

THE UNIVERSITY OF MICHIGAN LAW SCHOOL  
ANN ARBOR, MICHIGAN 48109-1215

Winter 2009-2010

**THE EUROPEAN LEGAL ORDER**

*Professor Senden*

<i>Office:</i>	935 Legal Research	<i>Secretary:</i>	Laura Harlow
<i>Phone:</i>	734-936-0287		405 Hutchins Hall
<i>Email:</i>	<a href="mailto:lsenden@umich.edu">lsenden@umich.edu</a>		734-763-0957
			<a href="mailto:harlowl@umich.edu">harlowl@umich.edu</a>

*Office Hours:* Tuesdays 10:45 – 12:00, or by appointment

*Class Hours:* Mon-Tues, 9.05-10.30, Room 118 Hutchins Hall

*Course Description:*

This course presents the basic legal architecture of the European Union, including its institutional organisation and division of powers principles, the progression of substantive law from free movement (of goods, persons, services, and capital) to common citizenship and fundamental human rights and the protection and enforcement of EU rights and obligations in the member States. The course will deal with these issues in the light of the different amendments to the EC and EU Treaties that have taken place through the years, exploring themes such as sovereignty, federalism, constitutionalisation and democratic legitimacy that occupy Europeans and Americans alike.

The course materials and lectures will be divided over five main themes. Theme I focuses on the historical development of the European integration process and the EU's institutional structure, dealing in particular with the Union's institutions, the division of powers in-between the EU institutions and between the EU and its Member States, the areas of competence of the EU, its legal sources and instruments and the decision-making process. These topics will be discussed in the light of the institutional changes that have recently come about as a result of the entry into force of the Treaty of Lisbon. In this context we will also consider different views on the constitutional/political nature of the EU (federation, confederation or otherwise), and discuss how this may compare with the US system.

Theme II concerns the Union's internal market, which is at the core of EU substantive law and as such of the EU's legislative powers. The general foundations of European internal market law will be discussed and the meaning of the 'negative' and 'positive' integration approaches. The specific Treaty rules concerning the free movement of goods, persons (employees and right of establishment), services and capital will be analysed, in the light of the interpretation the European Court of Justice has given to them and of their further substantiation in legislative harmonisation measures. We will critically analyse the role that both the European legislature and the European Courts have made to the development of the internal market. Students will also learn how to apply these market access rules to practical

cases, by preparing a number of cases which will be discussed in class. This theme will also make for good comparison with the US system.

Theme III will next deal with the way in which substantive law, in particular the rights and obligations that ensue from this law, can be effectively enforced and upheld in court; what legal protection do citizens and companies enjoy of the rights they derive from EU law? In this framework we will discuss the legal doctrines the European Court of Justice has developed and which national courts have to put to practice: supremacy of EU law over national law, direct effect, interpretation of national law in conformity with EU law, state liability and the duty to provide for effective legal protection. The role of the ECJ and of the Commission in ensuring compliance with Union law will also be part of this discussion, in particular the different legal procedures the European Treaties provide for this. In this part of the course, students will also have to prepare a number of practical cases. Special attention will be devoted to the preliminary rulings procedure, as this procedure provides an important link between the national judicial level and the European judicial level and as such between the European and national legal orders. This procedure has proven to play an essential role in the development of the European integration process. Another specific topic to be dealt with here concerns the protection of fundamental rights.

While internal market rules are concerned with enabling cross-border economic activity in the EU and this for EU-nationals, we are increasingly witnessing legislative and case law developments as regards not economically active EU-citizens, mainly as a result of the introduction of the principle of EU-citizenship. This will be the subject of Theme IV, as well as the way in which EU law affects the rights and duties of third country nationals in the framework of the development of an EU migration, visa and asylum policy. We will also briefly consider other important developments relating to the area of freedom, security and justice, which deals not only with migration issues but also with harmonisation of rules in the area of criminal law, civil law and police cooperation.

Theme V concerns an introduction to the most important EU competition law rules, as competition law forms an indispensable complement to the internal market rules. Whereas the last mentioned are geared foremost to steer state conduct, competition law intends to steer the market conduct of companies. It also encompasses rules on abuse of positions of power and on state aid. This final part of the course will be taught by professor Pierre Larouche, professor of competition law at Tilburg University, the Netherlands, and now visiting professor at Northwestern University in Chicago. If time permits, there will be a concluding lecture on the EU's external relations.

#### *Teaching method:*

Class meetings will be interactive, combining as much as possible instruction by the tutor with discussion with the students. While in some class meetings the emphasis will be on the theory, others will focus on the analysis of Court cases and legislative instruments and on the application of the theory to practical cases. The class meetings also serve the purpose of having a critical discussion on certain 'horizontal' themes, such as the constitutional nature of the European integration process, the Court's role in this process and the comparability of the EU system with the US system.

This requires a solid preparation for each meeting and active participation during class. Students are thus expected to make an important contribution to the course.

### *Reading Materials:*

The preparation for the lectures will involve, to a varying degree depending on each subject, the thorough analysis of primary sources (text of the EU Treaty, the Treaty on the Functioning of the EU, legislation and court cases). You must bring to class every time the text of the EU Treaty and of the Treaty on the Functioning of the European Union (consolidated Treaties version). These can be downloaded in official format from <http://www.consilium.europa.eu/showPage.aspx?id=1296&lang=en>.

Legislation and case law will be made available as much as possible through C-Tools Resources.

The handbook that will be used is: P. Craig and G. de Burca, EU. Text, Cases and Materials, OUP 2008. For each theme/topic, relevant chapters and/or sections are indicated. It is recommended that you read these in a way so that you get a good general sense of the topic and of the case law that is indicated for every topic in the outline of readings. So, you are not required to study these chapters/sections into their very detail.

### *Final Examination:*

The final examination will be in the form of a take-home examination.

You have the option of writing a research paper in lieu of taking the final examination. In order to write such a paper, you must first clear the topic with me, and you must hand in the final version of your paper not later than April 30 (regardless of whether you plan to graduate this year). If you would like me to read a draft, I will be happy to do so, as long as you give me your draft no later than March 31. If I read a draft and give you comments, I expect you to make revisions in response to my comments.

### *Laptops:*

Laptops are a virtue and a vice. You are allowed to use laptops with the understanding that you will do so for two purposes only: to take notes and to access the class materials distributed electronically via C-tools. This means you will not use your laptop for any other purpose, including checking e-mails, writing e-mails, shopping, playing games, or sending instant messages to classmates. There is a serious cost to you as well as to your classmates whenever you do these things.

If you bring your laptop to class, I will assume you have agreed to this proviso.

### *Background on European integration:*

You need not have any background in European law or politics to take this course. I will cover all the information on the EU you need in class. Also, I am always happy to answer questions along the way. Yet, the first chapters of the handbook provide you with a good introduction to the development of the European integration up to the Treaty of Lisbon.

## Outline of Readings

Handbook (“HB”)

C-Tools Resources (“R”)

### I. The Institutional Architecture of the European Union

#### A. Introduction: the Idea of European Integration and its Historical Development

HB Chapters 1 & 2

#### B. Horizontal Division of Powers, Institutions and Decision-Making

HB Chapter 4

EU art. 13-19  
TFEU arts. 223-250 and 292-294

R *Commission v. Council* (2005)

#### C. Vertical Division of Powers, Principles and Legal Sources

HB Chapter 3

EU arts. 1-7, 10-12, 20, 48-50  
TFEU arts. 2-6, 288-292

R Case 6/64, *Costa v. Enel* (1964)

R Case 26/62, *Van Gend en Loos* (1963)

### II. The Internal Market

#### A. General Foundations and Harmonisation

HB Chapter 17

HB Chapter 20 (sections 4 to 8)

EU arts. 3  
TFEU arts. 4-5, 26-36

R Case C-376/98, *Germany v. Parliament and Council (Tobacco Advertising I)* (2000)

## B. Free Movement of Goods

### 1. Financial and quantitative restrictions

HB	Chapter 18 (not section 4)
HB	Chapter 19 (sections 1 to 5)
TFEU	arts. 30, 34 and 36
R	Case 8/74, <i>Dassonville</i> (1974)
R	Case 249/81 <i>Buy Irish</i> (1982)
R	Case 178/84 <i>German Beer</i> (1987)

### 2. Development of the concept of MEE and Defences

HB	Chapter 19 (sections 6 to 10)
TFEU	arts. 30 and 34
R	Case 120/78, <i>Cassis de Dijon</i> (1979)
R	Case C-267/91, <i>Keck and Mithouard</i> (1993)
R	Case C-265/95, <i>Spanish Strawberries</i> (Commission v. France, 1997)
R	Case C-112/00, <i>Schmidberger</i> (2003)

## C. Free Movement of Persons: Workers

HB	Chapter 21 (not sections 6, 8 and 9)
TFEU	arts. 45, 46, 48
R	Case C-237/94, <i>O'Flynn</i> (1996)
R	Case C-281/98, <i>Angonese</i> (2000)

## D. Right of Establishment and Free Movement of Services

HB	Chapter 22
TFEU	arts. 49-62
R	Case C-55/94, <i>Gebhard</i> (1997)

### III. The Legal Architecture of the European Union

#### A. The Relationship between European and National Legal Orders

##### 1. Supremacy and Direct Applicability/Effect of Primary Law (March 8)

HB	Chapter 8 (sections 1 to 3) Chapter 10 (sections 1 and 2)
TEU/TFEU	Declaration 17, attached to the Treaty of Lisbon
R	Case 6/64 <i>Costa v Enel</i> (already discussed under I.C)
R	Case 26/62 <i>Van Gend en Loos</i> (already discussed under I.C)
R	Case 11/70 <i>Internationale Handelsgesellschaft</i>
R	Case 43/75 <i>Defrenne</i>
R	Case 35/76 <i>Simmenthal</i>

##### 2. The Reception of European Law in the Member States (March 8/9)

HB	Chapter 10 (sections 3 to 6)
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##### 3. Vertical Direct Effect of Secondary Law (March 9)

HB	Chapter 8 (sections 4 and 5(a) to (c))
R	Case 71/74 <i>Van Duyn</i>
R	Case 148/78 <i>Ratti</i>
R	Case C-129/96 <i>Inter-environnement Wallonie</i>
R	Case C-188/89 <i>Foster</i>

##### 4. Horizontal Direct Effect and Harmonious Interpretation (March 15)

HB	Chapter 8 (sections 5(d) to 7)
R	Case C-106/89 <i>Marleasing</i>
R	Case C-91/92 <i>Faccini Dori</i>
R	Case C-555/07 <i>Küçükdeveci</i> , judgment of 19 January 2010
R	Opinion of A-G Y. Bot in Case C-555/07, of 7 July 2009

## B. National Remedies for the Enforcement of EU Law

### 1. Equality and Effectiveness of Remedy (March 16)

HB	Chapter 9 (sections 1 to 6)
R	Case C-33/76 <i>Rewe</i>
R	Case 14/83 <i>Von Colson and Kamann</i>
R	Case C-213/89 <i>Factortame</i>
R	Case C-465/93 <i>Atlanta</i>

### 2. State Liability (March 22)

HB	Chapter 9 (sections 7 and 8)
R	Cases C-46/93 and C-48/93 <i>Brasserie du Pêcheur</i>

## C. Remedies before the European Courts

### 1. Court Organisation and the Infringement Procedure; Judicial Review of National Acts (March 23)

HB	Chapter 2 (section 6)
HB	Chapter 12
R	Articles 258 to 260

### 2. The Preliminary Procedure: Cooperation between the ECJ and National Courts (March 29)

HB	Chapter 13
TFEU	Article 267
R	Case 283/81 <i>CILFIT</i>
R	Case 314/85 <i>Foto-Frost</i>

### 3. The Procedure for Annulment; Judicial Review of EU Acts (March 30)

HB	Chapter 14 (not sections 7 and 8)
TFEU	Article 263

R Case 25/62 *Plaumann*  
R Case C-50/00 P *UPA* (it is strongly recommended to also take a look at the opinion of A-G Jacobs in this case, dating from 21 March 2002)

#### D. The Protection of Fundamental Rights (April 5/6)

##### 1. Basics and Conflicts

HB Chapter 11

R Case 36/75 *Rutili*  
R Case 44/79 *Hauer*  
R Case C-36/02 *Omega*

##### 2. Towards an Integrated European Human Rights Regime?

TEU Article 6

R Charter of Fundamental Rights of the European Union

#### **IV. European Citizenship, Third Country Nationals and the Area of Freedom, Security and Justice (AFSJ)**

##### A. Migration rights of EU Citizens and Third Country Nationals (April 6/12)

HB Chapter 21 (sections 6 and 8)

TFEU Articles 18-25 and 67-86

R Case 293/83 *Gravier*  
R Case C-378/99 *Wijzenbeek*  
R Directive 2004/38/EC, OJ 2004, L229/35

##### B. European Citizenship (April 12/13)

HB Chapter 23

TFEU Articles 18-25

R Case C-413/99 *Baumbast*  
R Case C-209/03 *Bidar*  
R Case C-456/02 *Trojani*  
R Case C-200/02 *Chen*

## **V. Competition Law**

Guest lectures by prof. P. Larouche on 19 and 20 April, with an additional (short) session during the lunch break on Monday 19 April. Materials will be announced at a later stage.

On Wednesday 21 April we will have a final session, winding up the course with some final observations and offering the students the opportunity to pose questions.