

MODERN STUDIES IN EUROPEAN LAW



DIRECT INVESTMENT,
NATIONAL CHAMPIONS
AND EU TREATY FREEDOMS

FROM MAASTRICHT TO LISBON

FRANK S BENYON

Direct Investment, National Champions and EU Treaty Freedoms

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Frank S Benyon



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DIRECT INVESTMENT, NATIONAL CHAMPIONS AND EU TREATY FREEDOMS

Within the European Union, the legal dimension of trade in goods and, more recently, of trade in services has gained clear contours. This is less true for cross-border direct investments. Within the system of the fundamental freedoms, cross-border direct investments may fall within the scope of the freedom of establishment (Article 49 TFEU; 43 EC), the free movement of capital (Article 63 TFEU, 56 EC) and sometimes the freedom to provide services (Article 56 TFEU, 49 EC). The free movement of capital has been the last fundamental freedom to be endowed with direct effect. The investment potential of Sovereign Wealth Funds makes this a very topical subject.

The European Court of Justice has started to develop the full potential of the free movement of capital and the freedom of establishment only recently. This has raised a number of important new questions, including how the two freedoms relate to each other, and how to balance the individual's rights to market access with the Member States' competence to regulate in the public interest. In particular, the use of state measures to protect strategic or alleged public interests selectively, or to foster 'national champions', will be considered. Under settled case law, to find an infringement of the free movement rules it suffices that a measure renders the exercise of the freedom 'less attractive'. Potentially this opens the door for a broad review of the appropriateness of all non-harmonised mandatory rules contained in general national laws. There is also a general question of when free movement of capital and freedom of establishment may have horizontal effect, a matter raised by the *Viking* case. The particular situation of third country investors also has to be considered, insofar as they may benefit from the free movement of capital but not from the establishment and services freedoms.

Recent developments in EU company law are discussed, notably those concerning cross-border relocation of businesses as well as those regulating takeovers and mergers. Overall the book analyses the role of the market and the role of the state with regard to direct investment, delineates the competences of the EU and the Member States in this field and places the debate in the larger context of international direct investment. Focussing on recent developments, cases and debates, the book also looks at the changes made to the applicable rules by the Treaty of Lisbon, including the inclusion of foreign direct investment into the Community's trade policy, thus providing an overview of this cutting-edge issue and a reflection on the rationales that should guide the evolution of this field of law.

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in the European Union *Heli Askola*
- 15 Unfair Contract Terms in European Law: A Study in Comparative and
EC Law *Paolisa Nebbia*
- 16 Energy Security: The External Legal Relations of the European Union with
Major Oil and Gas Supplying Countries *Sanam S Haghighi*
- 17 EU Criminal Law *Valsamis Mitsilegas*
- 18 Effective Judicial Protection and the Environmental Impact Assessment
Directive in Ireland *Áine Ryall*
- 19 Network-Based Governance in EC Law: The Example of EC Competition
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Table of Cases

European Union

Alphabetical

Alpine Investments BV v Minister van Financien, Case C-384/93 (1995)	
ECR I-1141	18
Angonese v Cassa di Risparmio di Bolzano, Case C-281/98 [2000]	
ECR I-4139	28
Annunziata Matteucci v Communauté française of Belgium, Case 235/87	
[1988] ECR 5589	107, 108
Association Eglise de Scientologie de Paris and Scientology International	
Reserves Trust v The Prime Minister, Case C-54/99 [2000]	
ECR I-1335	32, 35, 37, 38, 48, 53, 77, 86, 87, 88, 111
Audiolux SA and Others v Groupe Bruxelles Lambert SA (GBL) and	
Bertelsmann AG, Case C-101/08 (ECJ, 15 November 2009)	70
Bordessa and Others (Criminal proceedings against), Cases C-358/93 and	
C-416/94 [1995] ECR I-361	14
Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners	
of Inland Revenue, Case C-196/04 [2006] ECR I-7995	25, 53, 59, 75
Caixa-Bank France v Ministère de l'Economie, des Finances et de l'Industrie,	
Case C-442/02 [2004] ECR I-8961	4, 18, 26, 28, 32
Cartesio Oktató és Szolgáltató bt, Case C-210/06 [2008]	
ECR I-9641	57, 59, 65, 66, 114
Casati (Criminal proceedings against), Case 203/80 [1981] ECR I-2595	8, 14
Centros Ltd v Erhvervs- og Selskabsstyrelsen, Case C-212/97 [1999]	
ECR I-1459	53, 54, 55, 56, 59, 60, 66
Commission v Austria, Case C-205/06 (ECJ, 3 March 2009)	5, 78, 99,
	100, 101, 111
Commission v Belgium, Case C-503/99 [2002]	
ECR I-4809	16, 32, 35, 39, 51, 53, 67, 74, 111
Commission v Council (General system of preferences), Case C-14/86	
[1987] ECR 1493	80
Commission v Council (Energy Star Agreement), Case C-281/01	
[2002] ECR I-12049	80
Commission v Finland, Case C-118/07 (ECJ, 19 November 2009)	78, 99
Commission v France ('Spanish Strawberries'), Case C-265/95 [1997]	
ECR I-6959	29, 30, 33, 70, 109
Commission v France, Case C-483/99 [2002] ECR I-4781	16, 32, 35,
	42, 45, 51, 53, 67, 74, 111

Commission v Germany (Volkswagen), Case C-112/05 [2007]	
ECR I-8995	18, 19, 20, 39, 42, 74, 78, 81
Commission v Germany, Case C-546/07 (ECJ, 21 January 2010).....	107
Commission v Ireland, Case C-459/03 [2006] ECR I-4635	108
Commission v Italy, Case 10/61, judgment of 27 February 1962.....	107, 108
Commission v Italy, Case C-174/04 [2005] ECR I-4933	96
Commission v Italy, Case C-518/06 (ECJ, 28 April 2009)	28
Commission v Italy (pharmacies), Case C-531/06 (ECJ, 19 May 2009)	75
Commission v Italy, Case C-326/07 (ECJ, 26 March 2009) (2010)	
47 CMLR 245	38, 75, 78, 88
Commission v Luxembourg, Case C-472/98 [2002] ECR I-9427.....	26, 103
Commission v Netherlands, Cases C-282/04 and C-283/04 [2006]	
ECR I-9141	35, 42
Commission v Portugal; Commission v France; Commission v Belgium, Joined Cases C-367/98, C-483/99 and C-503/99 [2002]	
ECR I-4731	32, 51, 53, 67, 74, 111
Commission v Portugal, Case C-367/98 [2002]	
ECR I-4731.....	16, 32, 42, 45, 51, 53, 67, 74, 111
Commission v Portugal, Case C-70/99 [2001] ECR I-4845	45, 47
Commission v Spain, Case C-463/00 [2003] ECR I-4581	17, 36
Commission v Spain, Case C-196/07 (ECJ, 6 March 2008).....	46
Commission v Spain, Case C-207/07 (ECJ, 17 July 2008)	37, 46, 48, 75, 86, 88
Commission v Sweden, Case C-249/06 (ECJ, 3 March 2009)	78, 99, 101, 102
Commission v United Kingdom, Case C-98/01 [2003]	
ECR I-4641	17, 39, 42, 74
Commission v United Kingdom; Commission v Denmark; Commission v Sweden; Commission v Finland; Commission v Belgium; Commission v Luxembourg; Commission v Austria; Commission v Germany, Joined Cases C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98 and C-476/98 [2002] ECR I-9427.....	26, 103, 111
Eco Swiss China Time Ltd v Benetton International NV, Case C-126/97 [1999] ECR I-3055	109, 112
Eugen Schmidberger, Internationale Transporte and Planzuge v Austria, Case C-112/00 [2003] ECR I-5659	29, 70, 109
Fearon v Irish Land Commission, Case 182/83 [1984]	
ECR 3677.....	21, 101, 107
Federconsumatori and Others v Comune di Milano; Associazione Azionariato Diffuso dell'AEM SpA v Comune di Milano, Joined Cases C-463/04 and C-464/04 [2007] ECR I-10419	20, 39
Fidium Finanz AG v Bundesanstalt für Finanzdienstleistungsaufsicht, Case C-452/04 [2006] ECR I-9521.....	3, 72, 75, 76, 77, 115
International Transport Workers Federation v Viking Line ABP and Oü Viking Line Eesti, Case C-438/05 [2007] ECR I-10779	i, 4, 6, 26, 28, 29, 30, 56, 70, 113

Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd, Case C-167/01 [2003] ECR I-10155	54, 55, 59, 60
Keck and Mithouard, Joined Cases C-267/91 and C-268/91 [1993] ECR I-6097	17, 18, 27
Klaus Konle v Republik Österreich, C-302/97 [1999] ECR I-3099.....	31, 101
Kohl v Union des Caisses de Maladie, Case C-158/96 [1998] ECR I-1931	23
Kupferberg [1982] ECR 3641	84
Lasertec Gesellschaft für Stanzformen mbH v Finanzamt Emmendingen, Case C-492/04 [2007] ECR I-3775	72
Liga Portuguesa de Futebol Profissional, Baw International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa, Case C-42/07 (ECJ, 8 September 2009)	76
Meryem Demirel v Stadt Schwäbisch Gmünd, Case 12/86 [1987] ECR I-3719	89
Metalsa, Case C-312/91 [1993] ECR I-3751.....	84
Omega Spielhallen und Automatenaufstellungs GmbH v Oberbürgermeisterin der Bundesstadt Bonn, Case C-36/02 [2004] ECR I-9609	29
Open Skies cases <i>see</i> Commission v United Kingdom; Commission v Denmark; Commission v Sweden; Commission v Finland; Commission v Belgium; Commission v Luxembourg; Commission v Austria; Commission v Germany; Joined Cases C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-472/98 and C-476/98 [2002] ECR I-9427	
Ordre des Avocats de Paris v Klopp, Case 107/83 [1984] ECR 2971	24
Ospelt and Schlössle Weissenberg, Case C-452/01 [2003] ECR I-9843.....	31, 101
Polydor and RSO Records, Case C-270/80 [1982] ECR 329	84
Portugal v Commission, Case C-163/99 [2001] ECR I-2613	45
Portugal v Commission, Case C-42/01 [2004] ECR I-6079	44, 45
Queen, The v HM Treasury and Commissioners of Inland Revenue <i>ex parte</i> Daily Mail and General Trust plc, Case C-81/87 [1988] ECR 5483	52, 53, 54, 55, 56, 57, 63, 65, 66
R v Secretary of State for the Home Department <i>ex parte</i> Wieslaw and Elzbieta Gloszczuk, Case C-63/99 [2001] ECR I-6369	84, 90
Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, Case C-55/94 [1995] ECR I-4165	15, 24, 25, 59, 76
Reyners v Belgium, Case 2/74 [1974] ECR 631	23, 25
Sanz de Lera and Others (Criminal proceedings against), Joined Cases C-163/94, C-165/94 and C-250/94 [1995] ECR I-4821.....	13, 14
Segers, Case 79/85 (1986) ECR 2375	55
SETTG, Case C-398/95 [1997] ECR I-3091	33
SEVIC Systems AG v Amtsgericht Neuwied, Case C-411/03 [2005] ECR I-10805	62, 64
Skatteverket v A, Case C-101/05 [2007] ECR I-11531.....	83, 85
Spain, Belgium and Italy v Commission, Joined Cases C-271/90, C-282/90 and C-289/90 [1992] ECR I-5833.....	34

xii *Table of Cases*

Svensson, Peter and Lena Gustavsson v Ministre du Logement et de l'Urbanisme, C-484/93 [1995] ECR I-3955	15
Test Claimants in the Thin Cap Group Litigation v Commissioners of Inland Revenue, Case C-524/04 [2007] ECR I-2107	75
Trummer and Meyer, Case C-222/97 [1999] ECR I-1661	14, 15
Überseering BV v Nordic Construction Company Baumanagement GmbH, Case C-208/00 [2002] ECR I-9199.....	55, 56, 57, 58, 60, 66
Walrave and Koch v Association Union Cycliste internationale Case 36/74 (1974) ECR 1405.....	28
Woningstichting Sint Servatius, Case C-567/07	33

Numerical

Case 10/61 Commission v Italy, judgment of 27 February 1962.....	107, 108
Case 2/74 Reyners v Belgium [1974] ECR 631	23, 25
Case 203/80 Criminal proceedings against Casati [1981] ECR I-2595	8, 14
Case C-270/80 Polydor and RSO Records [1982] ECR 329	84
Case 104/81 Kupferberg [1982] ECR 3641	84
Case 107/83 Ordre des Avocats de Paris v Klopp [1984] ECR 2971	24
Case 182/83 Fearon v Irish Land Commission [1984] ECR 3677	21, 101, 107
Case 12/86 Meryem Demirel v Stadt Schwäbisch Gmünd [1987] ECR I-3719	89
Case C-14/86 Commission v Council (General system of preferences) [1987] ECR 1493.....	80
Case C-81/87 Queen, The v HM Treasury and Commissioners of Inland Revenue <i>ex parte</i> Daily Mail and General Trust plc, [1988] ECR 5483	52, 53, 54, 55, 56, 57, 63, 65, 66
Case C-235/87 Annunziata Matteucci v Communauté française of Belgium [1988] ECR 5589.....	107, 108
Joined Cases C-271/90, C-282/90 and C-289/90 Spain, Belgium and Italy v Commission [1992] ECR I-5833	34
Joined Cases C-267/91 and C-268/91 Keck and Mithouard [1993] ECR I-6097	17, 18, 27
Case C-312/91 Metalsa [1993] ECR I-3751.....	84
Cases C-358/93 and C-416/94 Criminal Proceedings against Bordessa and Others [1995] ECR I-361	14
Case 484/93 Svensson, Peter and Lena Gustavsson v Ministre du Logement et de l'Urbanisme [1995] ECR I-3955.....	15
Case C-55/94 Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano [1995] ECR I-4165.....	15, 24, 25, 59, 76
Joined Cases C-163/94, C-165/94 and C-250/94 Criminal Proceedings against Sanz de Lera and Others [1995] ECR I-4821	13, 14
Case C-265/95 Commission v France ('Spanish Strawberries') [1997] ECR I-6959	29, 30, 33, 70, 109

Case C-398/95 SETTG [1997] ECR I-3091	33
Case C-158/96 Kohll v Union des Caisses de Maladie [1998] ECR I-1931	23
Case C-126/97 Eco Swiss China Time Ltd v Benetton International NV [1999] ECR I-3055	109, 112
Case C-212/97 Centros Ltd v Erhvervs- og Selskabsstyrelsen [1999] ECR I-1459	53, 54, 55, 56, 59, 60, 66
Case C-222/97 Trummer and Meyer [1999] ECR I-1661	14, 15
Case C-302/97 Klaus Konle v Republik Österreich [1999] ECR I-3099	31, 101
Case C-281/98 Angonese v Cassa di Risparmio di Bolzano [2000] ECR I-4139	28
Case C-367/98 Commission v Portugal [2002] ECR I-4731	16, 32, 42, 45, 51, 53, 67, 74, 111
Joined Cases C-367/98, C-483/99 and C-503/99 Commission v Portugal; Commission v France; Commission v Belgium [2002] ECR I-4731	32, 51, 53, 67, 74, 111
Joined Cases C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98 and C-476/98 Commission v United Kingdom; Commission v Denmark; Commission v Sweden; Commission v Finland; Commission v Belgium; Commission v Luxembourg; Commission v Austria; Commission v Germany [2002] ECR I-9427	26, 103, 111
Case C-472/98 Commission v Luxembourg [2002] ECR I-9427	26, 103
Case C-54/99 Association Eglise de Scientologie de Paris and Scientology International Reserves Trust v The Prime Minister [2000] ECR I-1335	32, 35, 37, 38, 48, 53, 77, 86, 87, 88, 111
Case C-63/99 R v Secretary of State for the Home Department <i>ex parte</i> Wieslaw and Elzbieta Gloszczuk [2001] ECR I-6369	84, 90
Case C-70/99 Commission v Portugal [2001] ECR I-4845	45, 47
Case C-163/99 Portugal v Commission [2001] ECR I-2613	45
Case C-483/99 Commission v France [2002] ECR I-4781	16, 32, 35, 42, 45, 51, 53, 67, 74, 111
Case C-503/99 Commission v Belgium [2002] ECR I-4809	16, 32, 35, 39, 51, 53, 67, 74, 111
Case C-112/00 Eugen Schmidberger, Internationale Transporte and Planzuge v Austria [2003] ECR I-5659	29, 70, 109
Case C-208/00 Überseering BV v Nordic Construction Company Baumanagement GmbH [2002] ECR I-9199	55, 56, 57, 58, 60, 66
Case C-463/00 Commission v Spain [2003] ECR I-4581	17, 36
Case C-42/01 Portugal v Commission [2004] ECR I-6079	44, 45
Case C-98/01 Commission v United Kingdom [2003] ECR I-4641	17, 39, 42, 74
Case C-167/01 Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd [2003] ECR I-10155	54, 55, 59, 60
Case C-281/01 Commission v Council (Energy Star Agreement) [2002] ECR I-12049	80

Case C–4522/01 Ospelt and Schlössle Weissenberg [2003] ECR I–9843.....	31, 101
Case C–36/02 Omega Spielhallen und Automatenaufstellungs GmbH v Oberbürgermeisterin der Bundesstadt Bonn [2004] ECR I–9609	29
Case C–442/02 Caixa-Bank France v Ministère de l’Economie, des Finances et de l’Industrie [2004] ECR I–8961	4, 18, 26, 28, 32
Case C–411/03 SEVIC Systems AG v Amtsgericht Neuwied [2005] ECR I–10805	62, 64
Case C–459/03 Commission v Ireland [2006] ECR I–4635	108
Case C–174/04 Commission v Italy [2005] ECR I–4933	96
Case C–196/04 Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue [2006] ECR I–7995	25, 53, 59, 75
Cases C–282/04 and C–283/04 Commission v Netherlands [2006] ECR I–9141	35, 42
Case C–452/04 Fidium Finanz AG v Bundesanstalt für Finanzdienstleistungsaufsicht [2006] ECR I–9521	3, 72, 75, 76, 77, 115
Joined Cases C–463/04 and C–464/04 Federconsumatori and Others v Comune de Milano; Associazione Azionariato Diffuso dell’AEM SpA v Comune de Milano [2007] ECR I–10419.....	20, 39
Case C–492/04 Lasertec Gesellschaft für Stanzformen mbH v Finanzamt Emmendingen [2007] ECR I–3775.....	72
Case C–524/04 Test Claimants in the Thin Cap Group Litigation v Commissioners of Inland Revenue [2007] ECR I–2107.....	75
Case C–101/05 Skatteverket v A [2007] ECR I–11531.....	83, 85
Case C–112/05 Commission v Germany (Volkswagen) [2007] ECR I–8995.....	18, 19, 20, 39, 42, 74, 78, 81
Case C–438/05 International Transport Workers Federation v Viking Line ABP and Oü Viking Line Eesti [2007] ECR I–10779.....	i, 4, 26, 28, 29, 30, 56, 70, 113
Case C–205/06 Commission v Austria (ECJ, 3 March 2009).....	5, 78, 99, 100, 101, 111
Case C–210/06 Cartesio Oktató és Szolgáltató bt [2008] ECR I–9641	57, 59, 65, 66, 114
Case C–249/06 Commission v Sweden (ECJ, 3 March 2009)	78, 99, 101, 102
Case C–518/06 Commission v Italy (ECJ, 28 April 2009)	28
Case C–531/06 Commission v Italy (pharmacies), (ECJ, 19 May 2009)	75
Case C–2007/42 Liga Portuguesa de Futebol Profissional, Baw International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa (ECJ, 8 September 2009)	76
Case C–118/07 Commission v Finland (ECJ, 19 November 2009).....	78, 99
Case C–196/07 Commission v Spain (ECJ, 6 March 2008).....	46
Case C–207/07 Commission v Spain (ECJ, 17 July 2008)	37, 46, 48, 75, 86, 88
Case C–326/07 Commission v Italy (ECJ, 26 March 2009) (2010) 47 CMLR 245	38, 75, 78, 88
Case C–546/07 Commission v Germany (ECJ, 21 January 2010).....	107

Case C-567/07 Woningstichting Sint Servatius	33
Case C-101/08 Audiolux SA and Others v Groupe Bruxelles Lambert SA (GBL) and Bertelsmann AG, (ECJ 15 November 2009)	70

Other Cases

Eastern Sugar BV (Netherlands) v Czech Republic, Case SCC No 088/2004 (UNCITRAL, Paris)	110
European Free Trade Association (EFTA) Surveillance Authority v Norway, Case E-2/06 (EFTA Court, 26 June 2007)	101

Table of Legislation

European Union

Accession Treaty (Czech Republic)	110
EC Treaty	1, 7, 14, 41, 65, 73, 79, 89, 102, 107, 109, 110, 117
Title III	72
Chapter 4	10
Title IX	129
art 2	3
art 3(1)(g)	109
art 3(c) (3(1) EC)	84
art 3(g)	5
art 4(2)(a)	79
art 10	101
art 16 (14 TFEU)	4, 34
art 30	32
art 43 (49 TFEU)	16, 18, 28, 35, 37, 43, 46, 53, 56, 57, 65, 73, 74, 75, 90, 103
art 44	63, 70
art 44(2)(g) (50(2)(g) TFEU)	57, 61
art 45 (51 TFEU)	86, 119
art 46	42, 87
art 46(1)	87
art 47(2)	89
art 48 (54 TFEU)	53, 56, 57
art 49 (56 TFEU)	28, 74, 76, 89, 107
art 50 (57 TFEU)	76
art 51(2) (58(2) TFEU)	76
art 56 (63 TFEU)	5, 7, 18, 21, 35, 37, 43, 46, 74, 75, 76, 78, 81, 87, 93
art 57 (64 TFEU)	5, 7, 86
art 57(2)	11, 79, 100, 101, 102
art 57(3)–(4)	79
art 58 (65 TFEU)	5, 7, 42, 86
art 58(1)	87
art 58(4)	79
art 59 (66 TFEU)	5, 7, 100, 101, 102
art 60 (75 TFEU)	5, 7, 12, 100
art 60(1)	11, 101, 102
art 73b	14
art 73c(2) (64(2) TFEU)	101

art 73d.....	74
art 73d(1).....	33
art 73d(3).....	13
art 86.....	114
art 86(2).....	37
art 86(3).....	45
art 87 (107 TFEU).....	41
art 132.....	129
art 133(5)–(6).....	81
art 137(5) (153(5) TFEU).....	113
art 157 (173 TFEU).....	113
art 211.....	102
art 215.....	5
art 220.....	44
art 223.....	41
art 226 (258 TFEU).....	44, 45, 47
art 230 (263 TFEU).....	47
art 292.....	108, 109
art 293.....	52, 56, 57
art 294.....	51
art 301.....	11, 12
art 307 (351 TFEU).....	99, 108
art 307(2).....	100, 101, 102
art 308 (352 TFEU).....	41, 62, 63
art 310 (217 TFEU).....	73, 88, 89, 90
EEC Treaty.....	77, 107, 108
art 5.....	107
art 52 (43 EC, 49 TFEU).....	52, 53
art 54(3)(g) (44(3)(g) EC).....	53, 54
art 58 (48 EC, 54 TFEU).....	52, 53, 54
art 58(2).....	54
art 67.....	8, 9, 81
art 67(1).....	7, 8
art 69 (73b EC).....	7, 8, 14
art 70.....	7, 10
art 70(1).....	14
art 71.....	8
art 73c(2), (57(2) EC), (65(2) TFEU).....	91
art 235 (352 TFEU).....	91
Energy Charter 1991.....	73, 90
Energy Charter Treaty 1997.....	90, 91, 101, 104
Protocol on energy efficiency and related environmental aspects 1998.....	91
European Social Charter.....	29
Treaty on European Union (Maastricht).....	1, 10, 34, 82, 113

art 4	34
art 48	135
Treaty on the Functioning of the European Union	1, 4, 13, 15, 16, 22, 36, 83, 111, 115, 117
Pt 3	3
Pt 5	12
Titles IV–V	12
Title VII (VI EC)	125
art 3(1)	79
art 14 (16 EC)	34
art 34 (28 EC)	27
art 36 (30 EC)	13, 31
art 45 (39 EC)	3, 29
art 49 (43 EC)	i, 3, 4, 18, 26, 27, 28, 29, 30, 47, 53, 70, 75, 78, 106, 117
art 49(1) (43 EC)	23
art 49(2)	23, 77
art 50 (44 EC)	23, 60, 117
art 50(g)	23
art 51 (45 EC)	87, 119
art 52 (46 EC)	31, 45, 86, 88, 119
art 53 (47 EC)	23, 25, 119
art 54 (48 EC)	50, 51, 53, 54, 56, 57, 58, 60, 120
art 56 (49 EC)	i, 3, 5, 15, 33, 120
art 57 (50 EC)	3, 121
art 58 (51 EC)	3, 121
art 58(1)	26
art 58(2)	15
art 59 (52 EC)	98
art 59 (52 EC)	121
art 60 (53 EC)	98, 122
art 61 (54 EC)	122
art 62 (55 EC)	50, 122
art 63 (56 EC)	i, 3, 4, 10, 13, 14, 15, 16, 18, 19, 20, 21, 33, 36, 47, 77, 78, 80, 83, 85, 106, 108, 122
art 63(1)–(2)	10
art 64 (57 EC)	3, 10, 11, 14, 77, 78, 81, 83, 98, 103, 122
art 64 (57(2) EC)	79
art 64(1)	11, 77, 78
art 64(2) (57(2) EC)	11, 22, 77, 78, 82, 83, 92
art 64(3) (57(2) EC)	11, 13, 80
art 65 (58 EC)	3, 10, 12, 14, 45, 73, 75, 78, 80, 83, 84, 85, 88, 98, 115, 123
art 65(1)	12, 13, 80, 82
art 65(1)(b)	32, 98
art 65(2)	12, 13, 31, 73, 77, 82, 101

xx *Table of Legislation*

art 65(3)	13, 22, 31, 32, 98
art 65(4)	13, 80
art 66 (59 EC)	10, 11, 79, 92, 103, 124
art 75 (60 EC)	12, 103, 124
art 93 (73 EC)	34
art 101 (81 EC)	125
art 102 (82 EC)	126
arts 103–104 (83–84 EC)	127
art 105 (85 EC)	128
art 106 (86 EC)	14, 34, 36, 114, 128
art 106(2)–(3)	34
art 107 (87 EC)	34
art 153(5) (137(5) EC)	29
art 206 (131 EC)	129
art 207 (133 EC)	5, 73, 79, 81, 82, 83, 98, 115, 130
art 207(1)	83
art 207(3)	83
art 215 (60(1) EC)	12, 79
art 217 (310 EC)	137
art 218 (300 EC)	133
art 258 (226 EC)	6, 44, 111
art 267 (234 EC)	109, 111, 112
art 344 (234 EC)	110
art 344 (292 EC)	108, 109, 111
art 345 (295 EC)	21, 34, 96, 101
art 351 (307 EC)	106
Treaty of Lisbon 2007	i, 1, 5, 6, 34, 51, 72, 79, 81, 91, 105, 114
art 14	114
Treaty of Rome	34, 50, 106, 107

Secondary legislation

Directive 68/151/EEC	54
Directive 77/91/EEC	54
Directive 77/249/EEC	24
Directive 78/660/EEC	54
Directive 78/855/EEC	54, 66
Directive 82/891/EEC	54
Directive 83/349/EEC	54
Directive 84/253/EEC	54
Directive 85/611/EEC	89
Directive 88/301	34
Directive 88/361/EEC	3, 8, 9, 10, 14, 15, 16, 18, 20, 25, 32, 74, 76, 81
art 1	14