the subsidiaries in the territory of a Member State and as regards the conditions governing the entry of personnel belonging to the main establishment into managerial or supervisory posts in such agencies, branches or subsidiaries;
- (g) by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 54 with a view to making such safeguards equivalent throughout the Union;
- (h) by satisfying themselves that the conditions of establishment are not distorted by aids granted by Member States.

D3. TFEU: Establishment

Article 51 (ex Article 45 TEC)

The provisions of this Chapter **shall not apply**, so far as any given Member State is concerned, **to activities which in that State are connected**, even occasionally, with the exercise of official authority. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may rule that the provisions of this Chapter shall not apply to certain activities.

Article 52 (ex Article 46 TEC)

1. The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for **special treatment for foreign nationals on grounds of public policy, public security or public health**.
2. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the coordination of the abovementioned provisions.

Article 53 (ex Article 47 TEC)

1. In order to make it easier for persons to take up and pursue activities as self-employed persons, the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications and for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons.
2. In the case of the medical and allied and pharmaceutical professions, the progressive abolition of restrictions shall be dependent upon coordination of the conditions for their exercise in the various Member States.

D3. TFEU: Establishment

Article 54 (ex Article 48 TEC)

Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

‘Companies or firms’ means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.

Article 55 (ex Article 294 TEC)

Member States shall accord nationals of the other Member States the same treatment as their own nationals as regards participation in the capital of companies or firms within the meaning of Article 54, without prejudice to the application of the other provisions of the Treaties.

D3. Establishment of legal persons

- Establishment – **permanent or semi-permanent**; **primary** (LP registration / main seat) or **secondary** (agencies, branches, subsidiaries – not necessarily separate LP) establishment
 - Non-temporary presence and genuine economic activity (Cadbury Schweppes 2006; Stauffer 2006 property of IT charity in DE not actively managed, so Art 63 TFEU applies)
 - Passive investment rather capital, active participation in company management rather establishment (Baars 2000; Oy AA 2007)
- **Restrictions by home state**
 - Right of departure while maintaining same legal personality (Daily Mail 1988 from UK to NL; pre-authorisation by home state are allowed - different from natural persons)
 - Physical conversion (VALE 2012 firm transferred its head office and activity to HU), Polbud 2017 (PL firm emigrated into LU registry, keeping place of business in PL; winding up in PL as required was a breach not proportionately justified)
 - Secondary establishment (X AB & Y AB 1999 tax benefits; Centros 1999 emigrating main activity)
- **Access to the market in host state**
 - Both primary and secondary establishment covered by Art 55 TFEU. Secondary (Somafer 1978 characteristics of a branch etc, no definition; Com v DE insurance: not relevant how the establishment is qualified under host state law)
 - Effective right (Com v IT securities dealing: no exclusive form for specific trade; Segers 1986 social guarantees for employees; Com vs FR 1986 tax credits, Royal Bank of Scotland 1999: no tax preference for domestic firms)
 - Other than primary or secondary establishment; cross-border mergers included (SEVIC 2005); changing flag of a vessel as well (Viking Line 2007)
 - National insolvency rules are not in breach of establishment rights (Kornhaas 2015)

D3. Establishment of legal persons

- Looking for lower standards of establishment (Centros 1999 established by Danes in UK with no activity, then having a branch in DK with higher capital requirements; Inspire Art 2003)
 - Legal standing (Überseering 2002, a NL firm owned by DE nationals ought to be registered in DE pursuant DE law of *siège réel*; in breach of Art 49 and 54 TFEU)
- No restrictions to activity (Com v IT trade fairs pre-authorisation not allowed; Com v IT 2009 motor insurance closed list not allowed; Neri 2003 non-recognition of foreign degrees by IT not proportionate)
- Taxation
 - MSS are free to determine tax units, tax base, tax rate, and tax administration (fiscal autonomy)
 - How fiscal autonomy is exercised may be regulated by Union law (Com v UK 1991)
 - Usually residents and non-residents are treated distinctively, as is legitimate (principle of territoriality) (Futura Participations 1997)
 - Double Taxation Conventions allow home states to alleviate tax conditions but it is not a breach not to do so (in principle confirmed by Marks & Spencer 2005; Oy AA 2007)
 - In Innoventif 2006 discrimination has been taken into account: less favourable factual or legal situation

D4. Justifications

- Express derogations Art 45(3), 52, 62 TFEU
 - Particularly restrictive interpretation if citizens of the EU concerned (Orfanopoulos 2004)
 - Subject to proportionality and fundamental human rights (ERT 1991), exhaustive (FDC 1993), not applied in positively harmonised areas (Com v ES 2000 architects), no economic purposes (Bond 1988)
 - **Public policy, public security** – may vary from country to country and from time to time (Van Duyn 1974), no uniform scale (Jany 2001); public security (K 2018 CR suspected war criminal in NL)
 - **Individual conduct** (Art 27(2) CRD) (Bonsignore 1975 deportation of a convict; Van Duyn 1974 Scientology; Wahl 2013 Hell’s Angels; Adoui & Cornuaille 1982 prostitutes; Jipa 2008; Calfa 1999)
 - Exception Bogendorff von Wolffersdorff 2016 (change of name by a DE national in UK)
 - For **deportation** (“negates the very right conferred and guaranteed by the Treaty” Watson & Belmann 1976): genuine and sufficiently serious threat to a fundamental interest of society (conviction not enough); degree of integration, human rights and proportionality taken into account
 - Procedural requirements: notice, a month to leave (except urgency), right to appeal
 - Time limits: up to 3 m all three, 3 m – 5 y only public policy and security, 5–10 y serious grounds of the two, from 10 y (or if a minor) imperative grounds of public security
 - Other **restrictions**: fines (Pieck 1980 breach of formalities), territorial limits (Rutili 1975, Olazabal 2002)
 - Legal persons (Omega 2004 killing game, Centros 1999 tax evasion, Eglise de Scientology 2000)
 - **Public health** – Art 29(1) CRD, only initial entry (to 3 m), free medical inspection may be requested

D4. Justifications

- **Public service** exception Art 45(4) TFEU (narrowly construed Sotgiu 1979)
 - Participation in the exercise of powers conferred by public law and [?] duties designed to safeguard the interests of the State or of other public authorities (Com v BE 1982)
 - Teachers, railway posts, LG employees, lawyers, lower echelons of civil service not included
 - Local architects, supervisors, night watchmen included
 - Establishment Art 51; services Art 62 TFEU – **official authority**
 - Reyners (1974) *avocat* not in direct and specific connection with official authority
 - Traffic accident expert, data system designer, vehicle inspector, court translator, notary, certification bodies, security guards, insurance firms monitor not included
 - Art 51 TFEU does not extend to ancillary or preparatory activities; activities, even compulsory, that leave intact the discretionary powers of administrative and judicial authorities; which do not involve exercise of decision-making, enforcement, or coercion powers (Com v HU notaries 2017)
- **Public interest**: non-discriminatory, justified by imperative requirements, suitable, not go beyond (Gebhard 1995)
 - E.g. protection of intellectual property (Coditel 1980), recipient of service (Willy van Wesmael 1979), workers (Webb 1981), consumers (Com v FR 1986), national historic and artistic heritage (Com v IT 1991), cultural policy (Gouda 1991); quality of skilled work (Corsten 2000), creditors and shareholders (Überseering 2002), memory of the deceased (Memoria Srl 2018), environment (De Coster 2001), tourism (Yellow Cab 2010), sustainable settlement (EFTA v NO 2006), road and maritime safety (van Schaik 1994, Navileme 2014), reputation of financial markets (Alpine Investments 1995), civil liberties (Omega 2004, Sayn-Wittgenstein 2010), prevention of social dumping or unfair competition (Laval 2007, Wolff & Müller 2004), SMEs (Geurts 2007), services between islands (Analir 2001), language (Las 2013), student mobility (Thiele Meneses 2013), legal order and certainty...
 - Applied in a **proportionate** manner, with **good governance** (Kraus 1993 LLM degree), respecting fundamental **human rights** (Rendón Marín 2016 rights of child)

D5. Approximation of laws

- Negative vs positive harmonisation
 - Dynamics: Single European Act 1986 allowed qualified majority voting (cooperation, then co-decision, now ordinary legislative procedure) in the Council (Art 114 (then Art 100a) TFEU) to adopt ca 300 acts eliminating physical, technical and fiscal barriers
 - Art 114(1) as general rule (VAT 2006) intended for approximation of MS laws (ECS 2006)
 - Derogations: 114(4-5), notification, Commission scrutiny 114(6)
 - Non-legislative acts: delegated (290 TFEU) and implementing (291 TFEU) acts
- Types of harmonisation
 - **Mutual recognition** (Cassis de Dijon 1979), Regulation 2019/515
 - **Exhaustive** (or full) harmonisation
 - Cf Art 3(1) and 7 of the **extinct** Council Directive 76/768/EEC of 27 July 1976 on the approximation of the laws of the Member States relating to cosmetic products <http://data.europa.eu/eli/dir/1976/768/oj>; Art 4 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights <http://data.europa.eu/eli/dir/2011/83/2018-07-01>
 - Art 36 TFEU in such occasions not applicable (Van Bennekom 1983)
 - Subordinate legislation, comitology may enhance flexibility
 - **Optional** harmonisation – free movement clause but no exclusivity clause
 - **Minimum** harmonisation – MSS may choose higher standards, as much the Treaties allow
 - Buet 1989 doorstep selling Art 8 Dir 85/577, FR prohibitive law was in breach of Art 34 TFEU but justified
 - Reverse discrimination, higher standards do not affect trade between MSS (Compassion in World 1998)

D5. Approximation of laws

- **New approach**, safety directives
 - Safety standards, technical specification, certification, presumption of conformity, enforcement
 - E.g. Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys
<http://data.europa.eu/eli/dir/2009/48/2019-11-18>
- **Reflexive** harmonisation - self-regulatory process promoted
 - Targets, monitoring, evaluation, mutual learning processes
 - E.g. Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees
<http://data.europa.eu/eli/dir/2009/38/2015-10-09>
- Enhanced cooperation (e.g. Unitary patent 2013; EPPO)
- Better regulation standards
 - Overregulation: better is not always less or a matter of priorities, but achieving policy goals

C8. TFEU: Approximation of Laws

TITLE VII - COMMON RULES ON COMPETITION, TAXATION AND APPROXIMATION OF LAWS

CHAPTER 3 - APPROXIMATION OF LAWS

Article 114 (ex Article 95 TEC)

1. **Save where otherwise provided in the Treaties**, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the **ordinary legislative procedure** and after consulting the Economic and Social Committee, **adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States** which have as their object **the establishment and functioning of the internal market**.

2. Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.

3. The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective.

4. If, after the adoption of a harmonisation measure by the European Parliament and the Council, by the Council or by the Commission, a Member State deems it necessary to **maintain national provisions on grounds of major needs referred to in Article 36, or relating to the protection of the environment or the working environment**, it shall notify the Commission of these provisions as well as the grounds for maintaining them.

5. Moreover, without prejudice to paragraph 4, if, after the adoption of a harmonisation measure by the European Parliament and the Council, by the Council or by the Commission, a Member State deems it necessary to **introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure**, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them.

C8. TFEU: Approximation of laws

6. The Commission shall, **within six months of the notifications as referred to in paragraphs 4 and 5, approve or reject the national provisions involved** after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they shall constitute an obstacle to the functioning of the internal market. In the absence of a decision by the Commission within this period the national provisions referred to in paragraphs 4 and 5 shall be deemed to have been approved.

When justified by the complexity of the matter and in the absence of danger for human health, the Commission may notify the Member State concerned that the period referred to in this paragraph may be extended for a further period of up to six months.

7. When, pursuant to paragraph 6, a Member State is authorised to maintain or introduce national provisions derogating from a harmonisation measure, the Commission shall immediately examine whether to propose an adaptation to that measure.

8. When a Member State raises a **specific problem on public health** in a field which has been the subject of prior harmonisation measures, it shall bring it to the attention of the Commission which shall immediately examine whether to propose appropriate measures to the Council.

9. By way of derogation from the procedure laid down in Articles 258 and 259, the Commission and any Member State may bring the matter directly before the Court of Justice of the European Union if it considers that another Member State is making improper use of the powers provided for in this Article.

10. The harmonisation measures referred to above shall, in appropriate cases, include a **safeguard clause authorising the Member States to take, for one or more of the non-economic reasons referred to in Article 36, provisional measures** subject to a Union control procedure.

Article 115 (ex Article 94 TEC)

Without prejudice to Article 114, the Council shall, acting **unanimously** in accordance with a **special legislative procedure** and after consulting the European Parliament and the Economic and Social Committee, issue **directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market.**

C8. TFEU: Approximation of laws

Article 116 (ex Article 96 TEC)

Where the Commission finds that a difference between the provisions laid down by law, regulation or administrative action in Member States is **distorting the conditions of competition** in the internal market and that the resultant distortion needs to be eliminated, it shall consult the Member States concerned.

If such consultation does not result in an agreement eliminating the distortion in question, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall issue the necessary directives. Any other appropriate measures provided for in the Treaties may be adopted.

Article 117 (ex Article 97 TEC)

1. Where there is a reason to fear that the adoption or amendment of a provision laid down by law, regulation or administrative action may cause distortion within the meaning of Article 116, a Member State desiring to proceed therewith shall consult the Commission. After consulting the Member States, the Commission shall recommend to the States concerned such measures as may be appropriate to avoid the distortion in question.

2. If a State desiring to introduce or amend its own provisions does not comply with the recommendation addressed to it by the Commission, other Member States shall not be required, pursuant to Article 116, to amend their own provisions in order to eliminate such distortion. If the Member State which has ignored the recommendation of the Commission causes distortion detrimental only to itself, the provisions of Article 116 shall not apply.

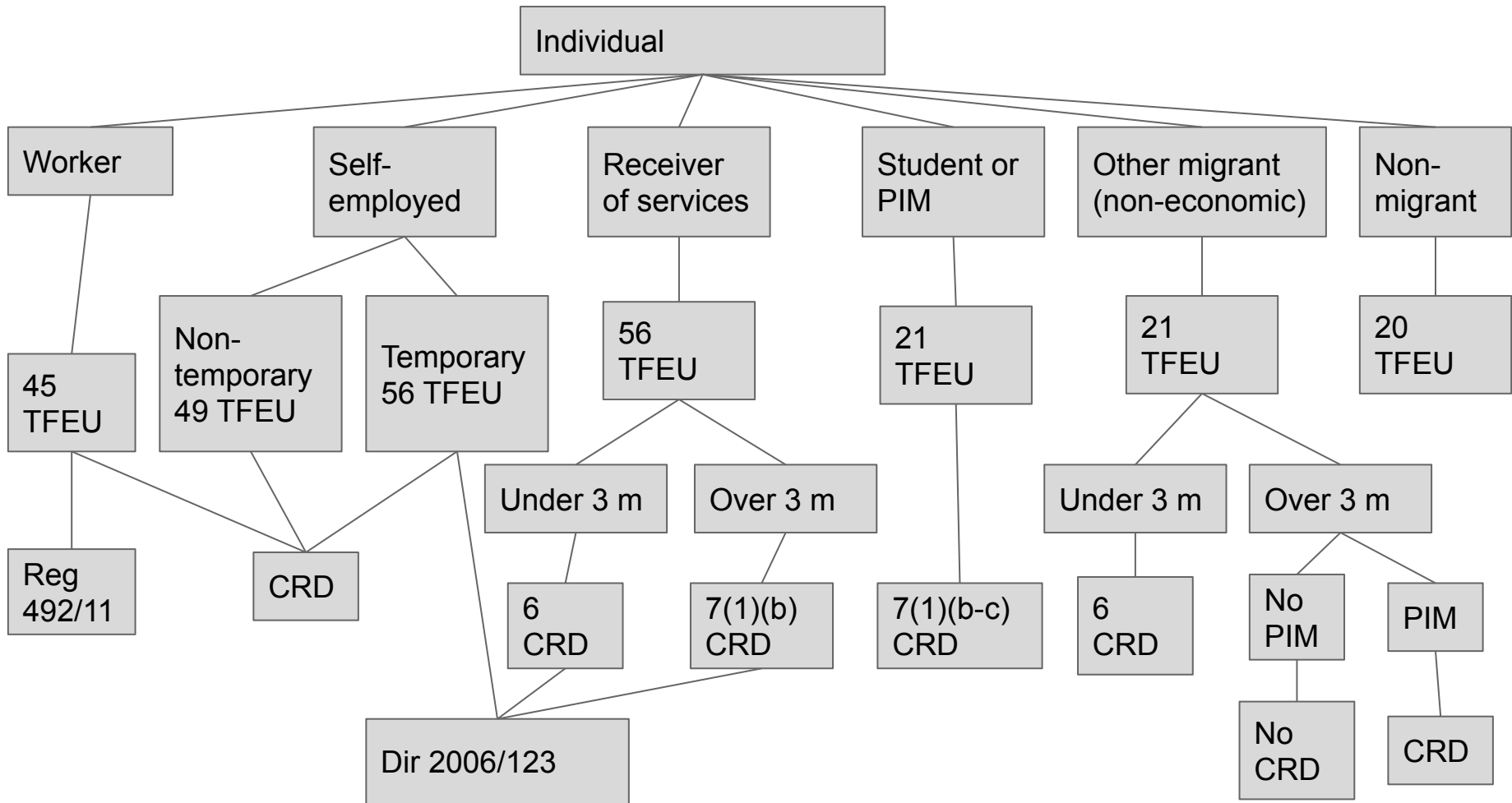
Article 118

In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of **European intellectual property rights** to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements.

The Council, acting in accordance with a special legislative procedure, shall by means of regulations establish language arrangements for the European intellectual property rights. The Council shall act unanimously after consulting the European Parliament.

E. Free Movement of Persons

- Categories
 - **Worker** Art 45(1) TFEU – broad meaning, **under control** of an employer (Unger 1964, Levin 1982; Lawrie-Blum 1986 for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration)
 - The sphere of employment (Walrave & Koch 1974), the nature of legal relationship (Sotgiu 1974, Haralambidis 2014), whether the worker lives in the host state (Caves Krier Frères 2012, Bechtel 2017) are **immaterial**
 - Genuine and effective **economic activity** (includes professional football Bosman 1995; apprentice Kurz 2002, trainee Kranemann 2005, working for a religious community for pocket money and food Steymann 1988)
 - Paid activity as part of drug rehab programme is not (Bettray 1989, cf Trojani 2004)
 - Not just in such a small scale as to be purely marginal and ancillary (Raulin 1992 on-call worker dubious); part-time work is work (Levin 1982 chambermaid, Kempf 1986 musician) even if paid under minimum or if livelihood not ensured (Vatsouras 2009)
 - Includes those **seeking work** (Martínez Sala 1998, Collins 2003), at least during 3 months or after, if there is a genuine chance to be employed (Antonissen 1991, Com v BE 1997 duty to leave after the period is in breach of Art 45). Cf Art 14(4)(b) CRD.
 - **Self-employed** Art 49 TFEU – **outside of subordination**, paid directly and in full (Jany 2001 prostitutes)
 - Activities of an industrial or commercial character, of craftsmen, or of professions (Barkoci & Malik 2001), participation, on a stable and continuous basis, in the economic life of a MS other than his state of origin and to profit therefrom (Gebhard 1995)
 - Art 7(3) CRD: **incapacitated, involuntarily unemployed job-seekers, on vocational training** (Saint Prix 2007)



E1. TFEU: Workers

CHAPTER 1 - WORKERS

Article 45 (ex Article 39 TEC)

1. Freedom of movement for workers shall be secured within the Union.
2. Such freedom of movement shall entail the **abolition of any discrimination based on nationality** between workers of the Member States as regards **employment, remuneration and other conditions of work** and employment.
3. It shall entail the right, subject to **limitations justified on grounds of public policy, public security or public health**:
 - (a) to **accept offers** of employment actually made;
 - (b) to **move freely** within the territory of Member States for this purpose;
 - (c) to **stay in a Member State for the purpose of employment** in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
 - (d) to **remain in the territory of a Member State after having been employed** in that State, subject to conditions which shall be embodied in **regulations to be drawn up by the Commission**.
4. The provisions of this Article shall **not apply to employment in the public service**.

E1. TFEU: Workers

Article 46 (ex Article 40 TEC)

The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, issue directives or make regulations setting out the measures required to bring about freedom of movement for workers, as defined in Article 45, in particular:

- (a) by ensuring close cooperation between national employment services;
- (b) by abolishing those administrative procedures and practices and those qualifying periods in respect of eligibility for available employment, whether resulting from national legislation or from agreements previously concluded between Member States, the maintenance of which would form an obstacle to liberalisation of the movement of workers;
- (c) by abolishing all such qualifying periods and other restrictions provided for either under national legislation or under agreements previously concluded between Member States as imposed on workers of other Member States conditions regarding the free choice of employment other than those imposed on workers of the State concerned;
- (d) by setting up appropriate machinery to bring offers of employment into touch with applications for employment and to facilitate the achievement of a balance between supply and demand in the employment market in such a way as to avoid serious threats to the standard of living and level of employment in the various regions and industries.

Article 47 (ex Article 41 TEC)

Member States shall, within the framework of a joint programme, encourage the exchange of young workers.

E1. TFEU: Workers

Article 48 (ex Article 42 TEC)

The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, they shall make arrangements to secure for employed and self-employed migrant workers and their dependants:

- (a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;
- (b) payment of benefits to persons resident in the territories of Member States.

Where a member of the Council declares that a draft legislative act referred to in the first subparagraph would affect important aspects of its social security system, including its scope, cost or financial structure, or would affect the financial balance of that system, it may request that the matter be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, the European Council shall, within four months of this suspension, either:

- (a) refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure; or
- (b) take no action or request the Commission to submit a new proposal; in that case, the act originally proposed shall be deemed not to have been adopted.

E1. Workers

- Rights stipulated in Art 45(2) TFEU, **rights to leave home state** (Masgio 1991), **to enter another state, and to pursue economic activity there** (Roux 1991, Terhoeve 1999)
- Secondary law: Dir 68/360 (now CRD) on entry and residence, Reg 1612/68 (now 492/11, partially CRD) on free movement, Reg 1251/70 (now CRD) on the right to remain; **today** in addition to TFEU:
 - **Regulation** (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on **freedom of movement for workers within the Union** <http://data.europa.eu/eli/reg/2011/492/2019-07-31>
 - **CRD = Directive** 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on **the right of citizens** of the Union and their family members to move and reside freely within the territory of the Member States <http://data.europa.eu/eli/dir/2004/38/2011-06-16>
 - Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers <http://data.europa.eu/eli/dir/2014/54/oj>
 - The right of residence is fundamental, not dependent of a residence permit (Watson & Belmann 1976)
- **Access** to employment
 - Direct discrimination (Bosman 1997, Com v IT security firms 2001, Com v FR 1971 recruiting ratio of seamen)
 - Indirect discrimination, e.g period or residence requirements (Scholz 1994, Collins 2004), language requirements (Groener 1989 Gaelic justified; Angonese 2000 bilingualism certificate for Bolzano; LAs 2013)
 - Market access / restrictions approach (Bosman 1995 football, Lyyski 2007 access to training in Umeaa)

E1. Workers and self-employed persons

- Equal treatment while having employment (**exercise**)
 - Working conditions (Allué & Coonan 1989 term for foreign language lecturers; Clean Car 1998 managers' residence duty; Schönig-Kougebetopoulou 1998 seniority in promotion conditions)
 - Tax conditions (Schumacker 1995, Renneberg 2008, Com v DE 2008 dwelling subsidy; Bachmann 1992 justifications)
 - Social advantages (defined broadly Even 1979; Hartmann 2007, NL v Reed 1986 cohabitating companion), includes family members, work-seekers, social assistance to be provided (Brey 2013)
 - Real link test (Collins 2004) to justify benefits – between person and state providing benefits; proportionately applied, minimum period of residence as such is a breach
 - Vocational training (Gravier 1985, Com v AT 2005, Lair 1988 grants)
 - Equal treatment (ASTI 1991, 1994 trade union eligibility, Com v GR 1989 right to own property)
- Establishment for non-workers: departure, entry, residence, deportation
 - In addition to Art 49 etc. TFEU, Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, repealed by CRD
 - Home state is prohibited from hindering its nationals the establishment in another MS;
 - Right of residence does not depend on registration in the host state (probative, not constitutive residence permit) (Royer 1976);
 - Deportation of non-registered residents breaches Art 49 TFEU (Roux 1991)
- Self-employment in a host state: access and exercise

E2. Self employed persons: access, exercise

- **Primary** (permanent) and **secondary establishment** covered (Klopp 1984 DE Rechtsanwalt acting as an avocat in FR, right to have more than one establishments)
 - Discrimination, national treatment (Reyners 1974 NL national acting as BE avocat)
 - Indirect discrimination, e.g licenses, qualifications – dual burden, unless justified (Gullung 1988 FR requirement to be registered at the Bar, for supervision and ethics; Vlassopoulou 1991, for organisation of the profession)
 - Non-discriminatory restrictions, hindering market access (since Gebhard 1995 DE lawyer acting as avvocato) allowed if non-discriminatorily applied, justified by imperative requirements, proportionate (Haim 2000 language test for dentists; Wouters 2002 NL ban on multi-disciplinary partnerships; Apothekerkammer des Saarlandes 2009 exclusion of non-apothecaries from ownership); broad range of justifications accepted
 - Mere differences between national rules not restrictive, e.g maximum fees for lawyers in IT (Com v IT 2011)
- **Exercise** of a profession
 - Discrimination (Com v IT 2001 non-Italian dentists losing their national registration in IT; Com v BE 1999 residence time in BE for registering aircraft)
 - Indirect discrimination (Fearon 1985 IE conditions on acquisition of land, justified)
 - Restrictions (Konstantinidis 1993 correction of name in DE registry, spelling of name; Skanavi 1996 change of driving license unproportionately punished; Kemmler 1996 double request for social contributions by host state)
 - Social advantages (Steinhauser 1985 tender for artists' booths in FR; Com v IT 1988 social housing; Com v GR 1989 ban on buying houses)
 - Tax advantages (Wielockx 1995 pension deductions in NL; Asscher 1996 NL resident not benefitting from residence in NL while working in BE; De Lasteyrie du Saillant 2004 income tax due while leaving FR)

E2. Self-employed persons: qualifications

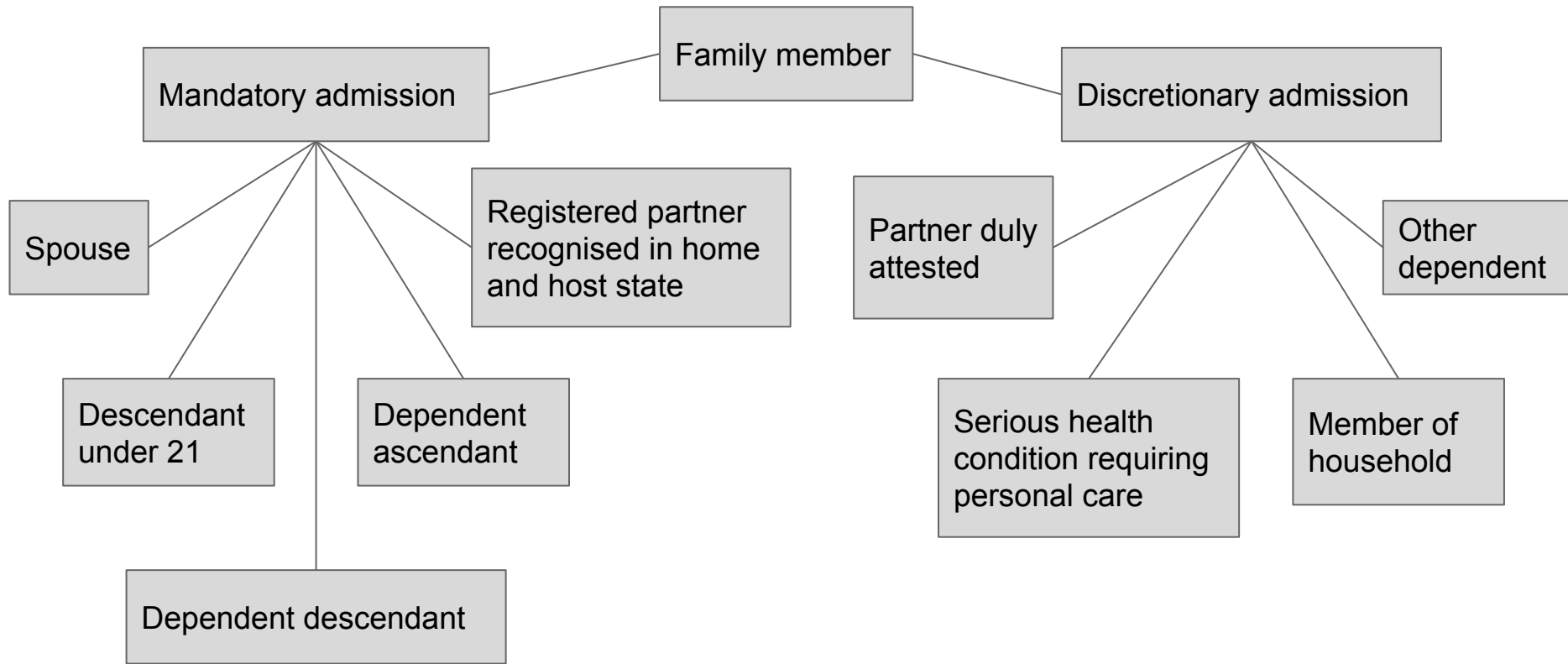
- Art 53 TFEU and secondary law (architects 85/384; *vertical directives on doctors, nurses, dentists, vets 75/362, 75/363, 77/452, 78/686 repealed by RPQ; small crafts, food and retail 64/427 etc repealed by RPQ; building industry 64/224 repealed by RPQ; lawyers 77/249, 98/5 – set minimum training requirements and recognition of equivalence principles)
 - Not all professions covered (Patrick 1977 UK architect in FR), rule of national treatment
 - Mutual recognition (Vlassopoulou 1991): comparison of qualifications, partial check, reviewable at court
- *Horizontal directives: Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration, Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC, Directive 1999/42/EC of the European Parliament and of the Council of 7 June 1999 establishing a mechanism for the recognition of qualifications in respect of the professional activities covered by the Directives on liberalisation and transitional measures and supplementing the general systems for the recognition of qualifications – professional recognition of equivalences, but allowed additional requirements if deficiencies – all repealed by RPQ
- RPQ = Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications <http://data.europa.eu/eli/dir/2005/36/2019-04-15>
 - Exercise of a regulated profession in another MS than where qualification obtained (Art 45, 49, 56 TFEU)
 - Professional qualifications: formal qualification, attestation of competence, professional experience
 - Providing services (documentary evidence) or establishment (general / special rules of recognition)
 - To be interpreted subject to Art 49 TFEU (Com v ES 2008 pharmacists)
 - General: mutual recognition, compensatory measures if substantive differences, five levels
 - If the profession is not regulated in home state, 2 years full-time experience suffices
 - Aptitude test or adaptation period of three years may be required under conditions
 - Special: automatic recognition for industrial, commercial, crafts; medical professions, architects⁵⁹

E3. Free movement of EU citizens

- Tindemans Report 1974 Europe for Citizens, Adonnino Report 1985 People's Europe, TEU 1992
 - Economic v **social** citizen; rights and duties, membership, participation (classification by D. Held 1991)
 - Art 20(2) TFEU citizen's rights, non-exhaustive list; Art 18 non-discrimination
 - Charter rights, enforceable against home or host state or (in limited areas) the EU
 - Duties (incl taxes) towards state; the state has the main role in safeguarding rights
 - Art 3(2) TEU, TFEU 1997: Area of freedom, justice and security without internal frontiers; external border controls, asylum, immigration, prevention and combating of crime
- Art 21(1) TFEU – right to move and reside in MSS subject to treaty and secondary law limitations
 - Economic activity not necessary (Grzelczyk 2001; Baumbast 2002, Chen 2004 baby born in NI to Chinese parents had IE and thus EU nationality and right to reside in UK)
 - Right to leave home state (Byankov 2012)
 - Initial right of entry into another MS (Yiadom 2000)
 - Right to reside in another MS despite economic activity (Baumbast 2002)
 - Right to enjoy social advantages without discrimination (Bickel & Franz 1998, Rüffler 2014, Martínez Sala 1998)
 - Right to have decisions against them reviewed regularly (Byankov 2012)
 - Codified in CRD 2004/38 <http://data.europa.eu/eli/dir/2004/38/2011-06-16>
 - Interpreted extensively, in effective manner (Metock 2008) but with conditions (Brey 2013, Dano 2014)

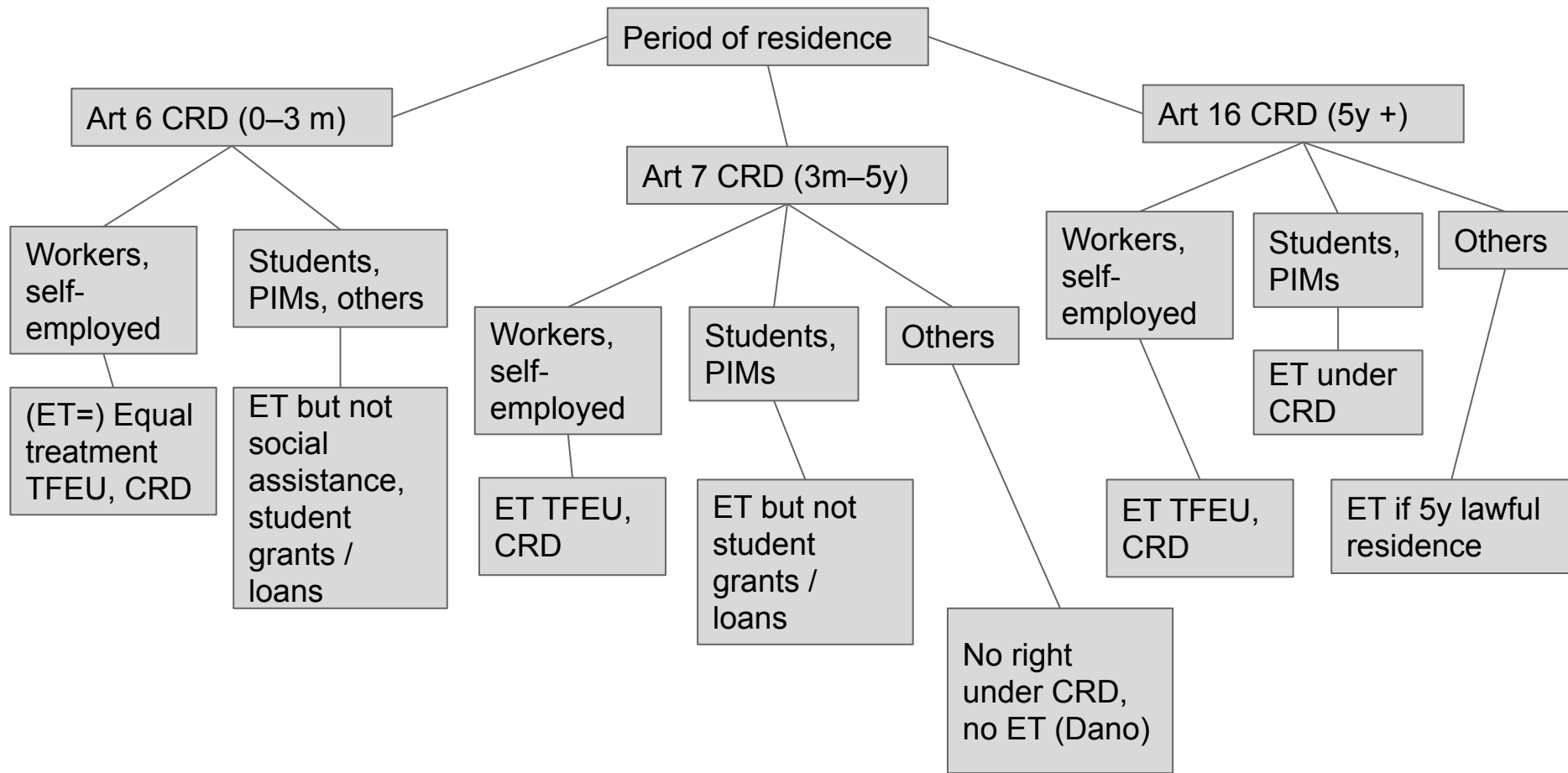
E3. Free movement of citizens: CRD

- Personal scope
 - **MS nationals** who **move or reside** to another MS covered, not those staying at home state (Lounes 2017 from ES had become UK national, her Algerian husband should not be treated less favourably than of a EU citizen recently moved; Coman 2018 RO national with US gay husband moved from BE to RO, RO lack of recognition should not limit the freedom)
 - **Family members, irrespective of nationality**, who **accompany or join** MS national in another MS:
 - Spouse (despite gender Coman; Diatta 1985 separated, CRD requires 5 years continuously in one MS, Singh 2015; Onuekwere 2014 prison term not counted),
 - Divorcee not covered but Art 13 CRD certain rights,
 - Cohabitees under discretion if durable and duly attested relationship Art 3(2)(b) CRD (cf Reed 1986),
 - Marriages of convenience MS discretion Art 35 CRD, forced marriages not covered,
 - Polygamous marriages are not required to be recognised but due account of the children interest,
 - TCN unlawful immigrants marrying EU nationals now covered (Akrich 2001, Metock 2008 'joined'),
 - Registered partners if recognised in home and host states Art 2(2)(b) CRD;
 - Descendants under 21 years and dependent descendants and ascendants - of the EU citizen, spouse or registered partner (Lebon 1987 matter of fact, Jia 2007 need of material support; voluntary support without need may not be enough),
 - Dependents or members of household in state of origin, or those with serious health condition, **under discretion**, duty to facilitate, as non-registered partners; duty of the MS to justify denial (Rahman 2012; Banger 2018 right to review)



E3. Free movement of citizens

- Content
 - Right to
 - **Depart** (Masgio 1991; Bosman 1995; Jipa 2008; identity card or passport; passport for TCN; state's duty to renew the document, five years minimum validity; no visas allowed; expiry of the document no basis for expulsion)
 - **Enter** (Messner 1989; travel document may be required; no visa requirement for EU nationals; MRAX 2002, may not require from TCN if marital ties otherwise attested; Com v BE 1989 residence permits may not be regularly checked; Com v NL 1991 purpose of travel questionnaire not allowed; Wijzenbeek 1999 identity checks lawful; melding duty of residents lawful, deportation for non-compliance unproportionate Watson & Belmann 1976)
 - and **return** (Surinder Singh 1992; Eind 2007 NL national returning from UK with TCN daughter; O & B 2014)
 - Rights to residence in a host state
 - **Up to three months** economically active or not, unless unreasonable burden on the social assistance system (SAS) of the host state (Cowan 1989 tourists as recipients of services)
 - **Three months to five years**, if:
 - **Worker or self-employed**
 - **PIM** = Persons of independent means – if with family not a burden on SAS and medical insurance (e.g retired persons Gunnarsson EFTA case 2014)
 - **Students** enrolled in an institution, accredited or financed by host state with medical insurance, and declared having sufficient resources (with limited family), may be annual; no right to equal treatment regarding maintenance aid for students (Art 24(2) CRD)
 - **Family members** accompanying or joining EU nationals, **incl TCN**.
 - **Five years and beyond** (Art 16 CRD; permanent residence), incl workers and self-employed with shorter period, if conditions met (Art 17 CRD)

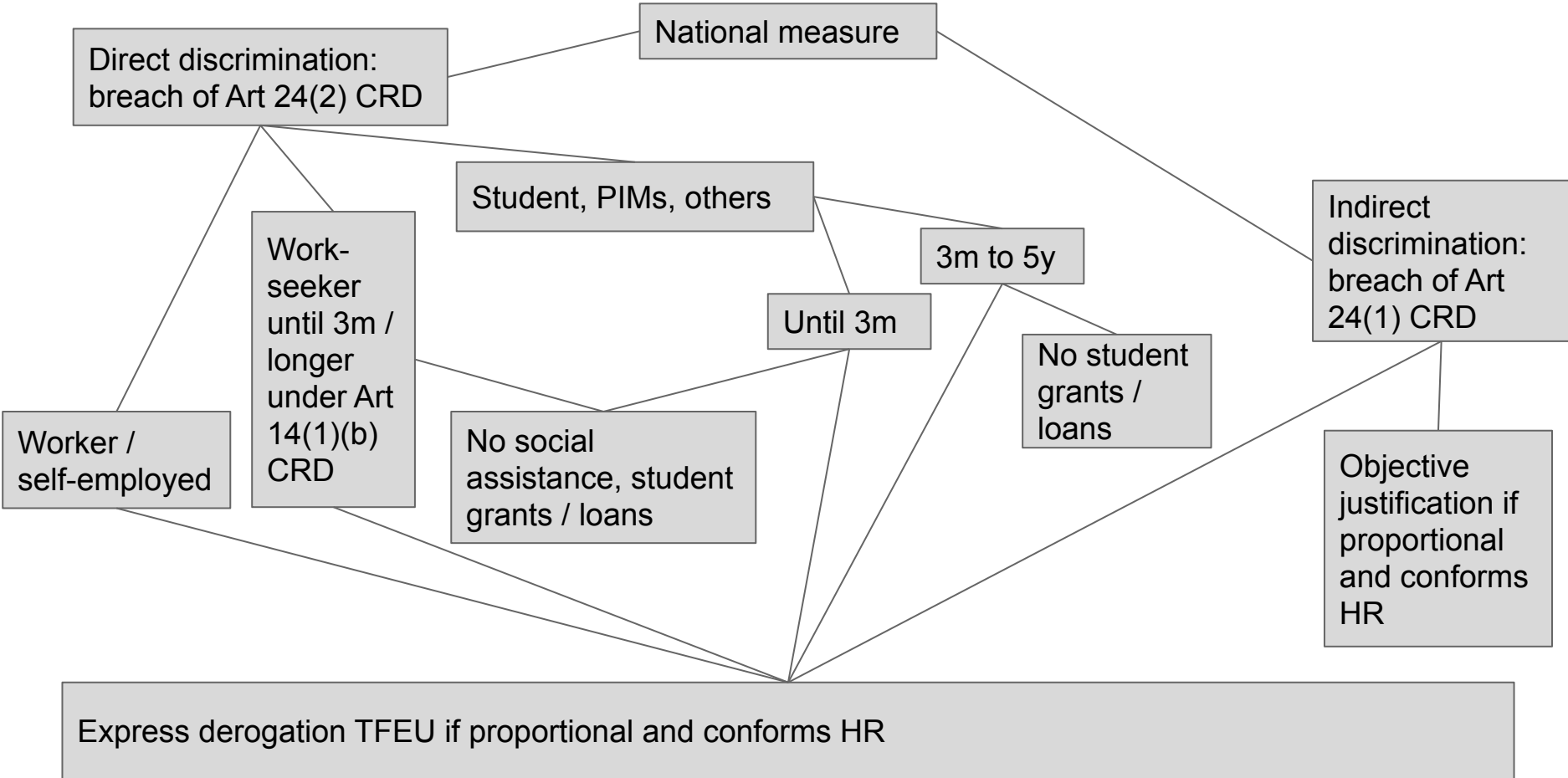


E3. Free movement of citizens

- Concepts
 - **SAS** - all assistance introduced by public authorities, that can be claimed by an individual who does not have resources sufficient to meet his own basic needs and the needs of his family (Brey 2013); MS may lay down a fixed amount but have to take into account circumstances.
 - Checks may be undertaken to ensure existence, amount and availability of the resources (Com v BE 2006 Portuguese migrants)
 - Legal link between the owner of the resources and the beneficiary PIM is not required (same case)
 - **Sickness insurance** - private or public, contracted in the host state or elsewhere, if it provides comprehensive coverage (Baumbast 2002) and there is no burden on the public finances of the host state
 - **Pensions** (invalidity, early retirement, old age, industrial accident or disease) meet the requirements if the amount sufficient to avoid becoming a burden to the host state, and sickness insurance by the state paying the pension
- If the criteria are not met
 - Grzelczyk (2001 FR student in BE denied benefit other than maintenance for nationality and status - in breach of Art 21(2) TFEU; but issue if he had means enough to remain in BE)
 - Expulsion not the automatic consequence of having no means enough (Art 14(3) CRD)
 - COM guidelines on how to assess unreasonable burden: duration, personal situation, amount
 - Baumbast (2002 DE migrant with family in UK, having income and medical insurance in DE, no emergency cover in UK - non-extension of residence permit unproportional)
 - Dano (2014 RO migrant with son in DE supported by sister denied benefits - justified under Art 7(1)(b) CRD, no discrimination. **Lawful residence must precede equal treatment claim**)

E3. Free movement of citizens

- **Registration** requirements
 - May be required, not before 3m limit; certificate must be issued, provided that there is:
 - A valid ID/passport; certification of employment / self-employment / studies / independent means
 - Sanctions may be available, if proportionate and non-discriminatory
 - TCN family members must be issued a residence card within 6m, valid for 5y unless there are prolonged absences; renewal of registration may be required
 - Registration is secondary to rights (Martinez Sala 1998 valid certificate to obtain child benefit discriminatory; Oulane 2005 passport not needed if identity may be proved otherwise)
- Retired workers and self-employed enjoy **permanent residence** if employed for a year and resided for 3y.
 - If permanent incapacity, then 2y residence suffice; specific rules on frontier workers - Art 17(1) CRD
 - Time limits interpreted strictly (Givane 2003 gap in residence between death of long-time resident)
- **Equal treatment**
 - During 3m no duty to provide social assistance (no evaluation needed), if not worker / self-employed, those retaining their status, and their family; work-seekers not entitled to social assistance
 - After 3m access to social assistance provided but students, PIMs etc should not become an unreasonable burden on the social system (B v Baden-Württemberg 2018)
 - Maintenance aid for studies and trainings (grants, loans) may be requested by permanent residents and economically active EU citizens (workers, self-employed + families) only
 - Social advantages (Bidar 2005 FR national living in UK denied student loan by UK; Morgan 2007 too strict DE grant conditions; D'Hoop 2002 BE national returning home with FR baccalauréat and asking aid; García Avello 2003 BE refusal of changing surname; Tas-Hagen 2006 compensation for war victims if residents only; Nerkowska 2008)
 - Tax advantages (Pusa 2004 FI pensioner in ES; Schwartz 2007 schooling tax relief; Rüffler 2009 DE pensioner in PL)



E3. Free movement of citizens: family

- Family members **after death, departure or divorce** of the primary beneficiary
 - Right to **retain residence** (Art 12 CRD) - the rule; exceptions:
 - In the case of death (not departure), TCN family members retain the right if resided lawfully for one year
 - Of divorce and similar, only if marriage lasted 3y (incl 1y in host state), or the TCN has custody of children, or is a victim of domestic violence, or has a right to access the child in host state;
 - In order to become a permanent resident, a TCN has to be a worker/self-employed or PIM, or a family member of a person meeting those requirements;
 - Children of a dead or departed national (and their actual caretaker) will not lose residence, if enrolled in an educational institution, until completion of studies
- Rights of family members on equal treatment
 - Right to work - employment in the host state (Art 23 CRD), despite nationality
 - Right to schooling (incl vocational training) - children of employed EU national (Art 10 Reg 492/11; Gaal 1995; Casagrande 1974 financial assistance for schooling; Di Leo 1990 access to grants of host state even if studying elsewhere; Baumbast 2002 residence derived from Art 10 Reg; Ibrahim 2010 residence right of TCN caretaker derived from Art 10 Reg)
 - Right to housing - ex Art 10(3) Reg 1612/68, repealed by CRD
- Other aspects of EU citizenship here not covered

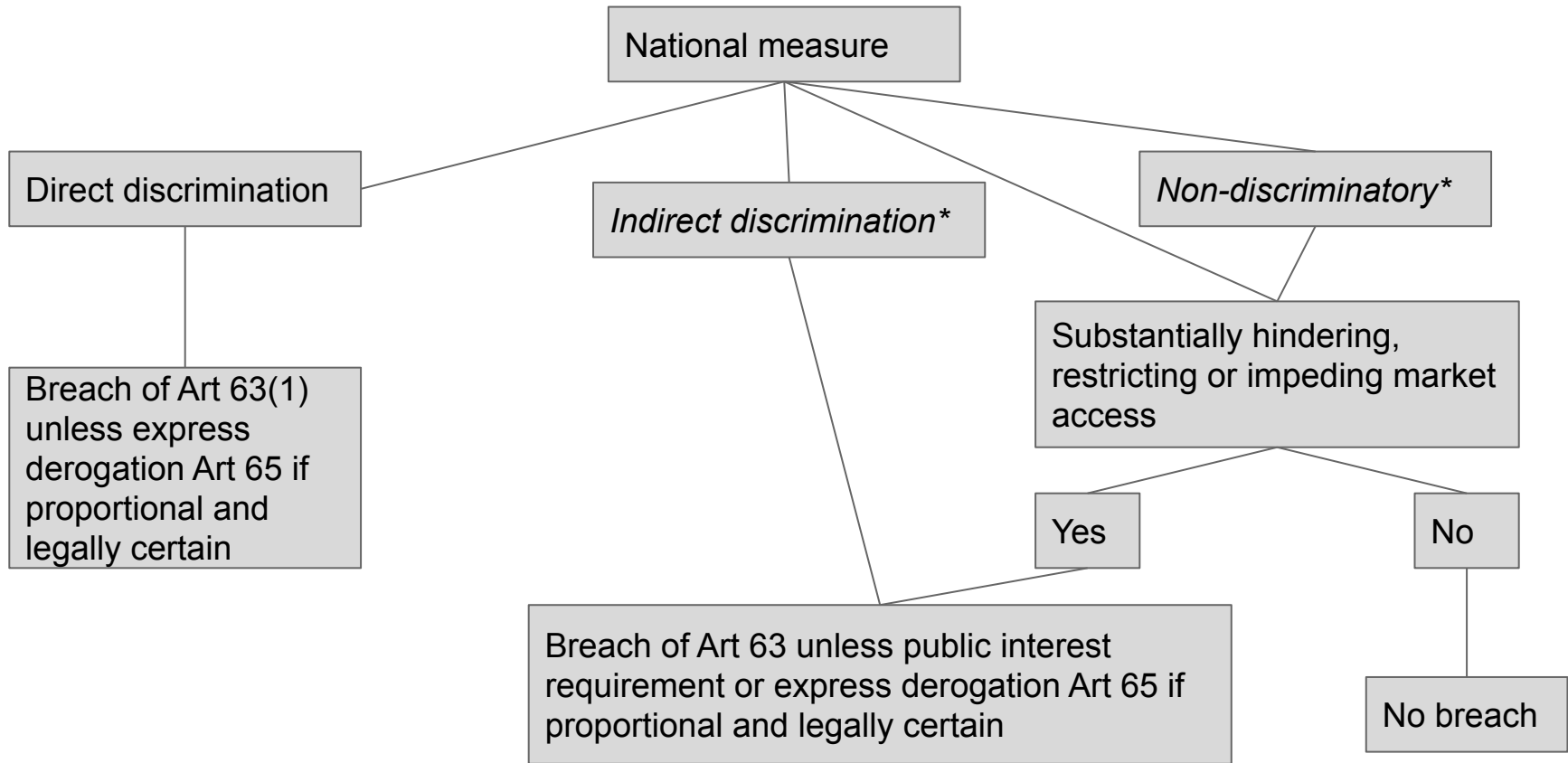
E4. Specific areas

Employment Art 145...150 TFEU

Social policy, Social Fund Art 151...164 TFEU

E. Free movement of capital and payments

- Dynamics: Art 67... TEEC*, Directives*, Casati 1981; Art 106 TEEC* on **payments**, ED Srl 1999, Lambert 1988
 - Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty <http://data.europa.eu/eli/dir/1988/361/oj>
- Definition based on the directive (Trummer & Mayer 1999); includes mortgages, inheritances, banknotes and coins, gifts in money or in kind, commercial credit, guarantees, also dividends (Hilten van der Heijden 2006; Bordessa 1995; Hein Persche 2009; Fidium Finanz 2006; Verkooijen 2000)
 - Not all money (Sanz de Lera 1995) is capital or payment
 - Limitation from other fundamental freedoms (payment usually connected)
 - Free movement of capital provisions only cover property purchase and investment (Konle 1999; Reisch 2002; Libert 2013); currency and other financial transactions (Bordessa 1995); loans (Com v BE 2000 Eurobond); investment in companies (Com v IT 2009 pharmacists); privatized companies (Com v FR 2002, Com v IT 2009, Barbier 2003)
- Intra-EU and **extra-EU** movement similarly covered, but restrictions available
- Direct effect of Art 63
 - Discrimination both on basis of nationality, but also residence and the place of investment are prohibited
 - Indirect discrimination and restriction included, parallel to other freedoms
- Justifications
 - Express derogations Art 65(1) TFEU – mainly tax policy – (see also Art 65(2))
 - Mandatory requirements that justify indirect discrimination or restrictions
 - Proportionality and legal clarity



F1. TFEU: Capital

CHAPTER 4 - CAPITAL AND PAYMENTS

Article 63 (ex Article 56 TEC)

1. Within the framework of the provisions set out in this Chapter, **all restrictions on the movement of capital** between Member States and between Member States and third countries shall be prohibited.
2. Within the framework of the provisions set out in this Chapter, **all restrictions on payments** between Member States and between Member States and third countries shall be prohibited.

Article 64 (ex Article 57 TEC)

1. The provisions of Article 63 shall be without prejudice to the application to third countries of any restrictions which exist on 31 December 1993 under national or Union law adopted in respect of the movement of capital to or from third countries involving direct investment – including in real estate – establishment, the provision of financial services or the admission of securities to capital markets. In respect of restrictions existing under national law in Bulgaria, Estonia and Hungary, the relevant date shall be 31 December 1999. In respect of restrictions existing under national law in Croatia, the relevant date shall be 31 December 2002.
2. Whilst endeavouring to achieve the objective of free movement of capital between Member States and third countries to the greatest extent possible and without prejudice to the other Chapters of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt the measures on the movement of capital to or from third countries involving direct investment – including investment in real estate – establishment, the provision of financial services or the admission of securities to capital markets.
3. Notwithstanding paragraph 2, only the Council, acting in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament, adopt measures which constitute a step backwards in Union law as regards the liberalisation of the movement of capital to or from third countries.

F1. TFEU: Capital

Article 65 (ex Article 58 TEC)

The provisions of Article 63 shall be without prejudice to the **right of Member States**:
to apply the relevant provisions of their **tax law** which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested;
to take all requisite measures to prevent **infringements of national law** and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security.

2. The provisions of this Chapter shall be without prejudice to the applicability of restrictions on the right of establishment which are compatible with the Treaties.

3. The measures and procedures referred to in paragraphs 1 and 2 shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63.

4. In the absence of measures pursuant to Article 64(3), the Commission or, in the absence of a Commission decision within three months from the request of the Member State concerned, the Council, may adopt a decision stating that restrictive tax measures adopted by a Member State concerning one or more third countries are to be considered compatible with the Treaties in so far as they are justified by one of the objectives of the Union and compatible with the proper functioning of the internal market. The Council shall act unanimously on application by a Member State.

Article 66 (ex Article 59 TEC)

Where, in exceptional circumstances, movements of capital to or from third countries cause, or threaten to cause, serious difficulties for the operation of economic and monetary union, the Council, on a proposal from the Commission and after consulting the European Central Bank, may take safeguard measures with regard to third countries for a period not exceeding six months if such measures are strictly necessary.

F2. Specific areas

Economic and Monetary Union Art 119...144 TFEU

Common Commercial Policy Art 206 TFEU

etc