

CASES AND MATERIALS ON
EUROPEAN UNION LAW

Second Edition

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American Casebook Series®



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CONSUMER RECYCLED PAPER



*To my wife, Sandra, and to my children,
Sloan, Suzanne and Grant*

G.A.B.

*To the memory of my father, Frank L. Goebel,
and to the memory of my mother,
Anne M. Goebel*

R.J.G.

*To my mother, Jean M. Davey,
and to my father, Norman B. Davey*

W.J.D.

*To my children, Douglas, Margot and Randy,
to my mother, Elizabeth S. Cohen,
and to the memory of my father,
Herman Cohen*

E.M.F.

*

Preface

The study of European Community law, always of interest since the Community's creation, has taken on special importance in recent years. As the Community perfects its goal of a true internal market and monetary union, while contemplating an unprecedented enlargement to the east and profound constitutional reform, American lawyers and law students naturally seek to learn more about the Community and its law. With the advent of the European Union in 1993, following the Maastricht Treaty, the European-level legal framework has become still more complex. Each of the Union's three "pillars" (Community law, common foreign and security policy, and police and judicial cooperation in criminal matters) has generated its own "law." We may truly speak today about both European Community law and European Union law, though the former predominates in this casebook and in the legal literature more generally.

This casebook is intended to provide a basic understanding of the Community and Union, their structures, goals, fields of action, achievements and aspirations, as well as to lay a foundation for further research, analysis and legal writing.

There are many valid reasons to study Community and Union law. We present here three of the most important ones. The most pragmatic of them is that the Community has become the largest trading partner of the US, constitutes the largest overseas single market in the world, and represents a major site of investment for US firms. US lawyers, both international house counsel and outside counsel, can no longer afford to possess only a limited knowledge of Community structure, law-making processes and substantive law. Community competition and trade law have long been staples of international practice. Today, the European Community's harmonization of health, safety and technical standards, banking, securities and company law, environmental and consumer protection measures, and actions in the field of agricultural and social policy (to name just a sampling of sectors) represent matters of practical concern to US interests and their lawyers. The Community's achievement of an economic and monetary union, with a single currency and a single monetary policy, is also of evident importance to the international business and legal world.

Second, Community and Union law are rewarding fields for comparative law study. This has long been true in competition and trade law, where academics and practitioners have found provocative points of comparison and contrast. Today a rich source of comparative study is to be found in the Community programs for harmonization of laws. In some fields, as in environmental and securities law, the Community has been significantly influenced by US models, but still strikes certain different notes. In other fields, such as banking, company law, consumer protection and social policy, the Community has taken quite a different path from the US, and its law has had its echoes in American law. Constitutional comparisons and contrasts between the US and EU have acquired unprecedented interest among comparatists. The diver-

gences between US and Community law have provoked thoughtful reflection on the context and underlying values of each system. They should continue to do so.

Third, Community law provides a laboratory for study of law formation: the development of an entire legal system in modern times. The study includes the Community's constitutional framework, its institutions, substantive legislation and judicial law, and the constant interplay of policy and politics in an evolving federal-type system, one comprised of fifteen (and soon more) nations having many commonalities but also divergent systems, demographics and interests.

The casebook rewards the student who has come to the course for any or all of these reasons. The book covers virtually all major fields of Community law. (We regret that, despite the book's increase in size over the first edition, space considerations prevented coverage of certain important topics, such as public procurement, transport, agriculture and telecommunications law.) The notes and questions have been crafted to facilitate reflection on how and why the Community and Union institutions, and especially the Court of Justice and Court of First Instance, have reached their legal and policy conclusions. The text and notes make frequent comparisons with US law. The authors hope that the reader will thereby achieve not only a good comprehension of Community and Union law, but also a critical one.

The casebook is intended for use in US law schools, but it may also be suitable for faculties in Europe and elsewhere. Our casebook follows traditional US teaching methods which give central attention to primary materials, such as legislation and court judgments, inviting students to examine these materials critically through focused questions. Accordingly, Court of Justice and Court of First Instance judgments and Community legislation are subjected to the same kind of analytic review as US laws and Supreme Court opinions would be in a standard constitutional law casebook. We hope that European professors and students will find that the process of analytic examination of judgments and legislation through questions will assist in a more reflective comprehension of Community rules and judicial doctrines.

The preparation of this edition and the teaching of the subject in general has been complicated by the decision implemented in the 1998 Treaty of Amsterdam (effective 1999) to renumber the articles of the treaties establishing both the European Community (EC Treaty) and the European Union (TEU). For instance, generations of Community law scholars have written and discussed the impact of Article 30's ban on quantitative restrictions and measures with equivalent effect and the exceptions thereto in Article 36, only now to be faced with a numbering system that has the exception in Article 30 and the ban in Article 28. Likewise, probably the most familiar EC Treaty articles to American lawyers—the competition provisions in Articles 85 and 86—have become Articles 81 and 82. We have, of course, used the new numbering system in our text, with indications in parentheses of the old numbers. Similarly, in cases where we have kept the old article numbers, we have indicated the new numbers in brackets.

While this new edition was in preparation, new amendments to both the EC Treaty and the TEU were agreed to in the Treaty of Nice, signed in December 2000. (The proposed amendments will already undermine the purity of the new numbering system by adding, for example, new Articles 11a and 181a.) Where

significant, we have indicated in the text and notes the changes that will be made if and when the Treaty of Nice is ratified. As of November 2001, only Denmark, France and Luxembourg had deposited their ratifications, although the process of ratification was at an advanced stage in several other Member States. Unfortunately, in June 2001, Irish voters rejected the Treaty, reflecting the now longstanding complaints that there is too great a distance between the leadership and the people and, notwithstanding impressive institutional reform in recent years, still something of a “democratic deficit.”

The Selected Documents, which accompanies the casebook, contains the EC Treaty (as last amended by the Treaty of Amsterdam in 1999), the TEU (likewise as amended at Amsterdam), followed by (a) a conversion table of article numbers for both treaties showing the pre- and post-Amsterdam numbering, and (b) the 2000 Treaty of Nice which, as of this writing, remains to be ratified. The Nice Treaty consists primarily of amendments to the EC Treaty and TEU, and users are strongly encouraged when considering any treaty article to turn to the Nice Treaty (Document 4) for an indication of how, if at all, that particular provision would be altered upon the Nice Treaty’s entry into force. (Where highly significant, the projected changes will in any event be brought to the reader’s attention in text and notes throughout the book.) Because the treaties constitute the foundation of the Community legal system, they should in any case be read in tandem with the casebook as and when reference to treaty articles is made. Editors’ note in the Selected Documents try to make the interplay between these texts as clear as possible.

The Selected Documents volume also contains a large sample of important secondary legislation, excerpted lightly and with care. Students will profit from working with these complex legislative texts. The accessibility of these important Community law documents should also be helpful in research.

* * *

Users of the book commonly wonder how best to use its voluminous materials. Clearly there is more material (and more subjects) than can be responsibly covered in a single semester course. Those using the book for such a course have a range of possibilities at their disposal. Teachers who wish especially to emphasize constitutional and institutional issues will find that Parts I and II of the book provide a comprehensive picture of the legal and institutional framework of the European Community and European Union, furnishing material for up to at least a full half-semester of teaching, thereby allowing constitutional and institutional themes to become the course’s leitmotif. They may then assign substantive law chapters that best match their and their students’ interests. We recommend that any such substantive law selection include a very healthy dose of the material in Part III on the Internal Market, one or two basic chapters on competition policy (from Part IV), and one or two basic chapters on external relations and trade (from Part V) or economic and monetary union and free movement of capital (from Part VI).

Many other teachers will wish to leave considerably more room for inquiry into substantive aspects of Community and Union law. For them it will be necessary to select among the materials in Part I and Part II chapters, either deleting certain chapters (such as the chapters on preliminary references or infringement actions, or the lengthy chapter on the reception of Community law in the Member State legal systems) or assigning only portions of them. That will leave

them far the greater portion of the semester for the study of substantive European law. We facilitate this by placing in Part II, rather than Part I, all the chapters that focus on the reception, implementation and enforcement of Community law in the Member States.

As implied above, in the authors' judgment, no course in Community law is complete without extended reference to the fascinating range of issues surrounding the Internal Market. Those materials therefore receive privileged attention in Part III of the book. (The free movement of capital and the economic and monetary union have been placed in their own part—Part VI—but should be considered features of the internal market as well.) Part III chapters deserve a conspicuous place in any basic Community law course, however much attention may be given to constitutional and institutional issues in Parts I and II. Even so, Part III is structured to enable teachers to dispense with certain aspects of the internal market by simply deleting one or more chapters or portions thereof, if they wish to make more room for substantive law chapters in the remaining parts of the book.

Competition law (and related subjects) and external relations (including trade) comprise their own Parts of the book, Parts IV and V, respectively. Teachers clearly will differ on the extent to which they devote class hours to these materials. As noted, we believe that any introductory course should include at least some materials from both of these parts. But those who place emphasis on these matters will find that each Part thoroughly covers its domain and can sustain classroom study for over a third of a semester.

Without pretending to be exhaustive, Part VII presents assorted substantive law topics not falling within the domains of Parts III, IV, V or VI. They are a varied lot—from consumer protection to social policy to equal rights to jurisdiction and the enforcement of foreign country judgments. Should teachers find that they wish to address a particular policy area that is not covered in this Part, they will find that outside materials are readily available. (See the Note on Legal Sources following this Preface.) The authors invite suggestions from users as to policy areas that they recommend be included in subsequent editions of this book.

Ideally, Community law will be studied over the course of two semesters. The casebook is of a length and organization to facilitate such usage. It is recommended that, in that event, the first semester of the course emphasize Parts I through III and the second semester the remainder.

It is also possible to teach a variety of advanced semester-long courses making use of parts of the casebook. As noted above (in the context of a second-semester offering in a year-long curriculum), a course could concentrate entirely on Community competition and trade law, Parts IV and V. In the alternative, one could construct a comparative competition law or trade law course, using the relevant part of the casebook together with materials on US or other nations' antitrust or trade law, coupled with the emerging body of international law materials on these subjects. An advanced course might also center on the Community's integrated internal market, including the chapters on harmonization of laws, services, establishment (from Part III) and capital and economic and monetary union (from Part VI), again possibly supplemented by

market integration materials from other countries (such as the US) or the world trading system. Even Parts I and II lend themselves to use in a comparative federalism course.

We hope that the casebook will prove easy to use while also highly instructive, and that it will stimulate further study and scholarship in the ever-widening and seemingly always rich arenas of European Community and European Union.

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Foreword

I said in the Foreword to the first edition "From any standpoint this is a remarkable work". I remain of that opinion, indeed even more strongly since the first edition, already widely used, has been admirably brought up to date to include many recent cases (Keck is a good example) and the changes proposed in the Nice Agreement. The revision was an enormous and an important task, even increasing the wealth of detail to be found in the first edition.

The book deals with really three parts. First the institutions and the jurisdiction of the Court, its scope, its remedies, its attitudes. It deals secondly with the relationship between national law and domestic law and it analyses how far national courts have accepted the transplant or transfusion in a union of states which is far from being a federation. Thirdly it deals with many aspects of the substantive law—the freedom of movement of persons, goods and services, competition policy, external relations, the free movement of capital and monetary union and specific Community policies such as environment protection and consumer rights. Needless to say the problems arising from the creation of an internal market are dealt with in considerable detail.

I have found in using this book, both for my own benefit and in an occasional class, that the system adopted has been very valuable. There is a concise introduction of the particular subject followed by the reference to the cases. For each case there is a summary of the issues or facts followed by extracts from the judgment and then questions, comments and cross references including comparative law comments. The analysis by the authors of the judgment and their selection of paragraphs gives the student a very clear idea of what is to be got from the case without in any way discouraging him or her from going to the actual reports. Since students do not always have ready access to full reports this is a very useful technique to enable the student to see the cases in their context and to understand them. Many of the questions which are raised are far from superficial and require considerable thought and discussion by the student and the professor. Thus some of the questions require not only a detailed study of the facts of a case but more important a real attempt to understand what is the principle and how it may apply to other factual situations.

I am convinced that the teaching of European Union law outside the Community and especially in the English speaking world will be greatly enhanced by this new edition. I think also that the book is a very good working book for classes in other countries where students' knowledge of English may be not so complete. The style is concise and clear and forceful. I repeat what I said in the first Foreword "Any student who masters this book, or specific sections of it, will have a profound and detailed knowledge of what European law is all about."

SLYNN OF HADLEY

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Acknowledgments to the First Edition

The authors of every project of this scope owe a multitude of debts to those who have inspired and assisted them along the way. While it is not possible to acknowledge all those who have helped us, a number of contributions deserve special mention.

We jointly give our thanks to those who have made suggestions that have helped to shape the coverage or text of this casebook. Preeminent among them are Bernhard Schloh of the Council Legal Service, Peter Oliver of the Commission Legal Service, and Professor Valentine Korah of University College, London.

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We further wish to pay tribute to Professors Eric Stein, Peter Hay, Michel Waelbroeck and Joseph Weiler, whose earlier casebook representing a pioneering text from which we all profited when first teaching in this field.

Finally, we acknowledge the permission given by Sweet & Maxwell Ltd. for the use of excerpts from a number of national court judgments reported in the Common Market Law Reports, and thank the staff of the Court of Justice and of the information services of the EC Delegations in New York City and Washington, D.C., for their assistance in obtaining current materials.

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Legal Sources and Citation Forms

American students, academicians and lawyers encountering European Community and European Union law for the first time may find it difficult to deal with the source material, which is quite different in character and style from US legislation, case law and legal commentary. The purpose of this note is to explain briefly how to access European Community documents and secondary research materials, as well as to indicate the mode of citation used in this casebook.

1. The Constitutive Treaties

The basic treaties—the Treaty Establishing the European Community (EC Treaty) and the Treaty on European Union (TEU)—are published by the European Office for Publications or EOP (previously EC Office for Official Publications), Luxembourg, in both a complete and an abridged edition. They reflect the changes introduced by the Single European Act, the Treaty of Maastricht and the Treaty of Amsterdam. The Selected Documents volume published in conjunction with this casebook also sets out the constitutive treaties as amended to date.

The Treaty of Nice, agreed to in December 2000 and signed on February 26, 2001, but still in the process of ratification, appears in the Official Journal at O.J. C 80/1 (Oct. 3, 2001). The complete text has also been published by the European Office for Publications, and likewise appears in the Selected Documents volume published in conjunction with this casebook.

Major compilations of Community law, such as the Commerce Clearing House (CCH), European Union Law Reporter, and the Encyclopedia of European Union Law (K. Simmonds ed., Sweet & Maxwell looseleaf) also contain all of the treaties. The treaties are also available in electronic form from several sources. EurLex, the free legal database maintained by EUR-OP on the Internet, contains recent consolidated versions of the treaties (<http://europa.eu.int/eur-lex>). Copies of the treaties, along with their declarations, can be accessed for a fee on WESTLAW in the EU-TREATIES database, on LEXIS in the EC Treaties database (provided by CELEX) and in CELEX, the fee-based database of legal documents maintained by the European Union.

2. Secondary Legislation

Community legislation consists of regulations and directives. These, together with legally binding decisions and proposals for legislation, are published in a journal in each of the eleven working languages of the Community and Union (Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish and Swedish). The English language version is called the Official Journal of the European Union (previously Official Journal of the European Communities), typically abbreviated O.J. The French version is the Journal Officiel, or J.O. The Journal is published daily, except for holidays. (Occasionally more than one number is printed on the same date.)

There are two different series in the Journal. Council regulations and directives, Commission decisions in competition and antidumping cases, and

similar items, are found in the “L” (for “Legislation”) series. Proposed legislation, proceedings of the Parliament, recommendations of the Economic and Social Committee and various notices are published in the “C” (for “Communications”) series.

Each issue of the official Journal is separately paged. The Journal is commonly cited by series, issue number, page and date, for example: O.J. L 44/33 (Feb. 1, 1999). The Journal was not published in English prior to the accession of the United Kingdom and Ireland in 1973. Legislation prior to that date was translated and published in a special edition, cited, for example, as O.J. English Spec. Ed. 1968, at (page) 12.

A piece of legislation is typically cited by its number, its date of adoption and its title, followed by the journal reference. Thus, a complete citation would read as follows: Council Directive 85/374 of July 25, 1985, on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, O.J. L 210/29 (Aug. 7, 1985). Secondary sources, including this casebook, frequently shorten long titles of legislative acts or refer to them only by number and date, or only the number. Example: Council Directive 85/374 of July 25, 1985 on product liability, or simply Council Directive 85/374.

The Community publishes twice a year, as part of the Official Journal, a list of legislation in force (showing all amendments), on a topical and chronological basis. See, e.g., Official Journal of the European Union, Directory of Community Legislation In Force and Other Acts of the Community Institutions, the latest being from July 1, 2001 (37th ed.). The Official Journal publishes monthly and annual alphabetical and methodological indices. The latest version of the Directory of Community Legislation in Force is also available on EurLex (<http://europa.eu.int/eur-lex/en/lif/index.html>).

EurLex provides free access to the Official Journal since January 1, 1998 (in all the official languages of the EU), which can be searched full-text. Both WESTLAW and LEXIS publish databases of European Union legislation that allow searching full text. WESTLAW provides coverage beginning in 1952 in its European Union Legislation (EU-LEG) database. LEXIS provides coverage beginning in 1980 in its EC Legislation (EURCOM; LEGIS) database. CELEX provides access to all issues of the Official Journal with enhanced search capability compared to that provided by EurLex. The CCH European Union Law Reporter and the Encyclopedia of European Union Law mentioned above each publish a substantial quantity of secondary legislation.

3. Judgments of the Court of Justice and Court of First Instance

All judgments and important interlocutory orders of the Court of Justice and the Court of First Instance, as well as all opinions of the Advocates-General, are printed in the official Court reports, officially entitled Reports of Cases before the Court of Justice and the Court of First Instance (and often catalogued under that name), but more commonly called the European Court Reports (ECR). These are issued in all of eleven working languages of the Community. Since 1989, the volumes have been divided between the Court of Justice and the Court of First Instance, with separate pagination for each court.

The pages for the Court of Justice decisions are preceded by “I-”; the pages for the Court of First Instance decisions by “II-”.

Due to the delay in translation, the English series of these reports appears about fifteen to eighteen months after judgments are rendered. The Court of Justice publishes Weekly Proceedings containing summaries of the judgments and opinions, appearing about two months after they are rendered. The Court also makes issues of the Proceedings since 1998 available on its web site, <http://curia.eu.int/en/act/index.htm>. Moreover, the French text (the working language of the Court), as well as the text of the language initially used in each case, are both available on request from the Court’s information office, usually within a few weeks after the date of the judgment or opinion. Incidentally, it is often useful to consult the French text of judgments because it represents the initial formulation of the Court’s thinking, and the English translations may sometimes be imprecise or awkward.

CELEX contains all judgments and opinions after their publication in the ECR and is searchable full-text. WESTLAW in its database EU-CS similarly contains all judgments and opinions as provided in CELEX. WESTLAW’s EU-CS-ALL database contains judgments and opinions published in the ECR and selected commercial law reporters, including the Common Market Law Reports, mentioned below. LEXIS likewise provides full-text access to the contents of the ECR in its European Court of Justice Cases (EURCOM; ECJ) database.

The European Court of Justice publishes its opinions and judgments on its official web site, <http://curia.eu.int>. Full-text search capability is available for opinions and judgments since 1997. Access to opinions and judgments by case number is available from 1953 for the Court of Justice and since its inception in 1989 for the Court of First Instance.

Many, but not all, Court of Justice judgments and opinions are also published unofficially. The two primary English language sources are the CCH European Union Law Reporter and the Common Market Law Reports (Sweet & Maxwell), or CMLR. Both often publish judgments before the ECR does so. In addition, the Common Market Law Reports publishes selected judgments from the UK and other Member State courts dealing with Community law issues. CCH publishes recent cases in its current binders, which are then periodically transferred to permanent volumes, cited since 1989 as the CEC.

It is customary to cite Court of Justice decisions by name, case number, year and page and to abbreviate the title of the reports as ECR. Where the name of the case is common (e.g., *Commission v. Belgium* or *Commission v. Council*), we have devised (or borrowed from other sources) descriptive names as means of identification and put them into parentheses following the official name in the ECR. These descriptive names are not part of the official name of the case.

Thus, we use the following citation forms: *Commission v. Council* (ERTA), Case 22/70, [1971] ECR 263; *In re Kramer*, Cases 3, 4 & 6/76, [1976] ECR 1279; *GB-INNO-BM v. Confederation de Commerce Luxembourgeois*, Case C-362/88, [1990] ECR I683. If a judgment excerpted or cited in the casebook has not yet been published in the ECR, we indicate the ECR year, leave the page blank, and provide a parenthetical reference to the date.

We deliberately do not follow the “bluebook” citation forms, either for judgments, legislation or other materials. Our citation forms are adapted from

those commonly used by European writers and are designed to provide maximum clarity in use.

In our excerpting of cases, we denote omissions of whole paragraphs by three asterisks and omissions of words or sentences within a paragraph simply by three dots. For simplicity and conciseness, we have commonly omitted the Court's own citations without indicating the omission.

4. Community Reports and Bulletins

The Community publishes as substantial volume of reports and studies each year, many of which are available on the EU's official web site, Europa. The most important is the Commission's Annual General Report on the Activities of the European Union (addressed to the Parliament) which contains a valuable summary of the activities of each of the EU Community institutions in all of the important fields of Community and Union operations. This report is usually published in March. It should be cited both by reference to the year being reviewed and the year of publication. Example: Twenty-fifth General Report 1991, at 25 (1992). The full text of recent Annual Reports are available on the Europa web site by clicking on the Official Documents link or using the following link: <http://europa.eu.int/abc/doc/off/rg/en/rgset.htm>.

The Commission publishes a number of annual special reports, e.g., on agricultural policy, antidumping, competition policy, the environment, social policy, etc., which are useful research tools in those fields. The Commission also publishes a Bulletin of the European Union, usually on a monthly basis, but combining July and August. This Bulletin summarizes important developments, sector by sector, each month. Due to translation delays, the Bulletin usually appears several months late. We use the Annual General Report form of citing the Bulletin: Bull. EU 1990-3, at 17. The full text of recent Monthly Bulletins are available on the Europa web site by clicking on the Official Documents link or using the following link: <http://europa.eu.int/abc/doc/off/bull/en/welcome.htm>.

The Commission and the other EU institutions or agencies publish a great variety of special studies and reports. These are available, either for a charge or free, from the Office of Official Publications in Luxembourg. There are several US distributors including Bernan Associates, 4611-F Assembly Drive, Lanham, MD 20706-4391, Telephone: 800-274-4447, Fax 800-865-3450, email query@bernan.com; URL: <http://www.bernan.com>

5. Secondary Source Material

We have previously mentioned the CCH European Union Law Reporter and the Encyclopedia of European Union Law (K. Simmonds, ed. Sweet & Maxwell) as valuable sources of general information. Smit & Herzog, Law of the European Economic Community (Matthew Bender looseleaf), is a loose-leaf service analyzing the EC Treaty, article by article. In addition to its annual updates, it is being updated at the present time to reflect the amendments brought by the Treaty of Amsterdam.

Eurowatch is a semimonthly newsletter containing valuable information on current developments in the EU. A number of law firms, accounting firms and information offices in Brussels publish newsletters, often quite useful. The Economist and the Financial Times probably provide the best English-language news coverage.