

THIRD EDITION

EUROPEAN UNION LAW

Damian Chalmers | Gareth Davies | Giorgio Monti



CAMBRIDGE

European Union Law

As the preferred choice of both teachers and students, this textbook offers an unrivalled combination of expertise, accessibility and comprehensive coverage. The new edition reflects the way the economic crisis has impacted the shape and nature of European Union Law. Materials from case law, legislation and academic literature are integrated throughout to expose the student to the broadest range of views. Additional online material on the application of EU law in non-member states and on rulings on the Fiscal Compact ensures the material is completely current. The new edition includes a timeline which charts the evolution of the EU project. Written in a way which encourages sophisticated analysis, the book ensures the student's full engagement with sometimes complex material. More importantly, it offers the clarity which is essential to understanding. A required text for all interested in European Union law.

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European Union Law

TEXT AND MATERIALS

THIRD EDITION

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Contents

<i>Map</i>	xvii
<i>Preface</i>	xix
<i>Abbreviations</i>	xxiii
<i>Table of Cases</i>	xxv
<i>Table of Treaties, Instruments and Legislation</i>	lxxiii
<i>Table of Equivalents</i>	xcix
<i>Electronic Working Paper Series</i>	cv
<i>Time Line</i>	cvii

1	European Integration and the Treaty on European Union	1
1	Introduction	1
2	Europe and the European Union	4
	(i) The idea of Europe	4
	(ii) The idea of 'European Union'	7
3	The European Communities	11
	(i) From the Treaty of Paris to the Treaty of Rome	11
	(ii) EEC Treaty	13
	(iii) Emergence of two visions of EU law: intergovernmental and supranational	14
	(iv) Early enlargements	20
	(v) Single European Act	20
4	Establishment of the European Union	23
	(i) Road to Maastricht	23
	(ii) Maastricht and the Union's three legitimisation strategies	24
	(iii) Ratification of Treaty on European Union and end of permissive consensus	28
	(iv) Treaty of Amsterdam	29
5	Recasting the Borders of the European Union	30
6	Decade of Institutional Reform	35
	(i) European Union Charter of Fundamental Rights and Treaty of Nice	35
	(ii) Constitutional Treaty	36
	(iii) Road to the Lisbon Treaty	38
	(iv) Lisbon Treaty	39
	(a) Two treaties of equal value: Treaty on European Union and Treaty on the Functioning of the European Union	40
	(b) Lisbon Treaty and a democratic identity for Europe?	42
	(c) Lisbon and the recasting of the Union public sphere	46

7	Sovereign Debt Crisis and the European Union	46
	(i) European Stability Mechanism	48
	(ii) Fiscal compact and the 'six-pack'	50
	(iii) Integration and disintegration beyond the crisis	53
	Further reading	56
2	The EU Institutions	57
1	Introduction	57
2	EU Institutions and the Institutional Framework	59
3	The Commission	63
	(i) The Commission bureaucracy	63
	(a) College of Commissioners	63
	(b) Directorates-General	65
	(c) Cabinets	66
	(d) Modus operandi of the Commission	66
	(ii) Powers of the Commission	67
	(a) Legislative and quasi-legislative powers	67
	(b) Agenda-setting	72
	(c) Executive powers	74
	(d) Supervisory powers	75
	(iii) Regulatory agencies and the Commission	78
4	Council of Ministers	80
	(i) Powers and workings of the Council	80
	(ii) Decision-making within the Council	82
	(iii) Management of the Council: the Presidency, the Secretariat and COREPER	86
5	European Council	88
	(i) Powers of the European Council	89
	(ii) European Council President	91
	(iii) European Council within the EU institutional settlement	92
6	European Parliament	94
	(i) Composition and authority of the European Parliament	94
	(ii) Powers of the European Parliament	98
	(a) Legislative powers of the European Parliament	100
	(b) Powers over the Executive	101
	(c) Financial powers of the Parliament	103
7	Court of Auditors	103
	Further reading	103
3	Union Law-making	106
1	Introduction	106
2	Allocation of Legislative Procedures	108
3	EU Legislation	111
	(i) Binding instruments in EU law	111
	(ii) Soft law	114
4	Union Legislative Procedures	117
	(i) Ordinary legislative procedure	117
	(a) Central features of the ordinary legislative procedure	117
	(b) Legislative practice and the ordinary legislative procedure	119
	(c) First reading and the trilogue	120
	(ii) Consultation procedure	123
	(iii) Consent procedure	127

5	National Parliaments and Representative Democracy	128
	(i) National parliaments and political dialogue	129
	(ii) National parliamentary policing of the subsidiarity principle	131
	(iii) National parliaments: a third legislative chamber?	133
6	Differentiated Law-making	135
	(i) Enhanced cooperation	135
	(ii) Other differentiated law-making within the EU Treaty framework	139
	(iii) Differentiated law-making outside the EU Treaty framework	141
7	Comitology	144
8	EU Law-making: The Measure of its Democracy	151
	Further reading	155
4	The EU Judicial Order	156
1	Introduction	156
2	Court of Justice of the European Union	157
	(i) Court of Justice	158
	(ii) General Court	161
	(iii) European Union Civil Service Tribunal	163
3	Architecture of the EU Judicial Order	164
	(i) Judicial cooperation and competition within the EU judicial order	164
	(ii) Subjects of the EU judicial order	171
	(iii) Unified Patent Court as a challenge to the EU judicial order	173
4	Functions of the Preliminary Reference Procedure	174
	(i) Development of EU law	174
	(ii) Judicial review of EU institutions	177
	(iii) Preserving the unity of EU law	179
	(iv) Dispute resolution	183
5	Management of the EU Judicial Order	186
	(i) Managing the circumstances in which national courts refer	186
	(ii) Binding effects of Court of Justice judgments	192
	(iii) Protection of the parties' positions	195
	Further reading	197
5	The Authority of EU law	199
1	Introduction	199
2	Genesis of EU Legal Authority	200
3	Claims of EU Legal Authority	204
	(i) Autonomy of EU law	204
	(ii) Primacy of EU law	208
	(iii) Pre-emption	209
	(iv) Fidelity principle	213
4	Foundations of EU Legal Authority	215
	(i) Pedigree of EU legal authority	215
	(ii) Reasons for EU legal authority	217
5	Conditional Authority of EU Law	222
	(i) EU law and national fundamental rights	225
	(ii) Ultra vires review	229
	(iii) EU law and protection of democratic authority	235
	Further reading	245

6	Fundamental Rights	247
1	Introduction	247
2	Fundamental Rights and the Schema of the Treaties	249
3	Substance of EU Fundamental Rights Law	250
	(i) National constitutional traditions and the ECHR in EU fundamental rights law	251
	(ii) European Union Charter of Fundamental Rights	254
4	Standard of Protection of Fundamental Rights	259
	(i) Formal parameters of interpretation	261
	(ii) Development of fundamental rights in the light of EU objectives	266
5	Fundamental Rights and the Institutional Scheme of the European Union	275
	(i) Fundamental rights and the EU institutions	275
	(ii) Fundamental rights and the Member States	280
6	European Union Accession to the European Convention for the Protection of Human Rights	288
	Further reading	290
7	Rights and Remedies in National Courts	291
1	Introduction	291
2	Direct Effect and the Idea of an EU Right	293
3	Direct Effect and Development of Individual Rights	295
	(i) Relaxing the criteria: towards a test of justiciability	295
	(ii) Member State's duty to protect individual rights and emergence of horizontal direct effect	296
4	Direct Effect and the Development of EU Remedies and Procedures	298
	(i) Union oversight of local remedies in domestic courts	300
	(ii) EU law procedures and remedies in national courts	305
5	Direct Effect and EU Secondary Legislation	308
	(i) Direct effect of Directives	308
	(ii) Incidental direct effect	313
6	Indirect Effect	316
	(i) Evolution of indirect effect	316
	(ii) Duty to disapply and fundamental rights	321
	(iii) Duty to refrain from compromising EU law	323
7	State Liability	325
	(i) Arrival and challenges of Member State liability	325
	(ii) Conditions of liability	328
	(iii) Liability of judicial institutions	333
	Further reading	335
8	The Infringement Proceedings	337
1	Introduction	337
2	Different Dimensions to the Infringement Proceedings	339
	(i) Policing compliance with EU law	340
	(ii) An instrument for securing satisfactory performance of Union policies	343
	(iii) A public law framework to structure domestic negotiation of EU law	348
3	Scope of Member State Responsibilities	351
	(i) Acts and omissions of all state agencies	351
	(ii) Accountability of state actors	355
4	Different Stages of Article 258 TFEU Proceedings	357
	(i) EU Pilot	357
	(ii) Letter of formal notice and Member State observations	359
	(iii) Reasoned Opinion and period for national compliance	360

5	Administration of the Infringement Proceedings	363
	(i) Commission's discretion over the management of the proceedings	363
	(ii) Complainants and Article 258 TFEU	368
6	Sanctions and Article 260 TFEU	371
	(i) Article 260 TFEU and two routes to sanctions	371
	(ii) Level and form of sanctions levied under Article 260 TFEU	374
	Further reading	377
9	Governance	379
1	Introduction	379
2	Governance Agenda	381
	(i) Norms of governance	382
	(ii) Features of governance	383
3	Participatory Democracy and the European Citizens' Initiative	388
4	Subsidiarity and Proportionality	393
	(i) An outline of the subsidiarity and proportionality principles	393
	(ii) Subsidiarity	394
	(iii) Proportionality	399
	(iv) Subsidiarity, proportionality and 'Smart Regulation'	405
5	Consultation	406
	(i) General standards and the minimum principles for consultation	406
	(ii) Dialogue within the consultation process	407
	(iii) Transparency of the consultation process	410
	(iv) Inclusiveness of EU consultation	411
6	Transparency	412
	(i) Scope of the right of access to documents	412
	(ii) Exceptions to the right of access to information	414
	Further reading	422
10	Judicial Review	423
1	Introduction	423
2	Scope of Judicial Review and Article 263 TFEU	425
3	Grounds of Review	428
	(i) Lack of competence	428
	(ii) Manifest error of assessment and abuse of power	429
	(iii) Rights of process	433
	(a) Rights of defence	433
	(b) Right to a hearing	437
	(c) Right to good administration	437
	(iv) Infringement of the Treaties or of any rule of law relating to their application	439
	(a) Non-discrimination	439
	(b) Legal certainty	441
	(c) Legitimate expectations	442
4	Standing under Article 263 TFEU	443
	(i) Privileged and semi-privileged applicants	443
	(ii) Non-privileged applicants	444
	(a) Regulatory acts and legislative acts	444
	(b) Direct concern and implementing measures	446
	(c) Individual concern and <i>Plaumann</i>	448
	(d) Standing and interest groups	452

5	Article 265 TFEU and the Failure to Act	455
6	Plea of Illegality	457
7	Non-contractual Liability	458
	(i) Quality of the breach of EU law	459
	(ii) Presence of loss caused by the Union	462
8	Consequences of Annulment	464
	Further reading	465

11 Citizenship of the Union 466

1	Introduction	466
2	Evolution of Modern Citizenship	468
3	Nature of Union Citizenship	471
4	Right to Move and Reside within the Union	475
	(i) Conditions of residence	478
	(ii) Overcoming obstacles to migration	481
	(a) Prohibition of discrimination	481
	(b) Scope of the prohibition	482
	(c) Restrictions on movement	484
	(d) Citizenship and social assistance	487
	(e) Real links and integration	489
	(f) Internal situation and reverse discrimination	491
	(iii) Family rights	494
	(a) The EU idea of the family	495
	(b) Separation, death and divorce	497
	(c) Rights of children and carers	498
	(d) Family members arriving from outside the Union	503
	(iv) Administrative formalities	506
	(v) Grounds for exclusion	508
5	Political Rights of Union Citizens	513
	Further reading	515

12 EU Law and Non-EU Nationals 517

1	Introduction	517
2	Union Competences on Border Checks, Asylum and Immigration	519
	(i) Central competences	519
	(ii) Differentiated integration and EU border control, asylum and immigration policy	520
3	Non-EU Nationals and the Area of Freedom, Security and Justice	524
	(i) Economic mercantilism	526
	(ii) National security and national sovereignty	528
	(a) Frontiers as national markers	528
	(b) Criminalisation of migration	531
	(c) External frontier	534
	(iii) Humanitarianism	536
	(iv) European solidarity	539
4	'Unwelcome Foreigners': Returns Directive	544
5	'Desirable Foreigners': Worker Residents and Long-term Residents	546
	(i) Acquisition of employment and long-term residence status	547
	(ii) Rights acquired against the host state	549

- 6 'Suspicious Foreigners': EU Regime on International Protection 554
 - (i) Right to remain pending examination of the application and to individual examination of the application 555
 - (ii) Provision of material reception conditions 557
 - (iii) Policing of applicants through welfare 559
- 7 'Poor Foreigners': Refugees and Subsidiary Protection 562
 - (i) Acquisition of refugee status 563
 - (ii) Subsidiary protection 565
 - (iii) Benefits of international protection 567
- Further reading 568

13 Equal Opportunities Law and Policy 569

- 1 Introduction 569
- 2 Development of EU Equal Opportunities Law 571
 - (i) Economic versus non-economic visions of EU law 571
 - (ii) Sources of equal opportunities law 573
 - (iii) Equal opportunities versus substantive equality 577
 - (iv) Common core of EU equal opportunities: the labour market 578
- 3 Equality Grounds 581
 - (i) Sex/gender 583
 - (ii) Racial or ethnic origin 585
 - (iii) Religion or belief 586
 - (iv) Disability 587
 - (v) Age 590
 - (vi) Sexual orientation 591
 - (vii) Excluded groups 593
- 4 Discrimination: Meaning, Defences and Remedies 596
 - (i) Direct discrimination 596
 - (ii) Indirect discrimination 597
 - (a) Concept of indirect discrimination 597
 - (b) Legitimate aim defence 599
 - (iii) Harassment 600
 - (iv) Defences 601
 - (a) Genuine occupational requirements 601
 - (b) Other defences 603
 - (v) Remedies 608
 - (a) Procedures 608
 - (b) Compensation 610
- 5 Widening the Scope of EU Equal Opportunities Policy 611
 - (i) Beyond the labour market 612
 - (ii) Positive action 614
 - (iii) Dialogue 616
 - (iv) Mainstreaming 618
- Further reading 622

14 EU Criminal Law 623

- 1 Introduction 623
- 2 Characterising EU Criminal Law 625
 - (i) Member States and internal security 626
 - (ii) Rationales of EU criminal law: augmentation of national security and European Union public order 629

- (iii) Mediation of domestic and Union security concerns 634
 - (a) Retention of pre-Lisbon Treaty normative order 634
 - (b) National controls over the law-making process 635
 - (c) Differentiated integration 636
- 3 Judicial Cooperation in Criminal Justice 638
 - (i) Principle of mutual recognition 638
 - (ii) European Arrest Warrant 640
 - (a) European Arrest Warrant and duties of surrender 640
 - (b) European Arrest Warrant and rights of defence 642
 - (c) European Arrest Warrant and principles of legality and proportionality 647
 - (d) European Arrest Warrant and national citizenship 649
 - (iii) Principle of *ne bis in idem* 651
- 4 Harmonisation and Increased Criminalisation through EU Law 655
 - (i) Euro-crimes 657
 - (ii) EU criminal law and regulatory effectiveness of other EU policies 661
- 5 European Union Rights of Victims 661
 - Further reading 666

15 The Internal Market 667

- 1 Introduction 667
- 2 Purpose of the Internal Market 668
- 3 Legal Framework of the Internal Market 670
- 4 Competence to Legislate 677
- 5 Techniques of Regulation 687
 - (i) Old and new approaches 687
 - (ii) Mechanics of the new approach 689
 - (iii) Minimum harmonisation 692
- 6 Non-economic Interests in the Internal Market 693
- 7 Regulatory Competition 697
 - Further Reading 702

16 Economic and Monetary Union 704

- 1 Introduction 704
- 2 Central Pillars of Economic and Monetary Union Prior to the Crisis 707
 - (i) Delors Blueprint for economic and monetary union 707
 - (ii) Four pillars of economic and monetary union prior to the crisis 709
- 3 Differentiated Obligations of Economic and Monetary Union 713
- 4 Revised Institutional Architecture after the Crisis 714
 - (i) Earthquake of the European sovereign debt crisis 714
 - (ii) More extensive Union oversight and disciplining of national fiscal and economic performance 717
 - (iii) Formalisation of financial support to sustain euro area state public finances 720
 - (iv) Extension of powers of European Central Bank 720
 - (v) Composite architecture of economic and monetary union 722
- 5 European Central Bank and European System of Central Banks 725
 - (i) European Central Bank and its decision-making bodies 725
 - (ii) Independence and accountability of European Central Bank 726
 - (iii) Tasks of European Central Bank 731
 - (a) Monetary policy 731
 - (b) Prudential supervision 733
 - (c) Lender of last resort 736

- 6 European Stability Mechanism 740
- 7 Europeanisation of Economic, Employment and Budgetary Policy through the European Semester 745
- 8 Sanction Procedures for Significant Observed Deviations from the MTBO, Excessive Imbalances and Excessive Deficits 748
- Further reading 753

17 The Free Movement of Goods 754

- 1 Introduction 754
- 2 General Definition of a Measure Equivalent to a Quantitative Restriction 756
 - (i) *Dassonville* 757
 - (ii) Limits of the notion of a MEQR 759
 - (iii) Form of a MEQR 763
 - (iv) *De minimis* 765
 - (v) Internal situation 766
 - (vi) Article 34 TFEU and private actors 768
- 3 Product Standards and *Cassis de Dijon* 773
 - (i) Mutual recognition 776
 - (ii) Mandatory requirements 779
 - (a) Consumer protection 780
 - (b) Protection of the environment 783
- 4 Selling Arrangements and *Keck* 786
 - (i) Notion of a selling arrangement 790
 - (ii) Unequal effect of selling arrangements 792
- 5 Article 35 TFEU and Restrictions on Exports 794
- Further Reading 796

18 The Free Movement of Services 798

- 1 Introduction 798
- 2 Regulating the Services Market 800
- 3 Cross-border Services 802
 - (i) What is a service? 802
 - (ii) Cross-border element 803
 - (iii) Remuneration 805
- 4 Restrictions on the Movement of Services 808
 - (i) Notion of a restriction on the provision of services 808
 - (ii) Horizontal application of Article 56 TFEU 813
- 5 Justifying Restrictions on Services 820
 - (i) Restrictions on marketing and prices 822
 - (ii) Access to regulated industries and professions 825
 - (iii) Tax and investment issues 828
- 6 Services and the Market Society 830
 - (i) Right to trade and socially sensitive services 830
 - (ii) The market society 832
 - (iii) Article 56 TFEU and the welfare state 833
- 7 Services Directive 842
 - (i) Scope of application of Services Directive 842
 - (ii) Administrative simplification 843
 - (iii) Right to provide and receive services 844
 - (iv) Administrative cooperation 845
- Further reading 846

19 The Pursuit of an Occupation in Another Member State 848

- 1 Introduction 848
- 2 Taking Up and Pursuit of an Occupation in Another Member State 849
 - (i) Employment and self-employment 851
 - (ii) Performance of significant economic activity in another Member State 853
 - (iii) Cross-border element 856
 - (iv) Right to pursue an occupation in another Member State 856
- 3 Restrictions on the Taking Up of an Occupation 859
 - (i) Discriminatory restrictions on taking up an occupation 859
 - (ii) Equally applicable restrictions on taking up an occupation 860
 - (iii) *De minimis*: limits of the right to take up an occupation 863
 - (iv) Restrictions on secondary establishment 864
 - (v) Restrictions on the use of diplomas and qualifications 866
 - (vi) Restrictions on grounds of abuse of free movement 873
- 4 Restrictions on the Pursuit of an Occupation 875
 - (i) Discrimination in labour markets 876
 - (ii) Discrimination in the pursuit of a business 878
 - (iii) Equally applicable restrictions on the pursuit of an occupation 879
- 5 Free Movement of Companies 883
 - (i) Discrimination and foreign companies 883
 - (ii) Movement of companies and reincorporation 884
- 6 Services Directive and Freedom of Establishment 890
 - Further reading 891

20 Trade Restrictions and Public Goods 892

- 1 Introduction 892
- 2 Balancing Free Movement Against other Interests 893
- 3 Public Goods Protected under EU Law 894
- 4 Principles Mediating Conflicts between Free Movement and Public Goods 899
 - (i) The measure must be necessary 901
 - (ii) The measure must be effective 906
 - (iii) Arbitrary discrimination and mutual recognition 911
 - (iv) The measure must be the least restrictive option 914
 - (v) The measure must be procedurally fair 922
- 5 Environmental Protection 925
- 6 Public Health 930
- 7 Public Policy, Public Security and Public Morality 933
- 8 Public Service and Official Authority 937
 - Further reading 941

21 EU Competition Law: Function and Enforcement 942

- 1 Introduction 942
- 2 Aims of EU Competition Law 944
 - (i) Economics of competition 944
 - (ii) Politics of competition law 950
 - (iii) Aims of EU competition policy 953
 - (iv) Impact of the economic crisis 955

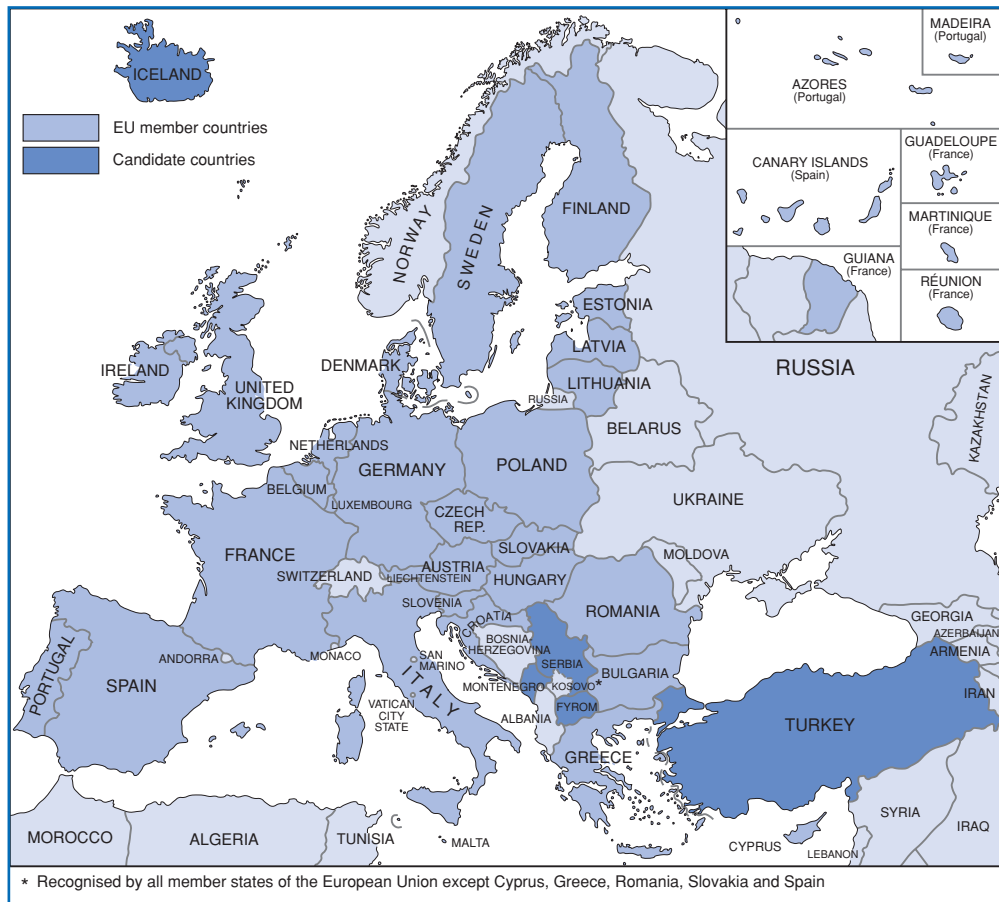
3	Enforcement by the Commission	957
(i)	First stage: investigation	958
(a)	Requests for information and interviews	958
(b)	Inspections	960
(ii)	Second stage: adjudication	963
(a)	Statement of objections and access to the file	963
(b)	Oral hearing	964
(iii)	Penalties for infringement	965
(a)	Fining policy	966
(b)	Leniency policy	969
(iv)	Commitment decisions	971
(v)	Commission's procedures: an assessment	973
(vi)	Commission's performance	977
4	Resettlement of Competition Regulatory Authority	978
(i)	Modernisation	978
(ii)	Commission's new role	981
(iii)	European Competition Network	982
(a)	Case allocation	982
(b)	Cooperation within the Network	983
(iv)	Modernisation in practice	984
(v)	Modernisation and the courts	987
5	Private Enforcement	988
(i)	An EU law right to damages	989
(ii)	Commission initiatives	992
(iii)	Assessment	995
	Further reading	995
22	Antitrust and Monopolies	997
1	Introduction	997
2	Scope of Application of EU Competition Law	999
(i)	Undertakings	999
(ii)	Effect on trade between Member States	1001
(iii)	Excluded agreements	1003
3	Article 101 TFEU: Restrictive Practices	1006
(i)	Agreements, decisions and concerted practices	1007
(a)	Cartels	1008
(b)	Distinguishing between agreement and unilateral action	1014
(ii)	Object or effect the restriction, distortion or prevention of competition	1018
(a)	Background	1018
(b)	Agreements restrictive of competition by object	1020
(c)	Agreements having an anti-competitive effect	1022
(iii)	Role of Article 101(3) TFEU	1025
(a)	Individual exemptions	1026
(b)	Block Exemptions	1029
4	Article 102 TFEU: Abuse of a Dominant Position	1031
(i)	Dominance	1032
(a)	Market shares	1033
(b)	Additional factors	1033
(ii)	Abuse of dominance: general principles	1035
(iii)	Predatory pricing	1038

- (iv) Reform 1041
- (v) Response by the Court of Justice 1046
- 5 Hidden Side of Competition Law Enforcement 1049
 - Further reading 1051

23 State Aid Law 1052

- 1 Introduction 1052
- 2 Role of State Aid Law in the EU 1053
 - (i) Justifications for state aid control 1053
 - (ii) Commission's state aid policy 1055
- 3 Meaning of State Aid 1057
 - (i) Intervention by the Member State or through state resources 1058
 - (a) Necessary involvement of state resources 1058
 - (b) State involvement 1060
 - (ii) Intervention gives the recipient an advantage 1061
 - (iii) Intervention is selective 1063
 - (a) Geographical selectivity 1064
 - (b) Material selectivity 1065
 - (iv) Effect on trade and restriction of competition 1069
 - (a) Overly broad standards 1069
 - (b) *De minimis* aid 1070
- 4 Enforcement and Supervision 1071
 - (i) Commission supervision 1071
 - (ii) Enforcement 1072
 - (a) Recovery 1072
 - (b) Private enforcement 1074
- 5 Exemptions 1076
 - (i) Overview 1076
 - (ii) Better targeted aid and Europe 2020 1077
 - (iii) Better targeted aid enforcement 1080
 - (iv) Rescuing banks 1082
 - Further reading 1085

Index 1087



Preface

The cover of this book portrays the *Myth of Europa*. The story has it that Europa, a Phoenician princess, was abducted by Zeus, the god of thunder, disguised as a bull. Zeus had been searching for a wife beautiful enough to become Queen of his native Crete. When he saw Europa he was smitten. Europa was gathering flowers by the seaside with her friends when she came upon the bull. Uncommonly gentle, the bull inspired no fear. Decking its horns with flowers, Europa climbed upon its back, whereupon the bull – Zeus – took off at a trot and dived into the sea. Europa was carried off to Crete, where she became the mother of Minos, the mythical King of Crete, who periodically demanded a tribute of young men and women of Athens to be sacrificed to the Minotaur.

This myth has not died with the ancients. In 1956, the six countries that were to sign the EEC Treaty appropriated her name to issue a set of Europa stamps to symbolise a community of interests and objectives. And today, Zeus's kidnap of Europa is depicted on the Greek 2 euro coin. The myth has been understood in a variety of ways. On one level it is a story of virtue, innocence and romance; on another, it is a warning of violence and exclusion. As with many of the ancient myths, misunderstanding and contestation lie at its very heart. The Roman depiction on our cover is one of the first depictions and, insofar as the human participants are depicted as Romans, reminds us too that the myth has been repeatedly appropriated and reinvented. We have also here a tale with its origins in modern Lebanon, which was told by the Ancient Greeks, and which then became a central fable of Ancient Rome. Yet Europa's myth is now seen as the origin of a territory whose cultural heartland lies somewhere in central Europe, *Mittleuropa*, perhaps in the modern Czech Republic, perhaps in Vienna, but certainly somewhere in a nation that became a Member State of the European Union only very recently.

In today's Europe, misunderstanding, contestation, appropriation and reinvention permeate not only its founding myth, but also its most modern institution, the European Union, the law of which is this book's subject. European Union law is often seen as embodying new ideals, new rights and new forms of welfare. Equally, however, it is portrayed as being intrusive, divisive and costly. On the one hand, EU law is said to bring an international comity and to provide a powerful counter to the narrow (and historically dangerous) parochialism that has marked so much of Europe's bloody past. On the other hand, critics point to an overweening, inflexible, even pernicious European-ness, that is intolerant of national diversity and that stymies local democracy.

It is exactly this anxious fragility that gives European Union law its peculiar vitality and interest. It brings both a sceptical eye to the analysis of EU law and a constant demand to revisit old assumptions. As such, debates about EU law have in recent years been central in reconsidering ideas of the state, political community, the market, tradition and society.

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The Treaties were renumbered by the Treaty of Lisbon and we have used the Treaty numbers set by it throughout. A Table of Equivalent is included for reference's sake. We have aimed to state the law as at 31 December 2013.

DC, GD, GM

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Abbreviations

AFSJ	Area of Freedom, Security and Justice	ENP	European Neighbourhood Policy
BER	Block Exemption Regulation	EO	European Ombudsman
BSE	bovine spongiform encephalopathy	ERDF	European Regional Development Fund
CAP	Common Agricultural Policy	ERM	exchange rate mechanism
CESR	Committee of European Securities Regulators	ERT	European Round Table
CFI	Court of First Instance	ESC	Economic and Social Committee
CFSP	Common Foreign and Security Policy	ESCB	European System of Central Banks
CISA	Schengen Implementing Convention	ESDP	European Security and Defence Policy
COR	Committee of the Regions	ESecC	European Securities Committee
COREPER	Committee of Permanent Representatives	ESF	European Social Fund
COSAC	Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union	ESM	European Stability Mechanism
CPVO	Community Plant Variety Office	EUCFR	European Union Charter of Fundamental Rights
CT	Constitutional Treaty	EURATOM	European Atomic Energy Community
DCT	Draft Constitutional Treaty	EUROPOL	European Police Office
DG	Directorate-General	FSA	Financial Services Authority
EAW	European Arrest Warrant	FSAP	Financial Services Action Plan
EC	European Communities	GBER	General Block Exemption Regulation
ECB	European Central Bank	GDP	gross domestic product
ECHA	European Chemicals Agency	IGC	intergovernmental conference
ECHR	European Convention on Human Rights	IMF	International Monetary Fund
ECI	European Citizens' Initiative	ISO	International Standards Organisation
ECN	European Competition Network	JHA	Justice and Home Affairs
ECOWAS	Economic Community of West African States	MCA	monetary compensation amount
ECSC	European Coal and Steel Community	MEP	Member of the European Parliament
ECtHR	European Court of Human Rights	MEQR	measure of equivalent effect
ECU	European Currency Unit	MiFiD	Markets in Financial Instruments Directive
EDC	European Defence Community	MOU	Memorandum of Understanding
EDP	excessive deficit procedure	MTBO	Medium Term Budgetary Objective
EEA	European Economic Area	NAAT	no appreciable affectation of trade
EEC	European Economic Community	NCA	national competition authority
EFSA	European Food Safety Authority	NCB	national central bank
EFSF	European Financial Stability Facility	NGO	non-governmental organisation
EFTA	European Free Trade Area	OHIM	Office for Harmonisation in the Internal Market
EMI	European Monetary Institute	OLAF	European Anti-Fraud Office
EMS	European Monetary System	OMC	open method of coordination
EMU	economic and monetary union	OMT	Outright Monetary Transaction

PASP	Protocol on the Application of the Principles of Subsidiarity and Proportionality	StCF	Standing Committee on Foodstuffs
PJCC	police and judicial cooperation in criminal matters	TEU	Treaty on European Union
QMV	qualified majority voting	TEU(M)	Treaty on European Union (Maastricht)
SBC	Schengen Borders Code	TFEU	Treaty on the Functioning of the European Union
SEA	Single European Act	TSCG	Treaty on Stability, Coordination and Governance in the Economic and Monetary Union
SGEI	services of general economic interest	UNCRPD	UN Convention on the Rights of Persons with Disabilities
SIA	Schengen Implementing Agreement	UPC	United Patent Court
SIS	Schengen Information System	VIS	Visa Information System
SMP	Securities Market Programme	WTO	World Trade Organization
SSM	Single Supervisory Mechanism		

Table of Cases

European Court of Justice: numerical order

- 1/58 Stork v High Authority [1959] ECR 17 251
- 30/59 De Gezamenlijke Steenkolenmijnen in Limburg v High Authority [1961] ECR 1, 19 1063
- 36/59, 37/59, 38/59 & 40/59 Geitling v High Authority [1960] ECR 423 251
- 42/59 & 49/59 SNUPAT v High Authority [1961] ECR 109 441
- 7/61 Commission v Italy [1961] ECR 317 363
- 25/62 Plaumann & Co. v Commission [1963] ECR 95 448–9, 451–2
- 26/62 Van Gend en Loos v Nederlandse Administratie der Belastingen [1963] ECR 2, 199, 201, 202, 203, 204, 217, 222–3, 293–4, 296
- 28/62–30/62 Da Costa [1963] ECR 37 188, 192–3
- 31/62 & 33/62 Wöhrmann v Commission [1962] ECR 506 457
- 110/63 Willame v Commission [1965] ECR 649 463
- 6/64 Costa v ENEL [1964] ECR 585 199, 201–2, 203, 204–5, 208, 215, 216, 217, 222–3
- 40/64 Sgarlata v Commission [1965] ECR 215 251
- 56/64 & 58/64 Consten and Gründig v Commission [1966] ECR 299 1001, 1014–15
- 18/65 & 35/65 Gutmann v Commission [1966] ECR 103 433
- 48/65 Lütticke v Commission [1966] ECR 19 363
- 56/65 Société Technique Minière v Maschinenbau Ulm (Maschinenbau Ulm) [1966] ECR 234 1001, 1022, 1025
- 57/65 Lütticke v HZA Sarrelouis [1966] ECR 205 295
- 5/66, 7/66, 13/66–24/66 Kampfmeyer v Commission [1967] ECR 245 464
- 27/67 Firma Fink-Frucht GmbH v Hauptzollamt München-Landsbergerstrasse [1968] ECR 327 295
- 35/67 Van Eick v Commission [1968] ECR 329 251
- 13/68 Salgoil v Italian Ministry of Foreign Trade [1968] ECR 453 295
- 14/68 Walt Wilhelm v Bundeskartellamt [1969] ECR 1 978
- 5/69 Völk v Vervaecke [1969] ECR 295 1002
- 29/69 Stauder v City of Ulm [1969] ECR 419 251
- 41/69, 44/69 & 45/69 ACF Chemiefarmia v Commission [1970] ECR 661 965, 1008
- 48/69 ICI v Commission (Dyestuffs) [1972] ECR 619 1000, 1008, 1013
- 69/69 Alcan v Commission [1970] ECR 385 446
- 77/69 Commission v Belgium [1970] ECR 237 351, 352
- 9/70 Grad v Finanzamt Traustein [1970] ECR 838 309
- 11/70 Internationale Handelsgesellschaft v Einfuhr- und Vorratstelle für Getreide und Futtermittel ('Solange I') [1970] ECR 1125 180, 202–3, 251–3, 254, 400
- 15/70 Chevalley v Commission [1970] ECR 979 456
- 22/70 Commission v Council (ERTA) [1971] ECR 263 426
- 41/70 to 44/70 International Fruit Company v Commission [1971] ECR 411 113–14
- 72/70 Commission v Germany (Khlengesetz) [1973] ECR 813 1072
- 120/70 Lorenz v Germany [1973] ECR 1471 1074
- 93/71 Leonesio v Italian Ministry of Agriculture [1972] ECR 293 308
- 96/71 Haegeman v Commission [1972] ECR 1005 463
- 6/72 Europemballage Corporation and Continental Can Co. Inc. v Commission ('Continental Can') [1973] ECR 215 1042
- 21/72–24/72 International Fruit Company and others v Produktschap voor Groenten en Fruit [1972] ECR 1226 205
- 39/72 Commission v Italy (Premiums for Slaughtering Cows) [1973] ECR 101 112, 308
- 2/73 Riseria Luigi Geddo v Ente Nazionale Risi [1973] ECR 865 756, 757

- 4/73 Nold v Commission [1974] ECR 491 253
- 34/73 Variola v Amministrazione delle Finanze [1973] ECR 981 112
- 40/73–48/73, 50/73, 54/73–56/73, 111/73, 113/73 & 114/73 Cooperatieve Vereniging 'Suiker Unie' UA v Commission [1975] ECR 1663 1008
- 127/73 BRT v SABAM [1974] ECR 51 989
- 152/73 Sotgiu v Deutsche Bundespost [1974] ECR 153 482, 489, 515
- 155/73 Giuseppe Sacchi [1974] ECR 409 802
- 166/73 Rheinmühlen-Düsseldorf v Einfuhr- und Vorratstelle für Getreide [1974] ECR 33 167, 175
- 167/73 Commission v France (French Merchant Navy) [1974] ECR 359 859
- 173/73 Commission v Italy [1973] ECR 709 1058, 1065, 1066
- 175/73 Union Syndicale [1974] ECR 917 253
- 2/74 Reyners v Belgium [1974] ECR 631 296, 803, 856, 859
- 8/74 Procureur du Roi v Benoît and Gustave Dassonville [1974] ECR 837 494, 754–5, 756–60, 765, 766, 773, 790, 756, 921
- 17/74 Transocean Marine Paint v Commission [1974] ECR 1063 254
- 33/74 Van Binsbergen v Bestuur van der Bedrijfsvereniging voor de Metaalnijverheid [1974] ECR 1299 803, 808, 822, 823, 826, 827, 897
- 36/74 Walrave & Koch v Association Union Cycliste Internationale [1974] ECR 1405 814, 818–19
- 41/74 Van Duyn v Home Office [1974] ECR 1337 309–10, 509, 899, 904, 935
- 56/74–60/74 Kampffmeyer v Commission and Council [1976] ECR 711 463
- 71/74 FRUBO v Commission [1975] ECR 563 1003
- 74/74 CNTA v Commission [1975] ECR 533 443, 463
- 4/75 Rewe-Zentralfinanz GmbH v Landwirtschaftskammer Bonn [1975] ECR 843 912
- 32/75 Cristini v SNCF [1975] ECR 1085 877
- 36/75 Rutili v Ministre de l'Intérieur [1975] ECR 1219 253
- 39/75 Coenen v Sociaal-Economische Raad [1975] ECR 1547 808, 826
- 43/75 Defrenne v Sabena [1976] ECR 455 253, 295–8, 312, 572, 583
- 104/75 Officier van Justitie v De Peijper [1976] ECR 613 914–15, 916
- 105/75 Giuffrida v Council [1976] ECR 1395 433
- 118/75 Watson and Belmann [1976] ECR 1185 508
- 130/75 Prais [1976] ECR 1589 253
- 7/76 IRCA [1976] ECR 1213, 1237, Opinion of Advocate General Warner 252
- 26/76 Metro SB-Großmärkte GmbH & Co KG v Commission (No. 1) [1977] ECR 1875 1003, 1022
- 27/76 United Brands Company v Commission [1978] ECR 207 1032, 1033, 1035–6
- 33/76 Rewe-Zentralfinanz and others v Landwirtschaftskammer für das Saarland [1976] ECR 1989 299–300
- 52/76 Benedetti v Munari [1977] ECR 163 192–3
- 64/76 & 113/76, 167/78 & 239/78, 27/79, 28/79 & 45/79 Dumortier Frères v Council [1979] ECR 3091 464
- 71/76 Thieffry v Conseil de l'Ordre des Avocats à la Cour de Paris [1977] ECR 765 866, 897
- 85/76 Hoffmann-La Roche & Co. AG v Commission [1979] ECR 461 1033, 1037, 1039
- 90/76 Van Ameyde v UCI [1997] ECR 1091 815
- 117/76 & 16/77 Ruckdeschel v Council [1977] ECR 1753 439–40
- 38/77 ENKA v Inspecteur der Invoerrechten [1977] ECR 2203 113–14
- 82/77 Van Tiggele [1978] ECR 25 823
- 106/77 Amministrazione delle Finanze dello Stato v Simmenthal [1978] ECR 629 208–9
- 132/77 Société pour l'Exportation des Sucres SA v Commission [1978] ECR 1061 464
- 149/77 Defrenne II [1978] ECR 1365 253
- 15/78 SG Alsacienne v Koestler [1978] ECR 1971 803
- 22/78 Hugin Kassaregister AB v Commission [1979] ECR 1869 1035
- 32/78 & 36/78–82/78 BWM Belgium v Commission [1979] ECR 2435 1015
- 84/78 Tomadini v Amministrazione delle Finanze dello Stato [1979] ECR 1801 441
- 115/78 J. Knoors v Staatssecretaris van Economische Zaken [1979] ECR 399 873–4
- 120/78 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon) [1979] ECR 649 688–9, 754–5, 757, 758, 771, 773–6, 777, 779, 781, 786, 895–6
- 128/78 Commission v United Kingdom (Failure to Implement Regulation 1463/70 on recording equipment in road transport) [1978] ECR 2429 112
- 141/78 France v United Kingdom [1979] ECR 2923 339
- 148/78 Ministero Pubblico v Ratti [1979] ECR 1629 310
- 170/78 Commission v United Kingdom [1983] ECR I-02265 780
- 175/78 Saunders [1979] ECR 1129 856
- 230/78 Eridania [1979] ECR 2749 253
- 238/78 Ireks-Arkady v Council and Commission [1979] ECR 2955, 2998–9 462–3, 464
- 258/78 Nungesser v Commission [1982] ECR 2015 1022
- 15/79 Groenveld BV v Produktschap voor Vee en Vlees [1979] ECR 3409 794
- 34/79 R v Henn and Darby [1979] ECR 3975 509, 904, 912, 934, 935
- 44/79 Hauer [1979] ECR 3727 253

- 52/79 *Procureur du Roi v Debauve* [1980] ECR 833 803
- 61/79 *Denkavit Italiana* [1980] ECR 1205 193, 1058
- 104/79 *Foglia v Novello* (No. 1) [1980] ECR 745 165, 185
- 129/79 *Macarthys Ltd v Smith* [1980] ECR 1275 579
- 136/79 *National Panasonic* [1980] ECR 2033 253
- 138/79 *Roquette Frères v Council* [1980] ECR 3333 123
- 149/79 *Commission v Belgium* (No. 2) [1982] ECR 1845 515, 936
- 155/79 *AM & S Europe Ltd v Commission* [1982] ECR 1575 254, 435, 960
- C-730/79 *Philip Morris* [1980] ECR 2671 1077
- 788/79 *Gilli and Andres* [1980] ECR 2071 779, 781, 782
- 789/79 & 790/79 *Calpak and others v Commission* [1980] ECR 1949 112
- 27/80 *Fietje* [1980] ECR 3839 781
- 66/80 *International Chemical Corporation (ICC) v Amministrazione Finanze* [1981] ECR 1191 181, 193, 464
- 96/80 *Jenkins v Kingsgate (Clothing Productions) Ltd* [1981] ECR 911 599
- 100/80–103/80 *Musique diffusion française and others v Commission* [1983] ECR 1825 966
- 113/80 *Commission v Ireland (Irish Souvenirs)* [1981] ECR 1625 783, 900
- 154/80 *Staatsecretaris van Financiën v Coöperative Aardappelenbewaarplaats* [1981] ECR 445 805
- 155/80 *Oebel* [1981] ECR 1993 896
- 172/80 *Züchner v Bayerische Vereinsbank* [1981] ECR 2021 1013
- 244/80 *Foglia v Novello* (No. 2) [1981] ECR 3045 183, 192
- 246/80 *Broeckmeulen v Huisarts Registratie Commissie* [1981] ECR 2311 171
- 272/80 *Frans-Nederlandse Maatschappij voor Biologische Producten* [1981] ECR 3277 913, 930
- 279/80 *Webb* [1981] ECR 3305 821
- 8/81 *Becker v Finanzamt Münster-Innenstadt* [1982] ECR 53 310
- 12/81 *Garland v British Rail Engineering* [1982] ECR 359 580
- 52/81 *Faust v Commission* [1982] ECR 3745 443
- 53/81 *Levin v Staatssecretaris van Justitie* [1982] ECR 1035 478, 853, 854, 855, 856, 873
- 60/81 *IBM v Commission* [1981] ECR 2639 426–7
- 62/81 & 63/81 *Seco v Etablissement d'assurance contre la vieillesse et l'invalidité* [1982] ECR 223 821
- 102/81 *Nordsee Deutsche Hochseefischerei v Reederei Mond Hochseefischerei* [1982] ECR 1095 172
- 104/81 *Hauptzollamt Mainz v Kupferberg* [1982] ECR 3641 112–13, 308
- 115/81 & 116/81 *Adoui and Cornuaille v Belgian State and City of Liège* [1982] ECR 1665 509–10, 904, 935
- 124/81 *Commission v United Kingdom* [1983] ECR 203 916
- 210/81 *Demo-Studio Schmidt v Commission* [1983] ECR 3045 438
- 211/81 *Commission v Denmark* [1982] ECR 4547 359–60, 361
- 245/81 *Edeka v Commission* [1982] ECR 2745 441
- 249/81 *Commission v Ireland (Buy Irish)* [1982] ECR 4005 351, 759, 765, 768–9
- 261/81 *Rau v De Schmedt* [1982] ECR 3961 781
- 262/81 *Coditel v Ciné-Vog Films* [1980] ECR 881 896
- 267/81–269/81 *Amministrazione delle Finanze dello Stato v SPI* [1983] ECR 801 180
- 283/81 *CILFIT v Ministry of Health* [1982] ECR 341 188–90, 191
- 322/81 *Nederlandsche Banden-Industrie Michelin NV v Commission ('Michelin I')* [1983] ECR 3461 1033, 1034–5, 1045–6
- 7/82 *GVL v Commission* [1983] ECR 483 966
- 11/82 *Piraiki-Patraiki and others v Commission* [1985] ECR 207 446, 447, 450
- 35/82 & 36/82 *Morson and Jhanjan v Netherlands* [1982] ECR 3723 491
- 40/82 *Commission v United Kingdom (Newcastle Disease)* [1984] ECR 283 911–12
- 42/82 *Commission v France* [1983] ECR 1013 933
- 107/82 *AEG Telefunken v Commission* [1983] ECR 3135 1002, 1016
- 165/82 *Commission v United Kingdom* [1983] ECR 3431 602
- 174/82 *Sandoz* [1983] ECR 5094 901, 932
- 177/82 & 178/82 *Van de Haar* [1984] ECR 1797 765
- 199/82 *Amministrazione delle Finanze dello Stato v San Giorgio* [1983] ECR 3595 180, 306
- 222/82 *Apple & Pear Development Council* [1983] ECR 4083 351, 768, 769
- 231/82 *Spijker v Commission* [1983] ECR 2559 452
- 281/82 *Unifrex v Commission and Council* [1984] ECR 1969 463
- 286/82 & 26/83 *Luisi and Carbone v Ministero del Tesoro* [1984] ECR 377 803, 831
- 324/82 *Commission v Belgium* [1984] ECR 1861 805
- 13/83 *Parliament v Council* [1985] ECR 1513 455
- 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891 301, 316–17
- 37/83 *Rewe-Zentrale v Landwirtschaftskammer Rheinland* [1984] ECR 1229 933
- 63/83 *R v Kent Kirk* [1984] ECR 2689 254, 441
- 72/83 *Campus Oil v Minister for Industry and Energy* [1984] ECR 2727 779, 897, 898, 919

- 79/83 Harz v Deutsche Tradax [1984] ECR 192 316–17
- 107/83 Ordre des Avocats au Barreau de Paris v Klopp [1984] ECR 2971 827, 862, 864–5, 896
- 123/83 BNIC v Clair [1983] ECR 391 1002
- 145/83 Adams v Commission [1985] ECR 3539 464
- 207/83 Commission v United Kingdom (Marks of Origin) [1985] ECR 1201 759, 765, 783
- 220/83 Commission v France [1986] ECR 3663 896
- 229/83 Association des Centres Distributeurs Leclerc v SARL 'Au Blé Vert' [1985] ECR 1 767
- 231/83 Cullet [1985] ECR 305 823
- 240/83 ADBHU [1985] ECR 531 253
- 267/83 Diatta v Land Berlin [1985] ECR 567 497, 498
- 270/83 Commission v France [1986] ECR 273 884
- 293/83 Gravier v City of Liège [1985] ECR 593 361
- 294/83 Parti écologiste 'Les Verts' v European Parliament [1986] ECR 1339 182
- 21/84 Commission v France [1985] ECR 1355 763
- 25/84 & 26/84 Ford v Commission [1985] ECR 2725 1016
- 42/84 Remia [1985] ECR 2545 1003
- 152/84 Marshall v Southampton & South-West Hampshire Area Health Authority ('Marshall I') [1986] ECR 723 310–11, 312, 313, 319, 327–8
- 161/84 Pronuptia de Paris GmbH v Schilgallis [1986] ECR 353 1022
- 170/84 Bilka-Kaufhaus GmbH v Karin Weber von Hartz [1986] ECR 1607 580, 599
- 178/84 Commission v Germany [1987] ECR 1227 328–9, 780–1
- 197/84 Steinhauser v City of Biarritz [1985] ECR 1819 857, 878
- 205/84 Commission v Germany (German Insurance) [1986] ECR 3755 821, 826, 856, 896
- 222/84 Johnston v Chief Constable of the Royal Ulster Constabulary [1986] ECR 1651 254, 301, 602
- 248/84 Germany v Commission [1987] ECR 04013 1065
- 307/84 Commission v France [1986] ECR 1725 515
- 416/84 Commission v United Kingdom [1988] ECR 3127 363
- 5/85 Akzo v Commission [1986] ECR 2585 67
- 81/85 & 119/85 Usinor v Commission [1986] ECR 1777 457
- 89/85, 104/85, 114/85, 116/85, 117/85 & 125/85–129/85 A. Ahlström Osakeyhtiö and others v Commission (Wood Pulp) [1993] ECR I-1307 1013–14, 1013
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- 133/85–136/85 Rau v Bundesanstalt für Landwirtschaftliche Marktordnung [1987] ECR 2289 177–8
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- 225/85 Commission v Italy [1987] ECR 2625 940
- 265/85 Van den Bergh en Jurgens v Commission [1987] ECR 1155 442
- 278/85 Commission v Denmark [1987] ECR 4065 360
- 293/85 Commission v Belgium (Gravier) [1988] ECR 305 361–2
- 311/85 Vereniging van Vlaamse Reisbureaus (VVR) v ASBL Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten [1987] ECR 3801 768
- 314/85 Firma Fotofrost v Hauptzollamt Lübeck-Ost [1987] ECR 4199 178–9, 181–2, 186, 193, 452
- 325/85 Ireland v Commission [1987] ECR 5041 442
- 338/85 Pardini v Ministero del Commercio con l'Estero [1988] ECR 2041 193
- 351/85 & 360/85 Fabrique de Fer de Charleroi v Commission [1987] ECR 3639 433
- 352/85 Bond van Adverteerders [1988] ECR 2085 803, 898
- 355/85 Driancourt v Cagnet [1986] ECR 3231 766
- 407/85 Drei Glocken [1988] ECR 4233 781
- 1/86 Commission v Belgium [1987] ECR 2797 352
- 12/86 Demirel v Stadt Schwäbisch Gmünd [1987] ECR 3719 308
- 24/86 Blaizot v Belgium [1988] ECR 379 253
- 60/86 Commission v United Kingdom (Dim-Dip Lighting Devices) [1988] ECR 3921 211
- 62/86 Akzo Chemie BV v Commission [1991] ECR I-3359 1033, 1038–9, 1039–40, 1049
- 98/86 Mathot [1987] ECR 809 766
- 120/86 Mulder v Minister van Landbouw en Visserij [1988] ECR 2321 442, 443
- 121/86 Ledoux [1988] ECR 3741 880
- 196/86 Conradi and others v Direction de la Concurrence et des Prix [1987] ECR 4469 881
- 240/86 Commission v Greece [1988] ECR 1835 363
- 246/86 Belasco and others v Commission [1989] ECR 2117 1002
- 249/86 Commission v Germany (Migrant Workers) [1989] ECR 1263 253
- 263/86 Humbel v Belgium [1988] ECR 5365 806
- 286/86 Ministère Public v Deserbais [1988] ECR 4907 782
- 292/86 Gullung v Conseil de l'Ordre des Avocats [1988] ECR 111 866
- 302/86 Commission v Denmark [1988] ECR 4607 784, 896
- 22/87 Commission v Italy [1989] ECR 143 325
- 45/87 Commission v Ireland [1988] ECR 4929 760
- 46/87 & 227/88 Hoechst AG v Commission [1989] ECR 2859 433, 961

- 62/87 and 72/87 Exécutif régional wallon v Commission [1988] ECR I-01573 1077
- 81/87 R v HM Treasury, ex parte Daily Mail [1988] ECR 5483 861, 885–6
- 94/87 Commission v Germany [1989] ECR 175 1073
- 97/87 to 99/87 Dow Chemical Ibérica and others v Commission [1989] ECR 3165 962
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- 143/87 Stanton v INASTI [1988] ECR 3877 866
- 154/87 & 155/87 Rijksinstituut voor de sociale verzekering des zelfstandigen v Wolf [1998] ECR 3897 866
- 186/87 Cowan v Trésor Public [1989] ECR 195 482, 491, 803
- 196/87 Steymann v Staatssecretaris van Justitie [1988] ECR 6159 806, 853, 855
- 227/87 Sandoz v Commission [1990] ECR I-45 1015
- 247/87 Star Fruit v Commission [1989] ECR 291 368–9, 456
- 279/87 Tipp-Ex v Commission [1990] ECR 261 1015
- 344/87 Bettray [1989] ECR 1621 852, 853, 855
- 374/87 & 27/88 Orkem and Solvay v Commission [1989] ECR 3283 253, 254, 435, 958–9
- 379/87 Groener v Minister for Education and the City of Dublin Vocational Educational Committee [1989] ECR I-3967 830, 860
- 2/88 Zwartveld [1990] ECR I-3365 213
- 3/88 Commission v Italy [1989] ECR 4035 821
- 5/88 Wachauf v Germany [1989] ECR 2609 280–2
- 33/88 Allue v Università degli Studi di Venezia [1989] ECR 1591 515
- 47/88 Commission v Denmark [1990] ECR 4509 760
- 49/88 Al-Jubail v Council [1991] ECR I-3187 437
- 64/88 Commission v France [1991] ECR I-2727 374
- 68/88 Commission v Greece (Burden of Proof) [1989] ECR 2965 215, 355, 661
- 70/88 European Parliament v Council (Chernobyl) [1990] ECR I-2041 444
- 103/88 Fratelli Constanzo v Milano [1989] ECR 1839 193
- 109/88 Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danforss [1989] ECR 3199 583
- 143/88 & C-92/89 Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest [1991] ECR I-415 307
- 145/88 Torfaen Borough Council v B & Q [1989] ECR 765 193, 786, 897
- 150/88 Eau de Cologne v Provide [1989] ECR 3891 185
- 152/88 Sofrimport v Commission [1990] ECR I-2477 450
- 171/88 Rinner-Kühn v FWW Spezial-Gebäudereinigung GmbH & Co. KG [1989] ECR 2743 580, 599
- 175/88 Biehl [1990] ECR I-1779 877
- 200/88 Commission v Greece [1990] ECR I-4299 363
- 262/88 Barber v Guardian Royal Exchange Assurance Group [1990] ECR I-1889 580, 590
- 297/88 & C-197/89 Dzodzi v Belgium [1990] ECR I-3673 180
- 303/88 Italy v Commission [1991] ECR I-1603 1061
- 308/88 Italy v Commission [1991] ECR I-1433 1073
- 322/88 Grimaldi v Fonds des Maladies Professionnelles [1989] ECR 4407 320–1
- 323/88 Serres v Directeur de Service des Douanes de Strasbourg [1990] ECR I-3027 432
- 326/88 Hansen [1990] ECR I-2911 215
- 331/88 R v Minister of Agriculture, Fisheries and Food, ex parte Fedesa [1990] ECR I-4023 400, 401–2, 441
- C-5/89 Commission v Germany [1990] ECR I-3437 1074
- C-57/89 Commission v Germany (Conservation of Wild Birds) [1991] ECR I-883 212
- C-96/89 Commission v Netherlands (Own Resources: Manioc from Thailand) [1991] ECR I-2461 363
- C-104/89 & C-37/90 Mulder v Council and Commission ('Mulder II') [1992] ECR I-3061 464
- C-106/89 Marleasing SA v La Comercial Internacional de Alimentación SA [1990] ECR I-4135 317, 319
- C-113/89 Rush Portuguesa v Office national d'immigration [1990] ECR I-1417 896
- C-180/89 Commission v Italy [1991] ECR I-709 803, 896
- C-184/89 Nimz v Freie und Hansestadt Hamburg [1991] ECR I-297 599
- C-188/89 Foster v British Gas [1990] ECR I-3313 311–12
- C-213/89 R v Secretary of State for Transport, ex parte Factortame Ltd [1990] ECR 2433 196–7, 307–8
- C-221/89 R v Secretary of State for Transport, ex parte Factortame [1991] ECR I-3905 328–9
- C-234/89 Delimitis v Henninger Bräu AG [1991] ECR I-935 1022
- C-260/89 Elliniki Radiophonia Tiléorassi AE and others v Dimotiki Etairia Pliroforissis ('ERT') v Dimotiki [1991] ECR I-2925 253, 280, 281–2, 911
- C-288/89 Gouda v Commissariat voor de Media [1991] ECR I-4007 777, 808, 820, 821, 896
- C-300/89 Commission v Council (Titanium Dioxide) [1991] ECR I-2867 679
- C-340/89 Vlassopoulou v Ministerium für Justiz Bundes- und Europaangelegenheiten Baden-Württemberg [1991] ECR I-2357 866–8, 869
- T-7/89 Hercules v Commission [1991] ECR II-1711 964
- T-30/89 Hilti v Commission [1991] ECR II-1439 1035
- C-1/90 & C-176/90 Aragonesa [1991] ECR I-4151 796
- C-2/90 Commission v Belgium (Walloon Waste) [1992] ECR I-4431 900, 929

- C-6/90 & C-9/90 Francovich and Bonifaci v Italy [1991] ECR I-5537 325–8, 330
- C-16/90 Nölle v Hauptzollamt Bremen-Freihafen [1991] ECR I-5163 438
- C-41/90 Klaus Höfner and Fritz Elser v Macrotron GmbH [1991] ECR I-1979 999, 1032
- C-56/90 Commission v United Kingdom [1993] ECR I-4109 361
- C-65/90 Parliament v Council ('Cabotage II') [1992] ECR I-4593 123–5, 444
- C-76/90 Säger v Dennemeyer [1991] ECR I-4221 822
- C-159/90 Society for the Protection of the Unborn Child (SPUC) v Grogan [1991] ECR I-4685 284–5, 831
- C-204/90 Bachmann [1992] ECR I-249 897, 899
- C-213/90 Association de Soutien aux Travailleurs Immigres (ASTI) v Chambre des employés privés [1991] ECR I-3507 877
- C-240/90 Germany v Commission [1992] ECR I-5383 69
- C-295/90 Parliament v Council (Revision of Judgment) [1992] ECR I-4193 110
- C-300/90 Commission v Belgium [1992] ECR I-305 897
- C-351/90 Commission v Luxembourg [1992] ECR I-3945 865
- C-354/90 FNCE [1991] ECR I-5505 307
- C-369/90 Micheletti v Delegación del Gobierno Cantabria [1992] ECR I-4239 474
- C-370/90 Singh [1992] ECR I-4265 492–3, 505, 506
- T-24/90 Automec Srl v Commission ('Automec II') [1992] ECR II-2223 455, 957
- C-4/91 Bleis [1991] ECR I-5627 515
- C-25/91 Pesqueras Echebastar v Commission [1993] ECR I-1719 457
- C-72 & 73/91 Firma Sloman Neptun Schiffahrts AG v Seebetriebsrat Bodo Ziesemer der Sloman Neptun Schiffahrts AG [1993] ECR I-887 1058–9, 1060
- C-88/91 Federconsorzi v AIMA [1992] ECR I-4035 180
- C-155/91 Commission v Council (Framework Directive on Waste) [1993] ECR I-939 110
- C-159/91 & C-160/91 Poucet v Assurances Générales de France and Caisse Mutuelle Régionale du Languedoc-Roussillon [1993] ECR I-637 830
- C-169/91 Stoke on Trent and Norwich City Council v B & Q [1992] ECR I-6635 786
- C-181/91 & C-248/91 Parliament v Council [1993] ECR I-3713 61
- C-189/91 Kirsammer-Hack v Sidal [1993] ECR I-6185 600, 1059
- C-193/91 Finanzamt München III v Mohnsche [1993] ECR I-02615 1073
- C-267/91 & C-268/91 Keck & Mithouard [1993] ECR I-6097 754–5, 756–7, 786–90
- C-271/91 Marshall v Southampton and South-West Hampshire AHA ('Marshall II') [1993] ECR I-4367 301, 313, 610
- C-316/91 Parliament v Council [1994] ECR I-653 61
- C-325/91 France v Commission [1993] ECR I-3283 115
- T-30/91 Solvay SA v Commission [1995] ECR II-1775 435, 964
- T-83/91 Tetra Pak v Commission [1994] ECR II-755 1039
- C-11/92 R v Secretary of State for Health, ex parte Gallaher Ltd [1993] ECR I-3545 212, 692–3
- C-17/92 FDC v Estado Español and UPCT [1993] ECR I-2239 808
- C-19/92 Kraus v Land Baden-Württemberg [1993] ECR I-1663 869
- C-24/92 Corbiau v Administration des Contributions [1993] ECR I-1277 171
- C-36/92P SEP v Commission [1994] ECR I-1911 958
- C-49/92 Commission v Anic Partecipazioni SpA [1999] ECR I-4125 1009–11, 1012, 1013
- C-53/92P Hilti v Commission [1994] ECR I-667 1035
- C-91/92 Faccini Dori v Recreb [1994] ECR I-3325 313, 327–8
- C-109/92 Wirth v Landeshauptstadt Hannover [1993] ECR I-6447 807, 808
- C-127/92 Enderby v Frenchay Health Authority and Secretary for Health [1993] ECR I-5535 583
- C-137/92P Commission v BASF [1994] ECR I-2555 67, 464, 465
- C-188/92 TWD Textilwerke Deggendorf v Germany [1994] ECR I-833 178–9
- C-250/92 Gøttrup-Klim Grovvareforeninger v Dansk Landbrugs Grovvareselskab AmbA [1994] ECR I-5641 999, 1008
- C-275/92 HM Customs and Excise v Schindler [1994] ECR I-1039 802, 830, 896, 897, 903, 904, 918
- C-278/92 Spain v Commission [1994] ECR I-4103 1061
- C-292/92 Hünernmund v Landesapotheker Baden-Württemberg [1994] ECR I-6787 756
- C-315/92 Verband Sozialer Wettbewerb v Clinique Laboratories [1994] ECR I-317 783
- C-334/92 Wagner-Miret v Fondo de Garantía Salarial [1993] ECR I-6911 320–1
- C-364/92 SAT Fluggesellschaft v Eurocontrol [1994] ECR I-43 165–6
- C-375/92 Commission v Spain [1994] ECR I-923 813
- C-379/92 Peralta [1994] ECR I–ECR 3453 765–6, 825
- C-391/92 Commission v Greece (Greek Milk) [1995] ECR I-1621 793
- C-429/92 Ingetraut Scholz v Opera Universitaria di Cagliari and Cinzia Porcedda [1994] ECR I-505 877

- T-37/92 BEUC & NCC v Commission [1994] ECR II-285 437
- T-66/92 Herlitz v Commission [1994] ECR II-531 1000
- T-77/92 Parker Pen v Commission [1994] ECR II-549 1000, 1017
- C-16/93 Tolsma v Inspecteur der Omzelsbelastingen Leeuwarden [1994] ECR I-743 806
- C-18/93 Corsica Ferries France [1994] ECR I-1783 803, 825
- C-39/93P SFEI v Commission [1994] ECR I-2681 427
- C-45/93 Commission v Spain [1994] ECR I-911 482
- C-46/93 & 48/93 Brasserie du Pêcheur/Factortame III [1996] ECR I-1029 301, 305, 328–32, 458, 459
- C-55/93 Van Schaik [1994] ECR I-4837 802, 896
- C-65/93 Parlement v Council (General Tariff Preferences) [1995] ECR I-643 123–5
- C-69/93 & C-258/93 Punto Casa v Sindaco del Comune di Capena [1994] ECR I-2355 793
- C-135/93 Spain v Commission [1995] ECR I-1651 458
- C-151/93 Voogd Vleesimport en -export [1994] ECR I-4915 193
- C-279/93 Finanzamt Köln-Altstadt v Schumacker [1995] ECR I-225 877
- C-316/93 Vaneetveld v Le Foyer [1994] ECR I-763 313
- C-342/93 Gillespie v Northern Health and Social Services Board [1996] ECR I-457 580
- C-381/93 Commission v France [1994] ECR I-5145 803, 804
- C-384/93 Alpine Investments v Minister van Financiën [1995] ECR I-1141 799, 803, 805, 809, 813, 824–5, 857
- C-392/93 R v HM Treasury, ex parte British Telecommunications plc [1996] ECR I-1631 332
- C-412/93 Société d'Importation Edouard Leclerc-Siplec v TF1 Publicité SA and M6 Publicité SA [1995] ECR I-179 184–5, 672–3
- C-415/93 Union Royale Belge des Sociétés de Football Association and others v Bosman and others [1995] ECR I-4921 815, 857, 860–2, 863, 896, 897, 917, 941
- C-417/93 Parlement v Council (Consultation with Parliament) [1995] ECR I-1185 125
- C-450/93 Kalanke v Freie Hansestadt Bremen [1995] ECR I-3051 614
- C-465/93 Atlanta Fruchthandelsgesellschaft and others (No. 1) [1995] ECR I-3761 197, 307
- C-470/93 Verein gegen Unwesen in Handel und Gewerbe Köln v Mars GmbH (Mars Ice Cream) [1995] ECR I-1923 776
- C-473/93 Commission v Luxembourg [1996] ECR I-3207 361
- C-479/93 Francovich v Italian Republic ('Francovich II') [1996] ECR I-3843 441
- T-3/93 Air France v Commission [1994] ECR II-121 427
- T-17/93 Matra Hachette v Commission [1994] ECR II-595 1026
- T-244/93 & T-486/93 TWD Textilwerke Deggendorf v Commission ('TWD II') [1995] ECR I-2265 458
- T-461/93 An Taisce v Commission [1994] ECR II-733 455
- T-478/93 Wafer Zoo v Commission [1995] ECR II-1479 464
- T-481/93 & 484/93 Vereniging van Exporteurs in Levende Varkens v Commission [1995] ECR II-2941 460
- T-585/93 Greenpeace and others v Commission [1995] ECR II-2205 454
- C-13/94P v S and Cornwall County Council [1996] ECR I-2143 572, 583–4
- C-25/94 Commission v Council (FAO Fisheries Agreement) [1996] ECR I-1469 87
- C-39/94 SFEI [1996] ECR I-3547 307, 1074
- C-51/94 Commission v Germany [1995] ECR I-3599 781
- C-55/94 Gebhard v Consiglio dell'ordine degli avvocati e procuratori di Milano [1995] ECR I-4165 799, 803, 809, 811, 820, 854, 861, 862, 866
- C-70/94 Werner [1995] ECR I-3189 210–11
- C-80/94 Wielockx v Inspecteur der Directe Belastingen [1995] ECR I-2493 900
- C-84/94 United Kingdom v Council [1996] ECR I-5755 397
- C-107/94 Asscher [1994] ECR I-1137 856
- C-133/94 Commission v Belgium [1996] ECR I-2323 363
- C-177/94 Perfili [1996] ECR I-161 810
- C-178/94, C-179/94 & C-188/94 to C-190/94 Dillenkofer and others v Bundesrepublik Deutschland [1996] ECR I-4845 331–2
- C-194/94 CIA Security International v Signalson & Securitel [1996] ECR I-2201 316
- C-233/94 Germany v European Parliament and Council (Deposit Guarantee Directive) [1997] ECR I-2405 398–9
- C-237/94 O'Flynn v Adjudication Officer [1996] ECR I-2617 482, 875
- C-241/94 France v Commission [1996] ECR I-4551 1064
- C-266/94 Commission v Spain [1995] ECR I-1975 361
- C-272/94 Guiot [1996] ECR I-1905 821
- C-288/94 Argos Distributors Ltd v CCE [1996] ECR I-5311 805
- C-321/94 Pistre [1997] ECR I-2343 766–7
- C-333/94P Tetra Pak v Commission ('Tetra Pak II') [1996] ECR I-5951 1040

- T-115/94 Opel Austria v Council [1997] ECR II-39 441
- T-162/94 NMB France v Commission [1996] ECR II-427 162–3
- T-167/94 Nölle v Council and Commission [1995] ECR II-2589 463
- T-168/94 Blackspur DIY v Council and Commission [1995] ECR II-2627 463
- T-336/94 Efisol v Commission [1996] ECR II-1343 442
- T-374/94 European Night Services and others v Commission [1998] ECR II-3141 1022, 1025
- T-395/94 Atlantic Container Line v Commission [2002] ECR II-875 966
- C-3/95 Reisebüro Broede v Sandker [1996] ECR I-6511 897
- C-11/95 Commission v Belgium [1996] ECR I-4115 360
- C-32/95P Commission v Lisrestal and others [1996] ECR I-5375 437
- C-34/95–36/95 De Agostini and TV Shop [1997] ECR I-3843 793
- C-53/95 INASTI v Kammler [1996] ECR I-703 866
- C-65/95 & C-111/95 R v Secretary of State for the Home Department, ex parte Shingara and Radiom [1997] ECR I-3343 509
- C-68/95 T. Port [1996] ECR I-6065 307
- C-70/95 Sodemare v Regione Lombardia [1997] ECR I-3395 881
- C-72/95 Aanemersbedrijf P. K. Kraaijeveld v Gedeputeerde Staten van Zuid-Holland [1996] ECR I-5403 189
- C-73/95P Viho Europe BV v Commission [1996] ECR I-5457 999, 1000
- C-120/95 Decker v Caisse de maladie des employés privés [1998] ECR I-1831 900
- C-168/95 Arcaro [1996] ECR I-4705 89
- C-180/95 Draehmpaehl v Urania Immobilienservice [1997] ECR I-2195 215, 355, 610
- C-181/95 Biogen v Smithkline Beecham [1996] ECR I-717 165–6
- C-185/95P Baustahlgewerbe v Commission [1998] ECR I-8417 162
- C-192/95–C-218/95 Comateb and others [1997] ECR I-165 306
- C-242/95 GT-Link v DSB [1997] ECR I-4449 306
- C-250/95 Futura Participations and Singer v Administration des contributions [1997] ECR I-2471 899
- C-258/95 Söhne v Finanzamt Neustadt [1997] ECR I-5577 805
- C-261/95 Palmisani v INPS [1997] ECR I-4025 300, 304–5
- C-265/95 Commission v France (Spanish Strawberries) [1997] ECR I-6959 214, 355, 770, 771, 772, 935–6
- C-284/95 Safety Hi-Tech v S and T [1998] ECR I-4301 925
- C-299/95 Kremzow v Austria [1997] ECR I-2629 253, 494
- C-300/95 Commission v United Kingdom [1997] ECR I-2649 355
- C-321/95P Greenpeace and others v Commission [1998] ECR I-1651 454–5
- C-341/95 Bettati [1998] ECR I-4355 925
- C-367/95P Commission v Sytraval [1998] ECR I-1719 439
- C-368/95 Familiapresse v Heinrich Bauer Verlag [1997] ECR I-3843 790
- C-388/95 Belgium v Spain [2000] ECR I-3123 339, 795
- C-392/95 Parliament v Council (Consultation with Parliament: Visas) [1997] ECR I-3213 465
- C-398/95 Syndesmos ton en Elladi Touristikou kai Taxidiotikon Grafeion v Ypourgos Ergasias [1997] ECR I-3091 803, 805, 898
- C-409/95 Hellmut Marschall v Land Nordrhein-Westfalen [1997] ECR I-6363 614
- T-73/95 Oliveira v Commission [1997] ECR II-381 438
- T-219/95R. Danielsson and others v Commission [1995] ECR II-3051 455
- C-1/96 Compassion in World Farming [1998] ECR I-1251 904, 906
- C-15/96 Schöning-Kougebetopoulou [1998] ECR I-47 333
- C-48/96P Windpark Groothusen v Commission [1998] ECR I-2873 433
- C-50/96 Deutsche Telekom AG v Lilli Schröder [2000] ECR I-743 572
- C-51/96 & C-191/97 Deliège v Asbl Ligue Francophone de Judo [2000] ECR I-2549 806, 815
- C-53/96 Hermès International v FHT Marketing [1998] ECR I-3603 180
- C-54/96 Dorsch v Bundesbaugesellschaft Berlin [1997] ECR I-4961 172
- C-64/96 & C-65/96 Uecker and Jacquet [1997] ECR I-3171 491–2, 856
- C-67/96 Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie [1999] ECR I-5751 1003
- C-85/96 Martínez Sala v Freistaat Bayern [1998] ECR I-2691 487
- C-158/96 Kohll v Union des Caisses de Maladie [1998] ECR I-1931 808, 830, 835–6, 897, 898, 900
- C-176/96 Jyri Lehtonen and Castors Canada Dry Namur-Braine Asbl v Fédération royale belge des sociétés de basket-ball Asbl (FRBSB) [2000] ECR I-2681 815
- C-184/96 Commission v France [1998] ECR I-6197 782
- C-200/96 Metronome Musik v Music Point Hokamp [1998] ECR I-1953 896
- C-203/96 Chemische Afvalstoffen Dusseldorp BV and others v Minister van Volkhuysvesting,

- Ruimtelijke Ordening en Milieubeheer [1998] ECR I-4075 900, 929–30
- C-210/96 Gut Springenheide [1998] ECR I-4657 781
- C-213/96 Outokumpu Oy [1998] ECR I-1777 674
- C-274/96 Bickel and Franz [1998] ECR I-7637 482
- C-306/96 Javico International and Javico AG v Yves Saint Laurent Parfums SA [1998] ECR I-1983 1002
- C-309/96 Annibaldi [1997] ECR I-7493 280
- C-326/96 Levez v Jennings [1998] ECR I-7835 300, 303
- C-336/96 Gilly v Directeur des services fiscaux du Bas-Rhin [1998] ECR I-2793 856
- C-342/96 Spain v Commission [1999] ECR I-02459 1061
- C-369/96 & C-376/96 Arblade [1999] ECR I-8453 808–9
- C-389/96 Aher-Waggon v Federal Republic of Germany [1998] ECR I-4473 926
- C-416/96 El Yassini v Secretary of State for the Home Department [1999] ECR I-1209 172
- C-1/97 Birden [1998] ECR I-7747 853
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- C-75/97 Belgium v Commission [1999] ECR I-03671 1065
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- T-228/97 Irish Sugar plc v Commission [1999] ECR II-2969 999
- C-15/98 & 105/99 Italy and Sardegna Lines v Commission [2000] ECR I-08855 1070
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- C-78/98 Preston v Wolverhampton Health Care Trust [2000] ECR I-3201 303
- C-97/98 Jägerskiöld v Gustafsson [1999] ECR I-7319 802
- C-108/98 RI-SAN v Commune de Ischia [1999] ECR I-5219 803
- C-110/98–147/98 Gabalfrisa [2000] ECR I-1577 171
- C-156/98 Germany v Commission [2000] ECR I-06857 1077
- C-165/98 Mazzoleni and ISA [2001] ECR I-2189 809, 810
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- C-205/98 Commission v Austria [2000] ECR I-7367 363
- C-224/98 D'Hoop [2002] ECR I-6191 484–5, 493
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- C-285/98 Kreil v Germany [2000] ECR I-69 602
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- C-303/98 Simap [2000] ECR I-7963 277–8
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- C-351/98 Spain v Commission [2002] ECR I-08031 1070

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- C-368/98 Vanbraekel v ANMC [2001] ECR I-5363 836
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- C-397/98 & C-410/98 Metallgesellschaft v IRC [2001] ECR I-1727 306
- C-398/98 Commission v Greece [2001] ECR I-7915 760, 919–20, 935
- C-405/98 Konsumentombudsmannen (KO) v Gourmet International Products AB [2001] ECR I-1795 793, 882
- C-407/98 Abrahamsson and Anderson v Fogelqvist [2000] ECR I-5539 615
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- C-443/98 Unilever Italia SpA v Central Food SpA [2000] ECR I-7535 315
- C-448/98 Guimont [2000] ECR I-10663 492, 767
- C-480/98 Spain v Commission [2000] ECR I-08717 1073
- T-38/98 Associazione Nazionale Bieticoltori v Council [1998] ECR II-4191 453
- T-62/98 Volkswagen AG v Commission [2000] ECR II-2707 1015
- T-112/98 Mannesmannröhren-Werke AG v Commission [2001] ECR II-729 959, 960
- T-178/98 Fresh Marine v Commission [2000] ECR II-3331 460
- C-54/99 Église de Scientologie de Paris v Prime Minister [2000] ECR I-1335 923–4
- C-55/99 Commission v France [2000] ECR I-11499 783, 906
- C-70/99 Commission v Portugal (Flight Taxes) [2001] ECR I-4845 803, 813
- C-110/99 Emsland-Stärke [2000] ECR I-11569 506
- C-143/99 Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH v Finanzlandesdirektion für Kärnten [2001] ECR I-8365 1066
- C-150/99 Stockholm Lindöpark [2001] ECR I-493 331–2
- C-157/99 Geraets-Smits v Stichting Ziekenfonds; Peerbooms v Stichting CZ Groep Zorgverzekeringen [2001] ECR I-5473 808, 835, 836, 837, 839
- C-159/99 Commission v Italy (Conservation of Wild Birds) [2001] ECR I-4007 214, 355
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- C-184/99 Grzelczyk [2001] ECR I-6193 479, 487–8
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- C-309/99 Wouters and others v Algemene Raad van de Nederlandse Orde van Advocaten [2002] ECR I-1577 897, 999, 1004, 1008
- C-313/99 Mulgan and others [2002] ECR I-5719 214
- C-324/99 DaimlerChrysler v Land Baden-Württemberg [2001] ECR I-9897 930
- C-353/99P Council v Hautala [2001] ECR I-9565 413
- C-385/99 Müller-Fauré v Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen [2003] ECR I-4509 836, 837, 838–9
- C-413/99 Baumbast v Secretary of State for the Home Department [2002] ECR I-7091 479, 498
- C-439/99 Commission v Italy (Trade Fairs) [2002] ECR I-305 821
- C-451/99 Cura Anlagen v Auto Source Leasing [2002] ECR I-3193 802, 896
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- C-481/99 Heininger [2001] ECR I-9945 303
- C-482/99 France v Commission (Stardust Marine) [2002] ECR I-4397 1061
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- C-516/99 Schmid [2002] ECR I-4573 171
- T-13/99 Pfizer Animal Health v Council [2002] ECR II-3305 78, 426, 451, 694
- T-23/99 LR af 1998 A/S v Commission [2002] ECR II-1705 964, 1012
- T-54/99 max.mobil v Commission [2002] ECR II-313 369
- T-112/99 Métropole télévision (M6) and others v Commission [2001] ECR II-2459 1023
- T-191/99 Petrie v Commission [2001] ECR II-3677 365
- T-219/99 British Airways v Commission [2003] ECR II-5917 1033, 1037, 1045

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- T-319/99 Federación Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental (FENIN) v Commission [2003] ECR II-357 807
- C-11/00 Commission v ECB [2003] ECR I-7147 727
- C-12/00 Commission v Spain (Spanish Chocolate) [2003] ECR I-459 782
- C-14/00 Commission v Italy (Chocolate) [2003] ECR I-513 782
- C-17/00 De Coster v Collège des bourgmestre et échevins de Watermael-Boitsfort [2001] ECR I-9445 172-3, 214, 829, 896
- C-24/00 Commission v France (French Vitamins) [2004] ECR I-1277 922-3, 925, 932
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- C-99/00 Lyckeskog [2002] ECR I-4839 186-7
- C-112/00 Schmidberger v Republic of Austria [2003] ECR I-5659 172, 770-2, 896, 936
- C-113/00 Spain v Commission [2002] ECR I-7601 408-9
- C-118/00 Larsy v INASTI [2001] ECR I-5063 331-2
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- C-136/00 Danner [2002] ECR I-8147 900
- C-159/00 Sapod Audic [2002] ECR I-5031 790
- C-182/00 Lutz [2002] ECR I-547 172
- C-204/00 & C-205/00 P, C-211/00 P, C-213/00 P, C-217/00P & C-219/00P Aalborg Portland A/S and others v Commission [2004] ECR I-123 964
- C-208/00 Überseering v NCC [2002] ECR I-9919 889
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- C-327/00 Santex v Unità Socio Sanitaria Locale n. 42 di Pavia [2003] ECR I-1877 305
- C-338/00P Volkswagen AG v Commission [2003] ECR I-9189 1015
- C-409/00 Spain v Commission [2003] ECR I-01487 1065
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- C-465/00, C-138/01 & C-139/01 Österreichischer Rundfunk [2003] ECR I-4919 253
- C-469/00 Ravil v Bellon Import [2003] ECR I-5053 795
- C-472/00P Fresh Marine [2003] ECR I-7541 231
- T-3/00 & T-337/04 Pitsiorlas v Council and ECB [2007] ECR II-4779 464
- T-98/00 Linde v Commission [2002] ECR II-03961 1062
- T-211/00 Kuijter v Council [2002] ECR II-485 418
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- C-6/01 Anomar v Estado Português [2003] ECR I-8621 805, 827
- C-14/01 Niemann v Bezirksregierung Hannover [2003] ECR I-2279 69
- C-20/01 & C-28/01 Commission v Germany [2003] ECR I-3609 340, 341
- C-56/01 Inizan v Caisse Primaire d'Assurance Maladie des Hauts-de-Seine [2003] ECR I-12403 836
- C-76/01P Eurocoton v Council [2003] ECR I-10091 460
- C-95/01 Greenham and Abel [2004] ECR I-1333 901-2
- C-100/01 Ministre de l'Intérieur v Olazabal [2002] ECR I-10981 509, 934
- C-101/01 Lindqvist [2003] ECR I-12971 253
- C-109/01 Secretary of State for the Home Department v Akrich [2003] ECR I-9607 504, 506
- C-117/01 KB v National Health Service Pensions Agency [2004] ECR I-541 253, 584
- C-147/01 Weber's Wine World and others [2003] ECR I-11365 306
- C-152/01-154/07 Arcor v Germany [2008] ECR I-5959 313-14
- C-167/01 Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art [2003] ECR I-10195 215, 889
- C-187/01 & C-385/01 Gözütok and Brügge [2003] ECR I-1345 652-4
- C-192/01 Commission v Denmark [2003] ECR I-9693 763, 901, 932
- C-215/01 Schnitzer [2003] ECR I-14847 803
- C-224/01 Köbler v Austria [2003] ECR I-10239 187, 333-5, 353, 876
- C-243/01 Gambelli [2003] ECR I-13031 803, 827, 896, 904, 913, 918-19
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- C-276/01 Steffensen [2003] ECR I-3735 303
 C-278/01 Commission v Spain [2003] ECR I-14141 377
 C-308/01 GIL Insurance Ltd and others v Commissioners of Customs and Excise [2004] ECR I-4777 1067
 C-322/01 Deutsche Apothekerverband v DocMorris [2003] ECR I-14887 768, 793, 794, 916
 C-338/01 Commission v Council (Recovery of Indirect Taxes) [2004] ECR I-4829 109–10
 C-358/01 Commission v Spain [2003] ECR I-13145 782
 C-383/01 De Danske Bilimportører [2003] ECR I-6065 760
 C-388/01 Commission v Italy [2001] ECR I-721 482
 C-391/01 Runevič-Vardyn and Wardyn [2011] ECR I-3787 486–7
 C-397/01–C-403/01 Pfeiffer and others v Deutsches Rotes Kreuz [2004] ECR I-8835 318
 C-405/01 Colegio de Oficiales de la Marina Mercante Española v Administración del Estado [2003] ECR I-10391 515, 941
 C-413/01 Franca Ninni-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst [2003] ECR I-13187 854, 874
 C-422/01 Försäkringsaktiebolaget Skandia v Riksskatteverket [2003] ECR I-6817 803
 C-446/01 Commission v Spain [2003] ECR I-6053 363
 C-452/01 Ospelt v Schössle Weissenberg Familienstiftung [2003] ECR I-9743 710, 898, 908
 C-463/01 Commission v Germany [2004] ECR I-11705 784
 C-465/01 Commission v Austria [2004] ECR I-8291 877
 C-482/01 & C-493/01 Orfanopoulos v Land Baden-Württemberg [2004] ECR I-5257 510–11
 C-486/01P Front National v European Parliament [2004] ECR I-6289 447–8
 C-491/01 R v Secretary of State for Health, ex parte British American Tobacco (Investments) and Imperial Tobacco [2002] ECR I-11453 397
 C-494/01 Commission v Ireland [2005] ECR I-3331 356, 360
 T-30/01–T-32/01 & T-86/02–T-88/02 Diputación Foral de Álava v Commission, Judgment of 9 September 2009 438, 456, 457
 T-168/01 GlaxoSmithKline Services Unlimited (GSK) v Commission [2006] ECR II-2969 1018–19
 T-177/01 Jégo-Quéré v Commission [2002] ECR II-2365 162
 T-198/01 Technische Glaswerke Ilmenau v Commission [2004] ECR II-2717 437
 T-203/01 Michelin v Commission ('Michelin II') [2003] ECR II-4071 1035, 1045–6
 T-208/01 Volkswagen AG v Commission [2003] ECR II-541 1017
 T-213/01 & T-214/01 Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft v Commission [2006] ECR II-1601 427
 T-236/01, T-239/01, T-244/01–T-246/01, T-251/01 & T-252/01 Tokai Carbon Co. Ltd and others v Commission [2004] ECR II-1181 967
 T-310/01 Schneider Electric SA v Commission [2002] ECR II-4071 460–2
 C-6/02 Commission v France [2003] ECR I-2389 782
 C-8/02 Leichtle v Bundesanstalt für Arbeit [2004] ECR I-2641 836, 916, 917, 921
 C-12/02 Grilli [2003] ECR I-11585 796
 C-36/02 Omega Spielhallen- und Automatenaufstellungs v Oberbürgermeisterin der Bundesstadt Bonn [2004] ECR I-9609 265, 802, 896, 902–3, 934
 C-37/02 & C-38/02 Di Lenardo and Dilexport [2004] ECR I-6911 254
 C-41/02 Commission v Netherlands (Dutch Vitamins) [2004] ECR I-11375 930–1
 C-42/02 Lindman [2003] ECR I-13519 827
 C-47/02 Anker [2003] ECR I-10447 941
 C-71/02 Karner v Troostwijk [2004] ECR I-3025 793, 802, 896
 C-105/02 Commission v Germany [2006] ECR I-9659 214, 355
 C-138/02 Collins [2004] ECR I-2703 488
 C-141/02P Commission v max.mobil [2005] ECR I-1283 369
 C-148/02 Garcia Avello [2003] ECR I-11613 481, 482–3, 493
 C-151/02 Landeshauptstadt Kiel v Jaeger [2003] ECR I-8389 276–8
 C-153/02 Neri v European School of Economics [2003] ECR I-13555 874, 875
 C-171/02 Commission v Portugal [2004] ECR I-5645 826, 866
 C-189/02P–C-202/02P, C205/02P to C-208/02P & C-213/02P Dansk Rorindustri and others v Commission [2005] ECR I-5425 443
 C-200/02 Zhu and Chen [2004] ECR I-9925 480, 498, 503
 C-201/02R v Secretary of State for Transport, Local Government and the Regions, ex parte Wells [2004] ECR I-723 313–14
 C-224/02 Pusa [2004] ECR I-5763 484
 C-262/02 Commission v France [2004] ECR I-6569 896
 C-263/02P Jégo-Quéré v Commission [2004] ECR I-3425 162, 178
 C-293/02 Jersey Potatoes [2005] ECR I-9543 796
 C-299/02 Commission v Netherlands [2004] ECR I-9761 826, 859, 862, 886
 C-304/02 Commission v France (Non-compliance with Judgment) [2005] ECR I-6263 374–6
 C-309/02 Radlberger Getränkegesellschaft v Land Baden-Württemberg [2004] ECR I-11763 784–5

- C-330/02 Colegio do Ingenieros de Caminos, Canales y Puertos [871](#)
- C-345/02 Pearle BV, Hans Prijs Optiek Franchise BV and Rinck Opticiëns BV v Hoofdbedrijfschap Ambachten [2004] ECR I-7139 [1061](#)
- C-350/02 Commission v Netherlands [2004] ECR I-6213 [361](#)
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- C-377/02 Van Parys v BIRB [2005] ECR I-1465 [439](#)
- C-387/02, C-391/02 & C-403/02 Berlusconi and others [2005] ECR I-3565 [215](#)
- C-429/02 Bacardi France v Télévision française I [2004] ECR I-6613 [896](#)
- C-434/02 Arnold André GmbH & Co. KG v Landrat des Kreises Herford [2004] ECR I-11825 [263](#)
- C-441/02 Commission v Germany [2006] ECR I-3449 [341](#), [355](#)
- C-442/02 Caixa Bank France v Ministère de l'Économie, des Finances et de l'Industrie [2004] ECR I-8961 [823](#), [881-3](#)
- C-456/02 Trojani v Centre public d'aide sociale [2004] ECR I-7573 [851-3](#)
- C-464/02 Commission v Denmark (Danish Company Cars) [2005] ECR I-7929 [857](#), [858](#), [879-80](#)
- T-3/02 Schlüsselverlag JS Moser v Commission [2002] ECR II-1473 [456](#)
- T-16/02 Audi v OHIM [2003] ECR II-5167 [435](#)
- T-76/02 Messina v Commission [2003] ECR II-3203 [421](#)
- T-279/02 Degussa AG v Commission [2006] ECR II-897 [968-9](#)
- T-313/02 Meca Medina and Majcen v Commission [2004] ECR II-3291 [816-17](#)
- T-351/02 Deutsche Bahn v Commission [2006] ECR II-1047 [427](#)
- C-6/03 Deponiezweckverband Eiterköpfe [2005] ECR I-2753 [211-12](#)
- C-12/03P Commission v Tetra Laval [2005] ECR I-987 [430-1](#), [432](#), [976](#)
- C-20/03 Burmanjer [2005] ECR I-4133 [787](#), [793](#)
- C-33/03 Commission v United Kingdom (VAT on Road Fuel) [2005] ECR I-1865 [214](#)
- C-53/03 Syfait and others v GlaxoSmithKline AVEE [2005] ECR I-4609 [171](#)
- C-60/03 Wolff and Müller v Felix [2004] ECR I-9553 [898](#)
- C-72/03 Carbonati Apuani [2004] ECR I-8027 [796](#)
- C-88/03 Portugal v Commission (Azores) [2006] ECR I-7115 [1064-5](#)
- C-105/03 Pupino [2005] ECR I-5285 [635](#), [665](#)
- C-110/03 Belgium v Commission [2005] ECR I-2801 [1080](#)
- C-134/03 Viacom Outdoor v Giotto Immobilier [2005] ECR I-1106 [810-11](#)
- C-136/03 Dörr and Ünal [2005] ECR I-4759 [509](#)
- C-140/03 Commission v Greece [2005] ECR I-3177 [863](#)
- C-147/03 Commission v Austria [2005] I-5969 [897](#), [920](#)
- C-157/03 Commission v Spain [2005] ECR I-2911 [341](#)
- C-166/03 Commission v France (Gold) [2004] ECR I-6535 [782](#)
- C-172/03 Wolfgang Heiser v Finanzamt Innsbruck [2005] ECR I-1627 [1064](#), [1069-70](#)
- C-173/03 Traghetti del Mediterraneo v Italy [2006] ECR I-5177 [335](#)
- C-209/03R v London Borough of Ealing and Secretary of State for Education, ex parte Bidar [2005] ECR I-2119 [490](#)
- C-210/03R v Secretary of State for Health, ex parte Swedish Match [2004] ECR I-11893 [681-2](#), [686](#)
- C-212/03 Commission v France [2005] ECR I-4213 [763](#)
- C-213/03 Geven v Land Nordrhein-Westfalen [2007] ECR I-6347 [856](#)
- C-215/03 Oulane v Minister voor Vreemdelingenzaken en Integratie [2005] ECR I-1215 [507](#), [508](#)
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- T-2/03 *Verein für Konsumenteninformation v Commission* [2005] ECR II-1121 414
- T-18/03 *CD Contact Data GmbH v Commission*, Judgment of 30 April 2009 967
- T-60/03 *Regione Siciliana v Commission* [2005] ECR II-4139 448
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- T-218/03–T-240/03 *Boyle v Commission* [2006] ECR II-1699 429
- T-279/03 *Galileo International Technology and others v Commission* [2006] ECR II-1291 463
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- T-347/03 *Branco v Commission* [2005] ECR II-2555 438, 442
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- C-66/04 *United Kingdom v Parliament and Council (Smoke Flavours)* [2005] ECR I-10553 683–4
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- C-95/04P *British Airways plc v Commission* [2007] ECR I-2331 1036–8
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- C-109/04 *Kranemann v Land Nordrhein-Westfalen* [2005] ECR I-2421 853, 864, 898
- C-125/04 *Denuit and Cordonier* [2005] ECR I-923 172
- C-144/04 *Mangold v Rüdiger Helm* [2005] ECR I-9981 230, 254, 321–2, 324, 325, 574–5, 576, 577, 606, 608
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- C-158/04 & C-159/04 *Alfa Vita Vassilopoulos AE v Elliniko Dimosio, Nomarkhiaki Aftodiikisi Ioanninon* [2006] ECR I-8135 671–2, 757, 781
- C-167/04P *JCB Service v Commission* [2006] ECR I-8935 115
- C-170/04 *Klas Rosengren and others v Riksåklagaren* [2007] ECR I-4071 760, 792
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- C-177/04 *Commission v France* [2006] ECR I-2461 377
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- C-188/04 *Alfa Vita v Elliniko Dimosio and Nomarchiaki Aftodioikisi Ioanninon* [2006] ECR I-8135 762–3, 787–8, 792
- C-212/04 *Adeneler and others v Ellinikos Organismos Galaktos (ELOG)* [2006] ECR I-6057 194–5, 213–14, 323–4
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- C-222/04 *Cassa di Risparmio di Firenze and others* [2006] ECR I-00289 1065
- C-227/04P *Lindorfer* [2007] ECR I-6767 575, 606
- C-234/04 *Kapferer v Schlank and Schlick* [2006] ECR I-2585 195
- C-258/04 *Ioannidis* [2005] ECR I-8275 489
- C-260/04 *Commission v Italy* [2007] ECR I-7083 827
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- C-290/04 *FKP Scorpio* [2006] ECR I-9461 803
- C-295/04–C-298/04 *Vincenzo Manfredi and others v Lloyd Adriatico Assicurazioni SpA and others* [2006] ECR I-6619 304–5, 307, 991–2
- C-300/04 *Eman and Sevinger* [2006] ECR I-8055 514
- C-301/04P *Commission v SGL Carbon* [2006] ECR I-5915 959, 960
- C-310/04 *Spain v Council* [2006] ECR I-7285 402
- C-338/04, 359/04 & 360/04 *Placanica, Palazzese and Soricchio* [2007] ECR I-1891 827, 904, 905, 916, 918
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- C-432/04 Commission v Cresson [2006] ECR I-6387 63
- C-433/04 Commission v Belgium [2006] ECR I-10653 829
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- C-436/04 Van Esbroeck [2006] ECR I-2333 654
- C-441/04 A-Punct Schmueckhandels [2006] ECR I-2093 787, 793
- C-446/04 Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue [2006] ECR I-11753 306
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- C-503/04 Commission v Germany [2007] ECR I-6153 340, 341
- C-506/04 Wilson v Ordre des avocats du barreau de Luxembourg [2006] ECR I-8613 171, 830, 860
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- T-167/04 Asklepios Kliniken v Commission [2007] ECR II-2379 456
- T-196/04 Ryanair Ltd v Commission [2008] ECR II-3643 1062–3
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- T-264/04 WWF European Policy Programme v Council [2007] ECR II-911 417
- T-395/04 Air One v Commission [2006] ECR II-1343 456
- C-1/05 Jia v Migrationsverket [2007] ECR I-1 496
- C-13/05 Sonia Chacón Navas v Eures Colectividades SA [2006] ECR I-6467 575, 588
- C-32/05 Commission v Luxembourg [2006] ECR I-11323 360
- C-39/05 & C-52/05 Sweden and Turco v Council [2008] ECR I-4723 418–19
- C-54/05 Commission v Finland [2007] ECR I-2473 760
- C-64/05P Sweden v Commission [2007] ECR I-11389 421–2
- C-76/05 Schwarz and Gootjes-Schwarz v Finanzamt Bergisch Gladbach [2007] ECR I-6849 484, 834
- C-77/05 United Kingdom v Council (Schengen) [2007] ECR I-11459 139–40, 523, 524–5
- C-94/05 Emsland-Stärke [2006] ECR I-2619 441
- C-110/05 Commission v Italy, [2009] ECR I-519 761, 762, 788, 792, 896
- C-112/05 Commission v Germany [2007] ECR I-8995 710
- C-134/05 Commission v Italy [2007] ECR I-6251 822, 823
- C-135/05 Commission v Italy [2007] ECR I-3475 356
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- C-138/05 Stichting Zuid-Hollandse Milieufederatie v Minister van Landbouw [2006] ECR I-8339 185
- C-142/05 Åklagaren v Mickelsson and Roos, Judgment of 4 June 2009 760
- C-150/05 Van Straaten [2006] ECR I-9327 654, 655
- C-192/05 Tas-Hagen and Tas v Raadskamer WUBO van de Pensioen- en Uitkeringsraad [2006] ECR I-10451 484
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- C-212/05 Hartmann v Freistaat Bayern [2007] ECR I-6303 856
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- C-246/05 Häupl v Lidl [2007] ECR I-4673 171
- C-254/05 Commission v Belgium [2007] ECR I-4269 691
- C-274/05 Commission v Greece [2008] ECR I-7969 875
- C-278/05 Robins v Secretary of State for Work and Pensions [2007] ECR I-1053 331–2
- C-288/05 Kretzinger [2007] ECR I-6441 655
- C-291/05 Minister voor Vreemdelingen zaken en Integratie v Eind [2004] ECR I-10719 505, 506
- C-303/05 Advocaten voor de Wereld v Leden van de Ministerraad [2007] ECR I-3633 275, 435, 647–8
- C-318/05 Commission v Germany [2007] ECR I-6957 807, 808, 831, 834
- C-319/05 Commission v Germany [2007] ECR I-9811 757, 930
- C-321/05 Kofeod v Skatteministeriet [2007] ECR I-5795 320–1
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- C-367/05 Kraaijenbrink [2007] ECR I-6619 655
- C-370/05 Festersen [2007] ECR I-1129 253, 897, 898, 908–9, 910
- C-380/05 Centro Europa 7 v Ministero delle Comunicazioni [2008] ECR I-349 281–2
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- C-393/05 Commission v Austria [2007] ECR I-10195 827, 913
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- C-404/05 Commission v Germany [2007] ECR I-10239 827, 913
- C-411/05 Félix Palacios de la Villa v Cortefiel Servicios SA [2007] ECR I-8531 575, 606
- C-431/05 Merck Genéricos–Produtos Farmacêuticos v Merck [2007] ECR I-7001 180
- C-432/05 Unibet v Justitiekanslern [2007] ECR I-2271 301–3, 308
- C-433/05 Sandström [2010] ECR I-2885 762
- C-438/05 International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti [2007] ECR I-10779 773, 815, 817, 818–19, 896, 1004
- C-439/05P & C-454/05P Land Oberösterreich and Austria v Commission (Austrian GMOs) [2007] ECR I-7141 694
- C-444/05 Stamatelaki v OAEE [2007] ECR I-3185 836
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- C-465/05 Commission v Italy [2007] ECR I-11091 826
- T-34/05R Makhteshim-Agan Holding BV and others v Commission [2005] ECR II-1465 456
- T-42/05 Williams v Commission [2008] ECR II-156 414
- T-48/05 Franchet and Byk v Commission [2008] ECR II-1585 460, 463
- T-101/05 & T-111/05 BASF AG and UCB SA v Commission [2007] ECR II-4949 1012
- T-185/05 Italy v Commission [2008] ECR II-3207 427
- T-420/05 Vischim v Commission, Judgment of 7 October 2009 438, 451, 457
- T-458/05 Tegometall International v OHIM–Wuppermann (TEK) [2007] ECR II-4721 435
- C-2/06 Kempter [2008] ECR I-411 195
- C-11/06 Morgan v Bezirksregierung Köln [2007] ECR I-9161 484, 486, 490
- C-15/06P Regione Siciliana v Commission [2007] ECR I-2591 449
- C-50/06 Commission v Netherlands [2007] ECR I-4383 509
- C-120/06 & C-121/06 FIAMM and others v Council and Commission [2008] ECR I-6513 460
- C-133/06 Parliament v Council (Safe Countries of Origin) [2008] I-3189 60–1, 62, 429
- C-143/06 Ludwigs–Apotheke München Internationale Apotheke v Juers Pharma Import–Export GmbH [2007] ECR I-9623 916
- C-206/06 Essent Network Noord and others [2008] ECR I-5497 1060
- C-210/06 Cartesio, Judgment of 16 December 2008 169, 886
- C-212/06 Government of the French Community and Walloon Government v Flemish Government [2008] ECR I-1683 355, 492
- C-221/06 Stadtgemeinde Frohnleiten [2007] ECR I-9643 673
- C-231/06 NPO v Jonkman [2007] ECR I-5149 194–5
- C-241/06 Lämmerzahl [2007] ECR I-8415 303
- C-244/06 Dynamic Medien Vertriebs GmbH v Avides Media AG [2008] ECR I-505 253, 791, 792
- C-250/06 United Pan-Europe Communications Belgium and others [2007] ECR I-11135 253, 830
- C-265/06 Commission v Portugal [2008] ECR I-2245 760
- C-266/06P Evonik Degussa v Commission [2008] ECR I-81 968
- C-267/06 Tadao Maruko v Versorgungsanstalt der deutschen Bühnen [2008] ECR I-1757 592
- C-268/06 Impact v MAFF [2008] ECR I-2483 303
- C-281/06 Jundt and Jundt v Finanzamt Offenburg [2007] ECR I-12231 808, 828
- C-286/06 Commission v Spain [2008] ECR I-8025 875
- C-303/06 S. Coleman v Attridge Law and Steve Law [2008] ECR I-5603 582, 583, 599
- C-309/06 Marks & Spencer v CCE [2008] ECR I-2283 306
- C-311/06 Consiglio Nazionale degli Ingegneri v Ministero della Giustizia and Marco Cavallera, Judgment of 29 January 2009 857, 875
- C-345/06 Heinrich, Judgment of 10 March 2009 441
- C-353/06 Grunkin and Paul [2008] ECR I-7639 483, 485
- C-372/06 Asda v Commissioners of Her Majesty’s Revenue and Customs [2007] ECR I-11223 206
- C-398/06 Commission v Netherlands [2008] ECR I-56 480
- C-409/06 Winner Wetten v Bürgermeisterin der Stadt Bergheim [2010] ECR I-8015 202–3, 265
- C-427/06 Birgit Bartsch v Bosch und Siemens Hausgeräte [2008] ECR I-7245 575
- C-428/06–434/06 Unión General de Trabajadores de La Rioja [2008] ECR I-6747 1065
- C-441/06 Commission v France [2007] ECR I-08887 1073

- C-445/06 *Danske Slagterier v Germany*, Judgment of 24 March 2009 305, 331–2
- C-452/06R v Licensing Authority of the Department of Health, ex parte Synthon [2008] ECR I-7681 331–2, 681–2
- C-460/06 *Paquay v Société d'architectes Hoet & Minne* [2007] ECR I-8511 215
- C-487/06P *British Aggregates Association v Commission* [2008] ECR I-10515 1067–9
- C-489/06 *Commission v Greece*, Judgment of 19 March 2009 341–2, 353
- C-499/06 *Nerkowska* [2008] ECR I-3993 484
- C-500/06 *Corporacion Dermoestetica* [2008] ECR I-5785 825, 908
- C-501/06P, C-513/06P, C-515/06P & C-519/06P *GlaxoSmithKline Services Unlimited (GSK) v Commission*, Judgment of 6 October 2009 949, 1019, 1020, 1029, 1038
- C-518/06 *Commission v Italy*, Judgment of 28 April 2009 800, 811–13
- C-521/06P *Athinaïki Techniki v Commission* [2008] ECR I-5829 427
- C-524/06 *Huber v Bundesrepublik Deutschland* [2008] ECR I-9705 483, 487
- C-531/06 *Commission v Italy*, Judgment of 9 May 2009 863
- C-14/07 *Weiss v Industrie- und Handelskammer Berlin* [2008] ECR I-3367 254
- C-33/07 *Jipa* [2008] ECR I-5157 512
- C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa*, Judgment of 8 September 2009 353, 827, 904, 905, 918
- C-48/07 *Les Vergers du Vieux Tauves*, Judgment of 22 December 2008 181
- C-54/07 *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn NV* [2008] ECR I-5187 600
- C-88/07 *Commission v Spain*, Judgment of 5 March 2009 757, 930
- C-94/07 *Raccanelli v Max-Planck-Gesellschaft zur Förderung der Wissenschaften* [2008] ECR I-5939 853
- C-95/07 & C-96/07 *Ecotrade v Agenzia delle Entrate-Ufficio di Genova* Judgment of 21 June 2008 305
- C-113/07P *SELEX Sistemi Integrati SpA v Commission*, Judgment of 26 March 2009 999
- C-138/07 *Belgische Staat v Cobelfret*, Judgment of 12 February 2009 296
- C-141/07 *Commission v Germany* [2008] ECR I-6935 898
- C-151/07 *Theologos-Grigorios Khatzithanasis v Ypourgos Ygeias kai Koinonikis Allilengyis and Organismos Epangelmatikis Ekpaidefsis kai Katartisis (OEEK)*, Judgment of 4 December 2008 875
- C-152/07 to C-154/07 *Arcor v Germany* [2008] ECR I-5959 313–14
- C-158/07 *Förster v Hoofddirectie van de Informatie Beheer Groep* [2008] ECR I-8507 491
- C-164/07 *Wood* [2008] ECR I-4143 482
- C-169/07 *Hartlauer Handelsgesellschaft mbH v Wiener Landesregierung, Oberösterreichische Landesregierung*, Judgment of 10 March 2009 862, 907–8, 910
- C-171/07 & C-172/07 *Apothekerkammer des Saarlandes*, Judgment of 19 May 2009 863
- C-202/07P *France Télécom SA v Commission*, Judgment of 2 April 2009 1040
- C-205/07 *Gysbrechts* [2008] ECR I-9947 795
- C-209/07 *Competition Authority v Beef Industry Development Society Ltd* [2008] ECR I-8637 1020
- C-221/07 *Zablocka*, Judgment of 4 December 2008 484
- C-222/07 *UTECA v Administración General del Estado*, Judgment of 5 March 2009 829, 917
- C-226/07 *Flughafen Köln/Bonn*, Judgment of 17 July 2008 296
- C-246/07 *Commission v Sweden* [2010] ECR I-3317 212–13
- C-276/07 *Nancy Delay v Università degli studi di Firenze, Istituto nazionale della previdenza sociale* [2008] ECR I-3635 877
- C-297/07 *Bourquain*, [2008] ECR I-9425 654, 655
- C-316/07 *Stoß* [2010] ECR I-08069 827, 904, 914
- C-322/07P, C-327/07P & C-338/07P *Papierfabrik August Koehler v Commission*, Judgment of 3 September 2009 438
- C-330/07 *Jobra Vermögensverwaltungs-Gesellschaft mbH v Finanzamt Amstetten Melk Scheibbs*, Judgment of 4 December 2008 506, 828
- C-343/07 *Bavaria and Bavaria Italia v Bayerischer Brauerbund* [2009] ECR I-5491 179
- C-343/07 *Bavaria and Bavaria Italia v Bayerischer Brauerbund* [2009] ECR I-5491 402
- C-349/07 *Sopropé* [2008] ECR I-10369 437
- C-385/07P *Grüne Punkt DSD v Commission*, Judgment of 16 July 2009 162
- C-393/07 & C-9/08 *Italy v Parliament*, Judgment of 30 April 2009 95
- C-402/07 & C-432/07 *Sturgeon v Condor Flugdienst GmbH*, Judgment of 19 November 2009 175
- C-423/07 *Commission v Spain* [2010] ECR I-3429 353
- C-440/07P *Commission v Schneider Electric*, Judgment of 16 July 2009 462
- C-441/07 *Commission v Alrosa* [2010] ECR I-5949 972
- C-445/07P & C-455/07P *Commission v Ente per le Ville Vesuviane*, Judgment of 10 September 2009 446, 447
- C-457/07 *Commission v Portugal*, Judgment of 10 September 2009 372

- C-475/07 Elgafaji v Staatsecretaris van Justitie, Judgment of 17 February 2009 253, 565–6
- C-491/07 Turansky, Judgment of 22 December 2008 654
- C-519/07P Commission v Koninklijke Friesland Campina, Judgment of 17 September 2009 449–50
- C-531/07 Fachverband der Buch-und Medienwirtschaft, Judgment of 30 April 2009 793, 794
- C-544/07 Rüffler, Judgment of 23 April 2009 485, 857
- C-550/07P Akzo Nobel Chemicals v Commission [2010] ECR I-8301 439
- C-551/07 Sahin, [2008] ECR I-1043 504
- C-553/07 College van Burgemeester en Wethouders van Rotterdam v Rijkeboer, Judgment of 7 May 2009 253
- C-555/07 Küçükdeveci v Swedex [2010] ECR I-365 321–2, 323
- C-555/07 Seda Küçükdeveci v Swedex GmbH Co KG [2010] ECR I-365 574
- C-570/07 Blanco Pérez [2010] ECR I-4629 805, 862, 908
- T-263/07 Estonia v Commission, Judgment of 23 September 2009 429, 438
- T-341/07 Sison v Council [2011] ECR II-7915 460
- T-423/07 Ryan Air v Commission [2011] ECR II-2397 456
- C-2/08 Fallimento Olimpiclub [2009] ECR I-7501 195
- C-8/08 T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse Mededingingsautoriteit, Judgment of 4 June 2009 1020–1, 1023–5, 1038
- C-14/08 Roda Golf and Beach Resort, Judgment of 25 June 2009 172
- C-22/08 Vatsouras v Arbeitsgemeinschaft Nürnberg, Judgment of 4 June 2009 488–9, 491
- C-40/08 Asturcom Telecomunicaciones v Rodríguez Nogueira [2009] ECR I-9579 304–5
- C-46/08 Carmen Media [2010] ECR I-08149 827, 904, 910–11
- C-51/08 Commission v Luxembourg, Judgment of 4 May 2011 236
- C-58/08 Vodafone [2010] ECR I-4999 682, 683
- C-73/08 Bressol [2010] ECR I-2735 897, 920
- C-76/08 Commission v Malta, Judgment of 10 September 2009 340
- C-96/08P CIBA [2010] ECR I-02911 879
- C-97/08 Akzo Nobel NV v Commission [2009] ECR I-8237 1000
- C-103/08 Gottwald v Bezirkshauptmannschaft Bregenz, Judgment of 1 October 2009 482, 490
- C-118/08 Transportes Urbanos y Servicios Generales [2010] ECR I-635 331
- C-123/08 Wolzenburg v London Borough of Ealing and Secretary of State for Education and Skills, [2009] ECR I-9621 482, 491, 649–51
- C-127/08 Metock [2008] ECR I-6241 504, 506, 539
- C-135/08 Rottmann v Freistaat Bayern, Judgment of 2 March 2010 472–4, 503
- C-141/08P Foshan Shunde Yongjian Housewares & Hardware Co. v Commission, Judgment of 1 October 2009 437
- C-147/08 Römer v Freie und Hansestadt Hamburg [2011] ECR I-3591 324, 592
- C-147/08 Römer [2011] ECR I-3591 592
- C-153/08 Commission v Spain, Judgment of 6 October 2009 828
- C-154/08 Commission v Spain [2009] ECR I-187 353, 515
- C-155/08 Passenheim-van School [2009] ECR I-5093 919
- C-160/08 Commission v Germany [2010] ECR I-3713 515, 937–8
- C-165/08 Commission v Poland, Judgment of 16 July 2009 349–50
- C-169/08 Presidente del Consiglio dei Ministri v Regione Sardegna, Judgment of 17 November 2009 828
- C-171/08 Commission v Portugal [2010] ECR I-6817 898
- C-205/08 Umweltanwalt von Kärnten v Kärntner Landesregierung [2009] ECR I-11525 172–3, 214
- C-208/08 Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien [2010] ECR I-13693 486
- C-209/08 Sayn Wittgenstein [2010] ECR I-13693 896, 917
- C-211/08 Commission v Spain, Judgment of 15 June 2010 836
- C-212/08 Zeturf [2011] ECR I-5633 901, 905–6
- C-229/08 Wolf [2010] ECR I-1 603
- C-258/08 Ladbroke's [2010] ECR I-04757 827, 904, 918, 934–5
- C-261/08 & C-348/08 Zurita García v Delegado del Gobierno en la Región de Murcia, Judgment of 22 October 2009 545
- C-271/08 Commission v Germany [2010] ECR I-7091 1004
- C-279/08P Commission v The Netherlands [2011] ECR I-07671 1054, 1057, 1068
- C-280/08P Deutsche Telekom v Commission [2010] ECR I-9555 1046
- C-310/08 Ibrahim, Judgment of 23 February 2010 497
- C-315/08 Grisoli [2011] ECR I-139 862
- C-325/08 Olympique Lyonnais [2010] ECR I-2177 862
- C-333/08 Commission v France, Judgment of 28 January 2010 901, 914, 925

- C-341/08 Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe [2010] ECR I-47 604, 878
- C-344/08 Rubach, Judgment of 16 July 2009 254, 435
- C-352/08 Modehuis A Zwijnenburg [2010] ECR I-4303 179
- C-407/08P Rauf v Commission [2010] ECR I-6375 256
- C-345/08 Pesla [2009] ECR I-11677 868
- C-362/08P Internationaler Hilfsfonds v Commission [2010] ECR I-669 406, 413
- C-379/08 & C-380/08 ERG and others v Ministero dello Sviluppo Economico [2010] ECR I-2007 402
- C-400/08 Commission v Spain [2011] ECR I-1915 863
- C-414/08P Sviluppo Italia Basilicata v Commission [2010] ECR I-2559 462
- C-438/08 Commission v Portugal ECR I-10219 939–40
- C-439/08 VEBIC [2010] ECR I-12471 987–8
- C-446/08 Solgar [2010] ECR I-39731 901
- C-447/08 Sjöberg [2010] ECR I-06921 828, 911, 918
- C-456/08 Commission v Ireland [2010] ECR I-859 340, 341
- C-458/08 Commission v Portugal [2010] ECR I-11599 845
- C-475/08 Commission v Belgium [2009] ECR I-11503 373
- C-480/08 Teixeira, Judgment of 23 February 2010 497
- C-482/08 United Kingdom v Council [2009] OJ C32/15 139
- C-499/08 Ingeniørforeningen i Danmark, acting on behalf of Ole Andersen v Region Syddanmark [2010] ECR I-9343 608
- C-506/08P Sweden and MyTravel Group v Commission [2011] ECR I-6237 415–16
- C-507/08 Commission v Slovak Republic [2010] ECR I-13489 353–4
- C-512/08 Commission v France, Judgment of 5 October 2010 836
- C-565/08 Commission v Italy [2011] ECR I-2101 813, 824
- C-568/08 Combinatie Spijker Infrabouw-De Jonge Konstruktie and others, [2010] ECR I-12655 331
- C-578/08 Chakroun v Minister van Buitenlandse Zaken [2010] ECR I-1839 553
- T-246/08 & T-332/08 Melli Bank v Council, Judgment of 9 July 2009 440, 458
- C-34/09 Zambrano [2011] ECR I-1177 282
- C-102/09 Camar v Presidenza del Consiglio dei Ministri [2010] ECR I-4045 112–3
- C-118/09 Koller [2010] ECR I-13629 172
- C-132/09 Commission v Belgium [2010] ECR I-8695 212–13
- C-165/09 – C-167/09 Stichting Natuur en Milieu v College van Gedeputeerde Staten van Groningen [2011] ECR I-4599 325
- C-173/09 Elchinov [2010] ECR I-8889 168
- C-208/09 Sayn-Wittgenstein [2010] ECR I-1369 236
- C-236/09 Association Belge des Consommateurs Test-Achats v Conseil des ministres [2011] ECR I-773 275
- C-246/09 Bulicke v Deutsche Büro Service [2010] ECR I-7003 300
- C-279/09 DEB [2010] ECR I-13849 254, 266, 303–4
- C-281/09 Commission v Spain, Judgment of 24 November 2011 179
- C-360/09 Pfeleiderer v Bundeskartellamt [2011] ECR I-5161 115, 307
- C-372/09 & C-373/09 Peñarroja Fa [2011] ECR I-1785 301
- C-391/09 Runevič-Vardyn, Judgment of 12 May 2011 236
- C-399/09 Landtóna [2011] ECR I-5573 233, 234
- C-429/09 Fuß v Stadt Halle [2010] ECR I-12167 305, 331–2
- C-452/09 Iaia and others v Ministero dell'Istruzione [2011] ECR I-4043 304–5
- C-460/09P Inalca –Industria Alimentari Carni v Commission, Judgment of 28 February 2013 162
- T-335/08 BNP Paribas v Commission [2010] ECR II-3323 408
- T-369/08 ERWIA v Commission [2010] ECR II-6283 427
- T-427/08 CEHR v Commission [2010] ECR II-5865 957
- T-443/08 & T-455/08 Freistaat Sachsen v Commission [2011] ECR II-1311 452
- C-1/09 CELF and Ministre de la Culture et de la Communication [2010] ECR I-02099 1074, 1075
- C-28/09 Commission v Austria [2011] ECR I-0000 785, 917, 928–9
- C-34/09 Gerardo Ruiz Zambrano v ONEm [2011] ECR I-1177 467, 493–4, 499–501, 502–3
- C-45/09 Rosenblatt v Oellerking Gebäudereinigungsges. mbH [2010] ECR I-9391 595, 606–7, 608
- C-52/09 Telia Sonera [2011] ECR I-527 955, 1046–7
- C-56/09 Zanotti [2010] ECR I-4517 807, 808
- C-108/09 Ker-Optika [2010] ECR I-12213 788
- C-118/09 Koller [2010] I-13627 868, 875
- C-137/09 Joseman v Burgemeester van Maastricht [2010] ECR I-13019 632, 934
- C-142/09 Lahousse [2010] ECR I-11685 761
- C-145/09 Tsakouridis [2010] ECR I-11979 511
- C-161/09 Kakavetsos-Fragkopoulous [2011] ECR I-915 796
- C-173/09 Elchinov, Judgment of 5 October 2010 836, 837

- C-217/09 Polliseni [2010] ECR I-175 862
- C-221/09 AJD Tuna v Commission [2011] ECR I-1655 408
- C-236/09 Association Belge des Consommateurs Test-Achats ASBL and others v Conseil des ministres [2011] ECR I-773 576
- C-245/09 Omalet [2010] ECR I-13771 805
- C-261/09 Mantello [2010] ECR I-11477 642
- C-262/09 Lassal [2010] ECR I-9217 477
- C-272/09P KME v Commission, Judgment of 8 December 2011 973, 974–5
- C-322/09P NDSHT v Commission [2010] ECR I-11911 427
- C-325/09 Dias [2011] ECR I-6387 477, 507
- C-331/09 Commission v Poland [2011] ECR I-02933 1073
- C-338/09 Yellow Cab [2010] ECR I-13927 863
- C-348/09PI, Judgment of 22 May 2012 511
- C-372/09 Peñarroja Fa [2011] ECR I-1785 938–9
- C-375/09 Prezes Urzędu Ochrony Konkurencji Konsumentów v Tele2 Polska sp. Z. O.o. divenue Netia SA [2011] ECR I-3055 988, 1025–6
- C-391/09 Runevic [2011] ECR I-03787 897
- C-407/09 Commission v Greece [2011] ECR I-2467 373
- C-421/09 Humanplasma [2010] ECR I-12869 916
- C-422/09 Vandorou [2010] ECR I-12411 868
- C-434/09 McCarthy [2011] ECR I-3375 494
- C-439/09 Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Economie, de l'Industrie et de l'Emploi [2011] ECR I-9419 1031
- C-496/09 Commission v Italy, Judgment of 17 November 2011 376
- C-503/09 Stewart [2011] ECR I-6497 490
- C-505/09P Commission v Estonia, Judgment of 29 March 2012 429
- C-522/09 Commission v Romania [2011] ECR I-2963 359
- C-542/09 Commission v Netherlands, Judgment of 14 June 2012 490, 897
- C-567/09 Woningstichting Sint Servatius, Judgment of 1 October 2009 924
- T-85/09 Kadi v Commission [2010] ECR II-5177 162–3
- T-147/09 & T-148/09 Trelleborg Industry v Commission, Judgment of 15 May 2013 275
- C-2/10 Azienda Agro-Zootecnica Franchini v Regione Puglia [2011] ECR I-6561 322–3
- C-34/10 Brüstle v Greenpeace [2011] ECR I-9821 267–70
- C-42/10, C-45/10 & C-57/10 Vlaamse Dierenartsenvereniging and Janssens [2011] ECR I-2975 166
- C-69/10 Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration [2011] ECR I-7151 304–5
- C-70/10 Scarlet Extended, Judgment of 24 November 2011, Opinion of Advocate General Cruz Villalón 254, 256–7
- C-89/10 & C-96/10 Q-Beef v Belgische Staat, Bosschaert v Belgische Staat, Judgment of 8 September 2011 193
- C-94/10 Danfoss and Sauer-Danfoss v Skatteministeriet [2011] ECR I-9963 331, 332
- C-110/10P Solvay v Commission [2011] ECR I-11439 275
- C-120/10 European Air Transport v Collège d'Environnement de la Région de Bruxelles-Capitale and Région de Bruxelles-Capitale [2011] ECR I-7865, Opinion of Advocate General Cruz Villalón 266
- C-130/10 Parliament v Council (Sanctions against Usama Bin Laden), Judgment of 19 July 2012 109
- C-163/10 Patriciello [2011] ECR I-7565 266
- C-188/10 & C-189/10 Melki and Abdeli 4 [2010] ECR I-5667 168–9
- C-203/10 Auto Nikolovi [2011] ECR I-1083 296
- C-221/10P Artegoda v Commission, Judgment of 19 April 2012 162
- C-244/10 & C-245/10 Mesopotamia Broadcast and Roj TV [2011] ECR I-8777 273–4
- C-282/10 Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la Région Centre, Judgment of 24 January 2012 266, 318–19, 320, 324
- C-355/10 Parliament v Council (Schengen Borders Code), Judgment of 5 September 2012 69–71
- C-400/10 PPU McB v LE [2010] ECR I-8965 262–4
- C-411/10 & C-493/10 NS v Secretary of State for the Home Department, Judgment of 21 December 2011 271–3
- C-416/10 Križan v Slovenská inšpekcia životného prostredia, Judgment of 15 January 2013 167–8
- C-539/10P & C-550/10P Stichting Al-Aqsa v Council, Judgment of 15 November 2012 112
- C-584/10 P, C-593/10P & C-595/10P Commission and United Kingdom v Kadi, Judgment of 18 July 2013 162, 205
- C-603/10 Pelati, Judgment of 18 October 2012 179, 300, 304–5
- C-606/10 ANAFE v Ministre de l'Intérieur, Judgment of 14 June 2012 112
- C-617/10 Åklagaren v Fransson, Judgment of 10 26 February 2013 248, 282–4, 286–7
- C-619/10 Trade Agency v Seramico Investments, Judgment of 6 September 2012 185
- C-621/10 & C-129/11 Balkan and Sea Properties; Probadinvest, Judgment of 26 April 2012 296
- T-526/10 Inuit Tapiriit Kanatami, Judgment of 12 25 April 2013 (Seal Products) 682–3
- C-25/11 Varzim Sol, Judgment of 16 February 2012 185

- C-32/11 Allianz Hungária Biztosító, Judgment of 14 March 2013 180
- C-59/11 Association Kokopelli v Baumaux, Judgment of 12 July 2012 254
- C-128/11 UsedSoft paragraph 41, Judgment of 3 July 2012 687
- C-146/11 Pimix, Judgment of 12 July 2012 214
- C-199/11 Otis, Judgment of 6 November 2012 213
- C-229/11 & C-230/11 Heimann v Kaiser, Judgment of 8 November 2012 259
- C-249/11 Byankov, Judgment of 4 October 2012 195
- C-251/11 Huet, Judgment of 8 March 2012 166
- C-260/11 R v Environment Agency, ex parte Edwards & Pallikaropoulos, Judgment of 11 April 2013 304
- C-274/11 & C295/11 Spain and Italy v Council (Unitary Patent), Judgment of 16 April 2013 136–7
- C-300/11 ZZ v Secretary of State for the Home Department, Judgment of 4 June 2013 301
- C-356/11 & C-357/11 O and S v Maahanmuuttovirasto, Judgment of 6 December 2012 176
- C-363/11 Epitropos tou Elegktikou Sinedriou sto Ipourgio Politismou kai Tourismou v Ipourgio Politismou kai Tourismou – Ipiresia Dimosionomikou Elenchou, Judgment of 19 December 2012 171
- C-394/11 Belov, Judgment of 31 January 2013 172
- C-396/11 Radu, Judgment of 29 January 2013 249, 275
- C-399/11 Melloni, Judgment of 26 February 2013 202–3, 208, 217, 259–61, 266
- C-415/11 Aziz v CatalunyaCaixa, Judgment of 14 March 2013 307–8
- C-418/11 Texdata Software, Judgment of 26 September 2013 283, 284, 287
- C-420/11 Leth v Republik Österreich, Judgment of 14 March 2013 332
- C-472/11 Banif Plus Bank v Csipai, Judgment of 21 February 2013 303
- C-476/11 HK Danmark v Experian, Judgment of 26 September 2013 313
- C-488/11 Brusse and Garabito v Jahani, Judgment of 30 May 2013 176, 300
- C-503/11P Schindler Holdings v Commission, Judgment of 18 July 2013 250
- C-536/11 Bundeswettbewerbshörde v Donau Chemie, Judgment of 6 June 2013 307
- C-565/11 Irimie v Administrația Finanțelor Publice Sibiu, Judgment of 18 April 2013 306
- C-643/11 LVK, Judgment of 31 January 2013 254
- T-187/11 Trabelsi v Council, Judgment of 28 May 2013 275
- C-45/12 Hadj Ahmed, Judgment of 13 June 2013 276
- C-93/12 ET Agroconsulting-04-Velko Stoyanov, Judgment of 27 June 2013 254
- C-124/12 AES-3C MARITZA EAST 1, Judgment of 18 July 2013 318
- C-370/12 Pringle v Government of Ireland, Judgment of 27 2 November 2012 61–2, 142–3
- T-59/09 Germany v Commission, Judgment of 14 February 2012 365
- T-88/09 Idromacchine v Commission [2011] ECR II-7833 460, 463
- T-219/09 & T-326/09 Albertini v European Parliament [2010] ECR II-5935 450
- T-233/09 Access Info Europe v Council [2011] ECR II-1073 419–21
- T-352/09 Novácke chemické závody v Commission, Judgment of 12 December 2012 435, 957
- T-387/09 Applied Microengineering v Commission, Judgment of 27 September 2012 443
- T-436/09 Dufour v ECB [2011] ECR II-7727 413, 464
- T-529/09 In't Veld v Commission, Judgment of 4 May 2012 418
- C-17/10 Toshiba, Judgment of 14 February 2012 983
- C-15/10 Etimine v Secretary of State for Work and Pensions [2011] ECR I-6681 402
- C-72/10 Costa, Judgment of 12 February 2012 862
- C-148/10 DHL [2011] ECR I-09543 883
- C-188/10 & C-189/10 Melki and Abdeli [2010] ECR I-05667 529
- C-209/10 Post Danmark A/S v Konkurrencerådet, Judgment of 27 March 2012 1047–8
- C-275/10 Residex Capital IV, Judgment of 8 December 2011 1074
- C-355/10 Parliament v Council, Judgment of 5 December 2012 429
- C-357/10 Duomo, Judgment of 10 May 2012 828, 863
- C-364/10 Hungary v Slovakia, Judgment of 16 October 2012 339, 509
- C-365/10 Commission v Slovenia, [2011] ECR I-140 360
- C-378/10 VALE, Judgment of 22 July 2012 887
- C-383/10 Commission v Belgium, Judgment of 6 June 2013 919
- C-411/10 & C-493/10 NS v Secretary of State for the Home Department; ME v Refugee Applications Commissioner, Judgment of 21 December 2011 542–3
- C-424/10 & C-425/10 Ziolkowski and Szeja v Land Berlin, Judgment of 21 December 2011 477
- C-443/10 Bonnarde [2010] ECR I-9327 760, 785
- C-456–10 Anett, Judgment of 26 April 2012 760
- C-463/10P & C-475/10P Deutsche Post v Commission [2011] ECR I 427
- C-571/10 Kamberaj v IPES, Judgment of 24 April 2012 551–2, 568
- C-577/10 Commission v Belgium, Judgment of 19 December 2012 826

- C-602/10 Volksbank Romania, Judgment of 12 July 2012 805, 813
- C-610/10 Commission v Spain, Judgment of 11 December 2012 372, 373, 376
- T-96/10 Rütgers Germany v ECHA, Judgment of 7 March 2013 427
- T-221/10 Iberdrola v Commission, Judgment of 8 March 2012 452
- T-262/10 Microban v Commission [2011] ECR II-7697 445, 446, 447
- T-301/10 In't Veld v Commission, Judgment of 19 March 2013 417
- T-339/10 COSEPURI v EFSA, Judgment of 29 January 2013 413
- T-509/10 Manufacturing Support and Procurement Kala Naft v Council, Judgment of 25 April 2012 441
- T-526/10 Inuit Tapiriit Kanatami v Commission, Judgment of 25 April 2013 457
- C-32/11 Allianz Hungária Biztosító and others, Judgment of 14 March 2013 988, 1019, 1020
- C-34/11 Commission v Portugal, Judgment of 15 November 2012 360
- C-35/11 Test Claimants in the FII Group Litigation, Judgment of 13 November 2012 710
- C-40/11 Iida, Judgment of 8 November 2012 494, 548
- C-61/11 PPU El Dridi [2011] ECR I-3015 546
- C-71/11 & C-99/11 Y and Z, Judgment of 5 September 2012 564–5
- C-75/11 Commission v Austria, Judgment of 4 October 2012 490
- C-83/11 Secretary of State for the Home Department v Rahman, Judgment of 5 September 2012 496
- C-132/11 Tyrolean Airways v Betriebsrat Bord, Judgment of 7 June 2012 576
- C-137/11 Partena, Judgment of 27 September 2012 919
- C-147/11 & C-148/11 Czap and Punakova, Judgments of 6 September 2012 477, 851
- C-152/11 Odar v Baxter, Judgment of 6 December 2012 576
- C-171/11 Fra.Bo, Judgment of 12 July 2012 760, 769–70
- C-172/11 Erny, Judgment of 28 June 2012 876, 898
- C-186/11 Stanleybet, Judgment of 24 January 2013 827, 904
- C-197/11 Libert, Judgment of 8 May 2013 897, 924
- C-202/11 Las v PSA Antwerp NV, Judgment of 16 April 2013 576, 859, 860
- C-212/11 Jyske Bank, Judgment of 25 April 2013 821, 919
- C-256/11 Dereci, Judgment of 15 November 2011 494, 500–1
- C-270/11 Commission v Sweden, Judgment of 30 May 2013 377
- C-277/11 M.M. v Minister for Justice, Equality and Law Reform, Judgment of 22 November 2012 437
- C-280/11P Council v Access Info Europe, Judgment of 17 October 2013 419
- C-300/11 ZZ v Secretary of State for the Home Department, Judgment of 4 June 2013 435, 436
- C-329/11 Achughbabian, Judgment of 6 December 2011 546
- C-335 & 337/11 HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab; HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S, Judgment of 11 April 2013 587–8, 589–90
- C-356/11 & C-357/11 O and S v Maahanmuuttovirasto; Maahanmuuttovirasto v L, Judgment of 6 December 2012 494, 501–2
- C-363/11 Elegktiko Sinedrio v Ipourgeio Politismou kai Tourismou, Judgment of 19 December 2012 577
- C-367/11 Prete, Judgment of 25 October 2012 490
- C-369/11 Commission v Italy, Judgment of 3 October 2013 355
- C-374/11 Commission v Ireland, Judgment of 19 December 2012 376
- C-379/11 Caves Krier, Judgment of 13 December 2012 487, 490, 878
- C-394/11 Valeri Hariev Belov v ChEZ Elektro BalgariaAD and others, Judgment of 31 January 2013 575
- C-396/11 Radu, Judgment of 29 January 2013 643
- C-399/11 Melloni, Judgment of 26 February 2013 644, 645
- C-439/11 Ziegler v Commission, Judgment of 11 July 2013 438
- C-461/11 Radziejewski, Judgment of 8 November 2012 486
- C-470/11 Garkalns, Judgment of 19 July 2012 924–5
- C-501/11P Schindler Holding Ltd (and others) v Commission, Judgment of 18 July 2013 1000–1
- C-529/11 Alarape, Judgment of 8 May 2013 497
- C-534/11 Arslan, Judgment of 30 May 2013 545
- C-536/11 Donau Chemie, Judgment of 6 June 2013 988
- C-539/11 Ottica, Judgment of 26 September 2013 862
- C-544/11 Petersen, Judgment of 28 February 2013 899
- C-573/11 Nasiopoulos, Judgment of 27 June 2013 870–1
- C-577/11 DKV, Judgment of 7 March 2013 824
- C-583/11P Inuit Tapiriit Kanatami v Council, Judgment of 3 October 2013 444–5
- C-648/11R v Secretary of State for the Home Department, ex parte MA, Judgment of 6 June 2013 541
- C-681/11 Schenker & Co. and others, Judgment of 18 June 2013 988

T-15/11 Sina Bank v Council, Judgment of 11 December 2012 459

T-18/11 Inuit Tapiriit Kanatami v European Parliament and Council [2011] ECR II-5599 445

T-93/11 Stichting Corporate Europe Observatory v Commission, Judgment of 7 June 2013 443

T-381/11 Eurofer v Commission, Judgment of 4 June 2012 448, 450

T-400/11 Altadis v Commission, Judgment of 9 September 2013 450

C-1/12 Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência, Judgment of 23 February 2013 1006

C-23/12 Zakaria, Judgment of 17 January 2013 535

C-46/12LN v Styrelsen for Videregående Uddannelser og Uddannelsesstøtte, Judgment of 21 February 2013 478, 873

C-57/12 Femarbel, Judgment of 11 July 2013 843

C-81/12 Asociația ACCEPT v Consiliul Național pentru Combaterea Discriminării, Judgment of 25 April 2013 355, 597, 610

C-86/12 Alokpa, Judgment of 10 October 2013 498

C-87/12 Ymeraga, Judgment of 8 May 2013 494

C-105/12 to 107/12 Staat der Nederlanden v Essent and others, Judgment of 22 October 2013 710

C-262/12 Vent de Colère and others 1060

C-179/12P Dow Chemical Company v Commission, Judgment of 26 September 2013 1000

C-186/12 Impacto Azul, Judgment of 20 June 2013 879

C-199/12, C-200/12 & C-201/12 X, Y and Z, Judgment of 7 November 2013 538–9

C-239/12P Abdulrahim v Council and Commission, Judgment of 28 May 2013 435

C-278/12 PPU Adil, Judgment of 19 July 2012 530

C-370/12 Pringle v Government of Ireland, Judgment of 27 November 2012 722–3, 743, 744

T-12/12 Laboratoires CTRS v Commission, Judgment of 4 July 2012 457

T-6/12 Godrej Industries v Council, Judgment of 6 September 2013 438

C-168/13 PPU F v Premier Ministre, Judgment of 30 May 2013 641

C-383/13 PPU MG v Staatssecretaris van Veiligheid en Justitie, Judgment of 10 September 2013 436

EC Commission Competition Decisions

Austrian Banks [2002] OJ L56/1 959

Bayer/BPCL [1988] OJ L150/35 1028

Bayo-n-ox [1990] OJ L21/71 1015

CECED [2000] OJ L187/47 1027–9

Distribution of Package Tours during the 1990 World Cup [1992] OJ L326/31 999

ENI [2010] COMP/39.315 1049, 1050

Fenex [1996] OJ L181/28 1008

Fine Art Auction Houses [2005] OJ L200/92 966

Ford/Volkswagen [1993] OJ L20/14 1003

E.ON: German Electricity Wholesale Market [2008] COMP/39.388 1036, 1050

Glaxo Wellcome [2001] OJ L302/1 1018

Gosmé/Martell-DMP [1991] OJ L185/23 999

Intel, Decision of 13 May 2009 1046

Konica [1988] OJ L78/34 1015

Microsoft Corporation [2007] OJ L32/23 949

Olivetti/Canon [1988] OJ L52/60 1028

Optical Fibres [1986] OJ L236/30 1028

Philips/Osram [1994] OJ L378/37 1028

Pioneer [1980] OJ L60/21 966

Polypropylene [1986] OJ L230/1 1008

Pre-Insulated Pipes Cartel [1999] OJ L24/1 958, 966

RAI/UNITEL [1978] OJ L157/39 999

Re Zanussi SpA Guarantee [1978] OJ L322/26 1002

Reuter/BASF [1976] OJ L254/40 999

RWE Gas Foreclosure, Decision of 19 March 2009 1036

Sandoz Prodotti Farmaceutici SpA [1987] OJ L222/28 1015

Stichting Baksteen [1994] OJ L131/15 1028

Synthetic Fibres [1984] OJ L207/17 1003, 1028

Télévision par satellite [1999] OJ L90/6 1022

Tipp-Ex [1987] OJ L222/1 1015, 1016

Viho/Parker Pen [1992] OJ L233/27 1000

Virgin/British Airways [2000] OJ L30/1 1037

Volkswagen [1998] OJ L124/60 1015

Wanadoo Interactive, Decision of 16 July 2003 1040

Zinc Phosphate [2003] OJ L153/1 958

Zinc Producer Group [1984] OJ L220/27 1008

European Ombudsman Decisions

Complaint 995/98/OV (Macedonian Metro) 370

European Commission of Human Rights

Arrowsmith v United Kingdom (1978) 19 DR 5 586

H v United Kingdom (1993) 16 EHRR CD 44 586

European Court of Human Rights

Bosphorus Airways v Ireland, 45036/98, Judgment of 30 June 2005 290

Campbell and Cosans v United Kingdom, 7511/76; 7743/76 [1982] ECHR 8 587

Eweida and others v United Kingdom [2013] ECHR 37 576

Funke v France, 10828/84 [1993] ECHR 7 960

Goodwin v United Kingdom, 28957/95 (2002) 35 EHRR 18 584

Horváth and Kiss v Hungary, 11146/11 [2013] ECHR 576

Kokkinakis v Greece, 14307/88 (1994) 17 EHRR 397 587
 Menarini Diagnostics v Italy, 43509/08 27 September 2011 974
 Niemetz v Germany, 13710/88 [1992] ECHR 80 962
 Saunders v United Kingdom, 19187/91 [1996] ECHR 65 960
 Smith and Grady v United Kingdom, 33985/96; 33986/96 [2000] ECHR 384 603
 Société Colas Est and others v France, 37971/97 [2002] ECHR 418 962
 Société Colas Est and others v France (2004) 39 EHRR 17 961
 Veeber v Estonia (No. 1) (2004) 39 EHRR 6 962

EFTA Court

E-5/07 Private Barnehagers Landsforbund v EFTA Surveillance Authority, Judgment of 21 February 2008 806

National Courts

Austria
 Connect Austria, VfSlg 15.427/1999 222–3
 Orfinger v Belgium [2000] 1 CMLR 612 222–3
 Cyprus
 Attorney General of the Republic of Cyprus v Konstantinou [2007] 3 CMLR 42 649
 Czech Republic
 Re Constitutionality of Framework Decision on the European Arrest Warrant (Czech Constitutional Court) [2007] 3 CMLR 24 238–9, 649
 Re Czech Sugar Quotas [2006] 3 CMLR 15 222–3
 Slovak Pensions, Judgment of 31 January 2012 (Czech Constitutional Court, Pl ÚS 5/12) 200, 233–5
 Sugar Quotas III, Judgment of 3 March 2008 (Czech Constitutional Court, Decision Pl ÚS 50/04) 226
 Treaty of Lisbon, 26 November 2008 (Constitutional Court, Decision Pl ÚS 19/08) 239
 Denmark
 Carlsen v Rasmussen [1999] 3 CMLR 854 222–3
 Estonia
 Article 4(4) ESM Treaty, Case 3–4–1–6–12 Judgment of Estonian Supreme Court of 12 July 2012 238–9
 Opinion on the Interpretation of the Constitution No. 3–4–1–18 3–06, Opinion of 11 May 2006 222–3
 Request of the Chancellor of Justice to declare Article 4(4) of the Treaty establishing the European Stability Mechanism signed on 2 February 2012 in Brussels to be in conflict with the Constitution, Judgment of 12 July 2012 (No. 3–4–1–6–12) Supreme Court of Estonia 716, 742

France
 Minister of the Interior v Cohn-Bendit [1980] 1 CMLR 543 202, 309–10
 Re Ratification of the Lisbon Treaty (2010) 2 CMLR 26 222–3
 Re Treaty on European Union (Decision 92–308), JORF 1992, No. 5354 28
 Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, Decision 2012–653, 9 August 2012 (French Constitutional Council) 238–9
 Germany
 Brunner v European Union Treaty [1994] 1 CMLR 57 222–3, 334
 Constitutionality of German Law Implementing the Framework Decision on a European Arrest Warrant [2006] 1 CMLR 16 229
 Counter-Terrorism Database (1 BvR 1215/07) 24 April 2013 (German Constitutional Court) 231, 248, 287
 ESM Treaty (Temporary Injunctions), Judgment 2 BvR 1390/12, 12 September 2012 (German Constitutional 5 Court) 200, 242–5
 ESM Treaty (Temporary Injunctions), Judgment of 12 September 2012 (2 BvR 1390/12) German Constitutional Court 716, 737, 743
 Gauweiler v Treaty of Lisbon (2 BvE 2/08) 45, 95–6, 130, 223–5, 229–30, 235–41, 627–8, 636, 656
 Honeywell Bremsbelag GmbH (Honeywell) (BvR 2661/06) 200, 230–1
 Internationale Handelsgesellschaft v Einfuhr- und Vorratstelle für Getreide und Futtermittel [1974] 2 CMLR 540 202, 225–6, 227
 North Rhine-Westphalia DTT, Decision of 23 October 2007 (C34/2006) 1077
 Re Value Added Tax Directives [1982] 1 CMLR 527 202, 309–10
 Wünsche Handelsgesellschaft ('Solange II') [1987] CMLR 225; (1986) BVerfGE 339 226–7, 229
 Greece
 Re Enforcement of a European Arrest Warrant against Tzoannos (Greek Court of Appeal) [2008] 2 CMLR 38 649
 Hungary
 Case 17/04 (V. 25) Speculation in Agricultural Products (AB Constitutional Court of the Republic of Hungary) 226
 Ireland
 Crotty v An Taoiseach [1987] IR 713 222–3
 Italy
 Admenta and others v Federforma [2006] 2 CMLR 47 222–3, 228
 Frontini v Ministero delle Finanze [1974] 2 CMLR 372 202, 225–6
 Latvia
 Ratification of the Lisbon Treaty [2010] 1 CMLR 42 222–3

Poland

- Re Enforcement of a European Arrest Warrant [2006] 1 CMLR 36 649
- Lisbon Treaty, Judgment K32/09, 24 September 2010 228, 238–9
- Polish Membership of the European Union (Accession Treaty), Judgment K18/04, 11 May 2005 (Polish Constitutional Court) 222–3
- Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments, Judgment SK 45/09, 16 November 2011, (Polish Constitutional Court) 228
- Treaty of Lisbon, Judgment K 32/09, 24 November 2010 222–3

Portugal

- Acordão 187/2013 on Portuguese Budget, Judgment of 5 April 2013 Portuguese Constitutional Tribunal 716, 744

Slovenia

- U-1-113/04 Rules on the Quality Labelling and Packaging of Feeding Stuffs, Judgment of 7 February 2007 222–3

Spain

- CanalSatelite Digital v State Attorney, Judgment of 6 June 2003 (Tribunal Supremo) [2005] 5 EuroCL 33 327
- Re EU Constitutional Treaty and the Spanish Constitution (Spanish Constitutional Court) [2005] 1 CMLR 981 222–3
- Re Treaty on European Union [1994] 3 CMLR 101 28

United Kingdom

- Assange v Swedish Prosecution Authority [2012] UKSC 22 640, 645
- BAA, R (on the application of) v HM Treasury [2002] EWHC 926 (Admin) 1074
- CRE v Dutton [1989] QB 783 586
- Crehan v Intntrepreneur [2004] EWCA Civ 637 989
- Dawkins v Department of Environment [1993] ICR 517 586
- Deide v Gillette [1980] IRLR 427 586
- Devenish Nutrition Ltd and others v Sanofi and others [2007] EWHC 2394 (Ch) 992
- Garden Cottage Foods v Milk Marketing Board [1984] AC 130 990
- Intntrepreneur Pub Company (CPC) and others v Crehan [2006] UKHL 38 989
- Macarthys Ltd v Smith [1980] ICR 672 579
- Mandla v Lee [1983] 2 AC 548 586
- Porcelli v Strathclyde Regional Council [1986] ICR 564 600
- R v MAFF, ex parte First City Trading [1997] 1 CMLR 250 231
- R v Secretary of State for Employment, ex parte EOC [1994] 1 All ER 910 581
- R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Rees-Mogg [1994] QB 552 28

- R v Secretary of State for the Home Department, ex parte Adam [2006] 1 AC 396 560

United States

- Brunswick Corp. v Pueblo Bowl-O-Mat, Inc. 429 US 477 (1977) 950
- Continental TV v GTE Sylvania 433 US 36 (1977) 1014
- Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v Amos 483 US 327 (1987) 605
- Meritor Savings Bank v Vinston 477 US 57 (1986) 600
- Pacific Bell v LinkLine Communications 555 US 438 (2009) 1046
- St Francis College v Al-Khazraji 481 US 604 (1987) 586
- Verizon v Trinko 540 US 398 (2004) 950

European Court of Justice: alphabetical order

- A-Punckt Schmuckhandels [2006] ECR I-2093 (C-441/04) 787, 793
- Aalborg Portland v Commission (Cement) [2004] ECR I-123 (C-204/00 & 205/00P, C-211/00P, C-213/00P, C-217/00P & C-219/00P) 964
- Aanemersbedrijf P. K. Kraaijeveld v Gedeputeerde Staten van Zuid-Holland [1996] ECR I-5403 (C-72/95) 189
- Abdulrahim v Council and Commission, Judgment of 28 May 2013 (C-239/12P) 435
- Abrahamsson [2000] ECR I-5539 (C-407/98) 615
- Access Info Europe v Council [2011] ECR II-1073 (T-233/09) 419–21
- ACF Chemiefarmia v Commission [1970] ECR 661 (41/69, 44/69 & 45/69) 965, 1008
- Achughbabian, Judgment of 6 December 2011 (C-329/11) 546
- Adams v Commission [1985] ECR 3539 (145/83) 464
- ADBHU [1985] ECR 531 (240/83) 253
- Adeneler v ELOG (Ellinikos Organismos Galaktos) [2006] ECR I-6057 (C-212/04) 194–5, 213–4, 323–4
- Adil, Judgment of 19 July 2012 (C-278/12 PPU) 530
- Adoui and Cornuaille [1982] ECR 1665 (115/81 & 116/81) 509–10, 904, 935
- Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke GmbH v Finanzlandesdirektion für Kärnten [2001] ECR I-8365 (C-143/99) 1066
- Advocaten voor de Wereld [2007] ECR I-3633 (C-303/05) 275, 435, 647–8
- AEG [1983] ECR 3135 (107/82) 1002, 1016
- AES-3C MARITZA EAST 1, Judgment of 18 July 2013 (C-124/12) 318

- Afvalstoffen [1998] ECR I-4075 (C-203/96) 900, 929–30
- AGM [2007] ECR I-2749 (C-470/03) 331–2, 763–5
- Aher-Waggon [1998] ECR I-4473 (C-389/96) 926
- Ahokkainen [2006] ECR I-9171 (C-434/04) 760, 917
- Air France v Commission [1994] ECR II-121 (T-3/93) 427
- Air Liquide Industries Belgium SA v Ville de Seraing and Province de Liège [2006] ECR I-5293 (C-393/04 & C-41/05) 1075
- Air One v Commission [2006] ECR II-1343 (T-395/04) 456
- Åklagaren v Fransson, Judgment of 10 26 February 2013 (C-617/10) 248, 282–4, 286–7
- AJD Tuna v Commission [2011] ECR I-1655 (C-221/09) 408
- Akrich [2003] ECR I-9607 (C-109/01) 504, 506
- Akzo v Commission [1986] ECR 2585 (5/85) 67
- Akzo [1991] ECR I-3359 (62/86) 1033, 1038–40, 1049
- Akzo Nobel Chemicals v Commission [2010] ECR I-8301 (C-550/07P) 439
- Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission [2007] ECR II-3523 (T-125/03 & T-253/03) 435, 960
- Akzo Nobel NV v Commission [2009] ECR I-8237 (C-97/08P) 1000
- Al-Jubail v Council [1991] ECR I-3187 (49/88) 437
- Alarape, Judgment of 8 May 2013 (C-529/11) 497
- Albany [1999] ECR I-5751 (C-67/96) 1003
- Albertini v European Parliament [2010] ECR II-5935 (T-219/09 & T-326/09) 10157 450
- Alcan v Commission [1970] ECR 385 (69/69) 446
- Alfa Vita v Elliniko Dimosio and Nomarchiaki Aftodioikisi Ioanninon [2006] ECR I-8135 (C-188/04) 762–3, 787–8, 792
- Alfa Vita Vassilopoulos v Elliniki Dimosio [2006] ECR I-8135 (C-158/04 & C-159/04) 671–2, 757, 781
- Alliance for Natural Health (R v Secretary of State for Health, ex parte Alliance for Natural Health) [2005] ECR I-6451 (C-154/04 & C-155/04) 397
- Allianz Hungária Biztosító, Judgment of 14 March 2013 (C-32/11) 180
- Allianz Hungária Biztosító and others, Judgment of 14 March 2013 (C-32/11) 988, 1019, 1020
- Allonby [2004] ECR I-873 (C-256/01) 579–81
- Allue v Università degli Studi di Venezia [1989] ECR 1591 (33/88) 515
- Alokpa, Judgment of 10 October 2013 (C-86/12) 498
- Alpine Investments [1995] ECR I-1141 (C-384/93) 799, 803, 805, 809, 813, 824–5, 857
- Altadis v Commission, Judgment of 9 September 2013 (T-400/11) 450
- AM & S Europe Ltd v Commission [1982] ECR 1575 (155/79) 254, 435, 960
- Amministrazione delle Finanze dello Stato v San Giorgio [1983] ECR 3595 (199/82) 180, 306
- Amministrazione delle Finanze dello Stato v Simmenthal [1978] ECR 629 (106/77) 208–9
- An Taise v Commission [1994] ECR II-733 (T-461/93) 455
- ANAFE v Ministre de l'Intérieur, Judgment of 14 June 2012 (C-606/10) 112
- André v Landrat des Kreises Herford [2004] ECR I-11825 (C-434/02) 681–2
- Anett, Judgment of 26 April 2012 (C-456–10) 760
- Angonese [2000] ECR I-4139 (C-281/98) 815, 856, 859
- Anic [1999] ECR I-4125 (C-49/92) 1009–11, 1012, 1013
- Anker [2003] ECR I-10447 (C-47/02) 941
- Annibaldi [1997] ECR I-7493 (C-309/96) 280
- Anomar v Estado Português [2003] ECR I-8621 (C-6/01) 805, 827
- Apothekerkammer des Saarlandes, Judgment of 19 May 2009 (C-171/07 & C-172/07) 863
- Apple & Pear Development Council [1983] ECR 4083 (222/82) 351, 768, 769
- Applied Microengineering v Commission, Judgment of 27 September 2012 (T-387/09) 443
- Aragonesa [1991] ECR I-4151 (C-1/90 & C-176/90) 796
- Arblade [1999] ECR I-8453 (C-369/96 & C-376/96) 808–9
- Arcaro [1996] ECR I-4705 (C-168/95) 320–1
- Arcor v Bundesrepublik Deutschland [2008] ECR I-5959 (C-152/07–154/07) 313–14
- Argos Distributors Ltd v CCE [1996] ECR I-5311 (C-288/94) 805
- Arslan, Judgment of 30 May 2013 (C-534/11) 545
- Artgodan v Commission, Judgment of 19 April 2012 (C-221/10P) 162
- Asda v Commissioners of Her Majesty's Revenue and Customs [2007] ECR I-11223 (C-372/06) 206
- Asklepios Kliniken v Commission [2007] ECR II-2379 (T-167/04) 456
- Asnef-Equifax v Ausbanc [2006] ECR I-11125 (C-238/05) 1028
- Asociația ACCEPT v Consiliul Național pentru Combaterea Discriminării, Judgment of 25 April 2013 (C-81/12) 355, 597, 610
- Asscher [1994] ECR I-1137 (C-107/94) 856
- Association Belge des Consommateurs Test-Achats v Conseil des ministres [2011] ECR I-773 (C-236/09) 275
- Association Kokopelli v Baumaux, Judgment of 12 July 2012 (C-59/11) 254
- Association Belge des Consommateurs Test-Achats ASBL and others v Conseil des ministres [2011] ECR I-773 (C-236/09) 576, 577
- Associazione Nazionale Bieticoltori v Council [1998] ECR II-4191 (T-38/98) 453
- ASTI [1991] ECR I-3507 (C-213/90) 877
- Asturcom Telecomunicaciones v Rodríguez Nogueira [2009] ECR I-9579 (C-40/08) 304–5

- Athinaiki Techniki v Commission [2008] ECR I-5829 (C-521/06P) 427
- Atlanta Fruchthandelsgesellschaft [1995] ECR I-3761 (C-465/93) 197, 307
- Atlantic Container Line v Commission [2002] ECR II-875 (T-395/94) 966
- Atzeni and others v Regione autonoma della Sardegna [2006] ECR I-1875 (C-346/03 & C-529/03) 179, 408, 438
- Au Blé Vert [1985] ECR I 1 (229/83) 767
- Audi v OHIM (TDI) [2003] ECR II-5167 (T-16/02) 435
- Austrian GOMs (Land Oberösterreich and Austria v Commission) [2007] ECR I-7141 (C-439/05P & C-454/05P) 694
- Auto Nikolovi [2011] ECR I-1083 (C-203/10) 296
- Automec Srl v Commission ('Automec II') [1992] ECR II-2223 (T-24/90) 455, 957
- Avello [2003] ECR I-11613 (C-148/02) 481, 482–3, 493
- Awoyemi [1998] ECR I-6781 (C-230/97) 508
- Azienda Agro-Zootecnica Franchini v Regione Puglia (C-2/10) [2011] ECR I-6561 322–3
- Aziz v Catalunyaixa, Judgment of 14 March 2013 (C-415/11) 307–8
- Bacardi France [2004] ECR I-6613 (C-429/02) 896
- Bachmann [1992] ECR I-249 (C-204/90) 897, 899
- Balkan and Sea Properties, Judgment of 26 April 2012 (C-621/10) 296
- Banif Plus Bank v Csapai, Judgment of 21 February 2013 (C-472/11) 303
- Barber [1990] ECR I-1889 (262/88) 580, 590
- BASF AG and UCB SA [2007] ECR II-4949 (T-101/05 & T-111/05) 1012
- BASF (Commission v BASF) [1994] ECR I-2555 (C-137/92P) 464, 465
- Baumbast v Secretary of State for the Home Department [2002] ECR I-7091 (C-413/99) 479, 498
- Baustahlgewerbe v Commission [1998] ECR I-8417 (C-185/95P) 162
- Bavaria and Bavaria Italia v Bayerischer Brauerbund [2009] ECR I-5491 (C-343/07) 179
- Bavaria and Bavaria Italia v Bayerischer Brauerbund [2009] ECR I-5491 (C-343/07) 402
- Bayer [2004] ECR I-23 (C-2/01 & C-3/01P) 1016–17
- Becker v Finanzamt Münster-Innenstadt [1982] ECR 53 (8/81) 310
- Becu [1999] ECR I-5665 (C-22/98) 999
- Belasco [1989] ECR 2117 (246/86) 1002
- Belgian (Walloon) Waste (C-2/90) [1992] ECR I-4431 900, 929
- Belgische Staat v Cobelfret, Judgment of 12 February 2009 (C-138/07) 296
- Belgium v Commission [1999] ECR I-03671 (C-75/97) 1065
- Belgium v Commission [2005] ECR I-2801 (C-110/03) 1080
- Belgium v Spain [2000] ECR I-3123 (C-388/95) 339, 795
- Bellamy and English Shop [2001] ECR I-2795 (C-123/00) 779
- Belov, Judgment of 31 January 2013 (C-394/11) 172
- Benedetti v Munari [1977] ECR 163 (52/76) 192–3
- Bergaderm [2000] ECR I-5291 (C-352/98P) 459–60
- Berlusconi and others [2005] ECR I-3565 (C-387/02, C-391/02 & C-403/02) 215
- Bettati [1998] ECR I-4355 (C-341/95) 925
- Bettray [1989] ECR 1621 (344/87) 852, 853, 855
- BEUC and NCC v Commission [1994] ECR II-285 (T-37/92) 437
- Bickel and Franz [1998] ECR I-7637 (C-274/96) 482
- Bidar (R v London Borough of Ealing and Secretary of State for Education, ex parte Bidar) [2005] ECR I-2119 (C-209/03) 490
- Biehl [1990] ECR I-1779 (175/88) 877
- Bilka-Kaufhaus [1986] ECR 1607 (170/84) 580, 599
- Biogen v Smithkline Beecham [1996] ECR I-717 (C-181/95) 165–6
- Biologische Produkten [1981] ECR 3277 (272/80) 913, 930
- Biotechnology Directive [2001] ECR I-7079 (C-377/98) 253, 397–8
- Birden [1998] ECR I-7747 (C-1/97) 853
- Birgit Bartsch v Bosch und Siemens Hausgeräte [2008] ECR I-7245 (C-427/06) 575
- Blackspur DIY v Council and Commission [1995] ECR II-2627 (T-168/94) 463
- Blaizot [1988] ECR 379 (24/86) 253
- Blanco Pérez [2010] ECR I-4629 (C-570/07) 805, 862, 908
- Bleis [1991] ECR I-5627 (C-4/91) 515
- Bluhme [1998] ECR I-8033 (C-67/97) 916, 926
- BNIC v Clair [1983] ECR 391 (123/83) 1002
- BNP Paribas v Commission [2010] ECR II-3323 (T-335/08) 408
- Bond van Adverteerders [1988] ECR 2085 (352/85) 803, 898
- Bonnarde [2010] ECR I-9327 (C-443/10) 760, 785
- Bosch [2008] ECR I-7245 (C-427/06) 575
- Bosman [1995] ECR I-4921 (C-415/93) 815, 857, 860–2, 863, 896, 897, 917, 941
- Bourquain, [2008] ECR I-9425 (C-297/07) 654, 655
- Boyle v Commission [2006] ECR II-1699 (T-218/03–T-240/03) 429
- Branco v Commission [2005] ECR II-2555 (T-347/03) 442, 438
- Brasserie du Pêcheur/Factortame III [1996] ECR I-1029 (C-46/93 & C-48/93) 301, 305, 328–32, 458, 459
- Brentjens' Handelsonderneming BV [1999] ECR I-6025 (C-115/97, C-116/97 & C-117/97) 1003
- Bressol [2010] ECR I-2735 (C-73/08) 897, 920
- British Aggregates Association v Commission, paras. 81–92 (C-487/06P) 1067–9

- British Airways [2003] ECR II-5917 (T-219/99) 1033, 1037, 1045
- British Airways [2007] ECR I-2331 (C-95/04P) 1036–8
- British American Tobacco/Imperial Tobacco (R v Secretary of State for Health, ex parte British American Tobacco (Investments) and Imperial Tobacco) [2002] ECR I-11453 (C-491/01) 397
- British Telecom (R v HM Treasury, ex parte British Telecommunications plc [1996] ECR I-1631) (C-392/93) 332
- Broeckmeulen v Huisarts Registratie Commissie [1981] ECR 2311 (246/80) 171
- BRT v SABAM [1974] ECR 51 (127/73) 989
- Brusse and Garabito v Jahani, Judgment of 30 May 2013 (C-488/11) 176, 300
- Brüstle v Greenpeace [2011] ECR I-9821 (C-34/10) 267–70
- Bulicke v Deutsche Büro Service [2010] ECR I-7003 (C-246/09) 300
- Bundeswettbewerbsbehörde v Donau Chemie, Judgment of 6 June 2013 (C-536/11) 307
- Burmanjer [2005] ECR I-4133 (C-20/03) 787, 793
- Buy Irish (Commission v Ireland) [1982] ECR 4005 (249/81) 351, 759, 765, 768–9
- BWM Belgium v Commission [1979] ECR 2435 (32/78 & 36/78–82/78) 1015
- Byankov, Judgment of 4 October 2012 (C-249/11) 195
- Cabotage II (Parliament v Council) [1992] ECR I-4593 (C-65/90) 444
- Caixa Bank France [2004] ECR I-8961 (C-442/02) 823, 881–3
- Calpak v Commission [1980] ECR 1949 (789/79 & 790/79) 112
- Camar v Presidenza del Consiglio dei Ministri [2010] ECR I-4045 (C-102/0) 112–13
- Campus Oil [1984] ECR 2727 (72/83) 779, 897, 898, 919
- Carbonati Apuani [2004] ECR I-8027 (C-72/03) 796
- Carmen Media [2010] ECR I-08149 (C-46/08) 827, 904, 910–11
- Carpenter v Secretary of State for the Home Department [2002] ECR I-6279 (C-60/00) 493, 503
- Cartesio, Judgment of 16 December 2008 (C-210/06) 169, 886
- Cassa di Risparmio di Firenze and others [2006] ECR I-00289 (C-222/04) 1065
- Cassis de Dijon (Rewe-Zentral v Bundesmonopolverwaltung für Branntwein) [1979] ECR 649 (120/78) 688–9, 754–5, 757, 758, 771, 773–6, 777, 779, 781, 786, 895–6
- Cavallera, Judgment of 29 January 2009 (C-311/06) 857, 875
- Caves Krier, Judgment of 13 December 2012 (C-379/11) 487, 490, 878
- CD Contact Data GmbH v Commission, Judgment of 30 April 2009 (T-18/03) 967
- CEAHR v Commission [2010] ECR II-5865 (T-427/08) 957
- CELF and Ministre de la Culture et de la Communication [2010] ECR I-02099 (C-1/09) 1074, 1075
- Centro Europa 7 v Ministero delle Comunicazioni [2008] ECR I-349 (C-380/05) 281–2
- Centros [1999] ECR I-1459 (C-212/97) 874, 887–9, 896
- Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn NV [2008] ECR I-5187 (C-54/07) 600
- Chakroun v Minister van Buitenlandse Zaken [2010] ECR I-1839 (C-578/08) 553
- Chernobyl (European Parliament v Council) [1990] ECR I-2041 (70/88) 444
- Chevalley v Commission [1970] ECR 979 (15/70) 456
- CIA Security International v Signalson and Securitel [1996] ECR I-2201 (194/94) 316
- CIBA [2010] ECR I-02911 (C-96/08) 879
- CILFIT v Ministry of Health [1982] ECR 341 (283/81) 188–90, 191
- Ciola [1999] ECR I-2517 (C-224/97) 813
- Cipolla and others v Rosaria Fazari, née Portolese and Roberto Meloni [2006] ECR I-11421 (C-94/04 & C-202/04) 813, 823
- Clinique [1994] ECR I-317 (315/92) 783
- CMA (Commission v Germany) [2002] ECR I-9977 (C-325/00) 351–2, 769
- CNTA v Commission [1975] ECR 533 (74/74) 443, 463
- Coditel [1980] ECR 881 (262/81) 896
- Coenen v SER [1975] ECR 1547 (39/75) 808, 826
- Colegio do Ingenieros de Caminos, Canales y Puertos (C-330/02) 871
- Colegio de Oficiales de la Marina Mercante Española v Administración del Estado [2003] ECR I-10391 (C-405/01) 515, 941
- Coleman [2008] ECR I-5603 (C-303/06) 582, 583, 599
- College van Burgemeester en Wethouders van Rotterdam v Rijkeboer, Judgment of 7 May 2009 (553/07) 253
- Collins [2004] ECR I-2703 (C-138/02) 488
- Comateb and others [1997] ECR I-165 (C-192/95–218/95) 306
- Combinatie Spijker Infrabouw-De Jonge Konstruktie and others, [2010] ECR I-12655 (C-568/08) 331
- Commission v Alrosa [2010] ECR I-5949 (C-441/07) 972
- Commission v Austria [2000] ECR I-7367 (C-205/98) 363

- Commission v Austria [2004] ECR I-8291 (C-465/01) 877
- Commission v Austria [2005] I-5969 (C-147/03) 897, 920
- Commission v Austria [2005] ECR I-9871 (C-320/03) 760
- Commission v Austria [2007] ECR I-10195 (C-393/05) 827, 913
- Commission v Austria [2011] ECR I-0000 (C-28/09) 760, 785, 917, 928–9
- Commission v Austria, Judgment of 4 October 2012 (C-75/11) 490
- Commission v BASF [1994] ECR I-2555 (C-137/92P) 67
- Commission v Belgium [1970] ECR 237 (C-77/69) 351, 352
- Commission v Belgium [1984] ECR 1861 (324/82) 805
- Commission v Belgium [1987] ECR 2797 (1/86) 352
- Commission v Belgium (Gravier) [1988] ECR 305 (293/85) 361–2
- Commission v Belgium [1992] ECR I-305 (C-300/90) 897
- Commission v Belgium [1996] ECR I-2323 (C-133/94) 363
- Commission v Belgium [1996] ECR I-4115 (C-11/95) 360
- Commission v Belgium [2000] ECR I-1221 (C-355/98) 826
- Commission v Belgium [2000] ECR I-10251 (C-217/99) 783, 906
- Commission v Belgium [2002] ECR I-4809 (C-503/99) 924
- Commission v Belgium [2006] ECR I-2647 (C-408/03) 480
- Commission v Belgium [2006] ECR I-10653 (C-433/04) 829
- Commission v Belgium [2007] ECR I-4269 (C-254/05) 691
- Commission v Belgium [2010] ECR I-8695 (C-132/09) 212–13
- Commission v Belgium [2009] ECR I-11503 (C-475/08) 373
- Commission v Belgium, Judgment of 19 December 2012 (C-577/10) 826
- Commission v Belgium, Judgment of 6 June 2013 (C-383/10) 919
- Commission v Belgium (No. 2) [1982] ECR 1845 (149/79) 515, 936
- Commission v Belgium (Right of Establishment: Clinical Biology Laboratories) [1987] ECR 719 (221/85) 881
- Commission v Council (FAO Fisheries Agreement) [1996] ECR I-1469 (C-25/94) 87
- Commission v Council (Framework Directive on Waste) [1993] ECR I-939 (C-155/91) 110
- Commission v Council (Recovery of Indirect Taxes) [2004] ECR I-4829 (C-338/01) 109–10
- Commission v Council (Stability and Growth Pact) [2004] ECR I-6649 (C-27/04) 427
- Commission v Council (Titanium Dioxide) [1991] ECR I-2867 (C-300/89) 679
- Commission v Cresson [2006] ECR I-6387 (C-432/04) 63
- Commission v Czech Republic, Judgment of 25 June 2013 (C-241/11) 376
- Commission v Denmark [1982] ECR 4547 (211/81) 359–60, 361
- Commission v Denmark [1987] ECR 4065 (278/85) 360
- Commission v Denmark [1988] ECR 4607 (302/86) 784, 896
- Commission v Denmark [1990] ECR 4509 (47/88) 760
- Commission v Denmark [2003] ECR I-9693 (C-192/01) 763, 901, 932
- Commission v Denmark [2007] ECR I-1163 (C-150/04) 865
- Commission v Denmark (Danish Company Cars) [2005] ECR I-7929 (C-464/02) 857, 858, 879–80
- Commission v Ente per le Ville Vesuviane, Judgment of 10 September 2009 (C-445/07P & C-455/07P) 446, 447
- Commission v Estonia, Judgment of 29 March 2012 (C-505/09P) 429
- Commission v Finland [2007] ECR I-2473 (C-54/05) 760
- Commission v France [1983] ECR 1013 (42/82) 933
- Commission v France [1985] ECR 1355 (21/84) 763
- Commission v France [1986] ECR 273 (270/83) 884
- Commission v France [1986] ECR 1475 (96/85) 865
- Commission v France [1986] ECR 1725 (307/84) 515
- Commission v France [1986] ECR 3663 (220/83) 896
- Commission v France [1991] ECR I-2727 (64/88) 374
- Commission v France [1994] ECR I-5145 (C-381/93) 803, 804
- Commission v France [1998] ECR I-6197 (184/96) 782
- Commission v France [2000] ECR I-11499 (C-55/99) 783, 906
- Commission v France [2002] ECR I-4781 (C-483/99) 924, 1062
- Commission v France [2003] ECR I-2389 (C-6/02) 782
- Commission v France [2004] ECR I-6569 (C-262/02) 896
- Commission v France [2005] ECR I-4213 (C-212/03) 763
- Commission v France [2006] ECR I-2461 (C-177/04) 377
- Commission v France [2007] ECR I-08887 (C-441/06) 1073

- Commission v France (French Merchant Navy) [1974] ECR 359 (167/73) 859
- Commission v France (French Vitamins) [2004] ECR I-1277 (C-24/00) 922–3, 925, 932
- Commission v France (Gold) [2004] ECR I-6535 (C-166/03) 782
- Commission v France, Judgment of 28 January 2010 (C-333/08) 901, 914, 925
- Commission v France, Judgment of 5 October 2010 (C-512/08) 836
- Commission v France (Non-compliance with Judgment) [2005] ECR I-6263 (C-304/02) 374–6
- Commission v France (Spanish Strawberries) [1997] ECR I-6959 (C-265/95) 355, 770, 771, 772, 935–6
- Commission v Germany [1987] ECR 1227 (178/84) 328–9
- Commission v Germany (Khlengesetz) [1973] ECR 813 (72/70) 1072
- Commission v Germany [1989] ECR 175 (94/87) 1073
- Commission v Germany [1990] ECR I-3437 (C-5/89) 1074
- Commission v Germany [1995] ECR I-3599 (C-51/94) 781
- Commission v Germany [2003] ECR I-3609 (C-20/01 & C-28/01) 340, 341
- Commission v Germany [2004] ECR I-11705 (C-463/01) 784
- Commission v Germany [2006] ECR I-3449 (C-441/02) 341, 355
- Commission v Germany [2006] ECR I-9659 (C-105/02) 214, 355
- Commission v Germany [2007] ECR I-6153 (C-503/04) 340, 341
- Commission v Germany [2007] ECR I-6957 (C-318/05) 807, 808, 831, 834
- Commission v Germany [2007] ECR I-8995 (C-112/05) 710
- Commission v Germany [2007] ECR I-9811 (C-319/05) 757, 930
- Commission v Germany [2007] ECR I-10239 (C-404/05) 827, 913
- Commission v Germany [2008] ECR I-6935 (C-141/07) 898
- Commission v Germany [2010] ECR I-3713 (C-160/08) 515, 937–8
- Commission v Germany [2010] ECR I-7091 (C-271/08) 1004
- Commission v Germany (CMA) [2002] ECR I-9977 (C-325/00) 351–2, 769
- Commission v Germany (Conservation of Wild Birds) [1991] ECR I-883 (C-57/89) 212
- Commission v Germany (German Beer) [1987] ECR 1227 (178/84) 780–1, 783
- Commission v Germany (German Insurance) [1986] ECR 3755 (205/84) 821, 826, 856, 896
- Commission v Germany (Migrant Workers) [1989] ECR 1263 (249/86) 253
- Commission v Greece [1988] ECR 1835 (240/86) 363
- Commission v Greece [1990] ECR I-4299 (C-200/88) 363
- Commission v Greece [2001] ECR I-7915 (C-398/98) 760, 919–20, 935
- Commission v Greece [2005] ECR I-3177 (C-140/03) 863
- Commission v Greece [2005] ECR I-03875 (C-415/03) 1074
- Commission v Greece [2008] ECR I-7969 (C-274/05) 875
- Commission v Greece [2011] ECR I-2467 (C-407/09) 373
- Commission v Greece (Burden of Proof) [1989] ECR 2965 (68/88) 215, 355, 661
- Commission v Greece, Judgment of 19 March 2009 (C-489/06) 341–2, 353
- Commission v Ireland [1988] ECR 4929 (45/87) 760
- Commission v Ireland [2005] ECR I-3331 (C-494/01) 356, 360
- Commission v Ireland [2007] ECR I-10947 (C-418/04) 355
- Commission v Ireland [2010] ECR I-859 (C-456/08) 340, 341
- Commission v Ireland, Judgment of 19 December 2012 (C-374/11) 376
- Commission v Ireland (Irish Souvenirs) [1981] ECR 1625 (113/80) 783, 900
- Commission v Italy [1961] ECR 317 (7/61) 363
- Commission v Italy [1973] ECR 709 (173/73) 1058, 1065, 1066
- Commission v Italy [1987] ECR 2599 (118/85) 807
- Commission v Italy [1987] ECR 1039 (199/85) 351
- Commission v Italy [1987] ECR 2625 (225/85) 940
- Commission v Italy [1989] ECR 143 (22/87) 325
- Commission v Italy [1989] ECR 4035 (3/88) 821
- Commission v Italy [1991] ECR I-709 (C-180/89) 803, 896
- Commission v Italy [2000] ECR I-4001 (C-424/98) 507
- Commission v Italy [2001] ECR I-721 (C-388/01) 482
- Commission v Italy [2003] ECR I-14637 (C-129/00) 352–3
- Commission v Italy [2006] ECR I-10257 (C-371/04) 360, 877
- Commission v Italy [2007] ECR I-6251 (C-134/05) 822, 823
- Commission v Italy [2007] ECR I-3475 (C-135/05) 356
- Commission v Italy [2007] ECR I-7083 (C-260/04) 827
- Commission v Italy [2007] ECR I-11091 (C-465/05) 826
- Commission v Italy, [2009] ECR I-519 (C-110/05) 761, 762, 788, 792, 896

- Commission v Italy [2011] ECR I-2101 (C-565/08) [813](#), [824](#)
- Commission v Italy, Judgment of 9 May 2009 (C-531/06) [863](#)
- Commission v Italy, Judgment of 28 April 2009 (C-518/06) [800](#), [811–13](#)
- Commission v Italy, Judgment of 17 November 2011 (C-496/09) [376](#)
- Commission v Italy, Judgment of 3 October 2013 (C-369/11) [355](#)
- Commission v Italy (Chocolate) [2003] ECR I-513 (C-14/00) [782](#)
- Commission v Italy (Conservation of Wild Birds) [2001] ECR I-4007 (C-159/99) [214](#), [355](#)
- Commission v Italy (Premiums for Slaughtering Cows) [1973] ECR 101 (39/72) [112](#), [308](#)
- Commission v Italy (Trade Fairs) [2002] ECR I-305 (C-439/99) [821](#)
- Commission v Lisrestal and others [1996] ECR I-5375 (C-32/95P) [437](#)
- Commission v Luxembourg [1992] ECR I-3945 (C-351/90) [865](#)
- Commission v Luxembourg [1996] ECR I-3207 (C-473/93) [361](#)
- Commission v Luxembourg [2005] ECR I-4805 (C-266/03) [213–14](#)
- Commission v Luxembourg, Judgment of 4 May 2011 (C-51/08) [236](#)
- Commission v Luxembourg [2006] ECR I-11323 (C-32/05) [360](#)
- Commission v Luxembourg (Employment of Foreign Workers) [2005] ECR I-10191 (C-445/03) [896](#)
- Commission v Malta, Judgment of 10 September 2009 (C-76/08) [340](#)
- Commission v max.mobil [2005] ECR I-1283 (C-141/02P) [369](#)
- Commission v Netherlands [2004] ECR I-6213 (C-350/02) [361](#)
- Commission v Netherlands [2004] ECR I-9761 (C-299/02) [826](#), [859](#), [862](#), [886](#)
- Commission v Netherlands [2007] ECR I-4383 (C-50/06) [509](#)
- Commission v Netherlands [2008] ECR I-56 (C-398/06) [480](#)
- Commission v Netherlands [2011] ECR I-07671 (C-279/08P) [1054](#), [1057](#), [1068](#)
- Commission v Netherlands, Judgment of 14 June 2012 (C-542/09) [490](#), [897](#)
- Commission v Netherlands (Direct and Portfolio Investments) [2006] ECR I-9141 (C-282/04 & C-283/04) [924](#)
- Commission v Netherlands (Own Resources: Manioc from Thailand) [1991] ECR I-2461 (C-96/89) [363](#)
- Commission v Poland, Judgment of 16 July 2009 (C-165/08) [349–50](#)
- Commission v Poland [2011] ECR I-02933 (C-331/09) [1073](#)
- Commission v Portugal [2004] ECR I-5645 (C-171/02) [826](#), [866](#)
- Commission v Portugal [2005] ECR I-9665 (C-432/03) [913](#)
- Commission v Portugal [2008] ECR I-2245 (C-265/06) [760](#)
- Commission v Portugal ECR I-10219 (C-438/08) [939–40](#)
- Commission v Portugal [2010] ECR I-6817 (C-171/08) [898](#)
- Commission v Portugal [2010] ECR I-11599 (C-458/08) [845](#)
- Commission v Portugal (Flight Taxes) [2001] ECR I-4845 (C-70/99) [803](#), [813](#)
- Commission v Portugal (Free Movement of Capital) [2002] ECR I-4731 (C-367/98) [898](#)
- Commission v Portugal, Judgment of 10 September 2009 (C-457/07) [372](#)
- Commission v Portugal, Judgment of 15 November 2012 (C-34/11) [360](#)
- Commission v Romania [2011] ECR I-2963 (C-522/09) [359](#)
- Commission v Schneider Electric, Judgment of 16 July 2009 (C-440/07P) [462](#)
- Commission v Slovak Republic [2010] ECR I-13489 (C-507/08) [353–4](#)
- Commission v Slovenia, [2011] ECR I-140 (C-365/10) [360](#)
- Commission v Spain [1994] ECR I-911 (C-45/93) [482](#)
- Commission v Spain [1994] ECR I-923 (C-375/92) [813](#)
- Commission v Spain [1995] ECR I-1975 (C-266/94) [361](#)
- Commission v Spain [2003] ECR I-14141 (C-278/01) [377](#)
- Commission v Spain [2003] ECR I-13145 (C-358/01) [782](#)
- Commission v Spain [2003] ECR I-6053 (C-446/01) [363](#)
- Commission v Spain [2005] ECR I-2911 (C-157/03) [341](#)
- Commission v Spain [2006] ECR I-963 (C-514/03) [341](#), [826](#)
- Commission v Spain [2006] ECR I-1097 (C-503/03) [341](#), [511](#)
- Commission v Spain [2008] ECR I-8025 (C-286/06) [875](#)
- Commission v Spain [2009] ECR I-187 (C-154/08) [353](#), [515](#)
- Commission v Spain [2010] ECR I-3429 (C-423/07) [353](#)
- Commission v Spain [2011] ECR I-1915 (C-400/08) [863](#)
- Commission v Spain, Judgment of 5 March 2009 (C-88/07) [757](#), [930](#)
- Commission v Spain, Judgment of 6 October 2009 (C-153/08) [828](#)

- Commission v Spain, Judgment of 24 November 2011 (C-281/09) [179](#)
- Commission v Spain, Judgment of 15 June 2010 (C-211/08) [836](#)
- Commission v Spain, Judgment of 11 December 2012 (C-610/10) [372](#), [373](#), [376](#)
- Commission v Spain (Spanish Chocolate) [2003] ECR I-459 (C-12/00) [782](#)
- Commission v Sweden [2010] ECR I-3317 (C-246/07) [212–13](#)
- Commission v Sweden, Judgment of 30 May 2013 (C-270/11) [377](#)
- Commission v Sytraval [1998] ECR I-1719 (C-367/95P) [439](#)
- Commission v Tetra Laval [2005] ECR I-987 (C-12/03P) [430–1](#), [432](#), [976](#)
- Commission v United Kingdom [1983] ECR I-02265 (170/78) [780](#)
- Commission v United Kingdom [1983] ECR 203 (124/81) [916](#)
- Commission v United Kingdom [1988] ECR 3127 (416/84) [363](#)
- Commission v United Kingdom [1993] ECR I-4109 (C-56/90) [361](#)
- Commission v United Kingdom [1997] ECR I-2649 (C-300/95) [355](#)
- Commission v United Kingdom (Dim-Dip Lighting Devices) [1988] ECR 3921 (60/86) [211](#)
- Commission v United Kingdom (Failure to Implement Regulation 1463/70) [1978] ECR 2429 (128/78) [112](#)
- Commission v United Kingdom (Marks of Origin) [1985] ECR 1201 (207/83) [759](#), [765](#), [783](#)
- Commission v United Kingdom (Newcastle Disease) [1984] ECR 283 (40/82) [911–12](#)
- Commission v United Kingdom (VAT on Road Fuel) [2005] ECR I-1865 (C-33/03) [214](#)
- Commission and United Kingdom v Kadi, Judgment of 18 July 2013 (C-584/10P, C-593/10P & C-595/10P) [162](#), [205](#)
- Compassion in World Farming [1998] ECR I-1251 (C-1/96) [906](#)
- Competition Authority v Beef Industry Development Society Ltd [2008] ECR I-8637 (C-209/07) [1020](#)
- Conegate [1986] ECR 1007 (121/85) [509](#), [903–4](#), [935](#)
- Conradi [1987] ECR 4469 (196/86) [881](#)
- Conservation of Wild Birds (Commission v Germany) [1991] ECR I-883 (C-57/89) [212](#)
- Conservation of Wild Birds (Commission v Italy) [2001] ECR I-4007 (C-159/99) [355](#)
- Consten and Grundig v Commission [1966] ECR 299 (56/64 & 58/64) [1001](#), [1014–15](#)
- Continental Can (Europemballage Corp. and Continental Can Co. Inc. v Commission) [1972] ECR 215 (6/72) [1042](#)
- Coöperative Aardappelenbewaarplaats [1981] ECR 445 (154/80) [805](#)
- Coote [1998] ECR I-5199 (C-185/97) [610](#)
- Corbiau v Administration des Contributions [1993] ECR I-1277 (C-24/92) [171](#)
- Corporacion Dermoestetica [2008] ECR I-5785 (C-500/06) [825](#), [908](#)
- Corsica Ferries France [1994] ECR I-1783 (C-18/93) [803](#), [825](#)
- Corsten [2000] ECR I-7919 (C-58/98) [825–6](#), [897](#)
- COSEPURI v EFSA, Judgment of 29 January 2013 (T-339/10) [413](#)
- Costa, Judgment of 12 February 2012 (C-72/10) [862](#)
- Costa v ENEL [1964] ECR 585 (6/64) [199](#), [201–2](#), [203](#), [204–5](#), [208](#), [215](#), [216](#), [217](#), [222–3](#)
- Council v Access Info Europe, Judgment of 17 October 2013 (C-280/11P) [419](#)
- Council v Hautala [2001] ECR I-9565 (C-353/99P) [413](#)
- Courage v Crehan [2001] ECR I-6297 (C-453/99) [307](#), [1007](#)
- Courage v Crehan [2001] ECR I-6314 (C-453/99) [989–90](#)
- Cowan v Trésor Public [1989] ECR 195 (186/87) [482](#), [491](#), [803](#)
- Cristini [1975] ECR 1085 (32/75) [877](#)
- Cullet [1985] ECR 305 (231/83) [823](#)
- Cura Anlagen v Auto Source Leasing [2002] ECR I-3193 (C-451/99) [802](#), [896](#)
- Czop and Punakova, Judgments of 6 September 2012 (C-147/11 & C-148/11) [477](#), [851](#)
- Da Costa [1963] ECR 37 (28/62–30/62) [188](#), [192–3](#)
- Daily Mail [1988] ECR 5483 (81/87) [861](#), [885–6](#)
- DaimlerChrysler v Land Baden-Württemberg [2001] ECR I-9897 (C-324/99) [930](#)
- Dalmine v Commission [2007] ECR I-829 (407/04) [958](#)
- Danforss [1989] ECR 3199 (109/88) [583](#)
- Danfoss and Sauer-Danfoss v Skatteministeriet [2011] ECR I-9963 (C-94/10) [331](#), [332](#)
- Danielsson and others v Commission [1995] ECR II-3051 (T-219/95 R) [455](#)
- Danish Company Cars (Commission v Denmark) [2005] ECR I-7929 (C-464/02) [857](#), [858](#)
- Danner [2002] ECR I-8147 (C-136/00) [900](#)
- Dansk Rorindustri and others v Commission [2005] ECR I-5425 (C-189/02P–202/02P, C205/02P to C-208/02P & C-213/02P) [443](#)
- Danske Slagterier v Germany, Judgment of 24 March 2009 (C-445/06) [305](#), [331–2](#)
- Dassonville [1974] ECR 837 (8/74) [494](#), [754–5](#), [756–60](#), [765](#), [766](#), [773](#), [790](#), [921](#)
- De Agostini and TV Shop [1997] ECR I-3843 (C-34/95–36/95) [793](#)
- De Coster [2001] ECR I-9445 (C-17/00) [172–3](#), [214](#), [829](#), [896](#)
- De Danske Bilimportører [2003] ECR I-6065 (C-383/01) [760](#)

- De Peijper [1976] ECR 613 (104/75) 914–15, 916
 DEB [2010] ECR I-13849 (C-279/09) 254, 266, 303–4
 Debaube [1980] ECR 833 (52/79) 803
 Decker [1998] ECR I-1831 (C-120/95) 900
 Defrenne v Sabena (No. 2) [1976] ECR 455 (43/75) 253, 295–8, 312, 572, 583
 Defrenne II [1978] ECR 1365 (149/77) 253
 Degussa AG v Commission [2006] ECR II-897 (T-279/02) 968–9
 Delay [2008] ECR I-3635 (C-276/07) 877
 Delière [2000] ECR I-2549 (C-51/96 & C-191/97) 806, 815
 Delimitis [1991] ECR I-935 (C-234/89) 1022
 Demirel [1987] ECR 3719 (12/86) 308
 Demo-Studio Schmidt v Commission [1983] ECR 3045 (210/81) 438
 Denkavit Italiana [1980] ECR 1205 (61/79) 193, 1058
 Denuit and Cordonier [2005] ECR I-923 (C-125/04) 172
 Deponiezweckverband Eiterköpfe [2005] ECR I-2753 (C-6/03) 211–12
 Deposit Guarantee Directive Case (Germany v European Parliament and Council) [1997] ECR I-2405 (C-233/94) 398–9
 Dereci, Judgment of 15 November 2011 (C-256/11) 494, 500–1
 Deserbais [1988] ECR 4907 (286/86) 782
 Deutsche Bahn v Commission [2006] ECR II-1047 (T-351/02) 427
 Deutsche Post v Commission [2011] ECR I (C-463/10P & C-475/10P) 427
 Deutsche Telekom v Commission [2010] ECR I-9555 (C-280/08P) 1046
 Deutsche Telekom AG v Lilli Schröder [2000] ECR I-743 (C-50/96) 572
 D’Hoop [2002] ECR I-6191 (C-224/98) 484–5, 493
 DHL [2011] ECR I-09543 (C-148/10) 883
 Di Lenardo and Dilexport [2004] ECR I-6911 (C-37/02 & C-38/02) 254
 Dias [2011] ECR I-6387 (C-325/09) 477, 507
 Diatta v Land Berlin [1985] ECR 567 (267/83) 497, 498
 Dillenkofer and others v Bundesrepublik Deutschland [1996] ECR I-4845 (C-178/94, C-179/94 & C-188/94–190/94) 331–2
 Diputación Foral de Álava v Commission, Judgment of 9 September 2009 (T-30/01–T-32/01 & T-86/02–T-88/02) 438, 456, 457
 DKV, Judgment of 7 March 2013 (C-577/11) 824
 DocMorris [2003] ECR I-14887 (C-322/01) 768, 793, 794, 916
 Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la Région Centre, Judgment of 24 January 2012, Opinion of Advocate General Trstenjak (C-282/10) 266, 318–19, 320, 324
 Donau Chemie, Judgment of 6 June 2013 (C-536/11) 988
 Dörr and Únal [2005] ECR I-4759 (C-136/03) 509
 Dorsch v Bundesbaugesellschaft Berlin [1997] ECR I-4961 (C-54/96) 172
 Dow Chemical Company v Commission, Judgment of 26 September 2013 (C-179/12P) 1000
 Dow Chemical Ibérica v Commission [1989] ECR 3165 (97–99/87) 962
 Draehmpaehl [1997] ECR I-2195 (C-180/95) 215, 355, 610
 Drei Glocken [1988] ECR 4233 (407/85) 781
 Driancourt v Cognet [1986] ECR 3231 (355/85) 766
 Dufour v ECB [2011] ECR II-7727 (T-436/09) 413, 464
 Dumortier Frères v Council [1979] ECR 3091 (64/76 & 113/76, 167/78 & 239/78) 464
 Duomo, Judgment of 10 May 2012 (C-357/10) 828, 863
 Dutch Vitamins [2004] ECR I-11375 (C-41/02) 930–1
 Dyestuffs, ICI v Commission [1972] ECR 619 (48/69) 1000, 1008, 1013
 Dynamic Medien Vertriebs v Avides Media [2008] ECR I-505 (C-244/06) 253, 791, 792
 Dzodzi v Belgium [1990] ECR I-3673 (C-297/88 & C-197/89) 180
 Eau de Cologne v Provide [1989] ECR 3891 (150/88) 185
 Eco Swiss China Time Ltd v Benetton [1999] ECR I-3055 (C-126/97) 1007
 Ecotrade v Agenzia delle Entrate – Ufficio di Genova 3 [2008] ECR I (C-96/07) 305
 Ecotrade v Altiforni e Ferriere di Servola [1998] ECR I-07907 (C-200/97) 1065
 Edeka v Commission [1982] ECR 2745 (245/81) 441
 Edwards (R v Environment Agency, ex parte Edwards and Pallikaropoulos), Judgment of 11 April 2013 (C-260/11) 304
 Efisol v Commission [1996] ECR II-1343 (T-336/94) 442
 Église de Scientologie de Paris [2000] ECR I-1335 (C-54/99) 923–4
 Eind [2004] ECR I-10719 (C-291/05) 505, 506
 El Dridi [2011] ECR I-3015 (C-61/11 PPU) 546
 El Yassini v Secretary of State for the Home Department [1999] ECR I-1209 (C-416/96) 172
 Elchinov [2010] ECR I-8889 (C-173/09) 168
 Elchinov, Judgment of 5 October 2010 (C-173/09) 836, 837
 Elegktiko Sinedrio v Ipourgeio Politismou kai Tourismou, Judgment of 19 December 2012 (C-363/11) 577
 Elgafaji v Staatsecretaris van Justitie, Judgment of 17 February 2009 (C-465/07) 253, 565–6
 Eman and Sevinger [2006] ECR I-8055 (C-300/04) 514
 Employment of Foreign Workers (Commission v Luxembourg) [2005] ECR I-10191 (C-445/03) 896

- Emsland-Stärke [2000] ECR I-11569 (C-110/99) 506
- Emsland-Stärke [2006] ECR I-2619 (C-94/05) 441
- Enderby [1993] ECR I-5535 (C-127/92) 583
- ENISA (United Kingdom v Parliament and Council) [2006] ECR I-3771 (C-217/04) 684–5
- ENKA v Inspecteur der Invoerrechten [1977] ECR 2203 (38/77) 113–14
- Epifanio Viscido v Ente Poste Italiane [1998] ECR I-2629 (C-52 – 54/97) 1059
- Epitropos tou Elegtikou Sinedriou sto Ipourgio Politismou kai Tourismou v Ipourgio Politismou kai Tourismou – Ipiresia Dimosionomikou Elenchou, Judgment of 19 December 2012 (C-363/11) 171
- Eridania [1979] ECR 2749 (230/78) 253
- ERG and others v Ministero dello Sviluppo Economico [2010] ECR I-2007 (C-379/08 & C-380/08) 402
- Erny, Judgment of 28 June 2012 (C-172/11) 876, 898
- ERT (Elliniki Radiophonia Tiléorassi) v Dimotiki (DEP) [1991] ECR I-2925 (C-260/89) 253, 280, 281–2, 911
- ERTA (Commission v Council) [1971] ECR 263 (22/70) 426
- ERWIA v Commission [2010] ECR II-6283 (T-369/08) 427
- Essent Netwerk Noord and others [2008] ECR I-5497 (C-206/06) 1060
- Estonia v Commission, Judgment of 23 September 2009 (T-263/07) 429, 438
- ET Agroconsulting-04-Velko Stoyanov, Judgment of 27 June 2013 (C-93/12) 254
- Etimine v Secretary of State for Work and Pensions [2011] ECR I-6681 (C-15/10) 402
- Eurocontrol (SAT Fluggesellschaft v Eurocontrol) [1994] ECR I-43 (C-364/92) 165–6
- Eurocoton v Council [2003] ECR I-10091 (C-76/01P) 460
- Eurofer v Commission, Judgment of 4 June 2012 (T-381/11) 448, 450
- European Air Transport v Collège d'Environnement de la Région de Bruxelles-Capitale and Région de Bruxelles-Capitale [2011] ECR I-7865, Opinion of Advocate General Cruz Villalón (C-120/10) 266
- European Night Services [1998] ECR II-3141 (T-374/94) 1022, 1025
- Eurowings [1999] ECR I-7447 (C-294/97) 808
- Evonik Degussa v Commission [2008] ECR I-81 (C-266/06P) 968
- Exécutif régional wallon v Commission [1988] ECR I-01573 (62/87 & 72/87) 1077
- F v Premier Ministre, Judgment of 30 May 2013 (C-168/13 PPU) 641
- Fabrique de Fer de Charleroi v Commission [1987] ECR 3639 (351/85 & 360/85) 433
- Faccini Dori v Recreb [1994] ECR I-3325 (C-91/92) 313, 327–8
- Fachverband der Buch- und Medienwirtschaft, Judgment of 30 April 2009 (C-531/07) 793, 794
- Factortame (R v Secretary of State for Transport, ex parte Factortame Ltd) [1990] ECR 2433 (C-213/89) 196–7, 307–8
- Factortame (R v Secretary of State for Transport, ex parte Factortame) [1991] ECR I-3905 (C-221/89) 328–9
- Factortame III/Brasserie du Pêcheur [1996] ECR I-1029 (C-46/93 and 48/93) 301, 305, 328–32, 458, 459
- Falck and Acciaierie di Bolzano v Commission [2002] ECR I-7869 (C-74/00P and C-75/00P) 438
- Fallimento Olimpiclub [2009] ECR I-7501 (C-2/08) 195
- Familiapresse v Heinrich Bauer [1997] ECR-I 3843 (C-368/95) 790
- Family Reunification (Parliament v Council) [2006] ECR I-5769 (C-540/03) 553
- FAO Fisheries Agreement [1996] ECR I-1469 (C-25/94) 87
- Faust v Commission [1982] ECR 3745 (52/81) 443
- FDC v Estado Español and UPCT [1993] ECR I-2239 (C-17/92) 808
- Federconsorzi v AIMA [1992] ECR I-4035 (C-88/91) 180
- Fedesa (R v Minister of Agriculture, Fisheries and Food, ex parte Fedesa) [1990] ECR I-4023 (331/88) 400, 401–2, 441
- Femarbel, Judgment of 11 July 2013 (C-57/12) 843
- FENIN [2003] ECR II-357 (T-319/99) 807
- Festersen [2007] ECR I-1129 (C-370/05) 253, 897, 898, 908–9, 910
- FIAMM [2008] ECR I-6513 (C-120/06 & C-121/06) 460
- Fidium Finanz v Bundesanstalt für Finanzdienstleistungsaufsicht [2006] ECR I-9521 (C-452/04) 803
- Fietje [1980] ECR 3839 (27/80) 781
- Finalarte [2001] ECR I-7831 (C-49/98) 809
- Finanzamt München III v Mohsche [1993] ECR I-02615 (C-193/91) 1073
- Firma Fink-Frucht GmbH v Hauptzollamt München-Landsbergerstrasse [1968] ECR 327 (27/67) 295
- Firma Fotofrost v Hauptzollamt Lübeck-Ost [1987] ECR 4199 (314/85) 178–9, 181–2, 186, 193
- Firma Sloman Neptun Schiffahrts AG v Seebetriebsrat Bodo Ziesemer der Sloman Neptun Schiffahrts AG [1993] ECR I-887 (C-72 & 73/91) 1058–9, 1060
- FKP Scorpio [2006] ECR I-9461 (C-290/04) 803
- Flemish Insurance [2008] ECR I-1683 (C-212/06) 492
- Flight Taxes (Commission v Portugal) [2001] ECR I-4845 (C-70/99) 813, 803

- Flughafen Köln/Bonn, Judgment of 17 July 2008 (C-226/07) 296
- FNCE [1991] ECR I-5505 (C-354/90) 307
- Foglia v Novello (No. 1) [1980] ECR 745 (104/79) 165, 185
- Foglia v Novello (No. 2) [1981] ECR 3045 (244/80) 183, 192
- Ford v Commission [1985] ECR 2725 (25/84 & 26/84) 1016, 1016
- Försäkringsaktiebolaget Skandia v Riksskatteverket [2003] ECR I-6817 (C-422/01) 803
- Förster [2008] ECR I-8507 (C-158/07) 491
- Foshan Shunde Yongjian Housewares & Hardware Co. v Commission, Judgment of 1 October 2009 (C-141/08P) 437
- Foster v British Gas [1990] ECR I-3313 (C-188/89) 311–12
- Fotofrost (Firma Fotofrost v Hauptzollamt Lübeck-Ost) [1987] ECR 4199 (314/85) 452
- Fra.Bo, Judgment of 12 July 2012 (C-171/11) 760, 769–70
- Framework Directive on Waste [1993] ECR I-939 (C-155/91) 110
- Franca Ninni-Orasche [2003] ECR I-13187 (C-413/01) 854, 874
- France v Commission [1993] ECR I-3283 (C-325/91) 115
- France v Commission [1996] ECR I-4551 (C-241/94) 1064
- France v Commission [1999] ECR 6639 9 (C-251/97) 1063
- France v Commission (Stardust Marine) [2002] ECR I-4397 (C-482/99) 1061
- France v United Kingdom [1979] ECR 2923 (141/78) 339
- France Télécom, Judgment of 2 April 2009 (C-202/07P) 1040
- Franchet and Byk v Commission [2008] ECR II-1585 (T-48/05) 460, 463
- Francovich v Italian Republic ('Francovich I') [1996] ECR I-3843 (C-479/93) 441
- Francovich and Bonifaci v Italy [1991] ECR I-5537 (C-6/90 & C-9/90) 325–8, 330, 334
- Fratelli Constanzo v Milano [1989] ECR 1839 (103/88) 193
- Free Movement of Capital (Commission v Italy) [2005] ECR I-4933 (C-174/04) 924
- Free Movement of Capital (Commission v Portugal) [2002] ECR I-4731 (C-367/98) 898
- Freistaat Sachsen v Commission [2011] ECR II-1311 (T-443/08 & T-455/08) 452
- French Merchant Navy [1974] ECR 359 (167/73) 859
- French Nutrients [2004] ECR I-1277 (C-24/00) 922–3, 925, 932
- Fresh Marine [2003] ECR I-7541 (C-472/00P) 231
- Fresh Marine v Commission [2000] ECR II-3331 (T-178/98) 460
- Front National v European Parliament [2004] ECR I-6289 (C-486/01P) 487
- FRUBO [1975] ECR 563 (71/74) 1003
- Fuß v Stadt Halle [2010] ECR I-12167 (C-429/09) 305, 331–2
- Futura Participations and Singer [1997] ECR I-2471 (C-250/95) 899
- Gabalfria [2000] ECR I-1577 (C-110/98–147/98) 171
- Galileo International Technology and others v Commission [2006] ECR II-1291 (T-279/03) 463
- Gallagher (R v Secretary of State for Health, ex parte Gallagher Ltd) [1993] ECR I-3545 (C-11/92) 212, 692–3
- Gambelli [2003] ECR I-13031 (C-243/01) 803, 827, 896, 904, 918–19, 913
- Garkalns, Judgment of 19 July 2012 (C-470/11) 924–5
- Garland [1982] ECR 359 (12/81) 580
- Gaspirini [2006] ECR I-9199 (C-467/04) 654
- Gebhard [1995] ECR I-4165 (C-55/94) 799, 803, 809, 811, 820, 854, 861, 862, 866
- German Quality Products (CMA) (Commission v Germany) [2002] ECR I-9977 (C-325/00) 351–2, 769
- Geitling v High Authority [1960] ECR 423 (36/59, 37/59, 38/59 & 40/59) 251
- General Tariff Preferences [1995] ECR I-643 (C-65/93) 123–5
- Geraets-Smits and Peerbooms [2001] ECR I-5473 (C-157/99) 808, 835, 836, 837, 839
- Gerardo Ruiz Zambrano v ONEm [2011] ECR I-1177 (C-34/09) 467, 493–4, 499–1, 502–3
- German Beer (Commission v Germany) [1987] ECR 1227 (178/84) 780–1, 783
- German Insurance (Commission v Germany) [1986] ECR 3755 (205/84) 821, 826, 856, 896
- Germany v Commission [1992] ECR I-5383 (C-240/90) 69
- Germany v Commission [1987] ECR 04013 (248/84) 1065
- Germany v Commission [2000] ECR I-06857 (C-156/98) 1077
- Germany v Commission [2004] ECR I-03925 (C-277/00) 1077
- Germany v Commission, Judgment of 14 February 2012 (T-59/09) 365
- Germany v European Parliament and Council (Deposit Guarantee Directive) [1997] ECR I-2405 (C-233/94) 398–9
- Germany v Parliament and Council ('Tobacco Advertising I') [2000] ECR I-8419 (C-376/98) 668, 677–81, 683, 685
- Germany v Parliament and Council ('Tobacco Advertising II') [2006] ECR I-11753 (C-380/03) 402, 681, 686

- Geurts and Vogten [2007] ECR I-9325 (C-464/05) 880
- Geven [2007] ECR I-6347 (C-213/03) 856
- Gezamenlijke Steenkolenmijnen in Limburg v High Authority [1961] ECR I, 19 (30/59) 1063
- GIL Insurance Ltd and others v Commissioners of Customs & Excise [2004] ECR I-4777 (C-308/01) 1067
- Gillespie [1996] ECR I-457 (C-342/93) 580
- Gilli and Andres [1980] ECR 2071 (788/79) 779, 781, 782
- Gilly [1998] ECR I-2793 (C-336/96) 856
- Giuffrida v Council [1976] ECR 1395 (105/75) 433
- Giuseppe Sacchi [1974] ECR 409 (155/73) 802
- GlaxoSmithKline Services Unlimited v Commission, Judgment of 6 October 2009 (C-501/06P, C-513/06P, C-515/06P & C-519/06P) 949, 1019, 1020, 1029, 1038
- GlaxoSmithKline Services Unlimited v Commission [2006] ECR II-2969 (T-168/01) 1018–19
- Godrej Industries v Council, Judgment of 6 September 2013 (T-6/12) 438
- Gold (Commission v France) [2004] ECR I-6535 (C-166/03) 782
- Gøttrup-Klim [1994] ECR I-5641 (C-250/92) 999, 1008
- Gottwald v Bezirkshauptmannschaft Bregenz, Judgment of 1 October 2009 (C-103/08) 482, 490
- Gouda [1991] ECR I-4007 (C-288/89) 777, 808, 820, 821, 896
- Gourmet International Products [2001] ECR I-1795 (C-405/98) 793, 882
- Gözütok and Brügge [2003] ECR I-1345 (C-187/01 & C-385/01) 652–4
- Grad v Finanzamt Traustein [1970] ECR 838 (9/70) 309
- Graf [2000] ECR I-493 (C-190/98) 863–4
- Gravier v City of Liège [1985] ECR 593 (293/83) 361
- Gravier (Commission v Belgium) [1988] ECR 305 (293/85) 361–2
- Greece v Commission [2000] ECR I-8787 (C-278/00) 1077
- Greek Milk (Commission v Greece) [1995] ECR I-1621 (C-391/92) 793
- Greenham and Abel [2004] ECR I-1333 (C-95/01) 901–2
- Greenpeace and others v Commission [1995] ECR II-2205 (T-585/93) 454
- Greenpeace and others v Commission [1998] ECR I-1651 (C-321/95P) 454–5
- Grilli [2003] ECR I-11585 (C-12/02) 796
- Grimaldi v Fonds des Maladies Professionnelles [1989] ECR 4407 (322/88) 320–1
- Grisoli [2011] ECR I-139 (C-315/08) 862
- Groener [1989] ECR I-3967 (379/87) 830, 860
- Groenveld [1979] ECR 3409 (15/79) 794
- Grogan [1991] ECR I-4685 (159/90) 831
- Grüne Punkt DSD v Commission, Judgment of 16 July 2009 (C-385/07P) 162
- Grunkin and Paul [2008] ECR I-7639 (C-353/06) 483, 485
- Grzelczyk [2001] ECR I-6193 (184/99) 479, 487–8
- GT-Link v DSB [1997] ECR I-4449 (C-242/95) 306
- Guimont [2000] ECR I-10663 (C-448/98) 492, 767
- Guiot [1996] ECR I-1905 (C-272/94) 821
- Gullung [1988] ECR 111 (292/86) 866
- Gut Springenheide [1998] ECR I-4657 (210/96) 781
- Gutmann v Commission [1966] ECR 103 (18/65 & 35/65) 433
- GVL v Commission [1983] ECR 483 (7/82) 966
- Gysbrechts, Judgment of 16 December 2008 (C-205/07) 795
- Hadj Ahmed, Judgment of 13 June 2013 (C-45/12) 276
- Haegeman v Commission [1972] ECR 1005 (96/71) 463
- Hahn [2002] ECR I-9193 (C-121/00) 932
- Haim [2000] ECR I-5123 (C-424/97) 830, 860
- Hansen [1990] ECR I-2911 (326/88) 215
- Hartlauer, Judgment of 10 March 2009 (C-169/07) 862, 907–8, 910
- Hartmann [2007] ECR I-6303 (C-212/05) 856
- Harz v Deutsche Tradax [1984] ECR 192 (79/83) 316–17
- Hauer [1979] ECR 3727 (44/79) 253
- Häupl v Lidl [2007] ECR I-4673 (C-246/05) 171
- Hauptzollamt Mainz v Kupferberg [1982] ECR 3641 (104/81) 112–13, 308
- Hautala [2001] ECR I-9565 (C-353/99P) 413
- Heimdienst [2000] ECR I-151 (C-254/98) 793
- Heimann v Kaiser, Judgment of 8 November 2012 (C-229/11 & C-230/11) 259
- Heininger [2001] ECR I-9945 (C-481/99) 303
- Heinrich, Judgment of 10 March 2009 (C-345/06) 441
- Hellmut Marschall [1997] ECR I-6363 (C-409/95) 614
- Henn and Darby [1979] ECR 3975 (34/79) 509, 904, 912, 935, 934
- Hercules v Commission [1991] ECR II-1711 (T-7/89) 964
- Herlitz [1994] ECR II-531 (T-66/92) 1000
- Hermès International [1998] ECR I-3603 (C-53/96) 180
- HI v Stadt Wien [2002] ECR I-5553 (C-92/00) 172
- Hilti [1991] ECR II-1439 (T-30/89) 1035
- Hilti [1994] ECR I-667 (C-53/92P) 1035
- HK Danmark v Experian, Judgment of 26 September 2013 (C-476/11) 313
- HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf

- of Pro Display A/S, Judgment of 11 April 2013 (C-335/11 & C-337/11) 587–8, 589–90
- Hocsman [2000] ECR I-6623 (C-238/98) 868
- Hoechst v Commission [2008] ECR II-881 (T-410/03) 438
- Hoechst AG v Commission [1989] ECR 2859 (46/87 & 227/88) 433, 961
- Hoffmann-La Roche [1979] ECR 461 (85/76) 1033, 1037, 1039
- Klaus Höfner and Fritz Elser v Macrotron GmbH [1991] ECR I-1979 (C-41/90) 999, 1032
- Huber v Bundesrepublik Deutschland, Judgment of 16 December 2008 (C-524/06) 483, 487
- Huet, Judgment of 8 March 2012 (C-251/11) 166
- Hugin Kassaregister [1979] ECR 1869 (22/78) 1035
- Humanplasma [2010] ECR I-12869 (C-421/09) 916
- Humbel [1988] ECR 5365 (263/86) 806
- Hünermund v Landesapotheker Baden-Württemberg [1994] ECR I-6787 (C-292/92) 756
- Hungary v Slovakia, Judgment of 16 October 2012 (C-364/10) 339, 509
- i-21 Germany v Bundesrepublik Deutschland [2006] ECR I-8559 (C-392/04 & C-422/04) 195
- Iaia and others v Ministero dell'Istruzione [2011] ECR I-4043 (C-452/09) 304–5
- IATA v Department for Transport [2006] ECR I-403 (C-344/04) 182–3
- Iberdrola v Commission, Judgment of 8 March 2012 (T-221/10) 452
- IBM v Commission [1981] ECR 2639 (60/81) 426–7
- Ibrahim, Judgment of 23 February 2010 (C-310/08) 497
- ICC (International Chemical Corporation) v Amministrazione Finanze [1981] ECR 1191 (66/80) 464
- ICI v Commission (Dyestuffs) [1972] ECR 619 (48/69) 1000, 1008, 1013
- Idromacchine v Commission [2011] ECR II-7833 (T-88/09) 460, 463
- Iida, Judgment of 8 November 2012 (C-40/11) 494, 548
- Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien [2010] ECR I-13693 (C-208/08) 486
- Impact v MAFF [2008] ECR I-2483 (C-268/06) 303
- Impacto Azul, Judgment of 20 June 2013 (C-186/12) 879
- In't Veld v Commission, Judgment of 19 March 2013 (T-301/10) 417
- In't Veld v Commission, Judgment of 4 May 2012 (T-529/09) 418
- Inalca-Industria Alimentari Carni v Commission, Judgment of 28 February 2013 (C-460/09P) 162
- INASTI v Kammler [1996] ECR I-703 (C-53/95) 866
- Ingeniørforeningen i Danmark, acting on behalf of Ole Andersen v Region Syddanmark [2010] ECR I-9343 (C-499/08) 608
- Inizan [2003] ECR I-12403 (C-56/01) 836
- Inspire Art [2003] ECR I-10195 (C-167/01) 215, 889
- International Chemical Corporation (ICC) v Amministrazione Finanze [1981] ECR 1191 (66/80) 181, 193
- International Fruit Company v Commission [1971] ECR 411 (41/70–44/70) 113–14
- International Fruit Company v Produktschap voor Groenten en Fruit [1972] ECR 1226 (21/72–24/72) 205
- International Transport Workers' Federation and others v Viking Line [2007] ECR I-10779 (C-438/05) 773, 815, 817, 818–19, 896, 1004
- Internationale Handelsgesellschaft v Einfuhr- und Vorratstelle für Getreide und Futtermittel ('Solange I') [1970] ECR 1125 (11/70) 180, 202–3, 251–3, 254, 400
- Internationaler Hilfsfonds v Commission [2010] ECR I-669 (C-362/08P) 413
- Inuit Tapiriit Kanatami, Judgment of 12 25 April 2013 (Seal Products) (T-526/10) 682–3
- Inuit Tapiriit Kanatami v Commission, Judgment of 25 April 2013 (T-526/10) 457
- Inuit Tapiriit Kanatami v Council, Judgment of 3 October 2013 (C-583/11P) 444–5
- Inuit Tapiriit Kanatami v European Parliament and Council [2011] ECR II-5599 (T-18/11) 445
- Ioannidis [2005] ECR I-8275 (C-258/04) 489
- IRCA [1976] ECR 1213, 1237 (7/76) 252
- Ireks-Arkady v Council and Commission [1979] ECR 2955 (238/78) 462–3, 464
- Ireland v Commission [1987] ECR 5041 (325/85) 442
- Irimie v Administrația Finanțelor Publice Sibiu, Judgment of 18 April 2013 (C-565/11) 306
- Irish Souvenirs (Commission v Ireland) [1981] ECR 1625 (113/80) 783, 900
- Irish Sugar plc v Commission [1999] ECR II-2969 (T-228/97) 999
- Italy v Commission [1991] ECR I-1433 (308/88) 1073
- Italy v Commission [1991] ECR I-1603 (303/88) 1061
- Italy v Commission [1999] ECR I-02981 (C-6/97) 1065
- Italy v Commission [2008] ECR II-3207 (T-185/05) 427
- Italy v Parliament, Judgment of 30 April 2009 (C-393/07 & C-9/08) 95
- Italy and Sardegna Lines v Commission [2000] ECR I-08855 (C-15/98 & C-105/99) 1070
- ITC [2007] ECR I-181 (C-208/05) 804
- Jägerskiöld v Gustafsson [1999] ECR I-7319 (C-97/98) 802
- Jany [2001] ECR I-8615 (C-268/99) 801, 830, 853, 904
- Javico [1998] ECR I-1983 (C-306/96) 1002
- JCB Service v Commission [2006] ECR I-8935 (C-167/04P) 115
- Jégo-Quéré v Commission [2002] ECR II-2365 (T-177/01) 162

- Jégo-Quéré v Commission [2004] ECR I-3425 (C-263/02P) 162, 178
- Jenkins [1981] ECR 911 (96/80) 599
- Jersey Potatoes [2005] ECR I-9543 (C-293/02) 796
- Jia v Migrationsverket [2007] ECR I-1 (C-1/05) 496
- Jipa [2008] ECR I-5157 (C-33/07) 512
- Jobra, Judgment of 4 December 2008 (C-330/07) 506, 828
- Johnston [1986] ECR 1651 (222/84) 254, 301, 602
- Joseman v Burgemeester van Maastricht [2010] ECR I-13019 (C-137/09) 632, 934
- Jundt [2007] ECR I-12231 (C-281/06) 808, 828
- Jyri Lehtonen and Castors Canada Dry Namur-Braine Asbl v Fédération royale belge des sociétés de basket-ball Asbl (FRBSB) [2000] ECR I-2681 (C-176/96) 815
- Jyske Bank, Judgment of 25 April 2013 C-212/11) 821, 919
- Kachelmann [2000] ECR I-7505 (C-322/98) 599
- Kadi v Commission [2010] ECR II-5177 (T-85/09) 162-3
- Kadi and Al Barakaat [2008] ECR I-6351 (C-402/05P & C-415/05P) 162-3, 205-6, 208, 224-5, 433-6
- Kakavetsos-Fragkopoulos [2011] ECR I-915 (C-161/09) 796
- Kalanke [1995] ECR I-3051 (C-450/93) 614
- Kamberaj v IPES, Judgment of 24 April 2012 (C-571/10) 551-2, 568
- Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art [2003] ECR I-10195 (C-167/01) 215
- Kampffmeyer v Commission and Council [1976] ECR 711 (56/74 to 60/74) 463
- Kampffmeyer v Commission [1967] ECR 245 (5/66, 7/66, 13/66-24/66) 464
- Kapferer v Schlang and Schlick [2006] ECR I-2585 (C-234/04) 195
- Karner v Troostwijk [2004] ECR I-3025 (C-71/02) 793, 802, 896
- Kaur [2001] ECR I-1237 (C-192/99) 474
- KB [2004] ECR I-541 (C-117/01) 253, 584
- Keck and Mithouard [1993] ECR I-6097 (C-267/91 & C-268/91) 754-5, 756-7, 786-90
- Kempf [1986] ECR 1741 (139/85) 478, 854, 855
- Kempter [2008] ECR I-411 (C-2/06) 195
- Ker-Optika [2010] ECR I-12213 (C-108/09) 788
- KFC (Koninklijke Friesland Campina), Judgment of 17 September 2009 (C-519/07P) 449-50
- Khatzithanas, Judgment of 4 December 2008 (C-151/07) 875
- Kirk (R v Kent Kirk) [1984] ECR 2689 (63/83) 254, 441,
- Kirsammer-Hack [1993] ECR I-6185 (C-189/91) 600, 1059
- Klas Rosengren and others v Riksåklagaren [2007] ECR I-4071 (C-170/04) 760, 792
- Klopp [1984] ECR 2971 (107/83) 827, 862, 864-5, 896
- KME v Commission, Judgment of 8 December 2011 (C-272/09P) 973, 974-5
- Knoors [1979] ECR 399 (115/78) 873-4
- Köhler v Austria [2003] ECR I-10239 (C-224/01) 187, 333-5, 353, 876
- Kofeod v Skatteministeriet [2007] ECR I-5795 (C-321/05) 320-1
- Kohl [1998] ECR I-1931 (C-158/96) 808, 830, 835-6, 898, 897, 900
- Koller [2010] ECR I-13629 (C-118/09) 172
- Koller [2010] ECR I-13627 (C-118/09) 868, 875
- Konle [1999] ECR I-3099 (C-302/97) 908
- Kraaijenbrink [2007] ECR I-6619 (C-367/05) 655
- Kranemann [2005] ECR I-2421 (C-109/04) 853, 864, 898
- Kraus [1993] ECR I-1663 (C-19/92) 869
- Kreil [2000] ECR I-69 (C-285/98) 602
- Kremzow v Austria [1997] ECR I-2629 (C-299/95) 253, 494
- Kretzinger [2007] ECR I-6441 (C-288/05) 655
- Křižan v Slovenská inšpekcia životného 13 prostredia, Judgment of 15 January 2013 (C-416/10) 167-8
- Kücükdeveci v Swedex [2010] ECR I-365 (C-555/07) 321-2, 323
- Kühne and Heitz v Productschap voor Pluimvee en Eieren [2004] ECR I-837 (C-453/00) 193-5
- Kuijper v Council [2002] ECR II-485 (T-211/00) 418
- Kupferberg [1982] ECR 3641 (104/81) 112-13, 308
- L. N. v Styrelsen for Videregående Uddannelser og Uddannelsesstøtte, Judgment of 21 February 2013 (C-46/12) 478, 873
- Läära [1999] ECR I-6067 (C-124/97) 904, 918, 934
- Laboratoires CTRS v Commission, Judgment of 4 July 2012 (T-12/12) 457
- Laboratoires Fournier v Direction des vérifications nationales et internationales [2005] ECR I-2057 (C-39/04) 828
- Ladbroke [2010] ECR I-04757 (C-258/08) 827, 904, 918, 934-5
- Lahousse [2010] ECR I-11685 (C-142/09) 761
- Lämmerzahl [2007] ECR I-8415 (C-241/06) 303
- Land Oberösterreich and Austria v Commission [2007] ECR I-7141 (C-439/05P and C-454/05P) 694
- Landeshauptstadt Kiel v Jaeger [2003] ECR I-8389 (C-151/02) 276-7
- Landtova [2011] ECR I-5573 (C-399/09) 233, 234
- Larsy v INASTI [2001] ECR I-5063 (C-118/00) 331-2
- Las v PSA Antwerp NV, Judgment of 16 April 2013 (C-202/11) 576, 859, 860
- Lassal [2010] ECR I-9217 (C-262/09) 477
- Laval v Svenska Byggnadsarbetareförbundet [2007] ECR I-11767 (C-341/05) 773, 817, 818-19, 896
- Lawrence [2002] ECR I-7325 (C-320/00) 579
- Leclerc v Sarl 'Au Blé Vert' [1985] ECR I (229/83) 767

- Leclerc-Siplec v TF1 Publicité and M6 Publicité [1995] ECR I-179 (C-412/93) 184–5, 672–3
 Ledoux [1988] ECR 3741 (121/86) 880
 Leffler v Berlin Chemie [2005] ECR I-9611 (C-443/03) 303
 Leichtle [2004] ECR I-2641 (C-8/02) 836, 916, 917, 921
 Leffler v Berlin Chemie [2005] ECR I-9611 (C-443/03) 303
 Leonesio v Italian Ministry of Agriculture [1972] ECR 293 (93/71) 308
 Les Vergers du Vieux Tauves, Judgment of 22 December 2008 (C-48/07) 181
 Leth v Republik Österreich, Judgment of 14 March 2013 (C-420/11) 332
 Levez v Jennings [1998] ECR I-7835 (C-326/96) 300, 303
 Levin v Staatssecretaris van Justitie [1982] ECR 1035 (53/81) 478, 853, 854, 855, 856, 873
 Libert, Judgment of 8 May 2013 (C-197/11) 897, 924
 Liga Portuguesa de Futebol Profissional, Judgment of 8 September 2009 (C-42/07) 353, 827, 904, 905, 918
 Limburgse Vinyl Maatschappij NV and others v Commission [2002] ECR I-8375 (C-238/99P, C-244/99P, C-245/99P, C-247/99P, C-250/99P–252/99P & C-254/99P) 438, 957
 Linde v Commission [2002] ECR II-03961 (T-98/00) 1062
 Lindfors [2004] ECR I-7183 (C-365/02) 167
 Lindman [2003] ECR I-13519 (C-42/02) 827
 Lindorfer [2007] ECR I-6767 (C-227/04) 575, 606
 Lindqvist [2003] ECR I-12971 (C-101/01) 253
 Linguistic Diversity [1999] ECR I-869 (C-42/97) 110–11
 Lisrestal (Commission v Lisrestal) [1996] ECR I-5375 (C-32/95P) 437
 Lorenz v Germany [1973] ECR 1471 (120/70) 1074
 LR af 1998 [2002] ECR II-1705 (T-23/99) 964, 1012
 Ludwigs-Apotheke München Internationale Apotheke v Juers Pharma Import-Export GmbH [2007] ECR I-9623 (C-143/06) 916
 Luisi and Carbone [1984] ECR 377 (286/82 & 26/83) 803, 831
 Lütticke v Commission [1966] ECR 19 (48/65) 363
 Lütticke v HZA Sarrelouis [1966] ECR 205 (57/65) 295
 Lutz [2002] ECR I-547 (C-182/00) 172
 LVK, Judgment of 31 January 2013 (C-643/11) 254
 Lyckeskog [2002] ECR I-4839 (C-99/00) 186–7
 McCarthy [2011] ECR I-3375 (C-434/09) 494
 Maatschappij Drijvende Bokken BV v Stichting Pensioenfonds voor de Vervoer- en Havenbedrijven [1999] ECR I-6121 (C-219/97) 1003
 Macarthy Ltd v Smith [1980] ECR 1275 (129/79) 579
 Makhteshim-Agan Holding BV and others v Commission [2005] ECR II-1465 (T-34/05 R) 456
 Manfredi and others v Lloyd Adriatico Assicurazioni SpA and others [2006] ECR I-6619 (C-295/04–298/04) 304–5, 307, 991–2
 Mangold (C-144/04) [2005] ECR I-9981 230, 254, 321–2, 324, 325, 574–5, 576, 577, 606, 608
 Mannesmannröhren-Werke AG v Commission [2001] ECR II-729 (T-112/98) 959, 960
 Mantello [2010] ECR I-11477 (C-261/09) 642
 Manufacturing Support and Procurement Kala Naft v Council, Judgment of 25 April 2012 (T-509/10) 441
 Marks & Spencer v CCE [2008] ECR I-2283 (C-309/06) 306
 Marks & Spencer v Halsey [2005] ECR I-10837 (C-446/03) 900
 Marleasing SA v La Comercial Internacional de Alimentación SA [1990] ECR I-4135 (C-106/89) 317, 319
 Mars Ice Cream (Verein gegen Unwesen in Handel und Gewerbe Köln v Mars GmbH) [1995] ECR I-1923 (C-470/93) 776
 Marshall I [1986] ECR 723 (152/84) 310–11, 312, 313, 319, 327–8
 Marshall II [1993] ECR I-4367 (C-271/91) 301, 313, 610
 Martinez and others v Parliament [2001] ECR II-2823 (T-222/99, T-327/99 & T-329/99) 440
 Martínez Sala v Freistaat Bayern [1998] ECR I-2691 (C-85/96) 487
 Martini v Ministero delle Politiche Agricole e Forestali [2005] ECR I-10423 (C-453/03, C-11/04, C-12/04 & C-194/04) 197, 307
 Masterfoods v HB Ice Cream [2000] ECR I-11369 (C-344/98) 213
 Mathot [1987] ECR 809 (98/86) 766
 Matra Hachette [1994] ECR II-595 (T-17/93) 1026
 max.mobil (Commission v max.mobil) [2005] ECR I-1283 (C-141/02P) 369
 max.mobil v Commission [2002] ECR II-313 (T-54/99) 369
 Mazzoleni and ISA [2001] ECR I-2189 (C-165/98) 809, 810
 Meca Medina and Majcen v Commission [2004] ECR II-3291 (T-313/02) 816–17
 Meca Medina and Majcen v Commission [2006] ECR I-6991 (C-519/04) 1005
 Melki and Abdeli 4 [2010] ECR I-5667 (C-188/10 & C-189/10) 168–9
 Melki and Abdeli [2010] ECR I-05667 (C-188/10 & C-189/10) 529
 Melli Bank v Council, Judgment of 9 July 2009 (T-246/08 & T-332/08) 440, 458
 Melloni, Judgment of 26 February 4 2013 (C-399/11) 202–3, 208, 217, 259–61, 266

- Melloni, Judgment of 26 February 2013 (C-399/11) 644, 645
- Merck Genéricos-Produtos Farmacêuticos v Merck [2007] ECR I-7001 (C-431/05) 180
- Mesopotamia Broadcast and Roj TV [2011] ECR I-8777 (C-244/10 & C-245/10) 273–4
- Messina v Commission [2003] ECR II-3203 (T-76/02) 421
- Metallgesellschaft v IRC [2001] ECR I-1727 (C-397/98 & C-410/98) 306
- Metock [2008] ECR I-6241 (C-127/08) 504, 506, 539
- Metro (No. 1) [1977] ECR 1875 (26/76) 1022, 1003
- Metronome Musik v Music Point Hokamp [1998] ECR I-1953 (C-200/96) 896
- Métropole télévision (M6) [2001] ECR II-2459 (T-112/99) 1023
- M.G. v Staatssecretaris van Veiligheid en Justitie, Judgment of 10 September 2013 (C-383/13 PPU) 436
- Micheletti v Delegación del Gobierno Cantabria [1992] ECR I-4239 (C-369/90) 474
- Michelin I [1983] ECR 3461 (322/81) 1033, 1034–5, 1045–6
- Michelin II [2003] ECR II-4071 (T-203/01) 1035, 1045–6
- Mickelsson and Roos, Judgment of 4 June 2009 (C-142/05) 760
- Microban v Commission [2011] ECR II-7697 (T-262/10) 445, 446, 447
- Microsoft v Commission [2007] ECR II-3601 (T-201/04) 965, 976
- Miraglia [2005] ECR I-2009 (C-469/03) 435, 654
- M.M. v Minister for Justice, Equality and Law Reform, Judgment of 22 November 2012 (C-277/11) 437
- Mobistar [2005] ECR I-7723 (C-544/03) 799, 809–11
- Modehuis A Zwijnenburg [2010] ECR I-4303 (C-352/08) 179
- Morellato [2003] ECR I-9343 (C-416/00) 791–2
- Morgan v Bezirksregierung Köln [2007] ECR I-9161 (C-11/06) 484, 486, 490
- Morson and Jhanjan v Netherlands [1982] ECR 3723 (35/82 & 36/82) 491
- MRAX [2002] ECR I-6591 (C-459/99) 508, 509
- Mulder v Minister van Landbouw en Visserij [1988] ECR 2321 (120/86) 442, 443
- Mulder II (Mulder v Council and Commission) [1992] ECR I-3061 (C-104/89 & C-37/90) 464
- Mulgan and others [2002] ECR I-5719 (C-313/99) 214
- Müller-Fauré [2003] ECR I-4509 (C-385/99) 836, 837, 838–9
- Musique diffusion française and others v Commission [1983] ECR 1825 (100/80–103/80) 966
- MyTravel v Commission [2003] OJ C200/28 (T-212/03) 461
- N v Inspecteur van de Belastingdienst Oostkantoor Almelo [2006] ECR I-7409 (C-470/04) 306, 332
- Nachi Europe v Hauptzollamt Krefeld [2001] ECR I-1197 (C-239/99) 179
- Nadin [2005] ECR I-11203 (C-151/04 & C-152/04) 880
- Nasiopoulos, Judgment of 27 June 2013 (C-573/11) 870–1
- National Panasonic [1980] ECR 2033 (136/79) 253
- NDSHT v Commission [2010] ECR I-11911 (C-322/09P) 427
- Neri [2003] ECR I-13555 (C-153/02) 874, 875
- Nerkowska [2008] ECR I-3993 (C-499/06) 484
- Netherlands v Council [2001] ECR I-8853 (C-301/97) 442
- Netherlands v European Parliament and Council (Biotechnology Directive) [2001] ECR I-7079 (C-377/98) 253, 397–8
- Newcastle Disease [1984] ECR 283 (40/82) 911–12
- Niemann v Bezirksregierung Hannover [2003] ECR I-2279 (C-14/01) 69
- Nimz [1991] ECR I-297 (C-184/89) 599
- NMB France v Commission [1996] ECR II-427 (T-162/94) 162–3
- Nold v Commission [1974] ECR 491 (4/73) 253
- Nölle v Council [1995] ECR II-2589 (T-167/94) 463
- Nölle v Hauptzollamt Bremen-Freihafen [1991] ECR I-5163 (C-16/90) 438
- Nordsee Deutsche Hochseefischerei v Reederei Mond Hochseefischerei [1982] ECR 1095 (102/81) 172
- Novácke chemické závody v Commission, Judgment of 12 December 2012 (T-352/09) 435, 957
- NPO v Jonkman [2007] ECR I-5149 (C-231/06) 194–5
- N S v Secretary of State for the Home Department, Judgment of 21 December 2011 (C-411/10 & C-493/10) 271–3
- NS v Secretary of State for the Home Department; ME v Refugee Applications Commissioner, Judgment of 21 December 2011 (C-411/10 & C-493/10) 542–3
- Nungesser [1982] ECR 2015 (258/78) 1022
- O and S v Maahanmuuttovirasto; Maahanmuuttovirasto v L, Judgment of 6 December 2012 (C-356/11 & C-357/11) 176, 494, 501–2
- O2 [2006] ECR II-1231 (T-328/03) 1023–4
- Odar v Baxter, Judgment of 6 December 2012 (C-152/11) 576
- Oebel [1981] ECR 1993 (155/80) 896
- O'Flynn [1996] ECR I-2617 (C-237/94) 482, 875
- OLAF (Commission v ECB) [2003] ECR I-7147 (C-11/00) 727
- Olazabal [2002] ECR I-10981 (C-100/01) 509, 934
- Oliveira v Commission [1997] ECR II-381 (T-73/95) 438
- Olympique Lyonnais [2010] ECR I-2177 (C-325/08) 862

- Omalet [2010] ECR I-13771 (C-245/09) 805
- Omega [2004] ECR I-9609 (C-36/02) 265, 802, 896, 902–3, 934
- Opel Austria v Council [1997] ECR II-39 (T-115/94) 441
- Ordem dos Técnicos Oficiais de Contas v Autoridade da Concorrência, Judgment of 23 February 2013 (C-1/12) 1006
- Orfanopoulos (C-482/01 & C-493/01) 510–11
- Orkem and Solvay [1989] ECR 3283 (374/87 & 27/88) 253, 254, 435, 958–9
- Ospelt [2003] ECR I-9743 (C-452/01) 710, 898, 908
- Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft v Commission [2006] ECR II-1601 (T-213/01 & T-214/01) 427
- Österreichischer Rundfunk [2003] ECR I-4919 (C-465/00, C-138/01 & C-139/01) 253
- Otis, Judgment of 6 November 2012 (C-199/11) 213
- Ottica, Judgment of 26 September 2013 (C-539/11) 862
- Oulane [2005] ECR I-1215 (C-215/03) 507, 508
- Outokumpu [1998] ECR I-1777 (C-213/96) 674
- Own Resources (Commission v Netherlands) [1991] ECR I-2461 (C-96/89) 363
- P v S and Cornwall County Council [1996] ECR I-2143 (C-13/94) 583–4, 572
- PI, Judgment of 22 May 2012 (C-348/09) 511
- Palacios [2007] ECR I-8531 (C-411/05) 575, 606
- Palmisani v INPS [1997] ECR I-4025 (C-261/95) 300, 304–5
- Papierfabrik Koehler v Commission, Judgment of 3 September 2009 (C-322/07P, C-327/07P & C-338/07P) 438
- Paquay v Société d'architectes Hoet & Minne [2007] ECR I-8511 (C-460/06) 215
- Pardini v Ministerio del Comercio con l'Estero [1988] ECR 2041 (338/85) 193
- Parfums Christian Dior v Tuk Consultancy [2000] ECR I-11307 (C-300/98 & C-302/98) 180
- Parker Pen [1994] ECR II-549 (T-77/92) 1000, 1017
- Parliament v Council [1985] ECR 1513 (13/83) 455
- Parliament v Council [1993] ECR I-3713 (C-181/91 & C-248/91) 61
- Parliament v Council [1994] ECR I-653 (C-316/91) 61
- Parliament v Council ('Cabotage II') [1992] ECR I-4593 (C-65/90) 123–5
- Parliament v Council (Consultation with Parliament) [1995] ECR I-1185 (C-417/93) 125
- Parliament v Council (Consultation with Parliament) [1997] ECR I-3213 (C-392/95) 465
- Parliament v Council (Family Reunification) [2006] ECR I-5769 (C-540/03) 253, 275, 278–80, 553
- Parliament v Council (General Tariff Preferences) [1995] ECR I-643 (C-65/93) 123–5
- Parliament v Council (Linguistic Diversity in the Information Society) [1999] ECR I-869 (C-42/97) 110–11
- Parliament v Council (Revision of Judgment) [1992] ECR I-4193 (C-295/90) 110
- Parliament v Council, Judgment of 5 December 2012 (C-355/10) 429
- Parliament v Council (Safe Countries of Origin) [2008] ECR I-3189 (C-133/06) 60–1, 62, 429
- Parliament v Council (Sanctions against Usama Bin Laden), Judgment of 19 July 2012 (C-130/10) 109
- Parliament v Council (Schengen Borders Code), Judgment of 5 September 2012 (C-355/10) 69–71
- Partena, Judgment of 27 September 2012 (C-137/11) 919
- Parti écologiste 'Les Verts' v European Parliament [1986] ECR 1339 (294/83) 182
- Passenheim-van School [2009] ECR I-5093 (C-155/08) 919
- Patriciello [2011] ECR I-7565 (C-163/10) 266
- Pearle BV, Hans Prijs Optiek Franchise BV and Rinck Opticiens BV v Hoofdbedrijfschap Ambachten [2004] ECR I-7139 (C-345/02) 1061
- Pelati, Judgment of 18 October 2012 (C-603/10) 179, 300, 304–5
- Peñarroja Fa [2011] ECR I-1785 (C-372/09 & C-373/09) 301
- Peñarroja Fa [2011] ECR I-1785 (C-372/09) 938–9
- Peralta [1994] ECR I-ECR 3453 (C-379/92) 765–6, 825
- Perfili [1996] ECR I-161 (C-177/94) 810
- Pesla [2009] ECR I-11677 (C-345/08) 868
- Pesqueras Echebaster v Commission [1993] ECR I-1719 (C-25/91) 457
- Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe [2010] ECR I-47 (C-341/08) 604, 878
- Petersen, Judgment of 28 February 2013 (C-544/11) 899
- Petrie v Commission [2001] ECR II-3677 (T-191/99) 365
- Pfeiffer and others v Deutsches Rotes Kreuz [2004] ECR I-8835 (C-397/01–403/01) 318
- Pfizer Animal Health v Council [2002] ECR II-3305 (T-13/99) 78, 426, 451, 694
- Pfleiderer v Bundeskartellamt [2011] ECR I-5161 (C-360/09) 115, 307
- Pimix, Judgment of 12 July 2012 (C-146/11) 214
- Philip Morris [1980] ECR 2671 (C-730/79) 1077
- Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Economie, de l'Industrie et de l'Emploi [2011] ECR I-9419 (C-439/09) 1031
- Piraiiki-Patraiki v Commission [1985] ECR 207 (11/82) 446, 447, 450
- Pistre [1997] ECR I-2343 (C-321/94) 766–7
- Pitsiorlas v Council and ECB [2007] ECR II-4779 (T-3/00 & T-337/04) 464
- Placanica, Palazzese and Soricchio [2007] ECR I-1891 (C-388/04, C-359/04 & C-360/04) 827, 904, 905, 916, 918

- Plaumann & Co. v Commission [1963] ECR 95 (25/62) 448–9, 451–2
- Polliseni [2010] ECR I-175 (C-217/09) 862
- Portugaia Construções [2002] ECR I-787 (C-164/99) 896
- Portugal v Commission (Azores) [2006] ECR I-7115 (C-88/03) 1064–5
- Post Danmark A/S v Konkurrencerådet, Judgment of 27 March 2012 (C-209/10) 1047–8
- Poucet [1993] ECR I-637 (C-159/91 & C-160/91) 830
- PPU McB v L.E. [2010] ECR I-8965 (C-400/10) 262–4
- Prais [1976] ECR 1589 (130/75) 253
- Presidente del Consiglio dei Ministri v Regione Sardegna, Judgment of 17 November 2009 (C-169/08) 828
- Preston v Wolverhampton Health Care Trust [2000] ECR I-3201 (C-78/98) 304–5
- Prete, Judgment of 25 October 2012 (C-367/11) 490
- PreussenElektra [2001] ECR I-2099 (C-379/98) 759, 900, 927–8, 1059–60
- Prezes Urzędu Ochrony Konkurencji Konsumentów v Tele2 Polska sp. Z. O.o. divenue Netia SA [2011] ECR I-3055 (C-375/09) 988, 1025–6
- Pringle v Government of Ireland, Judgment of 27 November 2012 (C-370/12) 61–2, 142–3, 722–3, 743, 744
- Pronuptia de Paris [1986] ECR 353 (161/84) 1022
- Provadinvest, Judgment of 26 April 2012 (C-129/11) 296
- Punto Casa v Sindaco del Comune di Capena [1994] ECR I-2355 (C-69/93 & C-258/93) 791
- Pupino [2005] ECR I-5285 (C-105/03) 635, 665
- Pusa [2004] ECR I-5763 (C-224/02) 484
- Q-Beef v Belgische Staat, Bosschaert v Belgische Staat, Judgment of 8 September 2011 (C-89/10 & C-96/10) 193
- R v Kent Kirk [1984] ECR 2689 (63/83) 441
- R v Secretary of State for the Home Department, ex parte MA, Judgment of 6 June 2013 (C-648/11) 541
- Raccanelli [2008] ECR I-5939 (C-94/07) 853
- Radlberger Getränkegesellschaft v Land Baden-Württemberg [2004] ECR I-11763 (C-309/02) 784–5
- Radu, Judgment of 29 January 2013 (C-396/11) 249, 275, 643
- Radziejewski, Judgment of 8 November 2012 (C-461/11) 486
- Ratti [1979] ECR 1629 (148/78) 310
- Rau v Bundesanstalt für Landwirtschaftliche Marktordnung [1987] ECR 2289 (133/85–136/85) 177–8
- Rau v De Schmedt [1982] ECR 3961 (261/81) 781
- Rauf v Commission [2010] ECR I-6375 (C-407/08P) 256
- Ravil v Bellon Import [2003] ECR I-5053 (C-469/00) 795
- Recovery of Indirect Taxes (Commission v Council) [2004] ECR I-4829 (C-338/01) 109–10
- Regione Siciliana v Commission [2005] ECR II-4139 (T-60/03) 448
- Regione Siciliana v Commission [2007] ECR I-2591 (C-15/06P) 449
- Reisch [2002] ECR I-2157 (C-515/99 & C-527/99–540/99) 896, 908
- Remia [1985] ECR 2545 (42/84) 1003
- Residex Capital IV, Judgment of 8 December 2011 (C-275/10) 1074
- Rewe-Zentral v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon) [1979] ECR 649 (120/78) 688–9, 754–5, 757, 758, 771, 773–6, 777, 779, 781, 786, 895–6
- Rewe-Zentrale v Landwirtschaftskammer Rheinland [1984] ECR 1229 (37/83) 933
- Rewe-Zentralfinanz v Landwirtschaftskammer für das Saarland [1976] ECR 1989 (33/76) 299–300
- Rewe-Zentralfinanz GmbH v Landwirtschaftskammer Bonn [1975] ECR 843 (4/75) 912
- Reyners [1974] ECR 631 (2/74) 296, 803, 856, 859
- Rheinmühlen-Düsseldorf v Einfuhr- und Vorratstelle für Getreide [1974] ECR 33 (166/73) 167, 175
- Richards [2006] ECR I-3585 (C-423/04) 584
- Rinner-Kühn [1989] ECR 2743 (171/88) 580, 599
- RI-SAN v Commune de Ischia [1999] ECR I-5219 (108/98) 803
- Riseria Luigi Geddo v Ente Nazionale Risi [1973] ECR 865 (2/73) 756, 757
- Robins v Secretary of State for Work and Pensions [2007] ECR I-1053 (C-278/05) 331–2
- Roda Golf and Beach Resort, Judgment of 25 June 2009 (C-14/08) 172
- Rohrbach v Arbeiterkammer Oberösterreich [2005] ECR I-4305 (C-297/03) 312
- Römer v Freie und Hansestadt Hamburg [2011] ECR I-3591 (C-147/08) 324, 592
- Römer [2011] ECR I-3591 (C-147/08) 592
- Roquette Frères v Council [1980] ECR 3333 (138/79) 123
- Roquette Frères v Directeur général de la concurrence, de la consommation et de la répression des fraudes [2002] ECR I-9011 (C-94/00) 962–3
- Rosenblatt v Oellerking Gebäudereinigungsges. mbH [2010] ECR I-9391 (C-45/09) 595, 606–7, 608
- Rottmann v Freistaat Bayern, Judgment of 2 March 2010 (C-135/08) 472–4, 503
- RSV v Commission [1987] ECR 4617 (223/85) 438
- Rubach, Judgment of 16 July 2009 (C-344/08) 254, 435
- Ruckdeschel v Council [1977] ECR 1753 (117/76 & 16/77) 439–40
- Rüffler, Judgment of 23 April 2009 (C-544/07) 485, 857

- Runevič-Vardyn, Judgment of 12 May 2011 (C-391/09) 236
- Runevič-Vardyn and Wardyn [2011] ECR I-3787 (C-391/01) 486–7
- Rush Portuguesa [1990] ECR I-1417 (C-113/89) 896
- Rütgers Germany v ECHA, Judgment of 7 March 2013 (T-96/10) 427
- Rutili v Ministre de l'Intérieur [1975] ECR 1219 (36/75) 253
- Ryanair Ltd v Commission [2008] ECR II-3643 (T-196/04) 1062–3
- Ryan Air v Commission [2011] ECR II-2397 (T-423/07) 456
- Safe Countries of Origin [2008] ECR I-3189 (C-133/06) 429
- Safety Hi-Tech v S and T [1998] ECR I-4301 (C-284/95) 925
- Säger v Denkmeyer [1991] ECR I-4221 (C-76/90) 822
- Sahin, Judgment of 19 December 2008 (C-551/07) 504
- Salgoil v Italian Ministry of Foreign Trade [1968] ECR 453 (13/68) 295
- Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration [2011] ECR I-7151 (C-69/10) 304–5
- San Giorgio (Amministrazione delle Finanze dello Stato v San Giorgio) [1983] ECR 3595 (199/82) 180, 306
- Sandker [1996] ECR I-6511 (C-3/95) 897
- Sandoz v Commission [1990] ECR I-45 (227/87) 1015
- Sandoz [1983] ECR 5094 (174/82) 901, 932
- Sandström [2010] ECR I-2885 (C-433/05) 762
- Santex v Unità Socio Sanitaria Locale no. 42 di Pavia [2003] ECR I-1877 (C-327/00) 305
- Sapod Audic [2002] ECR I-5031 (C-159/00) 790
- SAT Fluggesellschaft v Eurocontrol [1994] ECR I-43 (C-364/92) 165–6
- Saunders [1979] ECR 1129 (175/78) 856
- Sayn Wittgenstein [2010] ECR I-13693 (C-209/08) 896, 917
- Scarlet Extended, Judgment of 24 November 2011 (C-70/10) 254, 256–7
- Schempp [2005] ECR I-6421 (C-403/03) 484
- Schengen [2007] ECR I-11459 (C-77/05) 523, 524–5
- Schengen [2007] ECR I-11593 (C-137/05) 523–4
- Schenker & Co. and others, Judgment of 18 June 2013 (C-681/11) 988
- Schindler [1994] ECR I-1039 (C-275/92) 802, 830, 896, 897, 903, 904, 918
- Schindler Holdings v Commission, Judgment of 18 July 2013 (C-503/11P) 250
- Schindler Holding Ltd and others v Commission, Judgment of 18 July 2013 (C-501/11P) 1000–1
- Schlüsselverlag JS Moser v Commission [2002] ECR II-1473 (T-3/02) 456
- Schmid [2002] ECR I-4573 (C-516/99) 171
- Schmidberger v Austria [2003] ECR I-5659 (C-112/00) 214, 770–2, 896, 936
- Schneider v Commission [2007] ECR II-2237 (T-351/03) 460
- Schneider Electric SA v Commission [2002] ECR II-4071 (T-310/01) 460–2
- Schnitzer [2003] ECR I-14847 (C-215/01) 803
- Scholz [1994] ECR I-505 (C-429/92) 866
- Schöning-Kougebetopoulou [1998] ECR I-47 (C-15/96) 333
- Schul v Minister van Lanbouw, Natur en Voedselkwaliteit [2005] ECR I-10513 (C-461/03) 182
- Schumacker [1995] ECR I-225 (C-279/93) 877
- Schwarz (Georg) v Bürgermeister der Landeshauptstadt Salzburg [2006] ECR I-10139 (C-366/04) 791, 792
- Schwarz and Gootjes [2007] ECR I-6849 (C-76/05) 484, 834
- Seco [1982] ECR 223 (62/81 & 63/81) 821
- Secretary of State for the Home Department v Rahman, Judgment of 5 September 2012 (C-83/11) 496
- Seda Küçükdeveci v Swedex GmbH Co KG [2010] ECR I-365 (C-555/07) 574
- SELEX Sistemi Integrati SpA v Commission, Judgment of 26 March 2009 (C-113/07P) 999
- SEP v Commission [1994] ECR I-1911 (C-36/92P) 958
- Serge Brihenche [2004] ECR I-8807 (C-319/03) 615
- Sermes v Directeur de Service des Douanes de Strasbourg [1990] ECR I-3027 (323/88) 432
- SETTG v Ergasias [1997] ECR I-3091 (C-398/95) 803, 805, 898
- Seymour-Smith and Perez [1999] ECR I-623 (C-167/97R) 580, 598, 599
- SFEI v Commission [1994] ECR I-2681 (C-39/93P) 427
- SFEI [1996] ECR I-3547 (C-39/94) 307, 1074
- SG Alsacienne v Koestler [1978] ECR 1971 (15/78) 803
- Sgarlata v Commission [1965] ECR 215 (40/64) 250
- SGL Carbon [2006] ECR I-5915 (C-301/04P) 959, 960
- Shingara and Radiom [1997] ECR I-03343 (C-65/95 & C-111/95) 509
- Simap [2000] ECR I-7963 (C-303/98) 277–8
- Simmenthal (Italian Finance Administration v Simmenthal) [1978] ECR 629 (106/77) 208–9
- Sina Bank v Council, Judgment of 11 December 2012 (T-15/11) 459
- Singh [1992] ECR I-4265 (C-370/90) 492–3, 505, 506
- Sirdar [1999] ECR I-7403 (C-273/97) 602
- Sison v Council [2011] ECR II-7915 (T-341/07) 460
- Sjöberg [2010] ECR I-06921 (C-447/08) 828, 911, 918

- Skatteministeriet v Vestergaard [1999] ECR I-7641 (C-55/98) 804
- Smoke Flavours (United Kingdom v Parliament and Council) [2005] ECR I-10553 (C-66/04) 683–4
- SNUPAT v High Authority [1961] ECR 109 (42/59 & 49/59) 441
- Société pour l'Exportation des Sucres SA v Commission [1978] ECR 1061 (132/77) 464
- Society for the Protection of the Unborn Child (SPUC) v Grogan [1991] ECR I-4685 (C-159/90) 284–5
- Sodemare [1997] ECR I-3395 (C-70/95) 881
- Sofrimport v Commission [1990] ECR I-2477 (152/88) 450
- Söhne v Finanzamt Neustadt [1997] ECR I-5577 (C-258/95) 805
- Solgar [2010] ECR I-39731 (C-446/08) 901
- Solvay v Commission [2011] ECR I-11439 (C-110/10P) 275
- Solvay SA v Commission [1995] ECR II-1775 (T-30/91) 435, 964
- Sonia Chacón Navas [2006] ECR I-6467 (C-13/05) 575, 588
- Sopropé [2008] ECR I-10369 (C-349/07) 437
- Sotgiu v Deutsche Bundespost [1974] ECR 153 (152/73) 482, 489, 515
- Spain v Commission [1994] ECR I-4103 (C-278/92) 1061
- Spain v Commission [1995] ECR I-1651 (C-135/93) 458
- Spain v Commission [1999] ECR I-02459 (C-342/96) 1061
- Spain v Commission [2000] ECR I-08717 (C-480/98) 1073
- Spain v Commission [2002] ECR I-08031 (C-351/98) 1070
- Spain v Commission [2002] ECR I-7601 (C-113/00) 408–9
- Spain v Commission [2002] ECR I-07657 (C-114/00) 1077
- Spain v Commission [2003] ECR I-01487 (C-409/00) 1065
- Spain v Council [2006] ECR I-7285 (C-310/04) 402
- Spain v United Kingdom [2006] ECR I-7917 (C-145/04) 339, 513–14
- Spain and Italy v Council (Unitary Patent), Judgment of 16 April 2013 (C-274/11 & C-295/11) 136–7
- Spanish Chocolate (Commission v Spain) [2003] ECR I-459 (C-12/00) 782
- Spanish Strawberries (Commission v France) [1997] ECR I-6959 (C-265/95) 355, 770, 771, 772, 935–6
- SPI (Amministrazione delle Finanze dello Stato v SPI) [1983] ECR 801 (C-267–C-269/81) 180
- Spijker v Commission [1983] ECR 2559 (231/82) 452
- Staat der Nederlanden v Essent et al, Judgment of 22 October 2013 (C-105/12–107/12) 710
- Stability and Growth Pact (Commission v Council) [2004] ECR I-6649 (C-27/04) 427–8
- Stadtgemeinde Frohnleiten [2007] ECR I-9643 (C-221/06) 673
- Stamatelaki [2007] ECR I-3185 (C-444/05) 836
- Standesamt Stadt Niebüll [2006] ECR I-3561 (C-96/04) 172, 482
- Stanleybet, Judgment of 24 January 2013 (C-186/11) 827, 904
- Stanton v INASTI [1988] ECR 3877 (143/87) 866
- Star Fruit v Commission [1989] ECR 291 (247/87) 368–9, 456
- Stauder v City of Ulm [1969] ECR 419 (29/69) 251
- Steffensen [2003] ECR I-3735 (C-276/01) 303
- Steinhauser [1985] ECR 1819 (197/84) 857, 878
- Stewart [2011] ECR I-6497 (C-503/09) 490
- Steymann [1988] ECR 6159 (196/87) 806, 853, 855
- Stichting Al-Aqsa v Council, Judgment of 15 November 2012 (C-539/10P & C-550/10P) 112
- Stichting Natuur en Milieu v College van Gedeputeerde Staten van Groningen (C-165/09–167/09) [2011] ECR I-4599 325
- Stichting Corporate Europe Observatory v Commission, Judgment of 7 June 2013 (T-93/11) 443
- Stichting Zuid-Hollandse Milieufederatie v Minister van Landbouw [2006] ECR I-8339 (C-138/05) 185
- STM (Société Technique Minière) v Maschinenbau Ulm [1966] ECR 234 (56/65) 1001, 1022, 1025
- Stockholm Lindöpark [2001] ECR I-493 (C-150/99) 331–2
- Stoke on Trent and Norwich City Council v B & Q [1992] ECR I-6635 (C-169/91) 786
- Stork v High Authority [1959] ECR 17 (1/58) 251
- Sturgeon v Condor Flugdienst GmbH, Judgment of 19 November 2009 (C-402/07 & C-432/07) 175
- Stoß [2010] ECR I-08069 (C-316/07) 827, 904, 914
- Suiker Unie [1975] ECR 1663 (40/73, 50/73, 54/73–56/73, 111/73, 113/73 & 114/73) 1008
- Sviluppo Italia Basilicata v Commission [2010] ECR I-2559 (C-414/08P) 462
- Sweden v Commission [2007] ECR I-11389 (C-64/05P) 421–2
- Sweden and Turco v Council [2008] ECR I-4723 (C-39/05 & C-52/05) 418–19
- Sweden and MyTravel Group v Commission [2011] ECR I-6237 (C-506/08P) 415–16
- Swedish Match (R v Secretary of State for Health, ex parte Swedish Match) [2004] ECR I-11893 (C-210/03) 263, 682, 686
- Syfait [2005] ECR I-4609 (C-53/03) 171
- Synthon (R v Licensing Authority of the Department of Health, ex parte Synthon) [2008] ECR I-7681 (C-452/06) 331–2
- T. Port [1996] ECR I-6065 (C-68/95) 307

- T-Mobile, Judgment of 4 June 2009 (C-8/08) 1020–1, 1023–5, 1038
- Tadao Maruko [2008] ECR I-1757 (C-267/06) 592
- Talotta [2007] ECR I-2555 (C-383/05) 827, 828
- Tas-Hagen and Tas v Raadskamer WUBO van de Pensioen- en Uitkeringsraad [2006] ECR I-10451 (C-192/05) 484
- Technische Glaswerke Ilmenau v Commission [2004] ECR II-2717 (T-198/01) 437
- Tegometall International v OHIM-Wuppermann (TEK) [2007] ECR II-4721 (T-458/05) 435
- Teixeira, Judgment of 23 February 2010 (C-480/08) 497
- Telia Sonera [2011] ECR-527 (C-52/09) 955, 1046–7
- Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue [2006] ECR I-11753 (C-446/04) 306
- Tetra Laval (Commission v Tetra Laval) [2005] ECR I-987 (C-12/03P) 430–1, 432, 976
- Tetra Pak [1994] ECR II-755 (T-83/91) 1039
- Tetra Pak II [1996] ECR I-5951 (C-333/94P) 1040
- Texdata Software, Judgment of 26 September 2013 (C-418/11) 283, 284, 287
- Thieffry [1977] ECR 765 (71/76) 866, 897
- Tipp-Ex [1990] ECR 261 (279/87) 1015
- Tobacco Advertising I (Germany v Parliament and Council) [2000] ECR I-8419 (C-376/98) 668, 677–81, 683, 685
- Tobacco Advertising II (Germany v Parliament and Council) [2006] ECR I-11753 (C-380/03) 402, 681, 686
- Tokai Carbon and others v Commission [2004] ECR II-1181 (T-236/01, T-239/01, T-244/01–T-246/01, T-251/01 & T-252/01) 967
- Tolsma [1994] ECR I-743 (C-16/93) 806
- Tomadini v Amministrazione delle Finanze dello Stato [1979] ECR 1801 (84/78) 441
- Torfaen Borough Council v B & Q [1989] ECR 765 (145/88) 193, 786, 897
- Toshiba, Judgment of 14 February 2012 (C-17/10) 983
- Trabelsi v Council, Judgment of 28 May 2013 (T-187/11) 275
- Trade Agency v Seramico Investments, Judgment of 6 September 2012 (C-619/10) 185
- Trade Fairs (Commission v Italy) [2002] ECR I-305 (C-439/99) 821
- Traghetti del Mediterraneo v Italy [2006] ECR I-5177 (C-173/03) 335
- Transocean Marine Paint v Commission [1974] ECR 1063 (17/74) 254
- Transportes Urbanos y Servicios Generales [2010] ECR I-635 (C-118/08) 331
- Trelleborg Industry v Commission, Judgment of 15 May 2013 (T-147/09 & T-148/09) 275
- Trojani [2004] ECR I-7573 (C-456/02) 851–3
- Trummer and Mayer [1999] ECR I-1661 (C-222/97) 924
- Tsakouridis [2010] ECR I-11979 (C-145/09) 511
- Tubemuse [1990] ECR I-959 (142/87) 1073
- Turansky, Judgment of 22 December 2008 (C-491/07) 654
- TWD Textilwerke Deggendorf v Commission ('TWD II') [1995] ECR I-2265 (T-244/93 & T-486/93) 458
- TWD Textilwerke Deggendorf v Germany [1994] ECR I-833 (C-188/92) 178–9
- Tyrolean Airways v Betriebsrat Bord, Judgment of 7 June 2012 (C-132/11) 576
- Überseering [2002] ECR I-9919 (C-208/00) 889
- Uecker and Jacquet [1997] ECR I-3171 (C-64/96 & C-65/96) 491–2, 856
- Umweltanwalt von Kärnten v Kärntner Landesregierung [2009] ECR I-11525 (C-205/08) 172–3, 214
- Unibet v Justitiekanslern [2007] ECR I-2271 (C-432/05) 301–3, 308
- Unifrex v Commission and Council [1984] ECR 1969 (281/82) 463
- Unilever Italia SpA v Central Food SpA [2000] ECR I-7535 (C-443/98) 315
- Unión General de Trabajadores de La Rioja [2008] ECR I-6747 (C-428/06–434/06) 1065
- Union Syndicale [1974] ECR 917 (175/73) 253
- United Brands [1978] ECR 207 (27/76) 1032, 1033, 1035–6
- United Kingdom v Council [1996] ECR I-5755 (C-84/94) 397
- United Kingdom v Council, OJ 2009, C 32/15 (C-482/08) 139
- United Kingdom v Council (Schengen) [2007] ECR I-11459 (C-77/05) 139–40, 523, 524–5
- United Kingdom v Council (Schengen) [2007] ECR I-11593 (C-137/05) 139, 523–4
- United Kingdom v Parliament and Council (ENISA) [2006] ECR I-3771 (C-217/04) 683–4
- United Pan-Europe Communications Belgium and others [2007] ECR I-11135 (C-250/06) 253, 830
- UsedSoft paragraph 41, Judgment of 3 July 2012 (C-128/11) 687
- Usinor v Commission [1986] ECR 1777 (81/85 & 119/85) 457
- UTECA, Judgment of 5 March 2009 (C-222/07) 829
- VALE, Judgment of 22 July 2012 (C-378/10) 887
- Valeri Hariev Belov v ChEZ Elektro Bulgaria AD and others, Judgment of 31 January 2013 (C-394/11) 575, 577
- Van Ameyde [1997] ECR 1091 (90/76) 815
- Van Binsbergen [1974] ECR 1299 (33/74) 803, 808, 822, 823, 826, 827, 897
- Van de Haar [1984] ECR 1797 (177/82 & 178/82) 765
- Van den Bergh en Jurgens v Commission [1987] ECR 1155 (265/85) 442

- Van der Laan [1999] ECR I-731 (C-383/97) 757
- Van der Weerd v Minister van Landbouw, Natuur en Voedselkwaliteit [2007] ECR I-4233 (C-222/05–225/05) 303
- Van Duyn [1974] ECR 1337 (41/74) 309–10, 509, 899, 904, 935
- Van Eick v Commission [1968] ECR 329 (35/67) 251
- Van Esbroeck [2006] ECR I-2333 (C-436/04) 654
- Van Gend en Loos v Nederlandse Administratie der Belastingen [1963] ECR I (26/62) 199, 201, 202, 203, 204, 217, 222–3, 293–4, 296
- Van Parys v BIRB [2005] ECR I-1465 (C-377/02) 439
- Van Schaik [1994] ECR I-4837 (C-55/93) 802, 896
- Van Straaten [2006] ECR I-9327 (C-150/05) 654, 655
- Van Tiggele [1978] ECR 25 (82/77) 823
- Van Vlaamse [1987] ECR 3801 (311/85) 768
- Vanbraekel [2001] ECR I-5363 (C-368/98) 836
- Vandorou [2010] ECR I-12411 (C-422/09) 868
- Vaneetveld v Le Foyer [1994] ECR I-763 (C-316/93) 313
- Variola v Amministrazione delle Finanze [1973] ECR 981 (34/73) 112
- Varzim Sol, Judgment of 16 February 2012 (C-25/11) 185
- Vassallo v Azienda Ospedaliera Ospedale San Martino di Genova e Cliniche Universitarie Convenzionate [2006] ECR I-725 (C-180/04) 352, 312
- Vatsouras v Arbeitsgemeinschaft Nürnberg, Judgment of 4 June 2009 (C-22/08) 488–9, 491
- VEBIC [2010] ECR I-12471 (C-439/08) 987–8
- Vent de Colère and others (C-262/12) 1060
- Verein für Konsumenteninformation v Commission [2005] ECR II-1121 (T-2/03) 414
- Vereniging van Exporteurs in Levende Varkens v Commission [1995] ECR II-2941 (T-481/93 & 484/93) 460
- Verkooijen [2000] ECR I-4071 (C-35/98) 899
- Viacom Outdoor [2005] ECR I-1106 (C-134/03) 810–11
- Viho Europe BV [1996] ECR I-5457 (C-73/95P) 999, 1000
- Vischim v Commission, Judgment of 7 October 2009 (T-420/05) 438, 451, 457
- Vlaamse Dierenartsenvereniging and Janssens [2011] ECR I-2975 (C-42/10, C-45/10 & C-57/10) 166
- Vlassopoulou [1991] ECR I-2357 (C-340/89) 866–8, 869
- Vodafone [2010] ECR I-4999 (C-58/08) 682, 683
- Völk v Vervaecke [1969] ECR 295 (5/69) 1002
- Volksbank Romania, Judgment of 12 July 2012 (C-602/10) 805, 813
- Volkswagen AG v Commission [2000] ECR II-2707 (62/98) 1015
- Volkswagen AG v Commission [2003] ECR I-9189 (C-338/00P) 1015
- Volkswagen AG v Commission [2003] ERC II-541 (T-208/01) 1017
- Von Colson and Kamann v Land Nordrhein-Westfalen [1984] ECR 1891 (14/83) 301, 316–17
- Voogd Vleesimport en-export [1994] ECR I-4915 (C-151/93) 193
- Wachauf v Germany [1989] ECR 2609 (5/88) 280–2
- Wafer Zoo v Commission [1995] ECR II-1479 (T-478/93) 464
- Wagner-Miret v Fondo de Garantía Salarial [1993] ECR I-6911 (C-334/92) 320–1
- Walloon/Belgian Waste (C-2/90) [1992] ECR I-4431 900, 929
- Walrave and Koch [1974] ECR 1405 (36/74) 814, 818–19
- Walt Wilhelm v Bundeskartellamt [1969] ECR I (14/68) 978
- Watson and Belmann [1976] ECR 1185 (118/75) 508
- Watts [2006] ECR I-4325 (C-372/04) 835, 836, 837, 838, 839, 923
- Webb [1981] ECR 3305 (279/80) 821
- Weber's Wine World [2003] ECR I-11365 (C-147/01) 306
- Weiss v Industrie- und Handelskammer Berlin [2008] ECR I-3367 (C-14/07) 254
- Wells (R v Secretary of State for Transport, Local Government and the Regions, ex parte Wells) [2004] ECR I-723 (C-201/02) 313, 314
- Werner [1995] ECR I-3189 (C-70/94) 210–11
- Wielockx [1995] ECR I-2493 (C-80/94) 900
- Willame v Commission [1965] ECR 649 (110/63) 463
- Williams v Commission [2008] ECR II-156 (T-42/05) 414
- Wilson [2006] ECR I-8613 (C-506/04) 171, 830, 860
- Windpark Groothusen v Commission [1998] ECR I-2873 (C-48/96P) 433
- Winner Wetten v Bürgermeisterin der Stadt Bergheim [2010] ECR I-8015 (C-409/06) 202–3, 265
- Wirth [1993] ECR I-6447 (C-109/92) 807, 808
- Wöhrmann v Commission [1962] ECR 506 (31/62 & 33/62) 457
- Wolf [1998] ECR 3897 (154/87 & 155/87) 866
- Wolf [2010] ECR I-1 (C-229/08) 603
- Wolff [2004] ECR I-9553 (C-60/03) 898
- Wolfgang Heiser v Finanzamt Innsbruck [2005] ECR I-1627 (C-172/03) 1064, 1069–70
- Wolzenburg, [2009] ECR I-9621 (C-123/08) 482, 491, 649–51
- Woningstichting Sint Servatius, Judgment of 1 October 2009 (C-567/09) 924
- Wood [2008] ECR I-4143 (C-164/07) 482
- Wood Pulp [1993] ECR I-1307 (89/85, 114/85, 116/85, 117/85 & 125/85–129/85) 1013–14, 1013
- Wouters [2002] ECR I-1577 (C-309/99) 897, 999, 1004, 1008
- WWF v Autonome Provinz Bozen [1999] ECR I-5613 (C-435/97) 165

- WWF European Policy Programme [2007] ECR II-911 (T-264/04) 417
- X and Y [2002] ECR I-10829 (C-436/00) 899
- X, Y and Z, Judgment of 7 November 2013 (C-199/12, C-200/12 & C-201/12) 538–9
- Xunta de Galicia [2005] ECR I-7419 (C-71/04) 307
- Y and Z, Judgment of 5 September 2012 (C-71/11 & C-99/1) 564–5
- Yellow Cab [2010] ECR I-13927 (C-338/09) 863
- Ymeraga, Judgment of 8 May 2013 (C-87/12) 494
- Zablocka, Judgment of 4 December 2008 (C-221/07) 484
- Zakaria, Judgment of 17 January 2013 (C-23/12) 535
- Zambrano [2011] ECR I-1177 (C-34/09) 499–501
- Zanotti [2010] ECR I-4517 (C-56/09) 807, 808
- Zenatti [1999] ECR I-7289 (C-67/98) 827, 918, 934
- Zeturf [2011] ECR I-5633 (C-212/08) 901, 905–6
- Zhu and Chen [2004] ECR I-9925 (C-200/02) 427, 480, 503
- Ziegler v Commission, Judgment of 11 July 2013 (C-439/11) 438
- Ziolkowski and Szeja v Land Berlin, Judgment of 21 December 2011 (C-424/10 & C-425/10) 477
- Züchner v Bayerische Vereinsbank [1981] ECR 2021 (172/80) 1013
- Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest [1991] ECR I-415 (143/88 & C-92/89) 307
- Zurita García v Delegado del Gobierno en la Región de Murcia, Judgment of 22 October 2009 (C-261/08 & C-348/08) 545
- Zwartveld [1990] ECR I-3365 (2/88) 213
- ZZ v Secretary of State for the Home Department, Judgment of 4 June 2013 (C-300/11) 301
- ZZ v Secretary of State for the Home Department, Judgment of 4 June 2013 (C-300/11) 435, 436

European Court of Justice: Opinions

- Opinion 1/75 Re Understanding on a Local Costs Standard [1975] ECR 1355 210–11
- Opinion 1/91 Re European Economic Area [1991] ECR I-6079 231
- Opinion 2/94 Re Accession of the Community to the ECHR [1996] ECR I-1759 429
- Opinion 1/09 on a European and Community Patents 8 Court [2011] ECR I-1137 206–8
- Opinion 2/13 Accession to the European Convention on Human Rights [2013] OJ C260/19 289

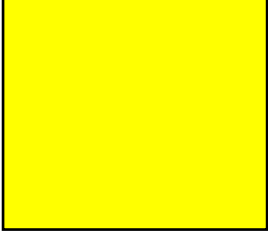


Table of Treaties, Instruments and Legislation

Treaties and Analogous Instruments

Acts of Accession 3

Austria 30–1
 Bulgaria 31
 Croatia 31, 44
 Czech Republic, Estonia, Cyprus, Latvia, Lithuania,
 Hungary, Malta, Poland, Slovenia and
 Slovakia 31

Protocol 7 on abortion in Malta 228

Denmark 20
 Finland 30–1
 Greece 20
 Iceland 30
 Ireland 20
 Malta 287
 Norway 30–1
 Portugal 20
 Romania 20
 Spain 20
 Sweden 30–1
 United Kingdom 20

Amsterdam Treaty 2, 35, 135, 281–2

Declaration 29: on sport 815

Association Agreement (EEC–Turkey) (1963) 32

Decision 1/80 of the EC–Turkey Association
 Council 537

Basel Agreement (1972) 707

Community Charter of Fundamental Social Rights of
 Workers 253–4, 277

Constitutional Treaty (CT) 3, 220, 255

Part I, Title I (definition and objectives of the
 Union)
 Art. I–3–2 955

Part I, Title III (Union competences)

Art. I–13 216

Part II (Charter of Fundamental Rights) 255

Part II, Title IV (solidarity)

Art. II–94 257

Constitutional Treaty (draft) (DCT)

Art. 23(1) 82

Convention Relating to Certain Institutions Common
 to the European Communities 18

Treaty establishing the European Stability
 Mechanism signed on 2 February 2012
 (ESM) 720, 722, 738

Art. 3 720

Art. 4(3) 740

Art. 4(5) 741

Art. 4(7) 741

Art. 5(1) 740

Art. 5(3) 740

Art. 9 741

Art. 10 741

Art. 13(1) 720, 741

Art. 13(3) and (4) 720

Art. 18(2) 741

Art. 37(2) 744

Art. 37(3) 744

Treaty on Stability, Coordination and Governance
 in the Economic and Monetary Union (TSCG)
 [2012] OJ C219/95 717, 722

Art. 3(1) 719

Art. 3(2) 719

Art. 3(3)(a) 719

Art. 7 751

Declarations Annexed to the Lisbon Treaty Final Act

17 on primacy 200, 216

41 on Art. 352 TFEU 240

Declaration by the Czech Republic on the Charter of
 Fundamental Rights of Art. 1 TEU 287

Declarations in Connection with the Lisbon Treaty

- Draft revised agreement on the accession of the
European Union to the Convention for the
Protection of Human Rights and Fundamental
Freedoms 289
- EC TREATY (CONSOLIDATED) 206, 302, 683
- Art. 2 855, 928, 954–5
Art. 3(1)(g) 686, 687
Art. 3(1)(p) 928
Art. 6 929
Art. 13 573
Art. 28 925
Arts. 28–30 954
Art. 30 928
Art. 45 937–8, 939–40
Art. 55 937–8
Art. 93 109
Art. 81 957
Art. 81(1) 954, 1024–5
Art. 82 957, 1044
Art. 85 1042
Art. 86 1042
Art. 87(1) 1063
Art. 95 687
Art. 152(1) 929
Art. 173 (ex-Art. 220) 206
Art. 174(1) 929
- ECSC TREATY (TREATY OF PARIS) 12
- Art. 65 943
Art. 66 943
- EEC TREATY (TREATY OF ROME) 13–14, 17, 19,
201, 251, 325–6
- Art. 177 172, 184–5
Arts. 31–2 759
- EFTA (1960) 20, 30–1
- EURATOM (TREATY OF ROME) 13
- EUROPEAN CHARTER OF FUNDAMENTAL
RIGHTS (EUCFR) (2000) 3, 37, 42, 220,
247–8, 249, 250, 254–8, 272, 276,
576, 744
- Title IV 44, 260, 288
- Arts. 1–5 255
Art. 4 271, 272
Art. 5 257
Arts. 6–19 255
Art. 7 262–3, 264, 538
Art. 9 258
Art. 10 564
Art. 14(3) 258
Art. 18 271, 537
Arts. 20–26 255
Art. 21 538, 576
Art. 23 258, 576
Art. 24 264, 542
- Art. 24(2) 264
Art. 24(3) 264
Art. 27 258
Arts. 27–38 256
Art. 28 258
Art. 29 257
Art. 30 258
Art. 34 258
Art. 34(3) 257
Art. 35 258
Art. 37 258
Art. 38 677
Arts. 39–46 256
Art. 41 368, 437
Art. 41(1) 437
Art. 41(2) 434
Arts. 47–50 256
Art. 47 254, 300–1, 302, 303, 304, 434, 435,
643, 644, 975
Art. 48 526, 643
Art. 48(2) 644
Art. 49 258
Art. 51 260, 280, 283
Art. 51(1) 256, 280, 282, 283, 284, 286
Art. 51(2) 275, 283, 434
Art. 52 260, 526
Art. 52(3) 259, 260, 262, 263
Art. 52(4) 259, 260, 265
Art. 52(5) 258
Art. 52(7) 261, 283
Art. 53 202–3, 259, 260
- EUROPEAN CONVENTION ON HUMAN RIGHTS
(ECHR) 42, 206, 220, 227, 247–50, 264,
271, 272, 279–80, 281, 285, 288, 289–90,
576, 577, 586
- Title VII 249, 254, 256–7, 262, 266
- Art. 3 272, 543
Art. 4 543
Art. 6 178, 302, 643, 994
Art. 6(1) 644, 973, 974
Art. 6(3) 644
Art. 7(1) 648
Art. 8 262–3, 279, 538, 553
Art. 8(1) 263
Art. 8(2) 961
Art. 9 586
Art. 10(1) 273, 280–1, 772
Art. 11 772
Art. 13 178, 302
Art. 14 263
Art. 15(1) 289
Art. 21(1) 322
- EUROPEAN DEFENCE COMMUNITY TREATY
(EDC) 12–13
- European Patent Convention 173–4

EUROPEAN SOCIAL CHARTER

European Stability Mechanism Treaty (ESM Treaty) 61–2, 76, 142, 143

Art. 4(4) 61

Art. 5(3) 61

Art. 6(2) 61

Art. 9(6)(f) 76

Art. 12(1) 76

Art. 13(1) 61

Art. 13(3) 61, 62, 76

Art. 13(4) 62, 76

Art. 13(7) 61, 76

GENEVA CONVENTION RELATING TO THE STATUS OF REFUGEES (1951) AND PROTOCOL (1967) 271, 272

Art. 33(1) 537

Art. 33(2) 537

Hague Convention 1980 263

International Covenant on Civil and Political Rights (ICCPR) 253

LISBON TREATY ON EUROPEAN UNION (GENERAL INCLUDING TEU AND TFEU) 3, 39–46, 58–9, 63, 68, 71, 92, 108, 112

LISBON TREATY ON EUROPEAN UNION (TEU) 31, 40, 634, 636–7, 743

Preamble, 4

TEU Title I (common provisions)

Art. 1 24, 109

Art. 1(2) 40

Art. 2 42, 249, 281–2, 521

Art. 3 248, 267, 521, 711

Art. 3(3) 955

Art. 3(4) 707

Art. 4 178, 194, 631

Art. 4(1) 50, 143

Art. 4(2) 43, 224, 230, 235, 236, 238–9, 626, 627, 629

Art. 4(3) 200, 201–2, 213, 236, 282, 283, 299, 316–7, 321, 324, 329, 355, 770, 771, 867, 1059–60,

Art. 5 393, 678

Art. 5(1) 230

Art. 5(2) 50, 143, 230

Art. 5(3) 393, 395

Art. 6 30, 169, 247–8, 249, 255, 275, 281–2, 645, 648

Art. 6(1) 230, 249, 250, 283, 322–3

Art. 6(2) 249, 273, 288, 289

Art. 6(3) 230, 249

Art. 7(3) 89

TEU Title II (provisions on democratic principles)

Art. 9 43

Art. 10(1) 43, 127

Art. 10(2) 127

Art. 11 406

Art. 11(1) 406

Art. 11(4) 73, 389–90

Art. 12 128

Art. 12(b) 636

Art. 12(f) 134–5

TEU Title III (provisions on the institutions)

Art. 13 159

Art. 13(1) 59, 62

Art. 13(2) 60, 61

Art. 14(1) 98–9

Art. 14(2) 89–90, 94

Art. 14(3) 94

Art. 15(1) 426, 88, 90–1

Art. 15(2) 74–5, 91

Art. 15(5) 91

Art. 15(6) 91

Art. 15(6)(d) 93, 103

Art. 16(1) 80

Art. 16(2) 81

Art. 16(3) 138

Art. 16(4) 84

Art. 16(6) 80–1, 81, 91

Art. 16(7) 87

Art. 16(8) 419

Art. 17(1) 62, 67

Art. 17(3) 63

Art. 17(4) 63, 74–5

Art. 17(5) 63, 89–90

Art. 17(6) 64–5

Art. 17(7) 64–5, 101

Art. 17(8) 74–5, 102

Art. 18(1) 74–5

Art. 18(2) 63, 74–5

Art. 18(3) 74–5

Art. 18(4) 74–5

Art. 19 678

Art. 19(1) 127, 158, 160, 164, 207, 297, 299

Art. 19(2) 89–90, 158, 161

TEU Title IV (enhanced cooperation)

Art. 20(1) 135, 136

Art. 20(2) 136

Art. 20(3) 138

Art. 20(4) 138

TEU Title V (external action), Chapter 1 (provisions on the common foreign and security policy), Section 1 (general provisions)

Art. 22 90

TEU Title V, Chapter 2 (specific provisions on CFSP), Section 1 (common provisions)

Art. 24(1) 115, 160

Art. 26 90

Art. 26(2) 80–1

Art. 27(2) 74–5

Art. 27(3) 74–5

Art. 30(1) 72

Art. 31(2) 90, 240

Art. 32 90

Art. 33 240

Art. 34 770

Art. 34(2) 625, 634
 Art. 35(1) 634
 Art. 35(2)(a) 634
 Art. 35(2)(b) 634
 Art. 36 103
 Art. 39 625
 Art. 40 160
 TEU Title VI (final provisions)
 Art. 48(2)–(4) 89
 Art. 48(3) 82, 127
 Art. 48(6) 49, 89
 Art. 48(7) 89, 127, 240
 Art. 49 74–5, 89

LISBON TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION (TFEU) 3, 40, 51–2, 743

Part One, Principles

Art. 1(2) 109

TFEU Part One, Title I (categories and areas of Union competence)

Art. 2(1) 210
 Art. 2(3) 49, 142
 Art. 3 210, 240–1
 Art. 3(1) 41
 Art. 3(1)(b) 955, 1047
 Art. 4(1) 41
 Art. 4(2) 211
 Art. 4(2)(a)
 Art. 4(3) 212–3
 Art. 4(4) 212–3
 Art. 5(1) 41, 49, 142
 Art. 6 42

TFEU Part One, Title II (provisions having general application)

Art. 7 693
 Art. 8 618
 Arts. 8–12 693
 Art. 10 439, 618
 Art. 11 927
 Art. 15(3) 412, 413

TFEU Part Two (non-discrimination and citizenship of the Union)

Art. 18 201–2, 593
 Art. 19 439, 573, 576, 582, 585, 587, 590, 593, 615
 Art. 19(1) 573
 Art. 19(2) 573
 Art. 20(2)(a) 263
 Art. 20(2)(d) 102
 Art. 21 576
 Art. 21(1) 263
 Art. 22 576
 Art. 24 67
 Art. 24(1) 389–90

Part Three, Union policies and internal actions, 89

TFEU Part Three, Title I (the internal market)

Art. 26 521, 670–1, 677, 686

Part Three, Title II (free movement of goods), Chapter 1 (the customs union)

Art. 28 293–4, 917
 Art. 30 670, 673

Part Three, Title II (free movement of goods), Chapter 2 (customs cooperation)

Art. 33(2)(a) 909

TFEU Part Three, Title II (free movement of goods), Chapter 3 (prohibition of quantitative restrictions)

Art. 34 214, 330, 671, 672, 761–73, 775, 783, 786, 788, 789–90, 791, 792–3, 861, 927, 928
 Art. 35 771, 794–6, 857
 Art. 36 756–9, 779, 894, 902, 911, 912, 915, 926, 928, 931, 693

TFEU Part Three, Title III (agriculture and fisheries)

Art. 39(1)(b) 909
 Art. 40(2) 440
 Art. 42 1003

TFEU Part Three, Title IV (free movement of persons, goods and capital), Chapter 1 (workers)

Art. 45 814, 816, 848, 849–59, 860–2, 863–4, 866, 877, 878, 879–83
 Art. 45(2) 876, 877
 Art. 45(3) 895
 Art. 45(3)(d) 67–8
 Art. 45(4) 895
 Art. 46(2) 22
 Art. 48 90
 Art. 48(2) 240

TFEU Part Three, Title IV (free movement of persons, goods and capital), Chapter 2 (right of establishment)

Art. 49 330, 818, 827, 848, 850–9, 861–2, 865, 866, 867, 869, 877, 879–83, 884, 885–9
 Art. 50(3)(g) 888
 Art. 51 895
 Art. 52 280–1
 Art. 52(1) 895
 Art. 53 678, 679
 Art. 54 808, 858, 883–9
 Art. 54(3)(g) 886

TFEU Part Three, Title IV (free movement of persons, goods and capital), Chapter 3 (services)

Art. 56 265, 284, 285, 301, 798–9, 800, 802–18, 816, 821, 826, 827, 830–7, 851, 911, 925
 Art. 57 790, 802, 803, 814, 805, 822, 808
 Art. 59 814
 Art. 61 802, 814
 Art. 62 280–1, 281, 678, 679, 808, 895

TFEU Part Three, Title IV (free movement of persons, goods and capital), Chapter 4 (capital and payments)

Art. 63 678, 924

- Art. 63(1) 710
- Art. 65 710, 894
- Art. 65(1) 894–5
- TFEU Part Three, Title V (freedom, security and justice), Chapter 1 (general provisions)
 - Art. 67 524–5
 - Art. 67(1) 29, 524–5, 537
 - Art. 68 90–1
 - Art. 69 636
 - Art. 71 532, 629
 - Art. 72 528, 626, 631
 - Art. 73 629
 - Art. 76 635
- TFEU Part Three, Title V (freedom, security and justice), Chapter 2 (border checks, asylum and immigration)
 - Art. 77(1) 520
 - Art. 77(2) 140
 - Art. 77(3) 520
 - Art. 77(4) 528
 - Arts. 77–9 517, 519, 521
 - Art. 78 271
 - Art. 78(1) 520, 537
 - Art. 78(3) 520
 - Art. 79(1) 520
 - Art. 79(5) 527
- TFEU Part Three, Title V (freedom, security and justice), Chapter 3 (judicial cooperation in civil matters)
 - Art. 80(1) 539
 - Art. 81(3) 240
- TFEU Part Three, Title V (freedom, security and justice), Chapter 4 (judicial cooperation in criminal matters)
 - Art. 82 625
 - Art. 82(1) 638
 - Art. 82(2) 211–2
 - Art. 82(2)(c) 661
 - Art. 82(2)(d) 127 626
 - Art. 82(3) 90, 240, 635
 - Art. 83 625, 655
 - Art. 83(1) 240, 656, 657, 658, 626
 - Art. 83(2) 656, 661
 - Art. 83(3) 90, 240, 635, 636, 656
 - Art. 86(1) 127, 626
 - Art. 86(3) 626
 - Art. 86(4) 127, 240, 626
 - Art. 87 626
 - Art. 87(3) 635
- TFEU Part Three, Title V (freedom, security and justice), Chapter 5 (police cooperation)
 - Art. 89 626
- TFEU Part Three, Title VII (common rules on competition, taxation and approximation of laws), Chapter 1 (rules applying to competition) Section 1 (rules applying to undertakings)
 - Art. 101 307, 942, 959, 961, 965, 966, 969, 982–4, 987, 988, 991, 972, 993, 997–1031, 1006–7
 - Art. 101(1) 982, 989, 980, 1003–6, 1009–11, 1014, 1016–7, 1018, 1019, 1021, 1022–3, 1025
 - Art. 101(3) 980, 982, 989, 949, 1003, 1006, 1015, 1022–3, 1024, 1025–31
 - Art. 102 942, 961, 965, 966, 980, 982–4, 987, 989, 972, 993, 997, 1017, 1026, 1031–49
 - Art. 102(1)(c) 1048
 - Art. 106(2) 1003
 - Art. 106(3) 67–8, 75, 369
 - Art. 107 676–7, 1054, 1059–60, 1075
 - Art. 107(1) 1053, 1057–60, 1069
 - Art. 107(2) 1053, 1076–7
 - Art. 107(3) 1053, 1068, 1076–7
 - Art. 107(3)(a) 1077
 - Art. 107(3)(b) 1077, 1082
- TFEU Part Three, Title VII (common rules on competition, taxation and approximation of laws), Chapter 1 (rules applying to competition), Section 2 (aids granted by States)
 - Art. 108 1053, 1058, 1059
 - Art. 108(2) 75, 353, 1071
 - Art. 108(3) 1057, 1071, 1074, 1075
- TFEU Part Three, Title VII (common rules on competition, taxation and approximation of laws), Chapter 2 (tax provisions)
 - Art. 110 673
 - Art. 113 109–10, 257
- TFEU Part Three, Title VII (common rules on competition, taxation and approximation of laws), Chapter 3 (approximation of laws)
 - Art. 114 108–10, 661, 668, 677–81, 682–3, 684–6, 687, 692–3
 - Art. 114(1) 678
 - Art. 114(2) 110
 - Art. 114(3) 678
 - Art. 114(5) 694
 - Art. 115 143, 257, 677
 - Art. 118 397
- TFEU Part Three, Title VIII (economic and monetary policy), Chapter 1 (economic policy)
 - Art. 119 711
 - Art. 119(1) 709
 - Art. 119(2) 712
 - Art. 120 711, 712
 - Art. 121 80–1, 746, 748
 - Art. 121(1) 712
 - Art. 121(2) 115, 711
 - Art. 121(4) 747
 - Art. 122(2) 142, 143
 - Art. 123 49
 - Arts. 123–126 737

- Art. 123(1) 728, 737
 Art. 125 49, 722–3
 Art. 125(1) 722
 Art. 126(1) 711
 Art. 126(2) 711
 Art. 126(3) 749
 Art. 126(5) 749
 Art. 126(6) 80–1, 749
 Art. 126(7) 749
 Art. 126(8) 749
 Art. 126(11) 80–1
 TFEU Part Three, Title VIII (economic and monetary policy), Chapter 2 (monetary policy)
 Art. 127 731
 Art. 127(1) 737
 Art. 127(2) 731
 Art. 127(6) 724, 733
 Art. 128 710
 Art. 128(1) 731
 Art. 128(3) 712
 Art. 129(1) 725
 Art. 130 727, 737
 TFEU Part Three, Title VIII (economic and monetary policy), Chapter 4 (provisions specific to Member States whose currency is the euro)
 Art. 136 737
 Art. 136(2) 714
 Art. 136(3) 49, 50, 142–3
 Art. 137 140, 714
 Art. 138(1) 732
 TFEU Part Three, Title VIII (economic and monetary policy), Chapter 5 (transitional arrangements)
 Art. 139(1) 713
 Art. 139(2) 713
 Art. 140 713
 TFEU Part Three, Title IX (employment)
 Art. 148 90–1, 746
 Art. 148(2) 115
 TFEU Part Three, Title X (social policy)
 Art. 153 240, 572, 573
 Art. 153(2)(b) 211–2
 Art. 157 295–8, 571–2, 579, 580–1, 583, 584, 578, 615
 Art. 157(1) 295, 580–1
 Art. 157(4) 614
 TFEU Part Three, Title XII (education, vocational training and sport)
 Art. 165(4) 115
 Art. 166(5) 110–11, 115
 TFEU Part Three, Title XIV (public health)
 Art. 168 678, 930
 Art. 168(4) 115
 Art. 168(4)(a) 211–2
 Art. 168(5) 115, 680
 Art. 168(7) 612
 TFEU Part Three, Title XV (consumer protection)
 Art. 169 211–2
 TFEU Part Three, Title XVII (industry)
 Art. 173(3) 110–11, 115
 TFEU Part Three, Title XIX (research and technological development and space)
 Art. 189(2) 115
 TFEU Part Three, Title XX (environment)
 Art. 191 930
 Art. 192(2) 110, 240
 Art. 193 211–2
 Part Three, Title XXII (tourism)
 Art. 195(2) 115
 Part Three, Title XXIII (civil protection)
 Art. 196(2) 115
 Part Three, Title XXIV (Administrative cooperation)
 Art. 197(2) 115
 TFEU Part Five, Title V (international agreements)
 Art. 216(2) 112, 205
 Art. 218(6)(a) 127
 Art. 218(11) 160, 206
 Art. 219 712
 Art. 219(1) 732
 Art. 219(2) 732
 Part Six, Title I, Chapter 1 (the institutions), Section 1 (European Parliament)
 Art. 225 101
 Art. 227 102
 Art. 228 103
 Art. 228(1) 101
 Art. 228(2) 101
 Art. 230 103
 Art. 234 102
 TFEU Part Six, Title I, Chapter 1 (the institutions), Section 2 (European Council)
 Art. 235(3) 82
 Art. 235(4) 87
 Part Six, Title I, Chapter 1 (the institutions), Section 3 (Council)
 Art. 238(3) 84
 Art. 240 532
 Art. 240(1) 87
 Art. 240(2) 87
 Art. 240(3) 82
 Art. 241 82
 Part Six, Title I, Chapter 1 (the institutions), Section 4 (Commission)
 Art. 245 63
 Art. 249 103
 TFEU Part Six, Title I, Chapter 1 (the institutions), Section 5 (European Court of Justice)
 Art. 251 159–60
 Art. 252 159
 Art. 253 158
 Art. 253(3) 158

- Art. 255 158
 Art. 256(1) 161, 162, 452
 Art. 256(3) 162
 Art. 257 163
 Art. 258 75, 160, 337–8, 339, 340, 341, 343, 344, 346, 348, 356–7, 359, 361, 363, 368, 369
 Art. 259 160, 339
 Art. 260 160, 371, 374–7
 Art. 260(2) 75, 338, 372, 373–4, 375
 Art. 260(3) 372, 376, 377
 Art. 261 975
 Art. 262 161
 Art. 263 80–1, 93, 101, 173, 178, 182, 425–8, 443–5, 454, 456, 457, 458, 974, 975
 Art. 263(1) 426, 443, 732
 Art. 263(2) 160, 443
 Art. 263(4) 444, 452, 732
 Art. 263(5) 178–9
 Art. 264 464–5
 Art. 264 (1) 465
 Art. 264 (2) 465
 Art. 265 80–1, 93, 101, 173, 455–7
 Art. 265(1) 160
 Art. 267 16–17, 156–7, 160, 165–6, 167, 168–9, 171, 172–3, 174, 175, 177–8, 180, 181, 182, 183–4, 193, 194, 207, 214, 227, 230, 309, 333, 334
 Art. 267(2) 188
 Art. 267(3) 186–7, 188, 190, 191, 334
 Art. 267(4) 196
 Art. 268 178, 182
 Art. 269 160
 Art. 271 732
 Art. 274 164, 165
 Art. 276 160
 Art. 277 457, 458
 TFEU Part Six, Title I, Chapter 1 (the institutions), Section 6 (European Central Bank)
 Art. 282 731
 Art. 282(2) 62
 Art. 283(1) 725
 Art. 283(2) 727
 Art. 284(1) 728
 Art. 284(2) 728
 Art. 284(3) 103, 728
 TFEU Part Six, Title I, Chapter 1 (the institutions), Section 7 (Court of Auditors)
 Art. 287(1) 103
 Art. 287(3) 103
 Art. 287(4) 103
 Part Six, Title I, Chapter 2, Section 1 (legal acts of the Union)
 Art. 288 111–12, 114, 202, 309–10, 311, 318, 324, 327–8, 329
 Art. 289 108, 114
 Art. 289(3) 114, 445
 Art. 290(1) 68, 114
 Art. 290(2) 71
 Art. 290(3) 114
 Art. 291(2) 68
 Art. 291(4) 114
 TFEU Part Six, Title I, Chapter 2, Section 2 (procedures for the adoption of acts)
 Art. 293(1) 119, 125
 Art. 294 106–19
 Art. 296 434, 435
 Art. 296(2) 408
 Art. 297 308
 Part Six, Title I, Chapter 4 (European Investment Bank)
 Art. 308 240
 Part Six, Title II (financial provisions), Chapter 1 (own resources)
 Art. 311 127
 TFEU Part Six, Title II (financial provisions), Chapter 2 (multiannual financial framework)
 Art. 312 127
 Art. 312(1) 103
 Art. 312(2) 103, 240
 Part Six, Title II (financial provisions), Chapter 3 (annual budget)
 Art. 314 103
 Art. 314(2) 72
 Part Six, Title II (financial provisions), Chapter 4 (implementation of budget and discharge)
 Art. 319(1) 103
 Part Six, Title II (financial provisions), Chapter 6 (combating fraud)
 Art. 325 282, 283, 284
 TFEU Part Six, Title III (enhanced cooperation)
 Arts. 326–34 135
 Art. 326 135–6
 Art. 327 136
 Art. 328 135
 Art. 329 135
 Art. 329(1) 138
 Art. 329(2) 137
 Art. 330 138
 Art. 331 138
 Art. 332
 TFEU Part Seven (general and final provisions)
 Art. 340 329, 330
 Art. 340(2) 458–61
 Art. 345 397
 Art. 346 1003
 Art. 352 89, 110, 127, 142, 212, 240–2, 428, 687
 Art. 352(1) 240
 Lisbon Treaty Protocol on Transitional Provisions
 Art. 3(2) 84–5
 Art. 3(3) 82

MAASTRICHT TREATY/TREATY ON EUROPEAN UNION (TEU) 2, 3, 24–9
 MERGER TREATY (1965) 18
 NICE TREATY (2001) 3, 36, 74

Declaration 23 on the future of the Union, 36
 Declaration of the European Council noting that nothing in the TEU affected Irish military neutrality, 36
 Oporto Treaty (EEA) 30–1

Protocols Annexed to the EC Treaty

20: Excessive Deficit Procedure (EDP)
 Art. 1 713
 25: EMU – provisions relating to the United Kingdom 713

26: EMU – provisions relating to Denmark 713
 29: asylum for nationals of Member States of EU 556

Protocols Annexed to the Lisbon Treaty

1 on the role of national parliaments in the EU
 Art. 2 130
 Art. 10 134–5
 2 on the application of the principles of subsidiarity and proportionality
 Art. 5 394
 Art. 6 131
 Art. 7(2) 131, 636
 Art. 7(3) 131–2
 7 Act of Accession of Malta to the European Union 2003 228
 8 on Article 6(2) TEU on the Accession of the Union to the ECHR 289
 14 on the EuroGroup, 140
 19 on the Schengen Acquis integrated into the framework of the EU 139, 140, 522, 523–4
 Art. 1 522
 Art. 4 139
 Art. 5 523
 Art. 5(1) 522
 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice 138, 521
 Arts. 1 – 4 636

Art. 1 138–9
 Art. 2 138–9
 Art. 3(1) 138–9
 Art. 3(2) 138–9
 Art. 4 138–9, 521
 22 on the position of Denmark 521, 636
 Art. 2 636
 Art. 4(1) 521, 636
 Art. 4(2) 521, 636
 Art. 4(a) 637
 27 on the internal market and competition 686
 30 on the application of the Charter of Fundamental Rights to Poland and the United Kingdom
 Art. 1(1) 287–8
 Art. 1(2) 288
 Art. 2 288
 36 on transitional provisions
 Art. 10 Art. 10(1) 634
 Art. 10(3) 634
 Art. 10(4) 636
 Protocol on the Concerns of the Irish People on the Treaty of Lisbon [2013] OJ L 60/131 228, 287

Protocols Annexed to the TEU

Article 40.3.3 of the Constitution of Ireland (abortion) 28

Protocols Annexed to the TEU, EC, ECSC and Euratom Treaties

9 role of national parliaments in the EU 128, 129

Protocols Annexed to the TEU and EC Treaty

- Prüm Convention 142
- Schengen I (1985) 29–30, 139, 521
- Schengen II (1990) (Implementing Agreement) (SIA) 29–30, 34–5, 139, 521
 - Art. 2 522
 - Arts. 3–8 522
 - Arts. 9–18 522
 - Arts. 19–27 522
 - Arts. 28–39 522
- Single European Act (SEA) (1986) 2, 23–24, 26, 30
 - Art. 2 22
 - Art. 3 94
- Statute of the Court of Justice (Protocol 11)
 - Art. 20 182, 190
 - Art. 21 182
 - Art. 51 160
 - Art. 54 651–3
 - Art. 56 162
 - Art. 61 162–3
- Statute of the ESCB and ECB (Protocol 18)
 - Art. 7 727
 - Art. 9.1 727
 - Art. 10.2 726
 - Art. 10.2 728
 - Art. 11.2 727
 - Art. 11.3 727
 - Art. 12.1 725, 732
 - Art. 12.2 726
 - Art. 13 726
 - Art. 14.3 732
 - Art. 14.4 732
 - Art. 15.1 728
 - Art. 15.3 728
 - Art. 19 733
 - Art. 22 733
- Art. 23 732
- Arts. 26–33 727
- Arts. 28–30 728
- Art. 35.1 732
- Art. 35.6 732
- Treaty Establishing the European Stability Mechanism (ESM Treaty) 3, 143
 - recital 1 143
- Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG, Fiscal Compact) 3, 141–2
 - Art. 2(2) 141–2
 - Art. 15 141–2
 - Art. 16 141–2
- UN Charter
 - Chapter VII 206
- UN Convention on the Rights of the Child
- Unified Patent Court Agreement [2013] OJ C 175/1 164, 173
- UN Convention on the Rights of Persons with Disabilities (UNCPRD) 587, 588
 - Art. 1 588
 - Art. 2 589
 - Art. 6(1) 173
 - Art. 7 173
 - Art. 8(1) 173
 - Art. 9(1) 173
 - Art. 20 164, 173–4
 - Art. 21 164, 174
 - Art. 24 177
 - Art. 24(1) 173–4
 - Art. 32 173
 - Art. 33 173
 - Art. 73(1) 173
 - Art. 89 164
 - Annex II 173

EU Legislation and Policy Documents

COMMISSION COMMUNICATIONS

- An area of freedom, security and justice serving the citizen COM(2009)262 525
- Annual Report 2011 on Relations between the European Commission and National Parliaments, COM(2012)375 133–4
- Annual Report 2012 on Relations between the European Commission and National Parliaments COM(2013)565 133–4
- Better regulation for growth and jobs COM(2005)97 405
- A citizens' agenda – delivering results for Europe COM(2006)211 final, 128
- Commission decision to withdraw the Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services COM(2012)130 132
- Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7 1043, 1044–5
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- Development of standardisation: action for faster technical integration in Europe COM(90)456 687
- European Governance: A White Paper, COM(2001)428 78
- Entrepreneurship 2020 Action Plan COM(2012)795 526
- EU Regulatory Fitness COM(2012)476 406
- European Transparency Initiative: a framework for relations with interest representatives (Register and Code of Conduct) COM(2008)323 410–11
- Former Yugoslav Republic of Macedonia: Implementation of Reforms Within The Framework Of The High Level Accession Dialogue And Promotion of Good Neighbourly Relations, COM(2013)205 32
- Free movement of workers: achieving the full benefits and potential COM(2002)694 179
- General principles and minimum standards for consultation of interested parties by the Commission COM(2002)704 407, 410, 411
- General Programme on the removal of technical obstacles to trade [1969] OJ C76/1 687
- Green Paper on confronting demographic change: a new solidarity between the generations COM(2005)94 final 591
- Green Paper on equality and non-discrimination in an enlarged European Union COM(04)379 final 612
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- Inquiry pursuant to Article 17 of Regulation 1/2003 into the European Gas and Electricity Sectors COM(2006)851 final 1049
- Migration COM(2011)248 526
- Mutual recognition of final decisions in criminal matters COM(2000)495 638
- On the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis ('Banking Communication') [2013] OJ C216/1 1084
- On the application of Directive 2003/86/EC on the right to family reunification COM(2008)610/3 552–3
- Art. 3(1) 552
- Art 13(1) 554
- On a Community immigration policy COM(2000)757 526
- On the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States COM(2010)175 649
- On incorporating equal opportunities for women and men into all Community policies and activities COM(96)67 final 618
- Period of Reflection and Plan D COM(2006)212 38
- Preparing for the 2014 European elections: further enhancing their democratic and efficient conduct COM(2013)126 102
- Proposal for a Council Regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions COM(2012)511 140
- Pro-active Competition Policy for a Competitive Europe COM(2004)293 final 954
- Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of racial or ethnic origin COM(1999)566 585
- Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation COM(2008)426 final 614
- Proposal for a Directive on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures COM(2012)614 final 616
- Proposal for a Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union COM(2013)404 final 992–4
- Proposal for a Directive on the protection of the euro and other currencies against counterfeiting by criminal law COM(2013)42 657
- Proposal for a Directive on public procurement COM(2011)896 final 674
- Proposal for a Directive on the promotion of electricity from renewable energy sources in the internal electricity market COM(2000)279 final 928
- Roadmap towards a Banking Union COM(2012)510 721
- Recommendation 84/635 on the promotion of positive action for women [1984] OJ L331/34 583, 614
- Recommendation 92/131/EEC on the protection of the dignity of women and men at work [1992] OJ L49/1 600
- Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law [2013] OJ L201/60 994

- Regulatory Fitness and Performance (REFIT):
Results and Next Steps COM(2013)685 406
- Reinforcing economic policy coordination
COM(2010)250 745
- Reforming the Commission, COM(2000)200 78
- Report on the activities of the EURODAC Central
Unit COM(2012)533 532
- Report on the application in 2008 of Regulation
1049/2001 412
- Report on the application of the principle of
mutual recognition in the single market
COM(2002)419 final (Second Biennial) 913
- Report based on Article 10 of Framework Decision
on combating trafficking in human beings
COM(2006)187 659
- Report from the Commission on the
Working of the Committees during
2011 COM(2012)685 144
- Report on the Evaluation of the Dublin System
COM(2007)299 541
- Report on the functioning of Regulation
1/2003 COM(2009)206 final 944, 985
- Report on Greek Government debt and Deficit
Statistics COM(2010)1 47
- Report on migration and integration (third)
COM(2007)512 525
- Report on migration and integration (fourth)
COM(2013)422 525, 527
- Report on the right to vote and to stand as a
candidate in elections to the European
Parliament COM(2007)846 final 513
- Report on the right to vote and to
stand as a candidate in municipal
elections to the European Parliament
COM(2005)382 final 513
- Report to the European Parliament and Council
on the application of Directive 94/80/EC on
the right to vote and stand as a candidate in
municipal elections COM(2002)260 final 514
- Report to the Laeken European Council – services
of general interest COM(2001)598
- Report on Competition Policy 2005
SEC(2006)761 final 970
- Report on Competition Policy
2006 COM(2007)358 final 970
- Report on Competition Policy
2007 COM(2008)368 final 970
- Report on Competition Policy (Ninth) (1979)
15–16 978
- Report on Competition Policy (Thirteenth) 989
- Report on Competition Policy (Twenty-first) 966
- Roadmap towards a Banking Union
COM(2012)510 47
- Role of European Standardisation in the
Framework of European Policies and
Legislation, COM(2004)674 final 689
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restructuring measures in the financial sector
in the current crisis under the State aid rules
[2009] OJ C195/9 1083
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strategy for implementing the Community
Lisbon programme COM(2005)535 405
- Single Market Act COM(2011)206 115
- Single Market Act II: Together for New Growth
COM(2012)573 385
- Smart Regulation in the European Union
COM(2010)583 405, 406
- Staff Working Document SEC(2007)173 690–1
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Turkey's Membership Perspective,
COM(2004)656 32
- Staff Working document Accompanying
the Commission on Competition Policy
2012 SWD(2013)159 final 1073
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aid rules in the context of the financial and
economic crisis (October 2011) 1084
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State aid in the EU Member States
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2005–2009' COM(2005)107 final 1053,
1055–6
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COM(2012)0209 final 1064–5
- State Aid Scoreboard COM(2012)778 final 1055,
1072
- State of the Internal Market in Services
COM(2002)441 final 800
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the Charter of Fundamental Rights by the
European Union COM(2010)573 275–6
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COM(98)459 631
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the Application of EU Law COM(2012)714 75
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effective implementation of EU policies
through criminal law COM(2011)573 633, 657
- Towards a Horizontal Framework for Collective
Redress COM(2013)401 final 994
- Towards a job-rich recovery COM(2012)173 526
- Treatment of Impaired Assets in the Community
Banking sector [2009] OJ C72/1 1082
- White Paper on completing the single market
COM(85)310 72
- White Paper on damages actions for breach
of the EC antitrust rules COM(2008)165
992
- White Paper on European governance
COM(2001)428 381–8
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implementing Articles [101 TFEU] and
[102 TFEU] [1999] OJ C132/1 979

White Paper on productivity and enterprise – a world class competition regime Cm 5233 (2001) 989

Work Programme for 2002 for the Implementation of the Framework Strategy on Gender Equality SEC(2001)773 final 619

Work Programme 2013 COM(2012)629 72

Work Programme for 2005 for the Implementation of the Framework Strategy on Gender Equality SEC(2005)1044 620

COMMISSION DECISIONS

Dec. 70/243/EEC on the replacement of financial contributions from Member States by the Communities' own resources [1970] OJ L 94/19 18

Dec. 96/239/EC of 27 March 1996 on emergency measures to protect against bovine spongiform encephalopathy [1996] OJ L78/47 67–8

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Dec. 2010/5/ECB establishing a securities markets programme [2010] OJ L124/8 48

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Dec. 2005/565 [2005] OJ L190/13 1074

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COMMISSION GUIDELINES

On the application of Article 81(3) of the Treaty [2004] OJ C101/97 1022, 1025, 1027, 1029

On the effect on trade concept contained in Articles 81 and 82 of the Treaty [2004] OJ C 101/81 1002

On impact assessment SEC(2009)92 406

On the method of setting fines [2006] OJ C210/2 967

On vertical restraints [2000] OJ C291/1 999, 1031

COMMISSION NOTICES

On agreements of minor importance which do not appreciably effect competition under Article 81(1) of EC Treaty [2001] OJ C368/13 115, 1002

On cooperation between national competition authorities and the Commission in handling cases falling within the scope of Articles [101 TFEU] and [102 TFEU] [1997] OJ C313/1 979

[101 TFEU] and [102 TFEU] [1993] OJ C39/6 979, 989

On cooperation within the Network of Competition Authorities [2004] OJ C101/42 213, 957, 983

On immunity from fines and reduction of fines in cartel cases [2006] OJ C298/17 969

On informal guidance [2004] OJ C101/78 981

On the internal rules of procedure for processing requests for access to the file in cases pursuant to Articles 81 and 82 of the EC Treaty [2005] OJ C325/7 964

Recovery Notice [2007] OJ C272/4 1073, 1074

COMMISSION REGULATIONS (EC)

Reg. 67/67 on block exemption of exclusive purchase agreements [1967] OJ L84/67 979

Reg. 1408/71 on the application of social security schemes to employed persons and their families moving within the Community [1971] OJ L149 234

Reg. 1983/83 on exclusive distribution [1983] OJ L173/1 1029

Reg. 1784/1999 on the European Social Fund [1999] OJ L213/5 620
Art. 2 620

Reg. 773/2004 on conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [2004] OJ L123/18 957, 965

Reg. 1998/2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid [2006] OJ L379/5 1070

Reg. 622/2008 amending Regulation 773/2004 as regards the conduct of settlement procedures in cartel cases [2008] OJ L171/3 971

Reg. 800/2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General Block Exemption Regulation) [2008] OJ L214/3 1080–2

art. 1 1080

art. 5 1080

art. 6(1)(b) 1080

art. 10 and 11 1081

art. 18 1081

Reg. 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practice [2010] OJ L102/1 1030

Art. 6 1030

Reg. 743/2013 amending Regulation (EC) No. 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2013] OJ L204/15 1071

COUNCIL COMMON POSITIONS

Delegated Acts 8753/11 10 April 2011 71–2

COUNCIL DECISIONS/COUNCIL AND PARLIAMENT DECISIONS

- Dec. 82/43/EC relating to the setting up of an Advisory Committee on Equal Opportunities for Women and Men [1982] OJ L20/35 583
- Dec. 94/69/EC [1994] OJ L33/11 (Kyoto Protocol) 927
- Dec. 98/701/JHA on common standards for filling in the residence permit for non-EU nationals [1998] OJ L333/8 635
- Dec. 99/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission [1999] OJ L184/23 as amended by Decision 2006/512 [2006] OJ L200/11 147
- Dec. 1999/436/EC determining the legal basis for each of the provisions or decisions which constitute the Schengen Acquis [1999] OJ L176/19 522
- Dec. 2000/365/EC concerning the request of the United Kingdom to take part in some of the provisions of the Schengen Acquis [2000] OJ L131/43 533
- Dec. 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro [2000] OJ L140/1 as amended by Framework Decision 2001/888/JHA [2001] OJ L329/3 657
- Dec. 2000/750 establishing a Community Action Programme to combat discrimination [2000] OJ L303/23
recital 5 574
- Dec. 646/2000/EC adopting a multiannual programme for the promotion of renewable energy sources in the Community [2000] OJ L79/1 927
- Dec. 2001/413/JHA combating fraud and counterfeiting of non-cash means of payment [2001] OJ L149/1 657
- Dec. 2001/500/JHA on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime [2001] OJ L182/1 657
- Dec. 2002/192/EC concerning the request of Ireland to take part in some of the provisions of the Schengen Acquis [2000] OJ L64/20 533
- Dec. 2002/475/JHA on combating terrorism [2002] OJ L164/3 as amended by Framework Decision 2008/919/JHA [2008] OJ L330/21 657
- Dec. 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1 202–3, 639, 640, 641, 643
art. 1(1) 640
art. 1(2) 641, 650
art. 1(3) 648
art. 2(2) 641, 648
art. 3 641
art. 4(2) 642
art. 4(3) 642
art. 4(4) 642
art. 4(5) 642
art. 4(6) 642, 649, 650
art. 4(7) 203, 642
art. 4a(1) 642
art. 4a(1)(a) 644
art. 4a(1)(b) 644
art. 5(3) 651
art. 6 640
art. 8 643
art. 9(1) 640
art. 14 643
art. 15 643
art. 17(2) 641
art. 17(3) 641
art. 17(4) 641
art. 19 641, 643
- Dec. 2002/629/JHA on combating trafficking in human beings [2002] OJ L203/1 658
- Dec. 2002/682/EC, Euratom adopting the Council's Rules of Procedure [2002] OJ L230/7 86
- Dec. 2002/772/EC, Euratom amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage [2002] OJ L283/1 95
- Dec. 2003/568/JHA on combating corruption in the private sector [2003] OJ L192/54 657
- Dec. 2004/526/EC adopting the Rules of Procedure of the General Council of the European Central Bank [2004] OJ L230/61 728
- Dec. 2004/257/EC adopting the Rules of Procedure of the European Central Bank [2004] OJ L80/33 728
- Dec. 2004/752/EC EURATOM establishing the European Union Civil Service Tribunal [2004] OJ L333/7 163
art. 18(4) 163
- Dec. 2004/757/JHA laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking [2004] OJ L335/8 657
- Dec. 2005/214/JHA on the application of the principle of mutual recognition to financial penalties [2005] OJ L76/16
art. 5 639
- Dec. 2005/671/JHA on the exchange of information and cooperation concerning terrorist offences [2005] OJ L253/22 287
- Dec. 2006/512/EC amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission [2006] OJ L100/11 147
art. 5a 147–8
- Dec. 2006/783/JHA on the application of the principle of mutual recognition of confiscation orders [2006] OJ L328/59
arts. 4–6 639

- Dec. 1672/2006/EC establishing a Community Programme for Employment and Social Solidarity [2006] OJ L315/1
 art. 2 619
 art. 7 619
 art. 8 619
- Dec. 2007/435 establishing the European Fund for the Integration of third-country nationals [2007] OJ L168/16 539
- Dec. 2007/533/JHA on the establishment, operation and use of the second generation Schengen Information System [2007] OJ L205/63 533
- Dec. 573/2007/EC establishing the European Refugee Fund [2007] OJ L144/1 539
- Dec. 574/2007/EC establishing the External Borders Fund [2007] OJ L144/22 539
- Dec. 575/2007/EC establishing a European Return Fund [2007] OJ L144/45 539
- Dec. 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime [2008] OJ L209/1 142
- Dec. 2008/616/JHA on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime [2008] OJ L210/12 142
- Dec. 2008/841/JHA on the fight against organised crime [2008] OJ L300/42 657, 659–60
- Dec. 2008/909/JHA on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union [2008] OJ L327/27 639
- Dec. 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law [2008] OJ L328/55 657
- Dec. 2008/978/JHA on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters [2008] OJ L350/72 639
- Dec. 2009/299/JHA amending Decision 2002/584/JHA enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial [2009] OJ L81/24
 art. 4a(1) 639, 644
- Dec. 2009/878/EU establishing the list of Council configurations in addition to those referred to in the second and third subparagraphs of Article 16(6) TEU [2009] OJ L315/46 81
- Dec. 2009/881/EU on the exercise of the Presidency of the Council [2009] OJ L315/50 86
- Dec. 2009/908/EU laying measures for the implementation of the European Council Decision on the exercise of the Presidency of the Council, and on the chairmanship of preparatory bodies of the Council [2009] OJ L322/28 86
- Dec. 2010/405/EU authorising enhanced cooperation in the area of the law applicable to divorce and legal separation [2010] OJ L189/12 138
- Dec. 2010/594/EU amending the list of Council configurations [2009] OJ L315/46 81
- Dec. 2011/167/EU authorising enhanced cooperation in the area of the creation of unitary patent protection [2011] OJ L76/53 138
- Dec. 2013/52/EU authorising enhanced cooperation in the area of financial transaction tax [2013] OJ L22/11 138
- Dec. 2013/336/EU increasing the number of Advocates-General of the Court of Justice of the European Union [2013] OJ L179/92 159
- Dec. 2009/829/JHA on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention [2009] OJ L294/20 639, 649
- Dec. 2010/48/EC on the Rights of persons with Disabilities [2010] OJ L23/35 587
- COUNCIL DECLARATIONS**
 Community Charter of Basic Social Rights for Workers COM(89)568 final 277
 On the occasion of the fiftieth anniversary of the signature of the Treaty of Rome (2007) 38–9
- COUNCIL DIRECTIVES/COUNCIL AND PARLIAMENT DIRECTIVES**
 Dir. 64/221/EEC on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health [1963–64] OJ Spec. Edn (II)/402 309
 Dir. 64/427/EEC laying down detailed provisions concerning transitional measures in respect of activities of self-employed persons in manufacturing and processing businesses 826
 Dir. 68/151/EEC on coordination of safeguards [1968] OJ L65/8 317
 Dir. 68/360/EEC [1968] OJ Spec. Edn L257/13 526
 Dir. 76/207 on the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L39/40 (Equal Treatment Directive) 310, 311, 316–17

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- Dir. 77/388/ECC [1977] OJ L145/1 (Sixth VAT Directive)
art. 2 806
- Dir. 79/7/EC [1979] OJ L6/24 (Social Security Directive) 574
- Dir. 79/409/EEC on the conservation of wild birds [1979] OJ L103/1 212, 926
- Dir. 80/987/EEC on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer [1980] OJ L283/23 325
- Dir. 83/189 EEC laying down a procedure for the provision of information in the field of technical standards and regulations [1983] OJ L109/8 314–16
- Dir. 89/552/EEC on the coordination of certain provisions laid down by law concerning television broadcasting activities [1989] OJ L298/23 (Broadcasting Directive) 679
- Dir. 89/622/EC on the approximation of the laws concerning the labelling of tobacco products [1989] OJ L359/1 692–3
- Dir. 90/425/EC concerning veterinary and zootechnical checks applicable in intra-Community trade in certain live animals and products with a view to the completion of the internal market [1990] OJ L224/29 67–8
- Dir. 91/155/EC on data sheets [1991] OJ L76/35 345
- Dir. 91/156/EC on waste 110
- Dir. 91/477/EC on control and the acquisition of firearms [1991] OJ L256/51 661
- Dir. 92/43/EC on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7 926
- Dir. 92/85/EC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding [1992] OJ L348/1 583
- Dir. 93/104/EC concerning the organisation of working time [1993] OJ L307/18 276–7
- Dir. 93/109/EC on the right to vote and stand as candidate in municipal elections [1993] OJ L329/34 513
- Dir. 94/19/EC on deposit guarantee schemes [1994] OJ L135/5 398
- Dir. 94/33/EC on the protection of young people at work [1994] OJ L216/12 591
- Dir. 94/80/EC laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections [1994] OJ L368/38 513
- Dir. 95/46/EC on the protection of individuals with regard to the processing of personal data [1995] OJ L281/31 287
art. 6(1) 533
- Dir. 96/92/EC concerning common rules for the internal market in electricity [1996] OJ L27/20 928
art. 8(3) 928
art. 11(3) 928
- Dir. 96/96/EC on the approximation of the laws of the Member States relating to roadworthiness tests for motor vehicles and their trailers [1996] OJ L46/1
art. 2 940
- Dir. 97/80/EC on the burden of proof in the cases of discrimination based on sex [1998] OJ L14/6 (Burden of Proof Directive) 609
art. 4 583, 609
- Dir. 97/81/EC on part-time work [1998] OJ L14/9 581
- Dir. 98/37/EC on the approximation of the laws relating to machinery [1998] OJ L207/1
art. 4(1) 763, 764
- Dir. 98/44/EC on the legal protection of biotechnological inventions [1998] OJ L213/13 267–70
- Dir. 99/70/EC concerning the framework agreement on fixed-term work [1999] OJ L175/43 230, 323–4
- Dir. 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22 (Race Directive) 574, 585–6, 595, 597, 599–600, 612–13, 614, 617, 820
- Preamble 585
- recitals 1–3 573
- recital 6 585
- recital 8 596
- recital 9 572
- recital 13 594
- recital 14 595
- art. 1 582
- art. 2(1) 596
- art. 2(2) 596
- art. 2(2)(b) 598
- art. 2(3) 600
- art. 3(1) 596, 612
- art. 3(1)(a)–(d) 578
- art. 3(1)(e) 612
- art. 3(1)(f) 612
- art. 4 578, 602
- art. 5 614
- art. 7 608
- art. 7(1) 610
- art. 8(1) 609
- art. 9 610

- art. 10 616
- art. 11 616
- art. 12 617
- art. 13 617
- art. 15 611
- Dir. 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16 (Framework Directive) 574, 582, 586, 588, 591, 592, 595, 597, 599–600, 605, 614, 615, 616, 321–2, 324
- Preamble 589–90
- recital 1 573
- recital 3 573, 595
- recital 4 573, 578
- recital 6 591
- recital 12 594
- recital 22 592
- art. 1 582
- art. 2(1) 582
- art. 2(2)(a) 596
- art. 2(2)(b) 598
- art. 2(3) 600
- art. 2(5) 603, 604
- art. 3 578
- art. 3(2) 593–4
- art. 3(4) 605
- art. 4(1) 602
- art. 4(2) 604
- art. 5 589–90
- art. 6(1) 605, 606
- art. 7 614
- art. 9 608
- art. 9(1) 610
- art. 9(2) 609
- art. 10 609–10
- art. 11 610
- art. 12 616
- art. 13 616
- art. 14 617
- art. 15 615
- art. 17 611
- Dir. 2001/18/EC on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EC [2001] OJ L106/1 349, 350, 694
- Dir. 2001/44/EC on mutual assistance for the recovery of claims resulting from certain agricultural claims [2001] OJ L175/17 109–10
- Dir. 2001/51/EC supplementing the provisions of Article 26 of the Schengen Implementation Agreement [2001] OJ L187/45 (Carrier Sanctions Directive) 536
- art. 2 536
- art. 3 536
- art. 4 536
- Dir. 2001/85/EC relating to special provisions for vehicles used for the carriage of passengers comprising more than eight seats in addition to the driver's seat and amending Directives 70/156/EEC and 97/27/EC [2002] OJ L42/1
- art. 3 621
- Dir. 2002/2/EC on the circulation and marketing of compound feeding stuffs for animals [2002] OJ L63/23
- Dir. 2002/22/EC on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive)
- art. 7 621
- Dir. 2002/90/EC defining the facilitation of unauthorized entry, transit and residence [2002] OJ L328/17 661
- Dir. 2003/6/EC on insider dealing and market manipulation [2003] OJ L96/16 661
- Dir. 2003/9/EC [2003] OJ L31/18 557, 560–61
- art. 7(3) 560
- art. 8 558
- art. 18(1) 558
- art. 10(1) 558
- art. 16 559
- Dir. 2003/86/EC on the right of family reunification for third-country nationals legally established in a Member State 278–80
- art. 4(1) 278, 279, 553
- art. 4(6) 278, 279–80
- art. 5(5) 279
- art. 7(2) 553
- art. 8(1) 553
- art. 17 279
- Dir. 2003/88/EC concerning certain aspects of the organisation of working time [2003] OJ L299/9 276
- Dir. 2003/109/EC concerning the status of third-country nationals who are long-term residents [2003] OJ L16/44 547, 550
- Preamble 551
- art. 3(2) 548
- art. 4(1) 548
- art. 4(2) 553
- art. 6 553
- art. 7(1) 548, 553
- art. 9(1)(a) 549
- art. 9(1)(b) 549
- art. 9(1)(c) 549
- art. 11(1) 550
- art. 11(2) and (3) 551
- art. 11(4) 551–2
- art. 11(5) 551
- art. 12(3) 550
- art. 12(4) 550

- Dir. 2003/577/JHA on the execution in the European Union of orders freezing property or evidence [2003] OJ L196/45 639
- Dir. 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [2004] OJ L134 674
- Dir. 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L134 674
- Dir. 2004/38/EC [2004] OJ L158/77 (Citizenship Directive) 467, 476–7, 487, 490, 492, 499, 508, 512, 537, 851, 878
- recital 6 469
- recital 16 479
- recital 17 478
- art. 2(2) 495
- art. 3 507
- art. 3(2) 495–6
- art. 4 492
- art. 4(1) 495
- art. 5(2) 495, 506
- art. 5(5) 506
- art. 6(2) 495
- art. 7 478
- art. 7(1) 476, 495
- art. 7(1)(a) 487
- art. 7(1)(b) 479, 487
- art. 7(2) 495
- art. 7(3) 477
- art. 8(1) 506
- art. 8(3) 507
- art. 8(4) 480
- art. 8(5) 507
- art. 12 497
- art. 12(3) 497
- art. 13 497
- art. 13(2) 497
- art. 14(1) 476
- art. 14(2) 480
- art. 14(4) 476
- art. 15 481
- art. 16 477
- art. 16(1) 477
- art. 16(2) 495
- art. 16(4) 477
- art. 17 478
- art. 23 495
- art. 24(1) 481, 495
- art. 24(2) 476, 488
- art. 25(1) 507
- art. 27 509
- art. 28(1) 512
- art. 28(2) 511
- art. 28(3) 511
- art. 30 481
- art. 30(1) 509
- art. 30(2) 509
- art. 30(3) 509
- art. 31 481
- art. 31(1) 509
- art. 31(3) 509
- art. 32(1) 511
- art. 33(2) 511
- Dir. 2004/80/EC on compensation to crime victims [2004] OJ L261/15 664, 665
- Dir. 2004/82/EC on the obligation of carriers to communicate passenger data [2004] OJ L261/24 536
- Dir. 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373/37 574–614, 820
- art. 5(2) 576
- Dir. 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements [2005] OJ L255/11 661
- Dir. 2005/36/EC on the recognition of professional qualifications [2005] OJ L255/22 869–70, 871
- art. 2(1) 869
- art. 3(1) 869
- art. 3(1)(b) 869
- art. 4(1) 869
- art. 13 870
- art. 14 870
- art. 16 872
- art. 21 872
- art. 24(1) 872
- Annex IV 871
- Dir. 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing [2008] OJ L309/15 661
- Dir. 2005/85/EC on minimum standards on procedures for granting and withdrawing refugee status [2005] OJ L326/13 989
- art. 9(1) 557
- art. 23 557
- art. 25(2)(c) 556
- art. 27(1) 556
- art. 27(2)(a) 556
- art. 27(2)(b) 556
- art. 31 557
- art. 39 557, 661
- Dir. 2006/54/EC on the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23 (Equal Treatment Directive) 574, 578, 584, 597, 599–600, 601, 617
- Preamble 602
- recital 2 573

- recital 3 585
- recital 4 573
- recital 19 602
- art. 2 601
- art. 2(1) 582
- art. 2(1)(a) 596
- art. 2(2)(b) 598
- art. 8(a) 617
- art. 8(b)(3) 617
- art. 8(b)(4) 617
- art. 8(c) 617
- art. 14(2) 578, 602
- art. 17 608
- art. 17(1) 610
- art. 18 611
- art. 19 609
- art. 20 608
- art. 21 616
- art. 24 610
- art. 30 616
- Dir. 2006/112/EC on the common system of value added tax [2006] OJ L347/1 283, 284
- Dir. 2006/123/EC on services in the internal market [2006] OJ L376/36 (Services Directive) 777, 842–6, 866, 890–1
- recital 33 842
- arts. 1–3 843
- art. 2 843
- art. 3(1) 843
- art. 5(1) 844
- art. 6 844
- art. 7 844
- art. 8 844
- art. 9 890
- arts. 9–13 890
- arts. 9–15 890
- art. 14 890
- art. 15 890
- art. 16 844–5
- art. 16(1)(b) 845
- art. 16(2) 845
- art. 17 843
- art. 22 846
- art. 24 846
- arts. 28–33 846
- art. 30 846
- art. 35(2) 846
- Chapter III 890, 891
- Chapter IV 890
- Chapter V 846
- Chapter VI 846
- Dir. 2008/98/EC on waste and repealing certain Directives [2008] OJ L312/3 108–9
- Dir. 2008/99/EC on the protection of the environment through criminal law [2008] OJ L309/15 661
- Dir. 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L348/98 (Returns Directive) 518, 524, 544, 561
- art. 2(2) 544
- art. 2(3) 544
- art. 3(2) 544
- art. 3(3) 544
- art. 4(1) 544
- art. 4(2) 544
- art. 6(2) 545
- art. 6(3) 545
- art. 6(4) 545
- art. 6(5) 545
- art. 7(1) 545
- art. 7(2) 545
- art. 7(4) 545
- art. 8(1) 545
- art. 11(1) 545
- art. 11(2) 545
- art. 13(1) 545
- art. 13(3) 545
- art. 15(3) 546
- art. 15(5) 546
- art. 15(6) 546
- Dir. 2008/947/JHA on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions [2008] OJ L377/102 639
- Dir. 2009/48/EC on toy safety [2009] OJ L170/1 687–8
- Dir. 2009/50/EC on conditions of entry and residence of third-country nationals for the purposes of highly qualified employment [2009] OJ L155/17 527
- art. 6 527
- art. 8(4) 527
- Dir. 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) [2010] OJ L95/1 273–5
- Dir. 2010/64/EU on the right to interpretation and translation in criminal proceedings [2010] OJ L280/1 646
- art. 2(1) 646
- art. 2(2) 646
- art. 3(1) 646
- Dir. 2011/85/EU on requirements for budgetary frameworks of the Member States [2011] OJ L306/41 51
- Dir. 2011/24/EU on the application of patients' rights in cross-border healthcare [2011] OJ L88/45 835
- art. 4 837, 840
- art. 5 839, 840

- art. 6 840
- art. 7 837
- art. 8 838
- art. 9 838, 839
- Dir. 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims [2011] OJ L101/1 657
- Dir. 2011/85/EU on requirements for budgetary frameworks of the Member States [2011] OJ L306/41 717, 720
- Dir. 2011/92/EU on combating the sexual exploitation of children and child pornography [2011] OJ L335/1 657
- Dir. 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] OJ L337/9 540, 555, 556, 563, 564–5
- art. 2(d) 555
- art. 2(f) 555, 565
- art. 2(j) 567
- art. 3(2) 541
- art. 4(1) 557
- art. 4(3) 557
- art. 4(5) 557
- art. 5 562
- arts. 7–15 541
- art. 8(3) 541
- art. 9 564
- art. 10(1) 563, 564
- art. 11(1)(e) 562
- art. 12(2) 562
- art. 14(3)(b) 562
- art. 14 (4)–(5) 562
- art. 15 555, 565–66
- art. 15(c) 566
- art. 17(1)(a)–(c) 562
- art. 17(1)(d) 562
- art. 17(3) 562
- art. 17(3)(b) 562
- art. 21 (1) and (2) 568
- art. 23(1) 567
- art. 23(2) 567
- art. 24(1) 567
- art. 24(2) 567
- art. 25 567
- art. 26(2) 567
- art. 27(1) 567
- art. 27 (2) 567
- art. 28(1) 567
- art. 29(1) 567
- art. 29(2) 568
- art. 30(1) 567
- art. 30(2) 567
- art. 32(1) 567
- art. 33 567
- art. 34 567
- art. 35 568
- Dir. 2011/98/EU on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State [2011] OJ L343/1 547
- art. 3(b) 547
- art. 5(1) 548
- art. 11(1) 550
- art. 11(a)–(c) 550
- art. 12(1)(a)–(h) 550
- art. 12(2)(a) 550
- art. 12(2)(b) 550
- art. 12(2)(c) 550
- art. 12(2)(d) 550
- art. 12(4) 550
- Dir. 2012/13/EU [2012] OJ L142/1 646
- art. 3(1) 646
- art. 3(2) 646
- art. 4(1) 646
- art. 4(2) 646
- art. 6(1) 646
- art. 6(2) 647
- art. 6(3) 647
- art. 7(4) 647
- Dir. 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime [2012] OJ L315/57 662
- art. 2(1)(a) 662
- art. 2(1)(b) 662
- art. 3(1) 663
- art. 4 663
- art. 5(1) 663
- art. 6(1) and (2) 663
- art. 6(3) 663
- art. 6(4) 664
- art. 6(5) 664
- art. 6(6) 664
- art. 7(1) 663
- art. 7(3) 663
- art. 8(1) 664
- art. 9(1) 664
- art. 10(1) 664
- art. 11(1) 664
- art. 12(1) 664
- art. 13 664
- art. 14 664
- art. 15 664
- art. 16 665
- art. 18 665
- art. 19 665
- art. 20(a), (b) 665
- art. 20(d) 665
- art. 21(1) 665
- art. 21(1), (2) 665
- art. 22(3) 665
- art. 22(4) 665
- art. 23(2) 665

- art. 23(3) 665
 art. 24(1)(a) 665
 art. 24(1)(b) 665
 art. 24(1)(c) 665
 Dir. 2013/32/EU on common procedures for granting and withdrawing international protection [2013] OJ L180/60 556, 561
 art. 2(q) 559
 art. 9(1) 556
 art. 11(1) 557
 art. 12(1)(b) 557
 art. 14 557
 art. 19 557
 art. 31 557
 art. 36 557
 art. 38(1) 556
 art. 38(2)(a) 556
 art. 38(2)(b) 556
 art. 39 557
 art. 46 557
 Dir. 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection [2013] OJ L180/96 557, 559, 561
 art. 2(g) 558
 art. 8(1) 561
 art. 8(3)(b) 562
 art. 8(4) 562
 art. 12 558
 art. 13(2) 557
 art. 14(1) 558
 art. 15(1) 558
 art. 15(2) 559
 art. 17(3) and (4) 558
 art. 18(1) 558
 art. 18(2) 558
 art. 19 558
 art. 20(1) 559
 art. 23(1) 558
 Dir. 2013/40/EU on attacks against information systems [2013] OJ L218/8 657
 Dir. 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L294/1 647
 art. 2 (1) 647
 art. 3(3) 647
 art. 4 647
 art. 9 647
 art. 10(1) 647
 art. 10(4) 647
 COUNCIL LEGAL SERVICE OPINIONS
 EU Council Doc. 11197/07 of 22 June 2007 216
 EU Council Doc. 7389/13 SIS Database Statistics 01/01/2013 533
 COUNCIL RECOMMENDATIONS
 On the implementation of Member States employment policies [2004] OJ L326/47 619
 COUNCIL REGULATIONS/COUNCIL AND PARLIAMENT REGULATIONS
 Reg. 17/62 First Regulation implementing Articles [81 and 82] of the EC Treaty [1962] OJ L13/204 957
 art. 15(2) 968, 974
 art. 17 975
 Reg. 26/62 applying certain rules of competition to production of and trade in agricultural products [1959–62] OJ Spec. Edn 129 1003
 Reg. 1612/68 on free movement of workers within the Community [1968] OJ Spec. Edn L257/2 851, 877
 art. 7(2) 612, 877
 art. 7(4) 814
 art. 8 877
 Reg. 907/73 establishing a European Monetary Cooperation Fund [1973] OJ L89/2 707
 Reg. 259/93 on the supervision and control of shipments of waste [1993] OJ L30/11 930
 Reg. 40/94 on the Community trade mark [2004] OJ L70/1 161
 Reg. 2200/96 on the common organisation of the market in fruit and vegetables [1996] OJ L297/1 409
 Reg. 1466/97 on the strengthening of the surveillance of budgetary positions [1997] OJ L209/1 80–1, 711
 art. 2a(1) 746
 art. 2a 746
 art. 2a(4) & 2ab 747
 art. 2a(3) 746–7
 art. 3 (1) and (2) 746
 art. 3 (4) 747
 art. 6(2) 719, 748, 751
 art. 6(3) 719
 art. 7(1) and (2) 746
 Reg. 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure [1997] OJ L209/6 711, 718, 747
 art. 2(1) 749
 art. 2(4) 749
 art. 5(1) 748
 art. 12 750
 Reg. 994/98 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal state aid [1998] OJ L142/1 1070
 Reg. 659/99 1071
 art. 14(1) 1073
 art. 14(2) 1072
 art. 14(3) 1073

- Reg. 2725/2000 concerning the establishment of EURODAC for the comparison of fingerprints for the effective application of the Dublin Convention [2000] OJ L316/1 (EURODAC Regulation) 532–33
- Reg. 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [2001] OJ L81/1 535
- Reg. 1049/2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43 380, 412, 413, 414, 415–16, 418–20, 422
- art. 4(1) 414–15
- art. 4(1)(a) 414
- art. 4(1)(b) 414
- art. 4(2) 415
- art. 4(3) 415, 419
- art. 4(4) 415, 421
- art. 4(5) 415, 421
- art. 4(6) 415
- Reg. 1030/2002 laying down a uniform format for residence permits for third-country nationals [2002] OJ L157/1 547
- art. 6 548
- Reg. 1/2003 implementing Articles 81 and 82 of the EC Treaty [2003] OJ L1/1 944, 957, 958, 979, 982, 985–6, 1022, 1025, 1026, 1049
- recital 4 1007
- recital 13 972
- recital 14 982
- recital 18 982
- recital 38 981
- art. 1 979, 1007
- art. 3 980
- art. 3(2) 980
- art. 5 982, 993, 1007
- art. 6 1007
- art. 7 75, 966, 972
- art. 7(1) 965
- art. 9 972
- art. 9(1) 971
- art. 10 982
- art. 11 984
- art. 11(2) 993
- art. 11(3) 984
- art. 11(4) 984, 986
- art. 11(6) 984, 986
- art. 12 984
- art. 14 965
- art. 14(1) 972
- art. 14(5) 965
- art. 15(3) 982
- art. 16 993
- art. 17 957
- art. 18 959
- art. 18(1) 958
- art. 19(1) 958
- art. 20 961, 962–3
- art. 21 961
- art. 22(4) 984
- art. 23 75
- art. 23(1) 958, 966
- art. 23(2) 968, 966, 1000, 1007
- art. 23(3) 967
- art. 23(5) 973
- art. 25(1) 1011
- art. 27(1) 963
- art. 27(2) 964
- art. 27(4) 972
- art. 29 1030
- art. 31 975
- art. 35(1) 982, 987
- Reg. 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L50/1 (Dublin Regulations) 271–3, 540, 543
- art. 3(2) 543
- Reg. 2004/2003 on the regulations governing political parties at European level and the rules regarding their funding [2003] OJ L297/1 95
- Reg. 2065/2003 on smoke flavourings used or intended for use in or on foods [2003] OJ L309/1 682
- Reg. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [2003] OJ L 338/1 262–3, 264
- recital 33 264
- art. 2 263
- Reg. 261/2004 providing for compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay to long-haul flights 182–3
- Reg. 773/2004 [2001] OJ L162/21 957
- Reg. 883/2004 on the coordination of social security systems [2004] OJ L166/1 835
- Reg. 2007/2004 establishing a European Agency for the management of operational cooperation at the external borders of the Member States of the European Union [2004] OJ L349 140
- Reg. 2252/2004 on standards for security features and biometrics in passports and travel documents issued by Member States [2004] OJ L385/1 523
- Reg. 1055/2005/OJ amending Regulation 1466/97/EC on the strengthening of the surveillance of

- budgetary positions and the surveillance and coordination of economic policies [2005] OJ L174/1 711
- Reg. 1056/2005 on speeding up and clarifying the implementation of the excessive deficit procedure [2005] OJ L174/5 711, 718
- Reg. 562/2006 establishing a Community Code on the rules governing the movement of persons across the borders (Schengen Borders Code) [2006] OJ L105/1 528, 529–30, 534
- recital 6 70
- art. 2 529
- art. 4 534
- art. 5 544
- art. 5(1) 534–5
- art. 5(1)(b) 535
- art. 5(4) 534
- art. 6 535
- art. 6(1) 545
- art. 7 534
- art. 10 534
- art. 12 70, 534
- art. 12(1) 70
- art. 12(4) 70
- art. 12(5) 69, 70
- art. 13 534
- art. 13(2) 535
- art. 13(3) 535
- art. 14 534
- art. 15(1) 546
- art. 20 530
- art. 21 528
- art. 21(a) 530
- art. 21(c) 529
- Reg. 1922/2006 on establishing a European Institute for Gender Equality [2006] OJ L43/9 583
- Reg. 1987/2006 on the establishment, operation and use of the second generation Schengen Information System [2006] OJ L381/4 533
- Reg. 622/2008 amending Regulation 773/2004 as regards the conduct of settlement procedures in cartel cases [2008] OJ L171/3 971
- Reg. 765/2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products [2008] OJ L218/30 692
- Reg. 767/2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas [2008] OJ L218/60 (VIS Regulation) 533, 534, 540
- Reg. 810/2009 on the Community Code on Visas [2009] OJ L243/1 539–40, 535
- art. 2(2) 539
- art. 2(3) 539
- art. 5(1) 540
- art. 21(1) 535
- art. 25 539
- art. 32(5) 540
- Reg. 1225/2009 on protection against dumped imports from countries not members of the European Community [2009] OJ L343/51 75
- Reg. 407/2010 establishing a European Financial Stabilisation Mechanism [2010] OJ L118/1 48, 142, 143
- Reg. 178/2011 amending for the 145th time Council Regulation 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban [2011] OJ L51/10 149
- Reg. 182/2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers [2011] OJ L55/13 72
- art. 2 144
- art. 3 145
- art. 3(7) 146–7
- art. 4 145
- art. 5(2) 146
- art. 5(4)(a) 146
- art. 5(4)(c) 146
- art. 6 146–7
- art. 7 146
- art. 8 146
- art. 10 148
- art. 11 147
- Reg. 1173/2011 on the effective enforcement of budgetary surveillance in the euro area [2011] OJ L306/1 51
- art. 6 80–1
- Reg. 1174/2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area [2011] OJ L 306/8 51
- art. 3 80–1
- Reg. 1175/2011 amending Regulation 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies [2011] OJ L306/12 51
- art. 2A 91
- art. 6(2) 80–1
- Reg. 1176/2011 on the prevention and correction of macroeconomic imbalances [2011] OJ L306/25 51
- art. 7(2) 80–1
- Reg. 1177/2011 amending Regulation 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure [2011] OJ L306/33 51
- Reg. 1257/2012 implementing enhanced cooperation in the area of the creation of unitary patent protection [2012] OJ L361/1 173–4

- Reg. 1260/2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements [2012] OJ L361/89 173–4
- Reg. 472/2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability [2013] OJ L140/1 51
- Reg. 473/2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area [2013] OJ L140/11 51
- Reg. 407/2010 establishing a European Financial Stabilisation Mechanism [2010] OJ L118/1 716
- Reg. 211/2011 on the European citizens' initiative [2011] OJ 2011 L65/1 380, 389–91
- Reg. 492/2011 on the freedom of movement for workers, replacing Reg. 1612/68/EEC 850, 851, 877
- art. 3 860
- art. 7(2) 877
- art. 7(4) 876
- art. 9 877
- Reg. 1173/2011 on the effective enforcement of budgetary surveillance in the euro area [2011] OJ L306/1 717
- art. 4(1) 750
- art. 5(1) 750
- art. 5(4) 750
- art. 6(1) 750
- Reg. 1174/2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area [2011] OJ L306/8 717, 719
- art. 3(1) 750
- art. 3(2) 750
- art. 3(5) 750
- art. 3(6) 750
- Reg. 1175/2011 amending Regulation 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies [2011] OJ L306/12 717
- Reg. 1176/2011 on the prevention and correction of macroeconomic imbalances [2011] OJ L306/25 717, 746, 747
- art. 2(1) 718
- art. 2(2) 718
- art. 3(1) 749
- art. 3(2) 749
- art. 3(5) 749
- art. 4(3) 718
- art. 5(1) 749
- art. 6(1)–(3) 749
- arts. 7–10 719
- art. 7(2) 749, 751
- art. 8(1) 749
- art. 8(2) 749
- art. 8(3) 749
- art. 9 749
- art. 10(4) 749
- Reg. 1177/2011 on speeding up and clarifying the implementation of the excessive deficit procedure [2011] OJ L306/33 717
- Reg. 98/2013 on the marketing and use of explosives precursors [2013] OJ L39/1 661
- Reg. 462/2013 amending Regulation (EC) No. 1060/2009 on credit rating agencies [2013] OJ L146/1
- art. 7(5) 745
- Reg. 472/2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability [2013] OJ L140/1 718, 744
- art. 7(1) 744, 745
- art. 8 745
- Reg. 473/2013/EU on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area [2013] OJ L140/11 718
- art. 4(2) 747
- art. 4(3) 748
- art. 6(1) 747
- art. 7(1) 747
- art. 7(3) 747
- Reg. 603/2013 on the establishment of 'Eurodac' [2013] OJ L180/1 532, 542–3
- art. 2 (j) and (k) 532
- art. 5(1) 532
- art. 7(2) 532
- art. 9(1) 532
- art. 14(1) 532
- art. 20 532
- art. 25(2) and (4) 532
- Reg. 604/2013 establishing the criteria and mechanisms for determining the Member State responsibility for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L180/31 518, 524, 540
- art. 3(1) 540, 542
- art. 28 561
- Chapter III 540–1
- Reg. 733/2013 amending Regulation 994/1998 on the application of Articles 92 and 93 of the Treaty establishing the European community to certain categories of horizontal state aid [2013] OJ L204/11
- art. 1 1082

Reg. 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions and the ongoing talks on banking union [2013] OJ L287/63 721, 1085

art. 3(6) 736

art. 4 721

art. 4(1) 734

art. 6(1) 733

art. 6(4) 734

art. 6(5) 734

art. 6(6) 734

art. 6(7) 734

art. 7(1), (2) 736

art. 7(7) 734

art. 14 736

art. 19(1) 727

art. 20(2) 730

art. 20(4) 730

art. 20(5) 730

art. 20(6) 730

art. 20(8) 730

art. 20(9) 730

art. 21(1) 730

art. 21(2) 730

art. 21(3) 730

art. 26(1) 726

art. 26(3) 726

art. 26(6) 726

art. 26(7) 726

art. 26(8) 726

Reg. 243/2013 amending Regulation 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2013] OJ L204/15

art. 6(a) 1071

art. 6(b) 1071

art. 20(a) 1072

art. 23(a) 1072

Reg. 1051/2013 amending Regulation 562/2006 in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances [2013] OJ L295/1 530

COUNCIL RESOLUTIONS

On the establishment of an exchange-rate mechanism in the third stage of economic and monetary union [1997] OJ C236/5 733

On limitation on admission of third-country nationals to the territory of the Member States for employment [1996] OJ C274/3 527

On renewable sources of energy [1998] OJ C198/01 927

On the Stability and Growth Pact [1997] OJ C236/1 711

INTER-INSTITUTIONAL AGREEMENTS

2003 Better Law-making 403–4

JOINT DECLARATIONS

Against racism and xenophobia [1986] OJ C158/1 585

On fundamental rights [2007] OJ C103/1 114

On practical arrangements for the co-decision procedure [2007] OJ C145/2 114, 120–2

On practical arrangements for the new co-decision procedure [1999] OJ C148/1 121

MISCELLANEOUS

EC-Turkey Association Council, Decision 1/80 537

ECB–NCBs outside the Euro area, Agreement laying down the operating procedures for an exchange rate mechanism in EMU stage three [2006] OJ C73/9 733

ECB– Reg. 2157/99 on the powers of the ECB to impose sanctions [1999] OJ L264/21 733

ECN Model Leniency Programme 970, 986

European Central Bank, Decision 2010/5/ECB establishing a securities markets programme [2010] OJ L124/8 48, 715

European Court of Justice, Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings [2012] OJ C338/1 166

European Parliament Resolution of 26 March 2009 on the White Paper on damages actions for breach of the EC antitrust rules P6-PROV (2009) 0187 994

European Parliament Resolution of 2 February 2012 on 'Towards a Coherent European Approach to Collective Redress' (2011/2089/INI) 994

Framework Agreement on relations between the European Parliament and the European Commission, [2010] OJ L304/47 102

House of Lords European Union Committee, European Banking Union: Key Issues and Challenges (7th Report, TSO, 2012) 141

House of Lords European Union Committee, Prüm: An effective weapon against terrorism and crime? (18th Report, TSO, 2006) 141

House of Lords European Union Committee, European banking Union: Key Issues and Challenges (7th Report, Stationery Office, 2012) 729–30, 734

House of Lords European Union Committee, The Treaty of Lisbon: An Impact Assessment (10th Report, TSO, 2008) 40, 86, 89

House of Lords European Union Committee, The Working Time Directive: A Response to the European Commission's Review (9th Report, TSO, 2003) 277–8

House of Lords European Union Committee, Workload of the Court of Justice (14th Report, TSO, 2010) 196

Review of the Balance of Competences between the United Kingdom and the European Union (Cm 8415, London, SO, 2012) 55

State of the Union 2012 Address, Strasbourg
12 September 2012 54
The Stockholm Programme: an open and secure
Europe serving and protecting the citizens,
Council Doc. 17024/09 547, 657

NATIONAL LEGISLATION AND POLICY DOCUMENTS

Belgium
Broadcasting Law 1987/1994 360
Czech Republic
Constitution 233
France
Labour Code 600
Germany
Basic Law 240
art. 1 235–9
art. 1(1) 265
art. 16(2) 229, 642
art. 20(1) 235–9, 244
art. 20(2)
art. 23(1) 223, 224–5, 231, 237
art. 24 200–1
art. 24(1) 226–7
art. 38(1) 243
art. 72(2) 395
art. 79(3) 224, 235–9, 244
art. 100(1) 229–30
Protection of Employees against Sexual
Harassment Act 1994 600
Greece
Bake-off Products Law 762, 792
Ireland
Constitution 44
Employment Act 1998 600
Italy
Highway Code 761

Law No. 428/1990 on provisions for the
fulfilment of obligations arising from Italy's
membership of the Community 353
Sale of Grated Cheese Law 795
Luxembourg
Constitution 200–1
Netherlands
Constitution 200–1
Criminal Code 659
Law on Cold-calling 809, 824
Plant Protection Products Law 913
Regulation on Professional Associations
1993 1004
Poland
Constitution 228
Portugal
Constitution 238–9
Decreto-Lei no. 48/95 of 15 March 1995 659
Lei 59/2007 of 4 September 2007 659
Penal Code 659
Spain
Civil Code 317
Constitution 202–3
Lotteries Law 828
Sweden
Code of Procedure 187
Lotteries Law 302–3
United Kingdom
Competition Act 1998 993
Customs Consolidation Act 1976 903
European Union Act 2011 222–3, 241–2
Employment Equality (Religion or Belief)
Regulations 2003, SI 2003/1660 586
Human Rights Act 1998 645
Merchant Shipping Act 1988 198
Race Relations Act 1976 593

Table of Equivalents

TREATY ON EUROPEAN UNION

Lisbon Treaty numbers and their Amsterdam and Pre-Amsterdam equivalents (Amsterdam and Pre-Amsterdam is TEU unless specified otherwise)

Lisbon	Amsterdam	Pre-Amsterdam	Lisbon	Amsterdam	Pre-Amsterdam
1	1	A	29	15	J.5
2			30	22	J.12
3	2	B	31	23	J.13
4	10 EC	5 EC	32	16	J.6
5	5 EC	3b EC	33	18	J.8
6	6	F	34	19	J.9
7	7	F.1	35	20	J.10
8			36	21	J.11
9			37	24	J.14
10	191(1) EC	138a	38	25	J.15
11	191(1) EC	138a	39		
12			40	47	M
13	3, 5, 7, 8, 10 EC	C, D 4, 4a, 5 EC	41	28	J.18
14	189/190/192/197 EC	137, 138, 138b, 140 EC	42	17	J.7
15	4	D	43		
16	202/203/205 EC	145, 146, 148 EC	44		
17	211/214/217 EC	155, 158, 161 EC	45		
18			46		
19	220/221/224 EC	164, 165, 168 EC	47	281 EC	210 EC
20	11/11A EC 27A-27E, 40-40B, 43-45		48	48	N
21	3	C	49	49	O
22			50		
23			51	311 EC	239 EC
24	11	J.1	52	299(1) EC	227(1) EC
25	12	J.2	53	51	Q
26	13	J.3	54	52	R
27			55	53	S
28	14	J.4		314 EC	248 EC

TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION

Lisbon Treaty numbers and their Amsterdam and Pre-Amsterdam equivalents (Amsterdam and Pre-Amsterdam is EC Treaty unless specified otherwise)

Lisbon	Amsterdam	Pre-Amsterdam	Lisbon	Amsterdam	Pre-Amsterdam
1			49	43	52
2			50	44	54
3			51	45	55
4			52	46	56
5			53	47	57
6			54	48	58
7	3 TEU	C TEU	55	294	221
8	3(2)	3(2)	56	49	59
9			57	50	60
10			58	51	61
11	6	3c	59	52	63
12	153(2)	129a	60	53	64
13			61	54	65
14	16	7d	62	55	66
15	255	191a	63	56	73b
16	286	213b	64	57	73c
17			65	58	73d
18	12	6	66	59	73f
19	13	6a	67	61	73i
20	17	8		29 TEU	K.1 TEU
21	18	8a	68		
22	19	8b	69		
23	20	8c	70		
24	21	8d	71	36 TEU	K.8 TEU
25	22	8e	72	64(1)	73l(1)
26	14	7a		33 TEU	K.4 TEU
27	15	7c	73		
28	23	9	74		
29	24	10	75	60	73g
30	25	12	76		
31	26	28	77	62	73j
32	27	29	78	63(1, 2), 64(2)	73k(1, 2), 73l(2)
33	135	116	79	63(3, 4)	73k(3, 4)
34	28	30	80		
35	29	34	81	65	73m
36	30	36	82	31 TEU	K.3 TEU
37	31	37	83	31 TEU	K.3 TEU
38	32	38	84		
39	33	39	85	31 TEU	K.3 TEU
40	34	40	86		
41	35	41	87	30 TEU	K.2 TEU
42	36	42	88	30 TEU	K.2 TEU
43	37	43	89	32 TFEU	K.4 TEU
44	38	46	90	70	74
45	39	48	91	71	75
46	40	49	92	72	76
47	41	50	93	73	77
48	42	51	94	74	78

Lisbon	Amsterdam	Pre-Amsterdam	Lisbon	Amsterdam	Pre-Amsterdam
95	75	79	147	127	109p
96	76	80	148	128	109q
97	77	81	149	129	109r
98	78	82	150	130	109s
99	79	83	151	136	117
100	80	84	152		
101	81	85	153	137	118
102	82	86	154	138	118a
103	83	87	155	139	118b
104	84	88	156	140	118c
105	85	89	157	141	119
106	86	90	158	142	119a
107	87	92	159	143	120
108	88	93	160	144	121
109	89	94	161	145	122
110	90	95	162	146	123
111	91	96	163	147	124
112	92	98	164	148	125
113	93	99	165	149	126
114	95	100a	166	150	127
115	96	101	167	151	128
116	96	101	168	152	129
117	97	102	169	153(1, 3, 4, 5)	129a
118			170	154	129b
119	4	3a	171	155	129c
120	98	102a	172	156	129d
121	99	103	173	157	130
122	100	103a	174	158	130a
123	101	104	175	159	130b
124	102	104a	176	160	130c
125	103	104b	177	161	130d
126	104	104c	178	162	130e
127	105	105	179	163	130f
128	106	105a	180	164	130g
129	107	106	181	165	130h
130	108	107	182	166	130i
131	109	108	183	167	130j
132	110	108a	184	168	130k
133			185	169	130l
134	114	109c	186	170	130m
135	115	109d	187	171	130n
136			188	172	130o
137			189		
138	111(4)	109(4)	190	173	130p
139			191	174	130r
140	121(1), 122(2), 123(5)	109j, 109k, 109l	192	175	130s
141	123(3), 117(2)	109l(3), 109f(2)	193	176	130t
142	124(1)	109m(1)	194		
143	119	109h	195		
144	120	109i	196		
145	125	109n	197		
146	126	109o	198	182	131

Lisbon	Amsterdam	Pre-Amsterdam	Lisbon	Amsterdam	Pre-Amsterdam
199	183	132	251	221(2), (3)	165
200	184	133	252	222	166
201	185	134	253	223	167
202	186	135	254	224	168
203	187	136	255		
204	188	136a	256	225	168a
205			257	225a	168a
206	131	110	258	226	169
207	133	113	259	227	170
208	177/178	130u/130v	260	228	171
209	179	130w	261	229	172
210	180	130x	262	229a	172
211	181	130y	263	230	173
212	181a	130y	264	231	174
213			265	232	175
214			266	233	176
215			267	234	177
216			268	235	178
217	310	238	269		
218			270	236	179
219	111(1, 3, 5)	109(1, 3, 5)	271	237	180
220	302, 303, 304	229, 230, 231	272	238	181
221			273	239	182
222			274	240	183
223	190(4, 5)	138(3)	275		
224	191(2)	138(3)	276		
225	192(2)	138b	277	241	184
226	193	138c	278	242	185
227	194	138d	279	243	186
228	195	138e	280	244	187
229	196	139	281	245	188
230	197(2)–(4)	140	282	8	4a
231	198	141	283	112	109a
232	199	142	284	113	109b
233	200	143	285	246	188a
234	201	144	286	247	188b
235			287	248	188c
236			288	249	189
237	204	147	289		
238	205(1, 3)	148(1, 3)	290	202	145
239	206	150	291	202	145
240	207	151	292		
241	208	152	293	250	189a
242	209	153	294	251	189b
243	210	154	295		
244			296	253	190
245	213	157	297	254	191
246	215	159	298		
247	216	160	299	256	192
248	217(2)	161	300	257/258/263	193/194/198a
249	218(2)	162(2)	301	258(1), (2), (4)	194(1), (2), (4)
250	219	163	302	259	195
			303	260	196

Lisbon	Amsterdam	Pre-Amsterdam	Lisbon	Amsterdam	Pre-Amsterdam
304	262	198	332		
305	263(2), (3), (4)	198a(2), (3), (4)	333		
306	264	198b	334		
307	265	198c	335	282	211
308	266	198d	336	283	212
309	267	198e	337	284	213
310	268/270	199/201a	338	285	213a
311	269	200	339	287	214
312			340	288	215
313	272(1)	203	341	289	216
314	272(2–10)	203	342	290	217
315	273	204	343	291	218
316	271	202	344	292	219
317	274	205	345	295	222
318	275	205a	346	296	223
319	276	206	347	297	224
320	277	207	348	298	225
321	278	208	349	299(2)–(4)	227
322	279	209	350	306	233
323			351	307	234
324			352	308	235
325	280	210	353		
326			354	309	236
327			355	299(2)–(6)	227
328			356	312	240
329			357	313	247
330			358		
331					

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Time Line

19 September 1946	Speech by Winston Churchill at University of Zurich calling for a 'United States of Europe'.
4 April 1949	Treaty establishing the North Atlantic Treaty Organisation (NATO).
5 May 1949	Treaty of London establishing the Council of Europe.
9 May 1950	Schuman Declaration.
24 October 1950	Pleven Plan proposing a European Defence Community.
4 November 1950	European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).
18 April 1951	Treaty of Paris establishing the European Coal and Steel Community (Belgium, France, Germany, Italy, Luxembourg, Netherlands).
27 May 1952	Treaty establishing a European Defence Community (Belgium, France, Germany, Italy, Luxembourg, Netherlands).
30 August 1954	French Assembly vote down European Defence Community.
20 May 1955	BENELUX Memorandum proposing customs union presented to ECSC Heads of Government (Beyen Plan).
1–3 June 1955	Messina Conference discussing steps for further European integration.
21 April 1956	Presentation of Spaak Report to ECSC Heads of Government.
25 March 1957	Signing of Treaty of Rome establishing the European Economic Community (EEC) and European Atomic Energy Community (Euratom) (Belgium, France, Germany, Italy, Luxembourg, Netherlands).
4 January 1960	Treaty of Stockholm establishing European Free Trade Association (EFTA) (Austria, Denmark, Norway, Portugal, Sweden, Switzerland and United Kingdom).
14 January 1963	British application for EEC membership vetoed by French Government and negotiations with Denmark, Ireland, Norway and United Kingdom end.
5 February 1963	<i>Van Gend en Loos</i> judgment of Court of Justice.
15 July 1963	<i>Plaumann</i> judgment of Court of Justice.
15 July 1964	<i>Costa v ENEL</i> judgment of Court of Justice.
8 April 1965	Merger Treaty creating common institutions for three Communities.

30 June 1965	'Empty chair crisis'. Refusal of French Government to take its seat in the Council.
29 January 1966	Luxembourg Accords ending 'empty chair crisis' and agreeing not to vote on any measure where any Member State raises 'very important interests'.
13 July 1966	<i>Consten and Grundig</i> judgment of the Court of Justice.
27 November 1967	Second British application to join the European Economic Community vetoed by the French Government.
31 December 1969	End of the Transitional Period.
21 April 1970	Own Resources Decision establishing independent Community Budget.
17 December 1970	<i>Internationale Handelsgesellschaft</i> judgment of the Court of Justice.
19–21 October 1972	Paris Summit establishing social and environment policy as objectives of European integration and creating the 'snake in the tunnel', the first system of European monetary cooperation.
1 January 1973	Denmark, Ireland and United Kingdom accede to the EEC. Norway refuses to do so after referendum.
21 February 1973	<i>Continental Can</i> judgment of the Court of Justice.
29 May 1974	<i>Internationale Handelsgesellschaft</i> judgment of German Constitutional Court.
4 December 1974	<i>Van Duyn</i> judgment of the Court of Justice.
10–11 March 1975	First European Council held in Dublin.
8 April 1976	<i>Defrenne</i> judgment of Court of Justice.
6 December 1978	Brussels European Council establishing European Monetary System and Exchange Rate Mechanism.
20 February 1979	<i>Cassis de Dijon</i> judgment of the Court of Justice.
7–10 June 1979	First direct elections to European Parliament.
1 January 1981	Greece joins the European Community.
19 June 1983	Stuttgart European Council Solemn Declaration on European Union.
14 February 1984	European Parliament Draft Treaty on European Union.
1 February 1985	Greenland leaves the European Economic Community.
14 June 1985	Commission White Paper on Completing the Internal Market.
14 June 1985	Schengen Convention for the gradual abolition of checks at common borders (Belgium, France, Germany, Luxembourg, Netherlands).
8–29 June 1985	Milan European Council opening Intergovernmental Conference (IGC) which leads to Single European Act.
1 January 1986	Portugal and Spain accede to the European Economic Community.
17 and 18 February 1986	Single European Act signed committing the European Economic Community to complete the internal market by 31 December 1992.
1 July 1987	Single European Act enters into effect. The European Economic Community henceforth known as the European Community.
22 October 1987	<i>Foto-Frost</i> judgment of the Court of Justice.
27–28 June 1988	Hannover European Council asks the President of the Commission, Jacques Delors, to chair a committee comprising the national central

	bankers to examine practical steps to realise economic and monetary union.
20 September 1988	Speech by British Prime Minister at the College of Europe, Bruges, criticising the direction and pace of European integration.
24 October 1988	Council establishes Court of First Instance (now the General Court).
9 November 1989	Fall of the Berlin Wall.
8–9 December 1989	Strasbourg European Council agree to convene an IGC to amend the EC Treaty to enable economic and monetary union.
19 June 1990	Convention implementing the Schengen Agreement.
25–26 June 1990	Dublin European Council agree to convene an IGC on political union.
18 June 1991	<i>ERT</i> judgment of the Court of Justice.
19 November 1991	<i>Francovich</i> judgment of the Court of Justice.
7 February 1992	Treaty on European Union (TEU) signed at Maastricht.
2 May 1992	Treaty of Oporto establishing the European Economic Area between the European Community and the EFTA States.
2 June 1992	Danish referendum rejects TEU by 50 to 49.7 per cent.
20 September 1992	French referendum approves TEU by 51 to 49 per cent.
11 December 1992	Edinburgh European Council set out principles which allow second Danish referendum to be held on TEU (which approves the TEU in 1993, with 56.8 per cent of votes in favour).
22 June 1993	Copenhagen European Council sets criteria for membership for states from Central and Eastern Europe ('Copenhagen criteria').
15 October 1993	<i>Brunner</i> judgment of the German Constitutional Court on the constitutionality of the TEU.
1 November 1993	TEU enters into force. European Union comes into being.
24 November 1993	<i>Keck</i> judgment of the Court of Justice.
1 January 1995	Austria, Finland and Sweden accede to the European Union. Norway refuses to do so after a referendum.
15 December 1995	<i>Bosman</i> judgment of the Court of Justice.
2 October 1997	Treaty of Amsterdam signed establishing, inter alia, the Area of Freedom, Security and Justice.
12 May 1998	<i>Martinez Sala</i> judgment of the Court of Justice.
1 January 1999	Eleven Member States (all Member States other than Denmark, Greece, Sweden and United Kingdom) enter into the third stage of EMU, the single currency arrangements.
15 March 1999	Resignation of Santer Commission following allegations of maladministration and corruption.
1 May 1999	Treaty of Amsterdam enters into force.
12 May 2000	Speech by German Foreign Minister, Joschka Fischer, at Humboldt University, Berlin, in which he calls for a need to determine the final point ('finality') of European integration.
2 October 2000	Charter of Fundamental Rights of the European Union (EUCFR) proclaimed by European Convention drafting it.

26 February 2001	Treaty of Nice signed.
7 June 2001	Irish referendum rejects Treaty of Nice by 53.87 per cent of the votes.
25 July 2001	Adoption of Commission White Paper on European Governance.
20 September 2001	<i>Courage v Crehan</i> judgment of the Court of Justice.
15 December 2001	Laeken Declaration of the European Council on the Future of the European Union establishes the Future of Europe Convention to propose treaty amendments allowing for institutional reform and constitutionalisation of the Treaties.
1 January 2002	Euro banknotes are circulated for the first time.
21 June 2002	Seville Declaration offers Ireland certain guarantees, on which basis a second referendum is held ratifying the Treaty of Nice in 2002 (with 62.9 per cent in favour).
1 February 2003	Treaty of Nice comes into force.
18 July 2003	Future of Europe Convention proposes a Draft Treaty Establishing a Constitution for Europe.
1 May 2004	Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovenia and Slovakia accede to the European Union.
29 October 2004	Following on from the Future of Europe Convention, the Member States sign the Constitutional Treaty.
29 May and 1 June 2005	Constitutional Treaty rejected in French and Dutch referendums by 54.68 per cent and 61.54 per cent of votes, respectively.
22 November 2005	<i>Mangold</i> judgment of the Court of Justice.
1 January 2007	Bulgaria and Romania accede to the European Union.
13 December 2007	Signing of Lisbon Treaty.
12 June 2008	Irish referendum rejects Lisbon Treaty by 53.4 per cent.
3 September 2008	<i>Kadi I</i> judgment of the Court of Justice.
19 June 2009	Declaration adopted by the European Council on the 'concerns of the Irish people' on which basis a second referendum ratified the Lisbon Treaty by 67.1 per cent.
30 June 2009	<i>Lisbon Treaty</i> judgment of the German Constitutional Court.
21 October 2009	Greek Government announces that its budget deficit is not 3.5 per cent of GDP as initially estimated but 12.5 per cent.
1 December 2009	Entry into force of the Lisbon Treaty.
2 May 2010	IMF and euro area governments agree €110 billion loan to Greece.
9 May 2010	European Financial Stability Facility (EFSF) established to provide €440 billion of conditional loans to euro area states experiencing public financing difficulties.
14 May 2010	Securities Market Programme (SMP) established by European Central Bank to purchase securities of euro area states having difficulties raising capital.
28 November 2010	€85 billion conditional loan facility provided to Ireland.
8 March 2011	<i>Zambrano</i> judgment of the Court of Justice.
4 May 2011	€78 billion conditional loan facility provided to Portugal.

31 January 2012	<i>Slovak Pensions</i> judgment of the Czech Constitutional Court.
2 February 2012	European Stability Mechanism Treaty (ESM) signed between euro area states, subsuming EFSF and offering up to €500 billion conditional loans to euro area states experiencing public financing difficulties.
2 March 2012	Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG) signed by all Member States other than Czech Republic and United Kingdom.
13 May 2012	Second conditional loan facility of €130 billion provided to Greece.
9 June 2012	€100 billion conditional loan facility offered to Spanish banks.
6 September 2012	European Central Bank replaces SMP with Outright Monetary Transaction (OMT) Programme committing itself to potentially unlimited purchase of euro area government securities.
12 September 2012	<i>European Stability Mechanism (Temporary Injunctions)</i> judgment of the German Constitutional Court.
8 October 2012	ESM Treaty enters into effect.
27 November 2012	<i>Pringle</i> judgment of the Court of Justice.
1 January 2013	TSCG enters into effect.
23 January 2013	British Prime Minister, David Cameron, commits the Conservative Party, if re-elected, to renegotiate the United Kingdom's relationship with the European Union and to submit it to a referendum by 31 December 2017.
5 April 2013	<i>Fransson</i> judgment of the Court of Justice.
13 May 2013	€10 billion conditional loan facility provided to Cyprus.
1 July 2013	Croatia accedes to the European Union.
18 July 2013	<i>Kadi II</i> judgment of the Court of Justice.
8 December 2013	Ireland successfully exits its EFSF loan arrangement.
31 December 2013	Spain successfully exits the ESM loan arrangement for its banks.

1

European Integration and the Treaty on European Union

CONTENTS

1 Introduction

2 Europe and the European Union

- (i) The idea of Europe
- (ii) The idea of 'European Union'

3 The European Communities

- (i) From the Treaty of Paris to the Treaty of Rome
- (ii) EEC Treaty
- (iii) Emergence of two visions of EU law: intergovernmental and supranational
- (iv) Early enlargements
- (v) Single European Act

4 Establishment of the European Union

- (i) Road to Maastricht
- (ii) Maastricht and the Union's three legitimisation strategies
- (iii) Ratification of Treaty on European Union and end of permissive consensus
- (iv) Treaty of Amsterdam

5 Recasting the Borders of the European Union

6 Decade of Institutional Reform

- (i) European Union Charter of Fundamental Rights and Treaty of Nice
- (ii) Constitutional Treaty
- (iii) Road to the Lisbon Treaty
- (iv) Lisbon Treaty
 - (a) Two Treaties of equal value: Treaty on European Union and Treaty on the Functioning of the European Union
 - (b) Lisbon Treaty and a democratic identity for Europe?
 - (c) Lisbon and the recasting of the Union public sphere

7 Sovereign Debt Crisis and the European Union

- (i) European Stability Mechanism
- (ii) Fiscal compact and the 'six-pack'
- (iii) Integration and disintegration beyond the crisis

Further reading

1 INTRODUCTION

This chapter sets out the central features of the European integration process, which provide the historical and political context for European Union law. It also introduces some of the central concepts, ideas and developments in EU law.

Section 2 explores how EU law is centred around an interplay between two themes. The first is the government of many contemporary problems through law. The second is the development of the ideals of Europe and European union. This interplay lays the ground for many of its debates. The European ideal conceives of Europe as the central place of progress, learning and civilisation, placing faith in humanity and its capacity to improve. Its dark side is its arrogance and its dismissal of 'un-European' ways of life or thought as violating these virtues. The idea of European union sets up a political community in competition with the nation-state but one, nevertheless, through which government policy is carried out.

Section 3 considers the establishment of the three Communities, the European Economic Community (EEC), the European Coal and Steel Community (ECSC) and the European Atomic Energy Community (EURATOM). It sets out the central institutions: the Commission, the Parliament, the Council and the Court of Justice. It also considers the central policies, most notably the common market. This section also compares two developments of the 1960s that set out the two dominant models of political authority in EU law: the Luxembourg Accords which set out an intergovernmental vision with political authority and democracy vested in the nation-state, and *Van Gend en Loos* which set out a supranational one in which these are vested in supranational institutions and the rights of European citizens. Finally, this section evaluates the Single European Act (SEA). This established the internal market, and transformed the legislative and political culture surrounding the European Communities by setting out both an ambitious legislative programme and providing for significant amounts of legislation to be adopted free from the national veto.

Section 4 looks at the establishment and early years of the European Union. It considers the three dominant strategies used to justify the authority of the Union, and how these were deployed in the various treaty reforms. These strategies involve increasing EU competencies to allow it to offer more benefits to its subjects, attempting to generate a sense of common identity, and democratic reform of its institutions. At Maastricht, the treaty which instituted the European Union, the central elements of each was, respectively, the establishment of economic and monetary union, European Union citizenship and increased powers for the European Parliament. The Treaty of Amsterdam, signed in 1997 to deal with unfinished business from Maastricht, established the area of freedom, security and justice. Its central features were the abolition of internal border controls between all Member States other than the United Kingdom and Ireland; the establishment of a supranational immigration and asylum policy; and police cooperation and judicial cooperation in criminal and civil matters. Amsterdam sought to orient Union identity more strongly around fundamental rights. In terms of democratic reform, it increased the powers of both the European Parliament and national parliaments.

These strategies were only partially successful. Devices were also introduced to offset tensions generated by the increased centralisation and supranationalisation of law-making. The subsidiarity principle provides that the Union should only act when Member States cannot realise its objectives unilaterally and by reason of the nature or scale of the action, these are better realised through Union action. Differentiated integration was also introduced. In some instances, such as economic and monetary union, it took the form of special regimes for individual Member States. At Amsterdam, a more general form of differentiation was adopted, enhanced cooperation, which allowed a majority of Member States to enact EU laws where others were unwilling.

Section 5 considers the enlargement of the Union. Initially agreed between six Member States, the Union had grown to fifteen Member States by the mid-1990s. Almost all were prosperous and almost all came from Western Europe. The accessions from 2004 onwards brought the number of Member States to twenty-eight, with most of the new Member States being from Central and East Europe and having a post-communist past. This has made the Union a genuinely pan-European organisation but it has made it much more heterogeneous, posing new preferences and challenges, and raising the question of whether it is possible to have a 'one size fits all' EU law.

Section 6 analyses the period of institutional reform which led up to the Lisbon Treaty. It looks, first, at the European Union Charter of Fundamental Rights (EUCFR). This pioneered the convention method for institutional reform, where instead of everything being decided by governments behind closed doors a body was established meeting in open session, taking evidence from civil society, to put forward proposals. The section then goes on to consider the limited institutional reforms agreed at the Treaty of Nice in 2004 and the failure of the Constitutional Treaty. It is then given over to discussion of the Lisbon Treaty.

The Treaty settles the European Union around two treaties, the Treaty on European Union and the Treaty on the Functioning of the European Union. The Treaty catalogues EU competencies, for the first time. In addition, whilst special arrangements are made for foreign and defence policy, all other policies are brought within a common supranational framework. The Treaty next orients the collective identity of the European Union around a particular mission, respect for democratic values and democratic identities. In this regard, the Union must now respect the values set out in the EUCFR and is to be founded on representative democracy. It must also respect the fundamental democratic structures of Member States. Finally, the Lisbon Treaty continues the process of democratic reform with yet further powers for both the European Parliament and significant power for national parliaments, who can now police the subsidiarity principle. As a counter-weight, it accelerates the process of differentiated integration, with a number of special regimes provided for under both the EUCFR and the area of freedom, security and justice.

Section 7, finally, considers how the financial crisis has affected the European Union and led to its re-evaluation. It, first, considers the mechanisms, notably the European Stability Mechanism Treaty, set up outside the formal structures of EU law to provide financial support to those Member States which were no longer able to sustain their public finances. It looks at the limited controls on these, and how these have moved the Union more directly into the world of fiscal and welfare policy, albeit in an asymmetric way where some Member States have considerably more influence than others. It then looks at the more general vision now set out by both EU legislation (the 'six-pack') and by the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (the fiscal compact). These put in place a series of extensive controls on fiscal and macro-economic policy for the euro area Member States in particular. It ponders the nature of this vision in these, and the challenges posed for democratic politics by it. Finally, the crisis has led to a re-evaluation of the Union. Some see the crisis as a reason for stronger EU institutions with wider competencies whilst others consider the crisis exposes the difficulties of European integration and throws the project into further doubt.

2 EUROPE AND THE EUROPEAN UNION

This book is about the European Union. The phrase itself suggests an interplay between two things. On the one hand, the European Union has been established to deal with a series of contemporary problems and realise a set of goals that individual Member States feel unable to manage alone. That idea is conveyed by the word *Union*. Its other feature is its claim to be *European*. In this, its mission is to lay claim to and further a European heritage. This is contentious. Some may disagree with its interpretation of this heritage, the need to further it or that the European Union should claim ownership of it. Nevertheless, the opening words of the Preamble to the Treaty on European Union establishing the European Union state:

RESOLVED to mark a new stage in the process of European integration undertaken with the establishment of the European Communities,

DRAWING INSPIRATION from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law.

To understand EU law, one has to realise that at its core is a constant interplay between these two agendas: the claim to develop European ideals and the government of the problems of contemporary Europe. Elements of both permeate all the chapters of this book. In some areas, there is a tension, imbalance or dysfunction between the two. In other areas, each is being revised in the light of concerns provoked by the other. The balance is constantly changing as political beliefs change, the European Union's institutional settlement evolves and the challenges of the outside world alter. However, each development is considered in the light of a long legacy: be this the history of the European ideal, the institutional settlement of the European Union or a policy whose inception and development goes back many years.

Different chapters of this book consider different legal problems and goals. Yet it is worth pausing at the beginning of the book to consider some of the central elements of this European inheritance, so we know the sort of venture upon which the European Union is embarked. If discussion of the Ancient Greeks and Charlemagne seems rather removed from that of discussion of the single currency, it is, however, worth considering what broader vision of life that currency is tapping into. Is it somehow distinct because it is European and, in turn, does it change our understandings of Europe that 'Europe' is now associated with a series of laws and policies established by the European Union?

(i) The idea of Europe

There is nothing fixed about the meaning of the term 'Europe'. It has been used for a variety of purposes. Its roots, like many things, are curious. The first references to 'Europe' depict it as a woman and the sun. The most famous early reference to Europe is that found in Greek mythology. Europa was a Phoenician woman seduced by the Greek god, Zeus, to come from Lebanon to Crete.¹ Europa was also, however, a Phoenician word that referred to the setting sun. From this, Europe was associated in Ancient Greece with the idea of 'the West'. Originally used to designate the lands to the west of Greece, usage shifted as the Ancient Greek territorial

¹ D. De Rougemont, *The Idea of Europe* (New York, Macmillan, 1965) 6–19.

centre of gravity changed with incursions into modern Turkey and Iran. In his wars, Alexander the Great used it to denote non-Persians and it became associated with the lands in Greece and Asia Minor (today's Turkish Mediterranean coastline). Following this, the term was to lie largely dormant for many centuries. The Roman Empire and Christianity dominated in the organisation of political life, and neither had much use for the term.

Europe re-emerged as an important political idea from the eighth century AD onwards. It was here that it began to acquire many of the associations that we currently make when we use the word 'European'. In part, it became an expression of a siege mentality. The advance of Islam from the South and the East led to Europe being associated with resistance to the religion. An army of Franks, which fought against the Moors, was referred to as a 'European army'.² At this time Europe also became associated with the idea of Western Christianity. The Frankish Empire stretched across much of West Europe under the rule of Charlemagne in the ninth century AD. He styled himself as the father of Europe and sought to impose a political system across the region, based on communication between a large number of political and administrative centres. Alongside this, common economic practices were developed: shared accounting standards, price controls and a currency. Finally, he also sought to build a common Christian culture, which fostered learning, Christian morality, the building of churches and the imposition of a single interpretation of Christianity.³

These elements are all associated with a European identity. However, it was only from the twelfth century onwards that Europe was used to refer to a place whose inhabitants enjoyed a shared way of life based on Christian humanism, revolving around images of God and Christ portrayed as human.⁴ Alongside particular religious beliefs, Europe also became associated with a particular form of political economy, namely, that of rural trade.⁵ Increasingly, the rural town became the centre of the local economy. Trade relations between towns expanded across Europe, so that from the fifteenth century onwards, trade flourished between the Italian ports in the South and Flanders in the North, in which the role of the merchant was pivotal. The final feature of this European region was the persecution of non-Christians, be they pagans or followers of other faiths, such as Judaism or Islam. Those whose conduct offended the central values of Christianity were also maltreated, such as heretics and homosexuals, as were those perceived as socially unproductive, in particular, lepers.

Developments in the sixteenth and seventeenth centuries were to set out the dominant institutional context for the subsequent evolution of the European idea. The establishment of the modern nation-state consolidated power in centralised, impersonal bureaucracies and led to certain core policies, such as tax, law and order and foreign policy being the exclusive competence of these bureaucracies.⁶ This hegemony of the nation-state over political life led

² D. Lewis, *God's Crucible: Islam and the Making of Europe 570–1215* (Norton, New York, 2008).

³ The most extensive exposition is to be found in R. McKitterick, *Charlemagne: The Formation of a European Identity* (Cambridge, Cambridge University Press, 2008).

⁴ J. Le Goff, *The Birth of Europe* (Oxford, Blackwell, 2005) 76–80.

⁵ On the earlier origins of this in the developments of crops of rye and oats which led both to new divisions of labour within agriculture, to trade and to sustaining centres of population see M. Mitterauer, *Why Europe? The Mediaeval Origins of Its Special Path* (G. Chapple (trans.), Chicago, IL, Chicago University Press, 2010) ch. 1.

⁶ C. Tilly (ed.), *The Formation of Nation-States in Europe* (Princeton, NJ, Princeton University Press, 1975); G. Poggi, *The Development of the Modern State: A Sociological Introduction* (Stanford, CA, Stanford University Press, 1978); M. Mann, 'The Autonomous Power of the State: Its Origins, Mechanisms and Results' (1984) 25 *European Journal of Sociology* 185; H. Spruyt, *The Sovereign State and Its Competitors: An Analysis of Systems Change* (Princeton, NJ, Princeton University Press, 1994).

to Europe acquiring new associations in the eighteenth and nineteenth centuries. It became, increasingly, an 'aesthetic category, romantic and nostalgic', associated with utopian ideals. Authors such as Rousseau and Kant saw Europe as an expression of certain ideals: be it a social contract between nations or as a form of perpetual peace. Europe was also considered to represent a shared aesthetic tradition:⁷ be this a common form of high culture, institutionalised through the growth of elite tourism in Europe at that time, or that of a historical civilisation, distinguishing it from the New World and justifying its colonialism.

The final twist came in the twentieth century and derives from the United States' involvement in Europe. The role of the United States in two World Wars, the Cold War and in the regeneration of Europe after the Second World War heavily influenced European identity.⁸ For those reverting to market democracy after forty-five years of communism, a 'return to Europe' means a turn to the West and to values that are associated, unashamedly, with the United States, namely, those of free markets and constitutional democracy. In today's Western Europe, Europe has acquired an alternate meaning where its values are similar to, but different from those of the United States. Although there is a shared commitment to markets and constitutional democracy, these take a different form from those in the United States. There is an emphasis on the social market and on supposedly 'European' values, such as opposition to the death penalty, which are not present in the United States.

J. Habermas and J. Derrida, 'February 15, or, What Binds Europeans Together: Plea for a Common Foreign Policy Beginning in Core Europe' in D. Levy et al., *Old Europe, New Europe, Core Europe: Transatlantic Relations after the Iraq War* (London, Verso, 2005) 5, 10–12

...the spread of the ideals of the French revolution throughout Europe explains, among other things, why politics in both of its forms – as organizing power and as a medium for the institutionalization of political liberty – has been welcomed in Europe. By contrast, the triumph of capitalism was bound up with sharp class conflicts, and this fact has hindered an equally positive appraisal of free markets. That differing evaluation of politics and markets may explain Europeans' trust in the civilizing power of the state, and their expectations for it to correct market failures.

The party system that emerged from the French revolution has often been copied. But only in Europe does this system also serve an ideological competition that subjects the socio-pathological results of capitalist modernization to an ongoing political evaluation. This fosters the sensitivities of citizens to the paradoxes of progress. The contest between conservative, liberal and socialist agendas comes down to the weighing of two aspects: Do the benefits of a chimerical progress outweigh the losses that come with the disintegration of protective, traditional forms of life? Or do the benefits that today's processes of 'creative destruction' promise for tomorrow outweigh the pain of modernity's losers?

In Europe, those affected by class distinctions, and their enduring consequences, understood these burdens as a fate that can be averted only through collective action. In the context of workers' movements and the Christian socialist traditions, an ethics of solidarity, the struggle for 'more social

⁷ A. Chebel d'Appollonia, 'European Nationalism and European Union' and J. Tully, 'The Kantian Idea of Europe: Critical and Cosmopolitan Perspectives' in A. Pagden (ed.), *The Idea of Europe: From Antiquity to the European Union* (Cambridge, Cambridge University Press, 2002). Recent examples of this tradition are Z. Bauman, *Europe: An Unfinished Adventure* (Cambridge, Polity, 2004); U. Beck, *Cosmopolitan Europe* (Cambridge, Polity, 2005).

⁸ G. Delanty, *Inventing Europe: Idea, Identity, Reality* (Basingstoke, Macmillan, 1995) 115–55.

justice', with the goal of equal provision for all, asserted itself against the individualist ethos of market justice that accepts glaring social inequalities as part of the bargain.

Contemporary Europe has been shaped by the experience of the totalitarian regimes of the twentieth century and by the Holocaust – the persecution and annihilation of European Jews in which the National Socialist regime made the societies of the conquered countries complicit as well. Self-critical controversies about the past remind us of the moral basis of politics. A heightened sensitivity to injuries to personal and bodily integrity reflects itself, among other ways, in the fact both the Council of Europe and the EU made the ban on capital punishment a condition for membership.

The excerpt from Habermas and Derrida conveys, amongst other things, the view that, since the eighth century, Europe has been seen as a place where there are multiple political communities with a shared way of life. For them, this shared way of life involves both a questioning of the excesses of the market and, since the Second World War, the excesses of the nation-state.⁹ This questioning and commitment to pluralism is attractive. However, this way of life is also based on a commitment to progress, civilisation, learning and culture and a belief in the value of humanity and its capacity to better itself and to resolve any problems.¹⁰ Europe is not only associated with this commitment and this belief, but they are often seen as something particularly European, to the irritation of many non-Europeans. Europe has, thus, historically posited itself as the centre of the world.¹¹ It has been its job to civilise others, to spread progress or human values. There is also an intolerance of things 'non-European'. For if they are not European, there is a chance that they do not represent the good things Europe represents. At its worse, this arrogance and intolerance has led to racism and colonialism, yet it is also present in the European integration process. Time and again, the *sui generis* nature or specialness of the process is emphasised as a form of particularly enlightened cooperation between nations. This leads to an assumption about the desirability of its policies, with opponents of integration, thus, often dismissed as unreasonable or nationalistic (i.e. un-European). It may be, however, that they simply disagree with the policy or the procedure, or that they believe there to exist other forms of value or ways of life beyond those expressed in the European ideal.

(ii) The idea of 'European Union'

The idea of European union has different associations from that of Europe. After all, many self-avowed Europeans oppose European union! Independent proposals for a 'united Europe' first emerged at the end of the seventeenth century. However, they were still firmly confederal in nature. Ultimate authority was vested in the state, with pan-European structures acting as little more than a fetter upon the autonomy of the states. In 1693, the English Quaker, William

⁹ J.-W. Müller, *Constitutional Patriotism* (Princeton, NJ, Princeton University Press, 2007) ch. 3.

¹⁰ This contradiction is present in the famous 1935 lecture presented by E. Husserl, 'Philosophy and the Crisis of European Humanity' reprinted in E. Husserl, *The Crisis of European Sciences and Transcendental Phenomenology* (Chicago, IL, North Western University Press, 1970) Appendix I.

¹¹ On the hegemonic force of this see R. Kanth (ed.), *The Challenge of Eurocentrism: Global Perspectives, Policy and Prospects* (Basingstoke, Palgrave, 2009).

Penn, wrote *An Essay Towards the Present and Future Peace of Europe*. Penn suggested that a European Parliament be established, consisting of representatives of the Member States. Its primary purposes would be to prevent wars breaking out between states and to promote justice. A more far-reaching proposal was put forward by John Bellers in 1710. Bellers proposed a cantonal system based upon the Swiss model whereby Europe would be divided into 100 cantons, each of which would be required to contribute to a European army and send representatives to a European Senate.

The first proposal for a Europe which replaced the state system with a sovereign central body came from the Frenchman, Saint-Simon, and was published in a pamphlet in 1814, entitled *Plan for the Reorganisation of the European Society*. Saint-Simon considered that all European states should be governed by national parliaments, but that a European Parliament should be created to decide on common interests. This Parliament would consist of a House of Commons peopled by representatives of local associations and a House of Lords consisting of peers appointed by a European monarch. Saint-Simon's views enjoyed considerable attention during the first part of the nineteenth century. Mazzini, the *éminence grise* of Italian nationalism, allied himself with Proudhon and Victor Hugo in declaring himself in favour of a United Europe. Yet, the nineteenth century represented the age of the nation-state and the relationship between that structure and that of a united Europe was never fully explored.

The balance was altered by the First World War, which acted as a stimulus for those who saw European union as the only means both to prevent war breaking out again between the nation-states and as a means of responding to increased competition from the United States, Argentina and Japan. Most prominent was the pan-European movement set up in the 1920s by the Czech, Count Coudenhove-Kalergi.¹² This movement not only enjoyed considerable support amongst many of Europe's intellectuals and some politicians, but was genuinely transnational, having 'Economic Councils' both in Berlin and in Paris. During the 1920s, the idea of European unity received governmental support in the shape of the 1929 Briand Memorandum. This Memorandum, submitted by the French Foreign Minister to twenty-six other European states, considered the League of Nations to be too weak a body to regulate international relations, and proposed a European Federal Union, which would better police states, whilst not 'in any way affect[ing] the sovereign rights of the States which are members of such an association'. This proposal, despite acknowledging the authority of the nation-states, was still regarded as too radical and received only a lukewarm response from the other states.

A further shock, in the form of the Second World War, was needed to arouse greater governmental interest in the idea of a united Europe. The coming into being of the European Communities and its transformation into the European Union are explored in greater depth in the rest of this chapter. It is useful to consider for a moment how the creation of this powerful organisation, which now adopted the term of 'European Union' for itself, changed the context within which the idea was understood.

In the first place, the European Union has become an independent centre of government in its own right, generating its own understandings about European union and European values and symbols. In some instances, to do this, it has tried to replicate the symbols and tools of nationhood at a pan-European level – be it through the (re)discovery of European flags, anthems,

¹² N. Coudenhove-Kalergi, *Pan-Europe* (New York, Knopf, 1926). An excellent discussion can be found in C. Pegg, *Evolution of the European Idea 1914–1932* (Chapel Hill, NC, University of North Carolina Press, 1983).

Cities of Culture or common passports.¹³ Other activities cannot be characterised in this way. We shall see in [Chapter 11](#) that the European Union idea of citizenship, for example, takes a very different trajectory from that of national citizenship. The European Union is projected as a model of political community which is an alternative to the nation-state and not a mimic of it.¹⁴ Both understandings of European union, that as mimic and that as alternate to the nation-state, are opposed by 'Euro-sceptic' groups, who see each as something equally destructive of local self-government.¹⁵

In the second place, European union has become a vehicle through which national governments pursue their understanding of the national interest. Here it does not sit in opposition to national governments, but is used to justify and redefine national government policy. Bickerton has argued that this has led to a subtle and not unproblematic shift in national government understandings of what they are about. They have moved from being nation-states to Member States.

C. Bickerton, *European Integration: From Nation States to Member States* (Oxford, Oxford University Press, 2012) 60, 68–9

The more traditional elements of statehood remain – central government, identifiable territory and a population – and member states retain a monopoly on the legitimate exercise of violence. But the integrated state-society relationship of the modern nation state is increasingly relativized and seen as only part of what makes up the state. The other part is membership of international organizations, regional organizations, and generally the participation in a multitude of activities that appear as external to the state itself and function as material constraints upon its liberty...

...we can point to two critical features of member statehood that stand out in terms of how they contrast with dominant assumptions and practices of modern nation states. The first is that central to member statehood is a presumed *opposition* between state and society. The purpose of limiting national power in ways that appear external to the national polity is in order that domestic populations are distanced from policy-making and decision-making. National elites seek to insulate themselves from the force and compulsion of public opinion because of the risk that 'vile people', as Weiler puts it, will generate vile policies. The idea of membership thus belongs to this sought-for separation between state and society. The contrast with modern nation states is striking: here the goal was to achieve a unity in what was a fractious and divided social space. Problems of economic and ideological conflict have generally been sublimated through unifying categories such as the people and the nation, even if those categories have themselves been subject to long-standing disagreements about their precise meaning.

Whilst modern nation states have sought unity, member states assume division. The state-society relationship is thus reconfigured in a way very alien from traditional thinking about the state: a presumed relationship of representation is replaced by one of insulation and separation.

¹³ C. Shore, *Building Europe: The Cultural Politics of European Integration* (London/New York, Routledge, 2000).

¹⁴ U. Beck and E. Grande, *Cosmopolitan Europe* (Cambridge, Polity, 2007) 225–40; J. Habermas, *The Crisis of the European Union: A Response* (Cambridge, Polity, 2012) 1–53. In some cases, EU policies adopt elements of both models. For a discussion of the European Cities of Culture and European Landscape Convention see M. Sassatelli, *Becoming Europeans: Cultural Identity and Cultural Policies* (Basingstoke, Palgrave, 2009).

¹⁵ A flavour is provided in M. Holmes (ed.), *The Eurosceptical Reader* (Basingstoke, Macmillan, 1996).