EULAW

TEXT, CASES, AND MATERIALS

Paul Craig and Grainne de Burca
Second Edition

OXFORD UNIVERSITY PRESS
## CONTENTS

Preface vii
Abbreviations xxix
Acknowledgements xxxiii
Table of Cases xxxv
Table of Treaties, Instruments, and Legislation cxxv
Tables of Equivalences clxv

### PROLOGUE

1. THE DEVELOPMENT OF EUROPEAN INTEGRATION 3
   1. Introduction 3
   2. A Brief Overview of Analyses of Integration 5
   3. The History and Ideas Behind European Integration 7
   4. The EEC and Euratom Treaties 10
   5. 1966-86: From the Luxembourg Accords to the Single European Act 13
      (a) Crisis: The Luxembourg Accords 13
      (b) Enlargement of the Community 14
      (c) Political Co-operation 15
      (d) Developments in the Budgetary and Monetary Spheres 18
   6. The Single European Act 19
   7. The Treaty on European Union: Maastricht 24
      (a) Title I: The Common Provisions 25
      (b) Titles II-IV: Changes to the Community Treaties 26
      (c) The Two Intergovernmental Pillars 28
         (i) Pillar 2, Title V: Common Foreign and Security Policy (CFSP) 28
         (ii) Pillar 3, Title VI: Justice and Home Affairs 29
      (d) Enlargement of the Community after the TEU 29
   8. From Maastricht to Amsterdam 31
   9. The Treaty of Amsterdam 32
      (a) The Common Provisions 33
      (b) The Community Pillar 34
      (c) Pillar 2, Title V: The Common Foreign and Security Policy (CFSP) 39
      (d) Pillar 3, Title VI: Police and Judicial Co-operation in Criminal Matters (PJCC) 43
      (e) Title VII: Closer Co-operation 45
      (f) Title VIII: Final Provisions 46
   10. Conclusion 46
   11. Further Reading 48
      (a) Books 48
      (b) Articles 48
## 2. The Institutions

1. Introduction 49
2. The Commission 50
  (a) The College of Commissioners: Composition and Appointment 50
  (b) The Commission Bureaucracy 51
  (c) The Powers of the Commission 53
  (d) The Role of the Commission: Conclusion 56
3. The Council 57
  (a) Composition of the Council 57
  (b) The Presidency of the Council 58
  (c) The Committee of Permanent Representatives 59
  (d) The Council Secretariat 60
  (e) The Powers of the Council 60
  (f) The Role of the Council: Conclusion 62
4. The European Council 63
  (a) Composition 63
  (b) Rationale 64
  (c) Role 64
  (d) The Role of the European Council: Conclusion 65
5. The European Parliament 66
  (a) Composition 67
  (b) Parliament's Legislative Role 70
  (c) Parliament's Supervisory Role 72
  (d) Parliament as a Litigant 73
6. The European Court of Justice and the Court of First Instance 78
  (a) Composition and Structure of the Court of Justice 79
  (b) The Court of First Instance 81
  (c) The Role of the Advocate General 83
  (d) Procedure before the Court 83
  (e) Proposals for Reform 84
  (f) Style of the Court's Judgments 86
  (g) Role and Methodology of the Court 86
7. The Court of Auditors 95
8. Other Community Institutions 97
  (a) The Economic and Social Committee 97
  (b) The Committee of the Regions 97
  (c) Agencies 98
9. The Inter-institutional Dimension: The Budget 99
  (a) Introduction 99
  (b) Community Revenue 99
  (c) Community Expenditure 100
  (d) The Budgetary Procedure 101
  (e) The Budget and the Institutional Division of Power 102
10. Enlargement and the Structure of the Community 103
11. Further Reading
3. COMMUNITY LEGISLATION AND POLICY-MAKING 105
   1. Introduction 105
   2. The Types of Community Legislation 105
      (a) Regulations 106
      (b) Directives 108
      (c) Decisions 109
      (d) Recommendations and Opinions 109
      (e) Other Methods of Developing Policy 110
   3. Substantive and Procedural Conditions for the Legality of Community Action 110
      (a) Substantive Requirements: Internal 110
      (b) Substantive Requirements: External 115
      (c) Procedural Requirements 119
   4. Substantive and Procedural Conditions for the Legality of Community Action: Subsidiarity 124
      (a) The Community Must Act within the Limits of its Powers 124
      (b) The Exclusive Competence of the Community 124
      (c) The Subsidiarity Principle Itself 127
      (d) The Role of the Court 128
   5. The Legislative Process: Six Procedures 129
      (a) Commission Acting Alone 130
      (b) Council and Commission Acting Alone 131
      (c) Council, Commission, and Consultation with Parliament 131
      (d) Council, Commission, and the Co-operation Procedure with the European Parliament 132
      (e) Council, Commission, and European Parliament: The Article 251 (formerly 189b) Procedure 135
      (f) Council, Commission, and the European Parliament: Assent 137
      (g) The Exercise of Delegated Legislative Power by the Commission 138
      (h) The Seeds of Legislative Initiative for the Parliament: Article 192 (formerly 138b) 141
      (i) Legislative Initiative and the Council’s Use of Article 208 (formerly 152) 141
   6. The Voting Requirements in the Council 142
   7. The Reality of Community Decision-Making: The Temporal Dimension 143
   8. The Reality of Community Decision-Making: The Inter-institutional Dimension 146
      (a) Institutional Co-operation: Planning the General Legislative Strategy 146
      (b) Institutional Co-operation: Inter-institutional Agreements 148
      (c) Inter-institutional Co-operation and Conflict-Resolution: The Making of Particular Policies 150
   9. Democracy within the Community 155
10. Further Reading 161
4. THE NATURE OF EC LAW: DIRECT AND INDIRECT EFFECT 163
   1. Introduction 163
   2. The Conditions for Direct Effect 168
   3. The Direct Effect of Measures other than Treaty Provisions 175
      (a) Regulations and Decisions 176
      (b) International Agreements 179
      (c) Directives 185
   4. Giving Effect to Directives in Other Ways 193
      (a) Broadening the Concept of the State 194
      (b) 'Indirect Effect': Development of the Principle of Interpretation 198
      (c) 'Incidental' Horizontal Direct Effect? 206
      (d) State Liability in Damages for Non-implementation of a Directive 210
   5. Conclusion 211
   6. Further Reading 212
      (a) Books 212
      (b) Articles 212

5. THE APPLICATION OF EC LAW: REMEDIES IN NATIONAL COURTS 213
   1. Introduction 213
      (a) The Principle of National Procedural Autonomy 214
      (b) The Absence of an Obligation to Create New Remedies 215
      (c) National Penalties and Remedies for Breach of Community Law: The Requirements of Proportionality, Adequacy, and Effectiveness 217
      (d) A Conflict Between the Principle of Effectiveness and the Principle that National Courts need not Create New Remedies 220
      (e) Conflicts Between the Principle of Effectiveness and the Application of National Procedural and Jurisdictional Rules 223
   2. A Different Approach? The Express Creation of a 'Uniform' Remedy by the Court of Justice 236
      (a) The Novelty of Francovich 236
      (b) Conditions for Liability under Francovich 239
      (c) Brasserie du Pecheur/Factortame III: Clarifying the Basis of the Principle of State Liability 240
      (d) Clarifying the Conditions for State Liability in Brasserie du Pecheur/Factortame III 242
      (e) The Relationship Between the Community Principle of State Liability and the National Remedial Framework 247
      (f) The Relationship Between Existing National Remedies and the Community Damages Remedy 250
   3. Conclusion 252
   4. Further Reading 254
      (a) Books 254
      (b) Articles 254
6. THE RELATIONSHIP BETWEEN EC LAW AND NATIONAL LAW: SUPREMACY

1. Introduction 255
2. The First Dimension: Supremacy of Community Law from the Court of Justice's Perspective 256
3. The Second Dimension: Supremacy of Community Law from the Perspective of the Member States 264
   (a) France 264
   (b) Germany 268
   (c) Italy 276
   (d) The United Kingdom 280
4. Conclusion 291
5. Further Reading 294

7. GENERAL PRINCIPLES I: FUNDAMENTAL RIGHTS

1. Introduction 296
2. The Development of Fundamental Rights and General Principles as Standards Binding on the Community 299
   (a) The Court's Initial Resistance 299
   (b) A More Receptive Approach 300
   (c) The Court's Development of Fundamental Rights as Grounds for Annulment of Community Laws 301
3. The Sources of Fundamental Rights Derived by the Court 303
4. The Types of Rights Recognized and Their Use by the Court 308
5. Are the General Principles of Community Law and Fundamental Rights Binding on the Member States? 317
   (a) Member States Applying Provisions of Community Law which are Based on Protection for Human Rights 318
   (b) Member States Enforcing Community Policies and Interpreting Community Rules 320
   (c) Member States Derogating from Community Law Requirements 323
   (d) Limits to the 'Scope of Community Law' and to the Domestic Applicability of Community Fundamental Rights 328
6. The Response of the Political Institutions to the ECJ Development of Fundamental Rights 331
   (a) 'Soft' Approval of the ECJ’s Developments 331
   (b) The TEU and the ToA: 'Hard' Approval? 332
   (c) Fundamental Rights as a Source of Legislative Competence? 333
8. Conclusion 347
9. Further Reading 347
   (a) Books 347
   (b) Articles 347
8. GENERAL PRINCIPLES II: PROPORTIONALITY, LEGITIMATE EXPECTATIONS, NON-DISCRIMINATION, AND TRANSPARENCY 349

1. Introduction 349
2. Proportionality 349
   (a) The Role of Proportionality and Its Meaning 349
   (b) Proportionality and Challenges to Community Action 353
   (c) Proportionality and Challenges to Member State Action 355
3. Legal Certainty and Legitimate Expectations 357
   (a) Legal Certainty and Actual Retroactivity 357
   (b) Legal Certainty, Legitimate Expectations, and Apparent Retroactivity 360
   (c) Legal Certainty, Legitimate Expectations, and Revocation of Unlawful Acts 363
4. Non-Discrimination 364
   (a) Non-discrimination as a 'General' Principle 364
   (b) Non-discrimination as a Community Goal and a Basis for Community Action 365
   (c) Justifying Discrimination 367
5. Transparency 368
6. Further Reading 371

9. ENFORCEMENT ACTIONS AGAINST MEMBER STATES 372

1. Introduction 372
   (a) The Procedure and its Function 373
   (b) Sharpening the Enforcement Procedure: The Pecuniary Penalty 376
2. The Relationship between the 'Public' and the 'Private' Enforcement Mechanisms 377
3. The Commission's Discretion in Bringing Article 226 (formerly 169) Proceedings 381
4. The Reasoned Opinion 387
   (a) Challenging the Reasoned Opinion 387
   (b) Can the Commission Change the Subject Matter of its Action after it has Issued a Reasoned Opinion? 389
5. Why is an Enforcement Action Admissible after the Breach is Remedied? 390
   (a) The Commission's Continued Interest in Bringing the Action 391
   (b) The Need to Rule on the Legality of Short Breaches 391
   (c) Establishing the Liability of a Defaulting Member State 391
6. Types of Breach by Member States of Community Law 392
   (a) Breach of the Obligation of Co-operation under the EC Treaty 393
   (b) Inadequate Implementation of Community Law 394
   (c) Failure to Give Proper Effect to Community Law 397
   (d) Action by the Courts of a Member State 397
7. State Defences in Enforcement Proceedings 398
   (a) *Force Majeure* 398
   (b) There was no Inertia or Opposition to the Application of EC Law 399
   (c) The Community Measure on which the Infringement Proceedings are Based is Illegal 400
   (d) Other Member States are also in Breach 401
8. Article 227 (formerly 170) 402
9. Interim Measures 403
10. Conclusion 404
11. Further Reading 405
   (a) Books 405
   (b) Articles 405

10. PRELIMINARY RULINGS AND THE BUILDING OF A EUROPEAN JUDICIAL SYSTEM 406
1. Introduction 406
2. Three Types of Preliminary Ruling Procedure 408
3. The Provisions which can be Referred 409
4. The Courts or Tribunals to which Article 234 (formerly 177) Applies 410
5. The Existence of a Question: The Development of Precedent 414
6. The Existence of a Question: The ‘Acte Clair’ Doctrine 420
   (a) *CILFIT* as Part of a Discourse with, and Constraint on, National Courts 421
   (b) *CILFIT* as a Flexible Tool which can be Manipulated by National Courts 422
8. The Decision to Refer: The National Court’s Perspective 427
9. The Reference to the ECJ: The Initial Approach, ‘Come One, Come All’ 433
   (a) The Correction of Improperly Framed References 433
   (b) Challenging the Reasons for Making a Reference or the Facts on Which it is Based 435
10. The Reference to the ECJ: The Foundations of the Court’s Authority over the Cases Referred to It 436
11. The Reference to the ECJ: Developing Control over the Article 234 (formerly 177) Procedure 441
12. The Reference to the ECJ: Case-Load, Docket Control, and the Judicial Architecture of the EC 446
13. Interpretation versus Application 449
14. Conclusion: A Glimpse of the Future 450
15. Further Reading 452
   (a) Books 452
   (b) Articles 452
### 11. REVIEW OF LEGALITY

1. Introduction 453
2. The Range of Reviewable Acts 454
3. Article 230 (formerly 173): Standing for Privileged Applicants 457
   (a) Challenges to Decisions Addressed to Another Person 461
   (b) Challenges to Regulations: The Traditional Approach 466
   (c) Challenges to Regulations and Decisions: The Emerging Jurisprudence 468
5. Article 230 (formerly 173): Standing for Non-Privileged Applicants in Particular Areas 473
   (a) Anti-dumping Cases 473
   (b) Competition Cases 476
   (c) State Aids 477
   (d) Reinforcing the Democratic Nature of the Community 478
6. Article 230 (formerly 173): The Policy Arguments Concerning Standing of Non-Privileged Applicants 479
   (a) The Appellate Court Argument 480
   (b) Restrictive Access and the Language of the Treaty 482
   (c) The Nature of the Subject Matter: Discretionary Determinations and the CAP 483
   (d) The Nature of the Subject Matter: Quasi-Judicial Determinations and the More Liberal Case Law 485
   (e) Two Central Issues Concerning Standing (I): The Meaning to be Given to Individual Concern 486
   (f) Two Central Issues Concerning Standing (II): Standing, Participation, and Intervention 486
7. Article 230 (formerly 173): Direct Concern 489
8. Article 232 (formerly 175): Failure to Act 490
   (a) The Range of Reviewable Omissions 491
   (b) The Procedure 493
   (c) Standing 493
9. Article 241 (formerly 184): The Plea of Illegality 494
   (a) The Range of Acts which can be Challenged 494
   (b) The Forum in which Article 241 (formerly 184) can be Used 496
   (c) The Types of Proceedings in which Article 241 (184) can be Raised 498
   (d) The Parties who are Allowed to Use Article 241 (formerly 184) 498
10. Article 234 (formerly 177): Preliminary Rulings as a Mechanism for Contesting the Legality of Community Measures 498
    (a) The Rationale for Using Article 234 (formerly 177) 498
    (b) The Mechanism for Testing Community Legality via the National Courts 499
    (c) The Acts which can be Challenged under Article 234 (formerly 177) 500
11. The Grounds of Review 502
   (a) Lack of Competence 502
   (b) Infringement of an Essential Procedural Requirement 503
   (c) Infringement of the Treaty or of any Rule of Law Relating to its Application 504
   (d) Misuse of Powers 505
   (e) The Intensity of Review 506
12. The Consequences of Illegality and Invalidity 510
13. Conclusion 513
14. Further Reading 514
   (a) On Locus Standi 514
   (b) On Failure to Act 515
   (c) On the Exception of Illegality 515
   (d) On Procedural Rights 515
   (e) On the Use of Article 234(177) 515
   (f) On the Consequences of Illegality 515

12. DAMAGES ACTIONS AND MONEY CLAIMS 516
1. Introduction 516
2. Liability for Legislative Acts 516
   (a) The General Test 516
   (b) The Meaning of Legislative Act 517
   (c) The Meaning of Superior Rule of Law 518
   (d) The Meaning of Flagrant Violation/Serious Breach: The Early Case Law 520
   (e) The Meaning of Flagrant Violation/Serious Breach: More Recent Developments 524
   (f) The Meaning of Flagrant Violation/Serious Breach: The Impact of Brasserie du Pecheur 526
   (g) The Present Law: An Assessment 527
3. Liability for Administrative Acts 528
4. Liability for Official Acts of Community Servants 532
5. Liability for Valid Legislative Acts 534
   (a) The Nature of the Problem 534
   (b) The Case Law 535
6. Causation and Damage 537
   (a) Causation 537
   (b) Damage 538
7. Joint Liability of the Community and the Member States 540
   (a) Procedural Issues 540
   (b) Substantive Issues 540
8. Liability in Contract 544
9. Liability to Make Restitution 545
10. Further Reading 547
    (a) Books 547
    (b) Articles 547
13. FREE MOVEMENT OF GOODS: DUTIES, CHARGES, AND TAXES 548

1. Introduction: Forms of Economic Integration 548
2. The Basic Structure of the Provisions Concerning Free Movement of Goods 550
3. Articles 23-25 (formerly 9-17): Duties and Charges 551
   (a) Duties and Charges: Effect, Not Purpose 552
   (b) Charges Having an Equivalent Effect: General Principles 554
   (c) Charges Having an Equivalent Effect: Inspections and the 'Exchange Exception' 555
   (d) Charges Having an Equivalent Effect: Inspections and Fulfilment of Mandatory Legal Requirements 558
   (e) Recovery of Unlawful Charges 560
   (a) The Purpose of Article 90 (formerly 95) 561
   (b) Article 90(1) (formerly 95(1)): Direct Discrimination 561
   (c) Article 90(1) (formerly 95(1)): Indirect Discrimination 562
   (d) Article 90 (formerly 95): National Autonomy and Fiscal Choices 563
   (e) The Relationship between Article 90(1), 95(1) and 95(2) and 90(2) (formerly 95(2)) 566
   (f) Article 90(1) and (2) (formerly 95(1) and (2)): The Determination of Similarity 567
   (g) Article 90(2) (formerly 95(2)): The Determination of Protective Effect 570
5. The Boundary Between Articles 23-25 (formerly 9-17) and 90-93 (formerly 95-99) 573
6. Conclusion 577
7. Further Reading 579

14. FREE MOVEMENT OF GOODS: QUANTITATIVE RESTRICTIONS 580

1. Introduction 580
   (a) The Place and Importance of Articles 28-31 (formerly 30-36) 580
   (b) The Attainment of a Single Market: The Interconnection between Judicial and Legislative Initiatives 582
2. Directive 70/50 and Dassonville 583
3. Discriminatory Barriers to Trade 585
   (a) Import and Export Restrictions 585
   (b) Promotion or Favouring of Domestic Products 586
   (c) Price-fixing 591
   (d) Measures which make Imports more Difficult or Costly 592
   (e) National Measures versus Private Action 593
4. Justifying Discriminatory Barriers to Trade: Article 30 (formerly 36) 594
   (a) Public Morality 595
Contents

(b) Public Policy 597
(c) Public Security 599
(d) Protection of Health and Life of Humans, Animals, or Plants 600
(e) Other Grounds for Validating Discriminatory Measures? 604

5. Indistinctly Applicable Rules: Cassis de Dijon 604
6. Indistinctly Applicable Rules: The Post-Cassis Jurisprudence 608
7. Indistinctly Applicable Rules and Article 29 (formerly 34) 609
8. Indistinctly Applicable Rules: The Limits of Article 28 (formerly 30) 610
   (a) The Nature of the Problem: Cinetheque and Torfaen 610
   (b) Academic Opinions Prior to Keck 616
   (c) The Judgment in Keck 617
   (d) Keck: The Rationale for and Legal Effect of the Decision 618
   (e) Keck: Selling Arrangements 620
   (f) Keck and the Scope of Article 28 (formerly 30): Factual and Legal Equality v. Market Access 622
   (g) Keck, Article 28 (formerly 30), and Market Access: Meaning and Application 624
   (h) Keck and the Scope of Article 28 (formerly 30): The Continuing Dilemma 626
9. Indistinctly Applicable Rules: The Mandatory Requirements 627
   (a) The Rationale for the Mandatory Requirements 627
   (b) The Mandatory Requirements
      (i) Consumer Protection 630
      (ii) Fairness of Commercial Transactions 633
      (iii) Public Health 633
      (iv) Other Mandatory Requirements 635
10. The Advantages and Disadvantages of Cassis and the Interrelationship Between Judicial and Legislative Initiatives 637
    (a) The Advantages of the Court's Jurisprudence and the Commission's Response to Cassis de Dijon 637
    (b) Problems Flowing from Cassis and the Commission's Response Thereto 640
11. Further Reading 644
    (a) Books 644
    (b) Articles 644

15. FREE MOVEMENT OF CAPITAL AND ECONOMIC AND MONETARY UNION 645
    1. Free Movement of Capital 645
       (a) The Original Treaty Provisions 645
       (b) The Current Provisions: The Basic Principle 646
       (c) The Current Provisions: The Exceptions 647
    2. Early Attempts at EMU and the European Monetary System 648
Contents

3. Economic and Monetary Union: The Three Stages 650
   (a) Stage One and the Delors Report 650
   (b) Stage Two: The Treaty on European Union 650
   (c) Stage Three: The Basic Legal Framework 652
   (d) The Legal Consequences of Moving to Stage Three 653
4. Understanding EMU: The Economic Foundations 655
   (a) The Case for EMU 655
   (b) The Case against EMU 657
5. Understanding EMU: Central Bank Independence 658
6. The Transition to EMU: The Real World 660
7. Further Reading 663

16. FREE MOVEMENT OF WORKERS AND BEYOND 664
1. Introduction 664
2. The Effect of Article 39 (formerly 48) 666
3. Who is Protected by Article 39 (formerly 48)? 672
4. The Article 39(4) (formerly 48(4)) Exception 684
5. Directive 68/360 691
7. Workers and their Families: Social Advantages and Other Rights 697
   (a) Regulation 1612/68 697
   (b) Article 7(2) of Regulation 1612/68 699
   (c) Rights of Families as Parasitic on the Workers' Rights 703
   (d) Family Members in an 'Internal Situation' 705
8. After Amsterdam: Freedom of Movement within the EU 707
9. Education 711
   (a) Children (and Family Members) of Workers 712
   (b) Workers 713
   (c) Students 714
10. Citizenship 719
    (a) A Significant Change? 719
    (b) Rights of Movement and Residence 720
    (c) Political Rights 722
    (d) Limits and Potential 723
11. Further Reading 725
    (a) Books 725
    (b) Articles 726

17. FREEDOM OF ESTABLISHMENT AND TO PROVIDE SERVICES 727
1. Introduction 727
   (a) The Three Chapters 728
   (b) The Secondary Legislation 730
   (c) Articles 45 and 55 (formerly 55 and 66): The Official-Authority Exception 731
## Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>2. The Right of Establishment</td>
<td>733</td>
</tr>
<tr>
<td>(a) The Effect of Article 43 (formerly 52)</td>
<td>734</td>
</tr>
<tr>
<td>(b) Harmonization and Mutual Recognition of Qualifications</td>
<td>738</td>
</tr>
<tr>
<td>(c) The Scope of Article 43 (formerly 52)</td>
<td>744</td>
</tr>
<tr>
<td>(i) Does It Cover Only Discriminatory Restrictions?</td>
<td>744</td>
</tr>
<tr>
<td>(ii) The 'Reverse Discrimination' Question: Can Nationals Rely on Article 43 (formerly 52) in their Own Member State?</td>
<td>749</td>
</tr>
<tr>
<td>(iii) Are Restrictions on Social Benefits Contrary to Article 43 (formerly 52)?</td>
<td>754</td>
</tr>
<tr>
<td>(d) Establishment of Companies</td>
<td>755</td>
</tr>
<tr>
<td>3. Free Movement of Services</td>
<td>762</td>
</tr>
<tr>
<td>(a) The Effect of Article 49 (formerly 59)</td>
<td>764</td>
</tr>
<tr>
<td>(b) The Scope of Article 49 (formerly 59)</td>
<td>766</td>
</tr>
<tr>
<td>(i) The Need of an Inter-State Element</td>
<td>766</td>
</tr>
<tr>
<td>(ii) The Freedom to Receive Services</td>
<td>767</td>
</tr>
<tr>
<td>(iii) The Economic Nature of the Services: Remuneration</td>
<td>769</td>
</tr>
<tr>
<td>(iv) Can Illegal Activities Constitute Services within Articles 49-50 (formerly 59-60)?</td>
<td>770</td>
</tr>
<tr>
<td>(v) Are Restrictions on Social Benefits Contrary to Article 49 (formerly 59)?</td>
<td>772</td>
</tr>
<tr>
<td>(c) Justifying Restrictions on the Free Movement of Services</td>
<td>774</td>
</tr>
<tr>
<td>(d) Are Non-Discriminatory Restrictions covered by Article 49 (formerly 59)?</td>
<td>780</td>
</tr>
<tr>
<td>4. Further Reading</td>
<td>785</td>
</tr>
<tr>
<td>(a) Books</td>
<td>785</td>
</tr>
<tr>
<td>(b) Articles</td>
<td>785</td>
</tr>
</tbody>
</table>

### 18. THE PUBLIC POLICY, SECURITY, AND HEALTH DEROGATIONS: DIRECTIVE 64/221

<table>
<thead>
<tr>
<th>Section</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Introduction</td>
<td>786</td>
</tr>
<tr>
<td>2. The Discretion of the Member States</td>
<td>788</td>
</tr>
<tr>
<td>(a) What Conduct Can Justify the Invocation of the Derogations?</td>
<td>788</td>
</tr>
<tr>
<td>(b) What Steps may Member States take Against Non-Nationals?</td>
<td>790</td>
</tr>
<tr>
<td>(c) The 'Personal Conduct' Requirement</td>
<td>793</td>
</tr>
<tr>
<td>(d) The Procedural Protections under Directive 64/221</td>
<td>796</td>
</tr>
<tr>
<td>3. Further Reading</td>
<td>800</td>
</tr>
</tbody>
</table>

### 19. EQUAL TREATMENT OF WOMEN AND MEN

<table>
<thead>
<tr>
<th>Section</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Introduction</td>
<td>801</td>
</tr>
<tr>
<td>2. Equal Pay</td>
<td>805</td>
</tr>
<tr>
<td>(a) Directive 75/117</td>
<td>808</td>
</tr>
<tr>
<td>(b) Indirect Discrimination in Pay and Objective Justification</td>
<td>811</td>
</tr>
<tr>
<td>(c) The Breadth of Article 141 (formerly 119): What can Constitute 'Pay'?</td>
<td>822</td>
</tr>
<tr>
<td>3. Equal Treatment</td>
<td>841</td>
</tr>
</tbody>
</table>
(a) Equal Treatment as a General Principle 841
(b) Directive 76/207 842
(c) The Distinction between Conditions of Work, Pay, and Social Security 848
(d) Equal Treatment and Pregnancy 852
(e) The Pregnancy Directive 861
(f) Directive 86/613 863
(g) Parental Leave 864
(h) Sexual Harassment 865

4. Social Security
   (a) Directive 79/7 866
      (i) Direct Effect of Directive 79/7 867
      (ii) Personal Scope 869
      (iii) Material Scope 872
      (iv) The Exceptions in Article 7 876
      (v) Indirect Discrimination in Social Security 879
   (b) Directive 86/378 as Amended by Directive 96/97 883

5. Remedies 884
6. Conclusion 889
7. Further Reading 890
   (a) Books 890
   (b) Articles 890

20. COMPETITION LAW: ARTICLE 81 (FORMERLY 85) 891
   1. Introduction 891
   2. Undertakings 893
   3. Agreements, Decisions, and Concerted Practices 894
   4. The Object or Effect of Preventing, Restricting, or Distorting Competition 903
      (a) The Nature of the Problem 903
      (b) The Experience in the United States 903
      (c) The Academic Debate in the EC 905
      (d) The Case Law in the EC 907
      (e) Economic Analysis within Article 81(1) (formerly 85(1)):
          An Evaluation 913
   5. The Effect on Trade between Member States 914
   6. The De Minimis Doctrine 915
   7. Exemption under Article 81(3) (formerly 85(3)) 916
      (a) Individual Exemption 916
      (b) Block Exemption 919
   8. Vertical Restraints 920
      (a) The Economic Debate 920
      (b) The Critique of the Commission and the Commission's Green Paper 924
      (c) Exclusive Distribution 926
21. COMPETITION LAW: ARTICLE 82 (FORMERLY 86)
   1. Introduction 940
   2. Dominant Position: The Product Market 942
   4. Dominant Position: The Commission's Notice on Market Definition 948
   5. Dominant Position: Market Power 949
   6. Abuse: General Principles 954
      (a) General Problems of Interpretation 954
      (b) Exploitation of Anti-competitive Practices 955
   7. Abuse: Particular Examples 956
      (a) Abuse and Mergers 956
      (b) Abuse and Refusal to Supply 958
      (c) Abuse and Price Discrimination 963
      (d) Abuse and Predatory Pricing 969
   8. Joint Dominance 972
   9. Objective Justification and Proportionality 975
  10. Further Reading 976
      (a) Books 976
      (b) Articles 976

32. COMPETITION LAW: MERGERS 978
   1. Introduction 978
   2. The Policy Reasons for Merger Control 979
      (a) Arguments against Mergers 979
      (b) Arguments in favour of Mergers 980
   3. Regulation 4064/89 as Amended: Procedural Issues 981
   4. Regulation 4064/89 as Amended: Substantive Issues 983
      (a) Concentration: General 983
      (b) Concentration: Joint Ventures 984
      (c) Concentrations which have a 'Community Dimension' 988
      (d) Concentrations: The Substantive Criteria 989
      (e) Concentrations: Reflections on the Substantive Criteria 996
   5. Relationship between Community and Member State Merger Control 998
      (a) The General Principle: One-stop Merger Control 998
      (b) Article 21(3) 999
      (c) Referral to the Competent Authorities of the Member State: The German Clause 999
      (d) Article 22(3): The Dutch Clause 999
(e) The Residual Role of Articles 81 and 82 (formerly 85 and 86) 1000
6. Judicial Review 1001
7. Further Reading 1001
   (a) Books 1001
   (b) Articles 1001

23. COMPETITION: ENFORCEMENT AND PROCEDURE 1003
1. Introduction 1003
2. Public Enforcement by the Commission: Finding the Violation 1004
   (a) Investigation 1004
   (b) Notification 1007
   (c) Complaints 1008
3. Public Enforcement by the Commission: Competition Decisions 1011
   (a) Informal Settlement 1011
   (b) Formal Decisions: Interim Orders 1012
   (c) Formal Decisions: Negative Clearance 1013
   (d) Formal Decisions: A Finding of Infringement 1014
   (e) Formal Decisions: Individual Exemption 1016
   (f) Judicial Review by the CFI 1017
4. Private Enforcement: The Role of the National Courts 1018
   (a) The Advantages and Disadvantages of Enforcement through National Courts 1018
   (b) Article 81 (formerly 85): Enforcement of Agreements 1019
   (c) National Courts and Comfort Letters 1022
   (d) Damages Actions and Recovery of Benefits 1023
5. Public Enforcement through National Competition Authorities 1024
6. Further Reading 1025
   (a) Books 1025
   (b) Articles 1025

24. INTELLECTUAL PROPERTY 1026
1. Introduction: Property Rights versus the Single Market 1026
2. Articles 28-30 (formerly 30-36): The Exhaustion of Rights Doctrine 1029
   (a) Patents 1029
   (b) Trade Marks 1033
   (c) Copyright 1036
3. The Limits of Articles 28-30 (formerly 30-36): The Demise of the Common Origin Doctrine and the Limits of Consent 1041
4. Articles 81 and 82 (formerly 85 and 86) 1047
   (a) General Principles: The Existence/Exercise Distinction 1047
   (b) Article 81 (formerly 85): Assignments 1048
   (c) Article 81 (formerly 85): Licensing 1050
   (d) Article 81 (formerly 85): Block Exemption 1053
   (e) Article 82 (formerly 86) 1054
5. Article 12 (formerly 6) and Non-Discrimination 1057
Contents

6. Intellectual-Property Rights and Harmonization 1057
7. Further Reading 1058
   (a) Books 1058
   (b) Articles 1059

25. THE STATE AND THE COMMON MARKET 1060
   1. Introduction 1060
   2. The State and Participation in the Market: General Principles 1061
   3. Public Undertakings and Article 86 (formerly 90) 1062
      (a) The Scope of Article 86(1) (formerly 90(1)): General Principles 1062
      (b) The Scope of Article 86(1) (formerly 90(1)): Agnosticism as to the Organization of Economic Activities? 1065
      (c) The Scope of Article 86(2) (formerly 90(2)) 1070
      (d) The Scope of Article 86(3) (formerly 90(3)) 1072
      (e) Article 86 (formerly 90) and National Courts 1074
   4. The State, Articles 10, 81, 82, and 28 (formerly 5, 85, 86, and 30) 1075
   5. State Aids: The Substantive Rules and Article 87 (formerly 92) 1077
      (a) Article 87(1) (formerly 92(1)) 1077
      (b) Article 87(2) (formerly 92(2)) 1082
      (c) Article 87(3) (formerly 92(3)): The Commission, Substantive Policy, and the Choice between Rule-Making and Individualized Adjudication 1082
      (d) Article 87(3) (formerly 92(3)): Particular Categories 1085
   6. State Aids: The Procedural Rules and Articles 88 and 89 (formerly 93 and 94) 1091
      (a) Review of Existing State Aids 1091
      (b) The Procedure for New State Aids: Notification and Preliminary Review 1091
      (c) The Procedure for State Aids: Detailed Investigation and Enforcement 1093
      (d) Exceptional Circumstances: Article 88(2) (formerly 93(2)) Paragraphs 3 and 4 1094
      (e) Article 89 (formerly 94): Implementing Regulations 1095
      (f) Challenges to Commission Decisions 1095
   7. State Aids: Recovery of Unlawful Aids 1096
   8. The Relationship of State Aids to Other Provisions of the Treaty 1098
   9. State Aids, Market Integration, and Regional Policy 1100
10. Further Reading 1102
    (a) Books 1102
    (b) Articles 1102

COMPLETION OF THE SINGLE MARKET 1104
   1. Introduction: The Limits of Integration Prior to 1986 1104
   3. The Reinvigoration of Europe: The Politics of Integration 1112
4. Completing the Internal Market: Legislative Reform and the SEA 1115
   (a) Article 14 (formerly 7a): The Obligation Stated 1115
   (b) Article 15 (formerly 7b and 7c): The Obligation Qualified 1118
   (c) Article 95(1) (formerly 100a(l)): Facilitating the Passage of Harmonization Measures 1118
   (d) Article 95(2)-(10 (formerly 100a(2)-(5)): Qualifications to Article 95(1) (formerly 100a(1)) 1120

5. Completing the Internal Market: The New Approach to Harmonization 1124
   (a) The Rationale for the New Approach 1124
   (b) The New Approach to Harmonization 1125
   (c) The New Approach to Harmonization: Legislative Format 1128
   (d) The New Approach to Harmonization: Beyond 1992 1130

6. Completing the Internal Market: Tensions and Concerns 1132
   (a) Consumer Interests and Commercial Power 1132
   (b) The Single Market, Market Freedom and Structural Balance 1134
   (c) Politics, Economics, and the Single Market Enterprise 1135

7. Conclusion 1136

8. Further Reading 1137
   (a) Books 1137
   (b) Articles 1137

Index 1139
European Union Law. Nationals of the member states of the European Union benefit from more favourable provisions of immigration law than nationals of other countries. It is important to realize, however, that not all EU nationals are in the same position in some cases there are special provisions. Nationals of European Union Member States: The EEA (European Economic Area) includes all EU states plus Iceland, Liechtenstein and Norway and, for immigration purposes, Switzerland.