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OVERVIEW:

- **Week 1:** EU law principles and internal market
- **Week 2:** free movement of good and services
- **Week 3:** free movement of establishment and free movement of workers
- **Week 4:** EU citizenship, non-discrimination principle, ASFJ
- **Week 5:** articles 101 and 102 TFEU, about undertakings in the internal market
- **Week 6:** Common commercial policy, Common foreign and security policy
- **Week 7:** Enforcement against acts of Member States

→ Prohibits discrimination

Deals with **internal taxation** of Member States on internal products. The article applies only to indirect taxation.

› compared to article 30 TFEU, This article has a very permissive approach toward MSs

› Applicable to indirect taxation ('on products')

Indirect taxation = taxes that can be passed on to another person (e.g. VAT, excise duties)

Direct taxation = taxes that cannot be passed on to another person (e.g. income tax, corporate tax)

› All taxation differentiates between products → no problem as long as there is no discrimination or protectionism against foreign products.

Article 110 TFEU

› Para. 1: Prohibition of **discriminatory taxation**

Tax on products which discriminates similar products from abroad

- only applies on similar products that are treated differently

- Similar products

- Prohibition of direct and indirect discrimination unless **objectively justified** (*Chemical*)

- *indirect discrimination is when → discrimination not on the basis of the actual text of the law. the text of the law doesn't make any distinction between domestic production and foreign production but in practice there is a discrimination.*

› Para. 2: Prohibition of **protective taxation**

- products that are not similar, but are treated differently

- Products which are not similar but do compete

- MSs tend to tax domestically produced products more favorably than foreign products

- See e.g. *Commission v. United Kingdom* (beer vs. wine)

If products compete even if they are not similar, MS cannot tax one product more favorably than other if it would lead to protection of domestic products.

Case: UK taxed beer more favorably than wine. UK has a large beer production, as opposed to wine.

➤ **Non fiscal rules regulating protection marketing of goods → non tax rules that apply to production, marketing and such. Ex. Cassis de Dijon, the percentage of alcohol in liquors**

Article 34 TFEU

This article is similar to art 30.

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

→ such as you can import maximum 200 cars each year into the country.

Q.R. -> restrictions on the number of products that you can, for example, import.

Art. prohibits also Measures having the same effect as quantitative restrictions.

- Quantitative restrictions ('quotas') by definition prohibited under Article 34 TFEU → but **derogation** in Article 36 TFEU

But what is a 'measure having equivalent effect' (MEE)?

“37 It follows, however, from the Court's case-law that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions:

- › *they must be applied in a non-discriminatory manner;*
- › *they must be justified by imperative requirements in the general interest;*
- › *they must be suitable for securing the attainment of the objective which they pursue; and*
- › *they must not go beyond what is necessary in order to attain it [...].*

38 Likewise, in applying their national provisions, Member States may not ignore the knowledge and qualifications already acquired by the person concerned in another Member State [...]. Consequently, they must take account of the equivalence of diplomas [...] and, if necessary, proceed to a comparison of the knowledge and qualifications required by their national rules and those of the person concerned [...]"

→ Cassis de Dijon justifications apply BUT They have to fulfill 4 conditions

- Indistinctly applicable → it means there must be no direct discrimination
- Public interest
- Proportionate (suitable and necessary)

In this case, it means that a MS cannot ignore equivalent qualifications in assessing its request.

Justifications

2 types of justifications available:

1) Legitimate objective of public interest

- Measure must be Indistinctly applicable → cannot discriminate directly
- Proportionality test
 - Suitability
 - Necessity

(non importante, leggi solo). The court doesn't always use the same formulation in every case. In Ghebard case the court doesn't say if the public interest justification has been harmonized at EU level. This happens because

- This criterion is only mentioned if relevant in the case
- If no applicable EU harmonization
- Compliance with fundamental rights is not mentioned by the court.

› Treaty derogations in Articles 51 and 52 TFEU → it's possible to discriminate but there must be:

- Ground of justification
- Proportionality
- Suitability
- Necessity

Question: How can Germany prohibit laser tags on the base of human dignity if other MS protect human dignity too but don't take such measures?

There are different degrees of protection

Human dignity protection in general → all MS do that

Higher degree of human dignity protection → Germany

➤ Directive 2004/38/EC or citizen right directive → Secondary legislation

- Member State A issues a European arrest warrant for conducting a criminal prosecution or executing a sentence
- Member State B obligated to execute the arrest warrant and surrender the requested person

→ Council Framework Decision regulates automatic execution of arrest warrants issued by MS. MS A "we are looking for Jim". MS B "we'll look for Jim because of the arrest warrant"

→ Applicable to crimes listed in Article 2 EAW. Crime must be recognized by both MS. For very serious crimes, the double criminality requirement is not needed.

Principle of mutual recognition

What if the executing MS has reasons to believe that certain fundamental rights wouldn't be respected by the issuing MS?

Technically, the idea behind the Council Framework Decision is governed by the **The principle of mutual trust, art 1(2), mutual recognition of each other judicial decision.**

For example, if MS A issues an arrest warrant, MS B is obliged to execute the arrest warrant on the basis that the institution is legitimate, that the conviction was done with due regard to procedure fairness, and that the punishment won't infringe fundamental rights.

- Mutual trust very similar to mutual recognition
 - **Free movement law** → recognize validity of other MS laws
 - **ASFJ arrest warrant** → whether there is mutual recognition of the judicial and police system of the other MS

› Article 1(2) EAW: execution of EAWs based on mutual recognition

› But also Article 1(3) EAW: obligation to respect fundamental rights

› Mutual trust as the basis for police and judicial cooperation

- Mutual recognition of national court judgments
- Mutual trust in national courts and their compliance with fundamental rights

› Difference between legal obligation and factual reality:

Legal obligation in EU arrest warrant decision → MS should and have to trust each other

Factual reality → MS not always trust each other.

➤ Melloni

Facts: a person convicted in Italy in absentia moved to Spain. Following the issue of the arrest warrant, he was arrested in Spain. Spain had a very stronger protection in regards of conviction in absentia and the Spanish judge asked the court of justice if the surrendering of this person could be made on the condition that the Italian authorities would be reviewing his case.

(So, execute him but the conviction is open for review)

The Spanish judge had looked at the charter and in art 53 it was said

→ Charter not effected by higher levels of human rights protection by MS constitutions

→ if the Spain judge applies the Spanish constitution with the conational surrendering, the judge deviates from the EU arrest warrant.

Question: can you deviate from the EU arrest warrant decision on the basis that your national constitution provides higher level of protection? NO.

relevant factors in **determine whether any undertaking has a relevant position:**

- › Market shares.
 - >50%: presumption of dominance position (can be challenged)
 - 40–50%: possibly a dominant position, other factors are needed
- › Relative position of competitors (if you have 45% market share and the second largest competitors has 10%, you might have a dominant position. It's your position in respect of the other companies).
- › Technological, economic, and legal advantages that your company might have (if you are more efficient than competitors)
- › Economies of scale (if you have very large production capacity, you are more efficient)
- › "Vertical integration"
- › (Other) barriers to market entry

In the United Brands case, in order to understand if the brand was dominant or not, the court had to answer the question whether the company was active on the market for bananas or all sorts of food? Defining the market was essential. If it's only bananas, it's likely to have more than 50% of share. However, if it's on all fruit market, the share is much lower.

→ Google claims that they are not dominant. "Google search is dominant, but they compete with other search engines (such as TikTok and amazon)". Google says this because it's more convenient for them.

Special responsibility

If you are a dominant company, you can still compete BUT you have special responsibility, not to allow your conduct to impair the competition. Once you are dominant, there are something you are no longer allowed to do, that smaller companies are allowed to do.

› "... irrespective of the reasons for which it has such a position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market" (*Michelin I*, para. 57)

Two types of abuse

› **Exploitative abuse:** using dominance to exploit customers. Such as types of conduct where you use your dominant position to exploit customers and treat them unfairly.

› **Exclusionary abuse:** using dominance to exclude competitors from the market and/or preventing new competitors from entering the market (a.k.a. "market foreclosure"). This abuse targets competitors: you exclude competitors by pushing them off the market or by preventing them accessing to the market.

Objective justification

→ Once identified any abuse, and concluded that the company has done this, there is also the possibility to objectively justify its conduct. Justifications are not included in the article but established through interpretation of caselaw. Justifications are almost never accepted.

- › No equivalent of Article 101(3) in Article 102
- › Dominant undertakings can escape the prohibition if their conduct is "objectively justified"
 - Requires absence of "less restrictive alternatives"
- › Removes the qualification of "abuse"

› Measures limiting capital movements and payments (so it's freezing financial assets) targeting "natural or legal persons, groups or non-State entities"

In order to prevent and combat terrorism

- Part of the AFSJ's counter-terrorism objective (Article 67 TFEU)
- Different procedure than Article 215 TFEU
- Which legal basis is the right one? Parliament v. Council (Al Qaeda sanctions)
- Since Al Qaeda was international organization, 215 TFEU was the right one.

➤ Sanctions against Russia

Case study: sanctions against Russia

Nowadays we hear about sanctions against Russia as a state or certain Russian individuals.

However, the sanctions adopted are all based on an initial sanction measure adopted in 2014, taken after an invasion.

› Series of economic and individual sanctions imposed on Russia and numerous natural and legal persons

- Since invasion and annexation of Crimea
- Substantially expanded and accelerated after the 2022 invasion

› Restrictive measures against Russia, legal and natural persons, bodies and entities

› Also suspension of the "Most-Favoured-Nation" status within the WTO on 15 March 2022 (see the statement here)

▪ How did this happen?

Main sanctions were imposed based on 2 legal basis:

a) **Council Decision 2014/145/CFSP** of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine.

- Adopted on the basis of Article 29 TEU Travel bans
- Freezing of assets

b) **Council Regulation 269/2014** of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine

- Adopted on the basis of Article 215 TFEU
- "Having regard to Council Decision 2014/145/CFSP"
- Freezing of assets

▪ situation in 2022:

› Article 14(1) of Council Regulation 269/2014: freezing assets of additional persons, entities or bodies by amending Annex I

› Example: Council Implementing Regulation (EU) 2022/260 of 23 February 2022 implementing Regulation (EU) No 269/2014

- Adopted on the basis of Article 14(1)
- "Article 1: The persons and entities listed in the Annex to this Regulation shall be added to the list set out in Annex I to Regulation (EU) No 269/2014."

b. The validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union”

- National courts are not competent to declare acts of EU institutions invalid (*Foto-Frost*)
 - If national court doubts the validity of an EU act, it must request a preliminary reference
 - No difference between lower courts and courts of last instance

Relationship between Art. 263 and 267 TFEU

- Art. 263 TFEU → direct action for the annulment of EU acts
 - Fastest route to ask the CJEU to decide on the legality of EU acts
 - Standard procedure for appeal against e.g the Commission fining decisions in competition law
 - Also for judicial review of acts of general application, but almost impossible for natural and legal persons
- Art. 267 TFEU → indirect route to request the CJEU to decide on the validity of EU acts
 - No time limit
 - No “individual and direct concern” requirement for natural and legal persons
 - But there could be other standing criteria in national procedural law
 - Subject to the principles of equivalence and effectiveness (*Rewe*)
- “[an act] which is of direct and individual concern to them [or] a regulatory act which is of direct concern to them and does not entail implementing measures”
- **Limiting direct access to CJEU for natural and legal persons against legislative acts**
 - Indirect route based on Art. 267 TFEU should be used
 - Or Direct route based on Art. 263 TFEU if the legislative act entails deleted or implementing acts that can be challenged
- **Limiting direct access to CJEU for natural and legal persons against regulatory acts that do entail implementing measures**
 - Indirect route based on Art. 267 TFEU should be used if the implementing measure is a national measure
 - Direct route based on Art. 263 TFEU should be used if the implementing measure is an EU act
 - Challenging idk what he said whatever is on the ppt