WHAT IS THE EU?

EU is something more than FTA , CU, CM.

EU is also a monetary union because 19 countries have agreed to adopt a single currency. But, not all countries have accepted it. Single currency depends to the acquis. Every time a country wants to accede to EU, you have to accept all the laws that have been agreed upon before. So, they also have to agree to adopt the single currency. Only Sweeden and Denmark do not have legal obligation to adopt the Euro. However, we can certainly say that EU is monetary union albeit we have to add that not all countries have introduced a single currency, even though they have a legal obligation to do so.

**MS with a derogation: their process towards achieving Maastricht Criteria are monitored to see when they can accede to the single currency.*

EU is a monetary union but not completely an economic union yet. Often referred to as an EMU. In reality, many people say that this is not a completely correct visualization of things. It should be more an "eMU" – because the EU has the exclusive competence in the field of monetary policy, but in the field of economic policy is the MS which still retain the main competences. So, EU has a single currency but one of the weaknesses is that there is no real corresponding economic policy.

Therefore, if we have to situate EU into the stages of economic integration between stage 4 and 5 of economic integration.

Fiscal policy, in terms of direct taxation, is a power sovereign to the MS.

The Union can be seen in some aspects of being a Political Union, with a supranational aspect. But it goes to far if one says that EU is a fully harmonized PU.

TECHNIQUES OF ECONOMIC INTEGRATION

1. Positive integration
    a. Harmonization of national laws
    b. Regulation
    c. Centralized model: positive regulations and rules are made which regulate a certain area for a certain group of states. So, treaties are concluded and laws are drafted that deal with a certain area.
2. Negative integration
    a. Deregulatory
    b. Mutual Recognition
    c. Decentralized model (non-discrimination, market access, competitive federalism): negative integration talks about the judicial architecture in the sence that CJEU can invalidate certain national regulations because these rules do not comply with certain provisions of the treaty, and as a result of that these national provision has to be set aside. This has a deregulatory impact. The term negative has also a little

"all forms of indirect tax protection in the case of products which, without being similar within the meaning of the first paragraph, are nevertheless in competition, even partial, indirect or potential, with certain products of the importing country."

Economic test: based on cross-elasticity of demand. One slightly increases the price of one product and sees whether it has an impact in other similar products.

Factual circumstances

Commission v UK: Dealt with alcohol. It was a case of beer and wine. Are these similar products or competing products? In this case, one investigated the tax behavior of UK. If one looked at the taxing of beer in the UK, which is a product massively manufactured in UK, whereas wine is completely imported, came to the conclusion that the tax burdens imposed on wine were 5 times higher than the taxes imposed on beer which was mostly domestically manufactured. UK stated that people simply drink more beer. However, tax policy of MS should not be allowed to crystallize consumer habits. So, the conclusion was that beer and wine are competitive products.

CONCLUSION: Tax is okay but no protection is allowed. This means that you don't have to equalize taxes but to lower them so there is no protectionism anymore. So, no equality required. If cross elasticity is very low, only a significant tax difference will have a protective effect.

+ *In a couple of situations is not immediately clear if we are dealing with CD or tax. You might at first be thinking that it is a CD but after closer scrutiny it turns out to be a tax. The opposite might happen as well.*

Keck did not solve all problems and it introduced a rather rigid distinction between rules we deal with and rules that we do not deal with. However, Keck is one of the standard references in the context of free movement of goods.

Keck attracted considerable criticism and did not solve all problems. Two cases serve as example:

1) *Familiapress (1997)*

Rules which affect the selling of a product, but affect also the nature of the product: Article 34 TFEU applies.

This case was dealing with a prohibition in Austria to sell newspaper which contained cross-word puzzles which indicated that the one who does the best will win a price.

The question was how do we deal with this because on one hand we can consider this rule as one that affects the selling of the product and at the same time their nature.

In such a situation, the fact that the rules affect also the nature of the product prevails and Art 35 applies, meaning that we have to treat this as a MEQR which can thus be justified either by an Article 36 exception or the mandatory requirements in the general interest.

2) *De Agostini – a children's magazine on dinosaurs (1997), Heimdienst (2000), Gourmet (2001) – alcohol, Ker-Optika – prohibition to sell lenses via internet in Hungary*

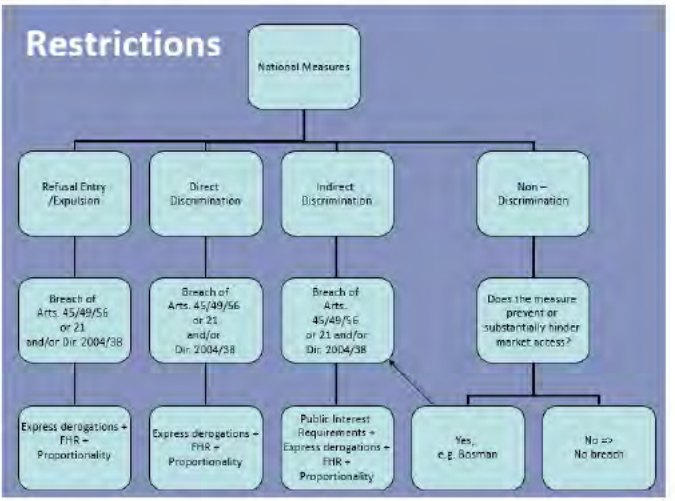
Selling arrangement fails to fulfill the conditions of para 16 Keck: Article 34 TFEU applies.

The main use in these cases was selling arrangements which in principle fall outside the scope of the treaty. But what happens if the Keck check is negative, if the rules in question do not apply to all traders or do not affect the marketing of the domestic and the foreign product in the same way? In practice, the first condition of *Keck* is almost always the case. The second condition is crucial. What happens if we come to the conclusion that because of the MS measure, the marketing of the foreign product is rendered more difficult than the marketing domestic product (i.e. *de Agostini:* the Swedish legislation said that no advertisements were allowed for these magazines)

If para 16 of Keck does not apply, the answer is not that remarkable. It says simply that Article 34 applies.

Crucial takeaway: selling arrangement fall in principle outside the scope of Art 34 and do not come under the Court's scrutiny provided that the two conditions of Keck are complied with. If that is not the case, then the measure is not a selling arrangement but a MEQR. If such is the case you need to check whether it is distinctively or indistinctively applicable and whether it can be justified or not. So, Keck still applies. In *Ker-optica* the conclusion was that the second condition of para 16 is not applied, this is a MEQR, and we will check whether this measure can be justified. It is worth looking at the justifications but then you still have to carry out the proportionality test. In Ker optica, although the measure could be justified by the legitimate objective, it did not pass the proportionality test.

Lastly, there is a very old case, *Bettray*, where the court said that someone may not be considered as a worker. In this case, somebody claimed to be working but his work was not considered to be a genuine and effective work. We were dealing with a **former drug addict** who was carrying out some work in the framework of a rehabilitation program. The work he carried out was not considered real work but a therapy. Thus, he was not considered a worker in the context of Article 45.



Right of movement – Entry/Exit

Articles 4 and 5

- Valid Identity Card or Passport
- No entry visa or equivalent formality for EU citizens
- TCN Family Members, entry visa (free of charge, accelerated procedure)

  MRAX (Identity and conjugal ties)

Arts. 8-11: Residence Cards

- Registration requirement for >3 months
- Merely administrative requirement: Proportionate and non discriminatory sanctions (see also Art. 26)

  Oulane : any appropriate means, knowledge of language itself not enough proof

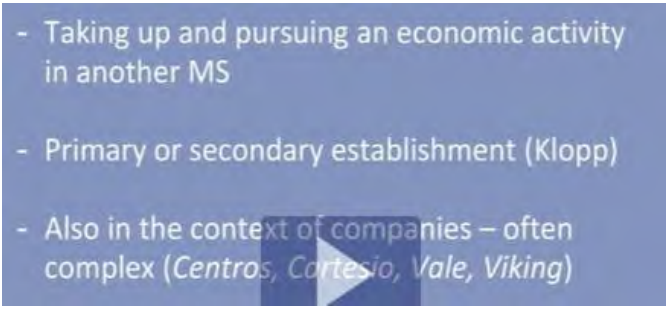
Art. 25: Residence card is proof of the right, not a precondition!

Arts. 12-14: Retention of Rights in case of death, divorce, loss of work

haven't made use of their free movement rights cannot rely on the Treaty. Thus, the people that have made use of their free movement rights are treated better than the home state nationals. In Finland the law prohibited reverse discrimination. So, if this were to happen, one has to make sure that Finnish nationals can rely on EU law. Thus, the Court said that for that reason, even if we are completely in a Finnish setting, we will apply Article 49. Again here the threshold of cross-border activity is increasingly interpreted very widely by the court.

In the case of *Visser,* the Court went even further. In this case the Court said that in the context of the Services Directive which also concerns establishment, this requirement of a cross-border element does not apply. So, even if a situation as is the case of *Visser,* about a small community in the NL, the Court said that nevertheless the Service Directive could be applied to the circumstances of the case, despite the fact that there was no cross border element. Again, this is another example of how easily the court goes with the requirement of the cross-border activity.

Essence of the right of establishment

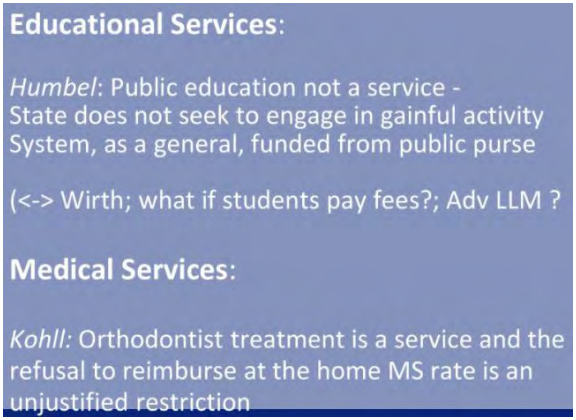


The essence of this right is that you go to another MS and pursue an economic activity there. In the case of *Susisalo,* you have a pharmacy and you either go to Finland and set up your pharmacy there or you keep your pharmacy in your country and you set up a branch in Finland. If you have an establishment in country A, you have the possibility to settle an establishment in another MS as well. This does not require that you have to tear up the first establishment, you can have two in different countries. Then, for these companies the rules of establishment of those MS will apply. Regarding people, you have the possibility to set secondary establishments. Regarding companies, the situation is quite complex and we see it in the cases *Centros, Cartesio, Vale, Viking,* etc. The complexity is due to the fact that there is hardly any specific legislation in Europe regarding company law. So, national law essentially prevails. The extend to which you can make use of the free movement law depends on what the national law says.

Restrictions

1. Direct and indirect discrimination (*Reyners, Thieffry*)
2. Restrictions – *Gebhard* (para 37)

"national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfill four conditions: (1) they must be applies in a non-



Educational Services: The question was to what extend can we consider education a service, namely teaching. There have been some interesting cases before the CJEU on this issue. In the old case of *Humbel*, the Court concluded that public education is not to be considered as a service within the meaning of the Treaty and since a state is not seeking to engage in a profitable activity but is seeking to fulfill its tasks as an authority to educate the population. Teaching public education is funded from the public purse. So, public education will not be considered a service. It is always dangerous to rely on the *a contrario* reasoning but on the .. CASE the Court came to the conclusion that when confronted with private education, then we are dealing with a service. Then, the Treaty rules can apply. The interesting case is what happens with the university. Public education is not a service. The state is carrying out his task to educate the population. The question now is how far does this public task go. Does it include university education? University education belongs to the task of the state. The Government provides money to the university. In order to set up a Bachelor or Master education the university gets money from the government. So, as far as bachelors and masters are concerned, we are not dealing with services. What about the Advanced Masters, whereby the university don't get any money? This means that for Advanced Masters, this is a commercial task because we have private fees, the University makes some profit. The 2000 euro that Bachelor and Master students are not considered to be private fees.

Medical Services: In the *Kohll* case, Kohll was a doctor in Luxemburg whose daughter needed Orthodontist treatment. He wanted to go in Germany to get her the treatment. The system in Luxemburg provided that he could only get reimbursement after receiving an authorization from the sickness fund in Luxemburg to go abroad and receive the treatment. Mr Kohll challenged this system in Luxemburg and indicated that this amounted to a restriction on the freedom to provide and receive services in Germany. There were many issues concerning this case, the most important was whether the medical services fall within the scope of the Treaty. The Court said that medical services is a service and the situation at hand was a restriction on the freedom of movement. The Luxemburg authorities invoke several justifications to justify the lack of reimbursement. The Court rejected them on the fact that Mr Kohl is not asking for a different

This is the most important justification aspect. The other aspects dealt with in Art 65 are often merely theoretical justifications that have hardly occurred. The justification on public policy and public security is very important in the context of i.e. foreign direct investments.

Judicial derogations

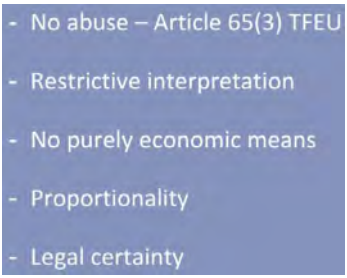
IOverriding reasons in the public interests/case law-made derogations:

- continuity of public service
- promotion of research and development
- protection of the environment
- preserving agricultural communities
- public-housing policy (*Sint Servatius, 2009*)
- by the reasons underlying the choice of the rules of property ownership adopted by the national legislation within the scope of Article 345 TFEU (*Essent, 2013*)

Apart from expressed treaty derogations are also overriding reasons in public interest.

- Continuity of public service: *Commission v Belgium***.** Belgium said that he golden shares were important to ensure the continuity of public service (electricity) in emergency situations.

Exceptions and derogations



As far as these exceptions and derogations are concerned we have to adopt the same restricting attitude as the other fundamental freedoms. Purely economic aims will not be accepted by the court. If you feel that a MS is purely trying to achieve economic goals when trying to justify a measure, this will not be allowed. Then of course, the principle of proportionality needs to be complied with at all costs. Also, often the issue of justifications turns in the issue of proportionality. Also, the legal certainty will come into play.

Case C-54/99 Association Eglise de Scientologie de Paris

Para 55: In the light of the principles extracted by the Court in paragraph 48 of the judgment in Centro di Musicologia Walter Stauffer, before granting a tax exemption to a body established and recognised as having charitable status in another Member State, a Member State is authorised to apply measures enabling it to ascertain in a clear and precise manner whether the body meets the conditions imposed by national law in order to be entitled to the exemption and to monitor its effective management, for example, by requiring the submission of annual accounts and an activity report. Any administrative disadvantages arising from the fact that such bodies may be established in another Member State are not sufficient to justify a refusal on the part of the authorities of the State concerned to grant such bodies the same tax exemptions as are granted to national bodies of the same kind.

Para 58: In that regard, declarations by a body which fulfils, in its Member State of establishment, the requirements of the law of that Member State for the grant of tax advantages, cannot be left out of consideration, particularly if that legislation makes the grant of tax advantages intended to encourage charitable activities subject to identical requirements.

C-318/05 Commission v Germany

Germany did not allow people who paid taxes in Germany to deduct their foreign tuition fees from their taxes, and the commission argues they are failing to fulfil its obligations under articles 18, 39, 43, and 49 EC (para. 1). The court finds that Germany is failing to fulfil its obligations pursuant to article 49 EC (para. 100). The court accepts all the arguments put forward by the commission, apart for that of freedom of establishment of schools established in other MS (para. 139).

Workers:

- parents

Establishment:

- not companies
- But parents as self-employed

Citizens:

- Parents move but they are not economically active.