DETAILED CONTENTS

Table of Abbreviations Acknowledgements Table of Cases

xxxiii xxxvi

xxxviii

Table of Treaties, Instruments, and Legislation Lisbon Table of Equivalences

THE DEVELOPMENT OF EUROPEAN INTEGRATION

- Central Issues
- European Integration: Theories 2
- European Integration: Background 3
- EEC and Euratom Treaties 4
 - EEC: Founding and Objectives (a)
 - (b) Geographical Reach of the Community: Enlargement
 - (c) Community Decision-Making: Intergovernmentalism and Supranationalism

cxxxix

1

2

4

5

10

11

11

12

13

13

14

14

15

15

15

16

cxxi

Single European Act 5

Institutional Changes (a)

(b) Substantive Changes

Reaction and Assessment (c)

Maastricht Treaty 6

- The Three-Pillar Structure (a)
- (b) The Common Provisions
- Changes to the Community Treaties (c)
- (d) Common Foreign and Security Policy
- Justice and Home Affairs (e)
- (f) Reaction and Assessment
- (g) Further Enlargement
- the f A material and

7	Treaty of Amsterdam	17
	(a) Common Provisions	17
	(b) The Community Pillar	17
	(c) Common Foreign and Security Policy	18
	(d) Police and Judicial Cooperation in Criminal Matters (PJCC)	18
	(e) Reaction and Assessment	19
8	Nice Treaty	19
	(a) The IGC	19
	(b) The Community Pillar	20

DETAILED CONTENTS X

× 4

. . .

.

2 I

.

CFSP and PJCC (c) Enhanced Cooperation (d) The Charter of Rights (e) Enlargement (f) (g) Reaction and Assessment 9 Constitutional Treaty From Nice to Laeken (a) (b) Convention on the Future of Europe (a) ICC and (Non)Datification

22

44

44

45

47

47

47

48

48

49

.

	(C)	IGC and (Non-)Ratification	23
	(d)	Reaction and Assessment	24
]	lo Lis	sbon Treaty	24
	(a)	IGC	24
	(b)	Formal Architecture	26
	(c)	Substantive Architecture: General	26
	(d)	Substantive Architecture: The Pillar Structure and the CFSP	27
	(e)	Reaction and Assessment	28
]	l1 Co	onclusions	. 28
/1	12 Fu	rther Reading	29
2 7	rhe i	NSTITUTIONS	31
	1 Ce	entral Issues	31
	2 Th	e Commission	32
	(a)	President of the Commission	32
	(b)	College of Commissioners	33
	(c)	Commission Bureaucracy	35
	(d)	Powers of the Commission	36
	(e)	Downfall of the Santer Commission and Subsequent Reform	39
	(f)	Role of the Commission	40
	3 Th	le Council	41
	(a)	Composition	41
	(b)	Presidency of the Council	42
	(c)	Committee of Permanent Representatives	43

(d) Council Secretariat (e) Powers of the Council Role of the Council (f) 4 The European Council (a) Composition (b) Presidency of the European Council Rationale (c) (d) Role Role of the European Council (e)

1

DETAILED CONTENTS | xi

	5	High Representative of the Union for Foreign Affairs and Security Policy	50
		(a) Powers	50
		(b) Role of the High Representative	50
	6	European Parliament	51
		(a) Composition and Functioning	52
1		(b) Powers	54
		(c) Role of the European Parliament	57
	7	Courts	58
		(a) European Court of Justice	58
		(b) General Court	59
		(c) Specialized Courts	60
		(d) Reform of the Court System	61
		(e) Advocate General	62
		(f) Procedure Before the Court	62
		(g) Style of the Court's Judgments	63
		(h) Role of the Court	63
	8	The Court of Auditors	67
	9	EU Advisory Bodies	68
		(a) Economic and Social Committee	68

- (a) ononne ana overal oonninttee (b) Committee of the Regions 10 Agencies 11 Conclusions 12 Further Reading
- COMPETENCE 3
 - 1 Central Issues
 - 2 Impetus for Reform
 - 3 Lisbon Strategy
 - (a) Categories and Consequences
 - (b) Express and Implied Power

*

68

69

- 4 Exclusive Competence
 - (a) Basic Principles
 - (b) Area Exclusivity
 - (c) Conditional Exclusivity
- 5 Shared Competence
 - **Basic Principles** (a)
 - (b) Pre-Emption
 - (c) Scope and Variation

xii | DETAILED CONTENTS

	6	Supporting, Coordinating, or Supplementary Action	85
		(a) Basic Principles	85
2	1	(b) Scope and Variation	86
		(c) Legal Acts, Harmonization, and Member State Competence	87
	7	Economic, Employment, and Social Policy	88
* 4		(a) Basic Principles	88
		(b) Category and Legal Consequence	88
	8	Common Foreign and Security Policy and Defence	89
	9	Broad Treaty Provisions: The 'Flexibility' Clause	89
		(a) Article 308 EC	90
		(b) Article 352 TFEU	91
	10	Broad Treaty Provisions: The Harmonization Clause	92
	11	Subsidiarity	94
		(a) Pre-Lisbon	94
		(b) Post-Lisbon	95
	12	Conclusion	100
	13	Further Reading	101

INSTRUMENTS AND THE HIERARCHY OF NORMS

	1	Central Issues	103
	2	Instruments(a) Introduction(b) Regulations(c) Directives(d) Decisions(e) Inter-Institutional Agreements(f) Recommendations, Opinions, and Soft Law	104 104 105 106 107 107
	3	 Hierarchy of Norms (a) Rationale (b) Treaties and Charter (c) General Principles (d) Legislative Acts (e) Delegated Acts (f) Implementing Acts (g) Incomplete Categorization 	108 109 109 112 113 115 118
	4	Conclusions Further Reading	119 120
5	LE 1	GISLATION AND DECISION-MAKING Central Issues	121 121

DETAILED CONTENTS | xiii

	2	Legislative Initiative: Principle and Practice	121
	3	 Legislative Acts: The Ordinary Legislative Procedure (a) Pre-Lisbon (b) Ordinary Legislative Procedure (c) Ordinary Legislative Procedure: Stages in the Process (d) Ordinary Legislative Procedure: Practical Operation (e) Ordinary Legislative Procedure: Power Dynamics (f) Ordinary Legislative Procedure: Normative Foundations 	123 123 126 127 128 129
	4	Legislative Acts: Special Legislative Procedure	130
	5	Legislative Acts: Council Voting Requirements (a) Pre-Lisbon (b) Post-Lisbon	131 131 132
	6	 Delegated Acts: Enactment and Control (a) Pre-Lisbon: The Rationale For Comitology (b) Post-Lisbon Delegated Acts: Demise of Comitology (c) Evaluation 	134 134 135 136
	7	Implementing Acts: Enactment and Control(a) The Lisbon Schema(b) Evaluation	139 139 141
	8	Enhanced Cooperation: Conditions and Use	142
	9	 EU Decision-Making: Process and Reality (a) The Temporal Dimension (b) The Inter-Institutional Dimension 	143 143 144
	10	 EU Democracy: Argument and Evaluation (a) The Nature of the Argument (b) Evaluation: The Empirical Frame of Reference (c) Evaluation: The Normative Frame of Reference 	149 150 152
	11	Conclusions	155
	12	Further Reading	156
6	NE	W FORMS OF GOVERNANCE	158
	1	Central Issues	158
	2	Introduction	158
	3	The New Approach to (Technical) Harmonization	162
		The Lisbon Agenda and the Open Method of Coordination	163
	5	General EU Governance Reform Initiatives	167
		(a) Subsidiarity and Proportionality(b) Better Regulation and the Commission's White Paper	168
		on Governance	170

.

*

.

.

•

. .

xiv | DETAILED CONTENTS

7

6 5

*

	6 Appraising the Move Towards New Forms of Governance	175
	7 Conclusions	178
	8 Further Reading	178
]	THE NATURE AND EFFECT OF EU LAW: DIRECT EFFECT AND BEYOND	180
1	Central Issues	180
2	2 Direct Effect: A Guide	181

3	Direct Effect: Treaty Provisions	183
	(a) Foundations: Van Gend en Loos	183
	(b) The Conditions for Direct Effect: Broadening the Conditions	186
	(c) Treaty Articles: Vertical and Horizontal Direct Effect	189
4	Direct Effect: Regulations and Decisions	190
	(a) Regulations	190
	(b) Decisions	191
5	Directives: Direct Effect	191
	(a) Direct Effect of Directives	191
	(b) The Vertical/Horizontal Distinction	194
	(c) Expanding Vertical Direct Effect: A Broad Concept of the State	196
	(d) Vertical Direct Effect: Triangular Situations	199
6	Directives: Legal Effects	. 200
	(a) 'Indirect Effect': Principle of Harmonious Interpretation	200
	(b) Incidental Horizontal Effects	207
	(c) General Principles of Law	211
	(d) Regulations Conditional on Compliance with Directives	214
	(e) State Liability in Damages	215
7	Conclusions	216
8	Further Reading	216
8 T]	HE APPLICATION OF EU LAW: REMEDIES IN NATIONAL COURTS	218
1	Central Issues	218

.

.

.

a The Division (NT. 1) Due level Astronomy Devised and

2	The Principles of National Procedural Autonomy, Equivalence, and	
	Practical Possibility	219
	(a) Where No Relevant EU Rules Exist: National Law Determines the	
	Conditions For Enforcement of EU Rights	219
	(b) The Principles of Equivalence and Practical Possibility	220
	(c) No Obligation to Create New Remedies (Unless)	220
3	Emergence of Requirements of Proportionality, Adequacy, and	
	Effective Judicial Protection	222
4	Development of the 'Effectiveness' Requirement	223
	(a) A Strong Initial Requirement	223

DETAILED CONTENTS | xv

-

.

*

	(b) A More Cautious Approach	227
	(c) When Specific Remedies Must be Made Available	229
5	The Current Approach: Balancing Effective Judicial Protection and	
	National Procedural Autonomy	231
	(a) Effectiveness	231
	(b) Equivalence	237
	(c) The Effect of the Plaintiff's Conduct on the Right to an Effective Remedy	240
6	Summary	241

4

C

A.

1

7	The Principle of (State) Liability for Breach of EU Law	241
	(a) Origins of the Principle	241
	(b) Clarifying and Extending the Principle	243
	(c) The Conditions for State Liability	247
	(d) State Liability and the National Remedial Framework	251
	(e) State Liability as a Residual Remedy?	252
8	Conclusions	254
9	Further Reading	254
TH	E RELATIONSHIP BETWEEN EU LAW AND NATIONAL LAW: SUPREMACY	256
1	Central Issues	256
2	First Dimension: Supremacy from the ECJ's Perspective	256
	(a) Foundations	256
	(b) Relation with Direct Effect	258
	(c) Ambit	260
	(d) The National Bodies that Must Apply the Supremacy Doctrine	262
	(e) Impact on National Law	264
	(f) Declaration 17 on Primacy	265
	(g) Conclusion	267
3	Second Dimension: Supremacy from the	
	Perspective of the Member States	268
	(a) France	269
	(b) Germany	272
	(c) Italy	283
	(d) The United Kingdom	285
	(e) Poland	293
	(f) Central and East European States	296
4	Constitutional Pluralism	297
5	Conclusions	300
6	Further Reading	300
EU	INTERNATIONAL RELATIONS LAW	302
	9 TH 1 2 3	 (a) Origins of the Principle (b) Clarifying and Extending the Principle (c) The Conditions for State Liability (d) State Liability and the National Remedial Framework (e) State Liability as a Residual Remedy? 8 Conclusions 9 Further Reading THE RELATIONSHIP BETWEEN EU LAW AND NATIONAL LAW: SUPREMACY 1 Central Issues 2 First Dimension: Supremacy from the ECJ's Perspective (a) Foundations (b) Relation with Direct Effect (c) Ambit (d) The National Bodies that Must Apply the Supremacy Doctrine (e) Impact on National Law (f) Declaration 17 on Primacy (g) Conclusion 3 Second Dimension: Supremacy from the Perspective of the Member States (a) France (b) Germany (c) Italy (d) The United Kingdom (e) Poland (f) Central and East European States

xvi | DETAILED CONTENTS

2	Introduction: The EU as an International Actor and the General	
	Principles of EU External Action	303
	(a) The EU as an International Actor	303
	(b) The Constitutional Framework and General Principles of EU External Action	304
	(c) The New Institutions of EU International Action	305
3	External Capacity and EU Competence	307
	(a) International Legal Personality	307
	(b) The Need for a Legal Basis and the Limits of External EU Competence	307
~	(c) Express and Implied Competence	308
	(d) Exclusive EU Competence	311
	(e) Shared Competence	316
	(f) Summary	318
4	A Survey of the Fields of EU External Action under the Treaties	318
	(a) The Common Commercial Policy (CCP)	319
	(b) Association, Partnership, Cooperation, and Neighbourhood Relations	323
	(c) Development Policy, Technical Cooperation, and Humanitarian Aid	324
	(d) External Dimensions of Other Internal Policies	325
5	The Common Foreign and Security Policy	326
	(a) The Scope of the CFSP	327
	(b) The Constitutional Nature of the CFSP	329
	(c) Interactions Between the CFSP and the Economic Dimensions of Security	330
6	The Conclusion of International Agreements by the EU and	
	Other Forms of EU International Practice	332
	(a) EU Procedures for Concluding International Agreements	332
	(b) Mixed Agreements	334
	(c) The Role of the European Parliament	336
	(d) The Member States' Duty of Sincere Cooperation	337
	(e) Cooperation within International Organizations	337
7	The EU and International Law	338
	(a) International Agreements Concluded by the EU are Binding Upon It	
	and are Part of EU Law	338
	(b) The EU Legal System as an Autonomous Legal Order	339
	(c) The Effect of Other Rules of International Law, and of International	
	Agreements to which the Member States are Party	340
8	The Legal Effect of International Agreements in the EU Legal Order	344
0	The Dele of the ECI in EUI International Deletions	351
7	The Role of the ECJ in EU International Relations	351
	 (a) Pre-Emptive Jurisdiction: The Advisory Opinion Procedure of Article 218(11) 	351
	(b) Jurisdiction of the ECJ over International Agreements under Other EU	551
	(b) Jurisdiction of the ECJ over International Agreements under Other EO Treaty Procedures	353
	(c) The ECJ and Mixed Agreements	354
	(d) The ECJ and the CFSP	356
	(u) me no and me or or	550

DETAILED CONTENTS | xvii

* *

1

10	0 Coherence, Consistency, and Cooperation in the Governance of				
	EU International Relations	357			
	(a) International Representation and the EU	357			
	(b) The Requirement of Coherence Across Policies	358			
	(c) Coordination Between the Member States and the EU:				
	Cooperation and Compliance	359			
11	Conclusions				
12	Further Reading	361			

	11	HUMAN RIGHTS IN THE EU	362
		1 Central Issues	362
		2 Introduction	363
		3 The ECJ Discovers the 'General Principles of EU Law'	364
		 4 The ECJ Develops the General Principles of EU Law (a) The ECHR as a Source of Special Significance for EU Law 	366 366
		(b) Other International Human Rights Instruments(c) National Constitutional Traditions	367 369
		5 Human Rights-Based Challenges to EU Action	372
		(a) Challenges to EU Legislation	372
		(b) Challenges to EU Administrative Action	378
-		(c) Summary	381
		6 Human Rights-Based Challenges to Member State Action	381
		 (a) Applying Provisions of EU Legislation Based on Protection for Human Rights (b) Momber States as Agents of the EU 	382 382
		(b) Member States as Agents of the EU(c) Member States Derogating from EU Rules or Restricting EU Rights	384
		(d) Member States and Situations Outside the Scope of EU Law	388
		7 Institutional and Policy Developments	389
		(a) The Inclusion of Human Rights in the Treaty Framework	389
		(b) The Fundamental Rights Agency	390
		(c) EU Human Rights Powers and Policies	391
		8 The EU Charter of Fundamental Rights	394
		(a) Introduction	394
		(b) Content	395
		(c) The 'Horizontal' Clauses	396
		9 The EU and the ECHR	399
		(a) Accession by the EU to the ECHR	399
		(b) Indirect Review of EU Acts by the ECtHR Prior to Accession	400
		(c) Mutual Influence of the ECJ and the ECtHR Prior to Accession	404
		10 Conclusions	406
		11 Further Reading	406

2 -

xviii | DETAILED CONTENTS

12	ENFORCEMENT ACTIONS AGAINST MEMBER STATES				
	1	Central Issues	408		
	2	The Function and Operation of the Infringement Procedure	409		
		(a) Nature and Function of the Article 258 Procedure	410		
		(b) Operation of the Procedure	413		
*	3	Relationship Between 'Public' and 'Private' Enforcement Mechanisms	414		
	4	The Commission's Discretion	415		

	5	The Reasoned Opinion	418	
		(a) Function	418	
		(b) Form and Content	418	
		(c) Confidentiality of the Reasoned Opinion	421	
	6	Why is an Enforcement Action Admissible After the Breach is Remedied?	422	
	7	Types of Breach by Member States of EU Law	423	
		(a) Breach of the Obligation of Sincere Cooperation Under Article 4(3) TEU	423	
		(b) Inadequate Implementation of EU Law	424	
		(c) Breaches which Interfere with EU External Relations	427	
		(d) Systemic and Persistent Breaches or General Practices	427	
		(e) Action by the Courts of a Member State	428	
	8	State Defences in Enforcement Proceedings	429	
		(a) Force Majeure	430	
		(b) Lack of Intentional Wrongdoing by the State	430	
		(c) The EU Measure on Which the Infringement		
		Proceedings are Based is Illegal	430	
		(d) Other Member States are also in Breach	431	
	9	The Consequences of an Article 258 Ruling	431	
	10	Article 259	432	,
	11	Article 260 TFEU: The Pecuniary Penalty	433	
	12	Interim Measures	439	
	13	Conclusions	439	

.

440

442

442

.

14 Further Reading

PRELIMINARY RULINGS 13

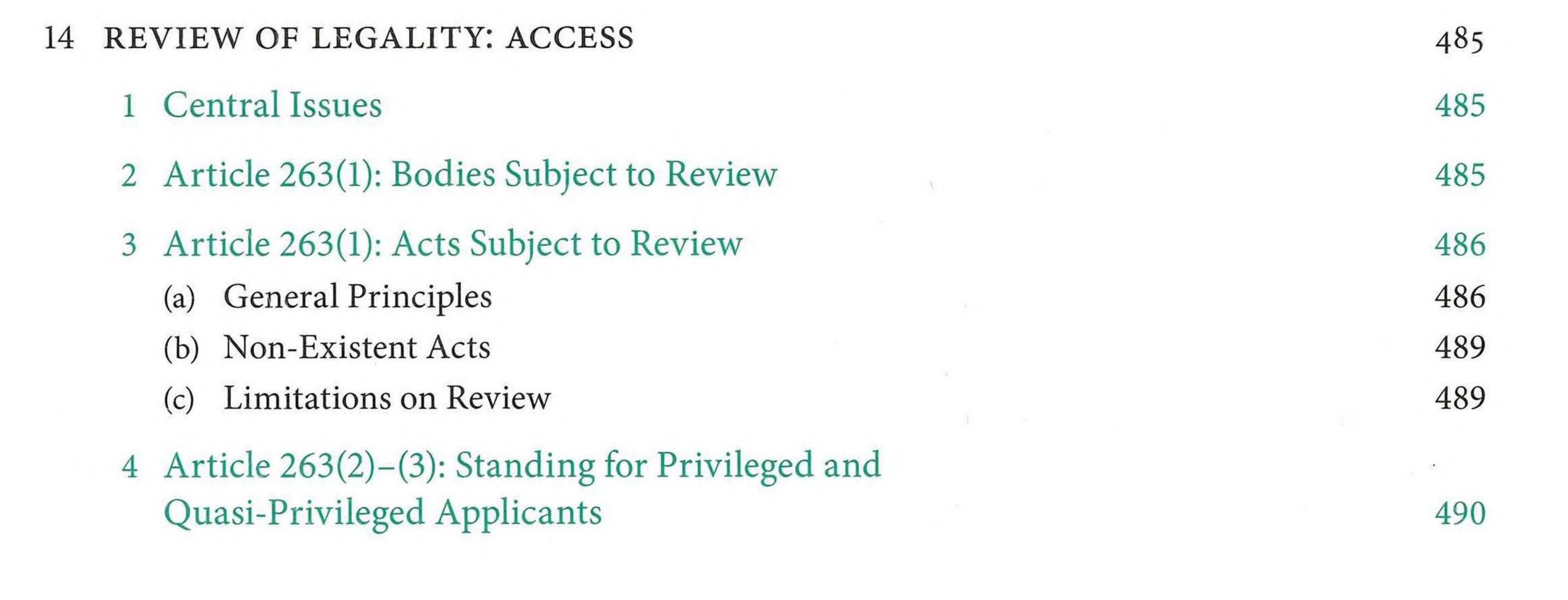
1 Central Issues

2 Foundations: Article 267 443 (a) Questions that Can be Referred 443 (b) Courts or Tribunals which Can Refer 444 (c) Courts or Tribunals which Must Refer 446 Relationship Between National Courts 447 (d) (e) National Court Raising EU Law of its Own Volition 448

DETAILED CONTENTS | xix

3	The Existence of a Question: Development of Precedent		448
	(a) National Law in Breach of EU Law and Prior ECJ Rulings		449
	(b) The Validity of EU Legislation and Prior ECJ Rulings		451
	(c) ECJ Rulings and Legal Certainty		454
	(d) Conclusion	4	455
4	The Existence of A Question: The 'Acte Clair' Doctrine		456
	Summary		459
5	The Decision to Refer: The National Court's Perspective		459

6	Acceptance of the Reference: The ECJ's Perspective	462
	(a) The Liberal Initial Approach	462
	(b) The ECJ Asserts Authority Over Cases Referred	463
	(c) Cases where the ECJ has Declined Jurisdiction	467
	(d) Information Note on Preliminary References	471
	(e) Limits of the Power to Decline a Case	471
	(f) Summary	472
7	The Decision on the Reference: Interpretation versus Application	473
8	Development of an EU Judicial System: National Courts and the ECJ	475
	(a) Precedent	475
	(b) Acte Clair	476
	(c) Sectoral Delegation	477
9	Development of an EU Judicial System: ECJ, General Court,	
	and National Courts	477
	(a) Limiting the National Courts Empowered to Make a Reference	478
	(b) A Filtering Mechanism Based on the Novelty, Complexity,	
	or Importance of the Question	479
	(c) The National Court Proposes an Answer to the Question	479
	(d) Towards an Appellate System	480
	(e) Creation of Decentralized Judicial Bodies	481
	(f) General Court to Have Jurisdiction to Give Preliminary Rulings	481
10	Conclusions	482
11	Further Reading	483



10

-

xx | **DETAILED CONTENTS**

100

	. 5	Article 263(4): Standing for Non-Privileged Applicants	491
		(a) Direct Concern	491
		(b) Individual Concern: Legal Acts Under the Lisbon Treaty	493
		(c) Individual Concern: Plaumann and Decisions	493
		(d) Individual Concern: Plaumann, Regulations, and Directives	496
		(e) Individual Concern: Anti-Dumping, Competition, and State Aids	499
* *		(f) Individual Concern: Reform and the Courts	502
		(g) Individual Concern: Reform and the Lisbon Treaty	508
		(h) Individual Concern: Reform and the Charter	509
		(i) Summary	510
	6	Article 267: Indirect Challenge to the Legality of EU Acts	510
		(a) The Rationale for Using Article 267	510
		(b) The Acts that Can be Challenged Under Article 267	511
	7	Article 265: Failure to Act	512
		(a) Reviewable Omissions	513
		(b) Procedure	514
		(c) Standing	514
	8	Article 277: The Plea of Illegality	515
		(a) The Acts that Can be Challenged	515
		(b) The Parties Who Can Use Article 277	517
	9	Conclusions	517
	10	Further Reading	518
	15 RI	EVIEW OF LEGALITY: GROUNDS OF REVIEW	519
~	1	Central Issues	519
	2	Lack of Competence	520
	3	Infringement of an Essential Procedural Requirement	520
		(a) Right to be Heard	520
		(b) Consultation and Participation	521
		(c) Duty to Give Reasons	522
	4	Infringement of the Treaty or Any Rule of Law Relating to its Application	525
		(a) Scope	525
		(b) General Principles of Law: Proportionality	526
		(c) General Principles of Law: Legal Certainty and Legitimate Expectations	533
		(d) General Principles of Law: Non-Discrimination	538
		(e) General Principles of Law: Transparency	541
		(f) General Principles of Law: Precautionary Principle	549
	5	Misuse of Power	550
	6	The Intensity of Review	551

....

.

DETAILED CONTENTS | xxi

	7	The Consequences of Illegality and Invalidity	553
	8	Conclusions	555
	9	Further Reading	556
16	DA	MAGES ACTIONS AND MONEY CLAIMS	557
	1	Central Issues	557
	2	 Discretionary Acts (a) The General Test (b) Legislative and Non-Legislative Discretionary Acts (c) Superior Rule of Law (d) Flagrant Violation/Serious Breach (e) Assessment (f) Summary 	557 558 559 561 564
	3	 (f) Summary Non-Discretionary Acts (a) The General Principle: Illegality, Causation, Damage (b) Application of the General Principle (c) The Meaning of Illegality (d) Summary 	565 565 566 567
	4	Official Acts of Union Servants	568
	5	Valid Legislative Acts(a) The Nature of the Problem(b) The Case Law	569 570
	6	Causation and Damage (a) Causation (b) Damage	571 571 573
	7	Joint Liability of the EU and Member States (a) Procedural Issues (b) Substantive Issues	574 574 575
	8	Contract	577
	9	Restitution	578

10 Conclusions 579 11 Further Reading 580 5 THE SINGLE MARKET 17 581 1 Central Issues 581 2 Economic Integration: Forms and Techniques 581 (a) Forms of Economic Integration 581 1 (b) Techniques of Economic Integration 582

5

,

xxii | DETAILED CONTENTS

-

17

3	Pre-1986: Limits of Integration	583
4	Single European Act 1986: The Economics and Politics of Integration	583
	(a) The Economic Dimension: The Commission's White Paper	583
	(b) The Political Dimension: The Politics of Integration	586
5	The Internal Market: Legislative Reform and the SEA	588
	(a) Article 26: The Obligation Stated	588
	(b) Article 27: The Obligation Qualified	589
	(c) Article 114(1): Facilitating the Passage of Harmonization Measures	589
	(d) Article 114(2)-(10): Qualifications to Article 114(1)	591
6	The Internal Market: The New Legislative Approach to	
	Marketing of Products and Harmonization	594
	(a) The Rationale for the New Approach	594
	(b) The Elements of the New Approach	594
7	The Internal Market: Tensions and Concerns	601
	(a) Consumer Interests and Commercial Power	601
	(b) The Single Market, Market Freedom, and Structural Balance	602
	(c) The Challenge to Positive Integration	603
	(d) Politics, Economics, and the Single Market Enterprise	604
8	The Internal Market: Reconceptualization	605
	4 5 7	 4 Single European Act 1986: The Economics and Politics of Integration (a) The Economic Dimension: The Commission's White Paper (b) The Political Dimension: The Politics of Integration 5 The Internal Market: Legislative Reform and the SEA (a) Article 26: The Obligation Stated (b) Article 27: The Obligation Qualified (c) Article 114(1): Facilitating the Passage of Harmonization Measures (d) Article 114(2)-(10): Qualifications to Article 114(1) 6 The Internal Market: The New Legislative Approach to Marketing of Products and Harmonization (a) The Rationale for the New Approach (b) The Elements of the New Approach 7 The Internal Market: Tensions and Concerns (a) Consumer Interests and Commercial Power (b) The Single Market, Market Freedom, and Structural Balance (c) The Challenge to Positive Integration

.....

.

9 Conclusions

10 Further Reading

609

.

609

-

18	FR	EE I	MOVEMENT OF GOODS: DUTIES, CHARGES, AND TAXES	611
	1	Ce	ntral Issues	611
	2	Ar	ticles 28–30: Duties and Charges	612
		(a)	Duties and Charges: Effect Not Purpose	613
		(b)	Charges Having an Equivalent Effect: General Principles	614
		(c)	Charges Having an Equivalent Effect: Inspections and the 'Exchange Exception'	615
		(d)	Charges Having an Equivalent Effect: Inspections and Fulfilment of	
			Mandatory Legal Requirements	617
		(e)	Recovery of Unlawful Charges	619
		(f)	The Customs Union: The Broader Perspective	619
	3	Ar	ticles 110–113: Discriminatory Tax Provisions	620
		(a)	The Purpose of Article 110	620
		(b)	Article 110(1): Direct Discrimination	621
		(c)	Article 110(1): Indirect Discrimination	621
		(d)	Article 110: National Autonomy and Fiscal Choices	623
		(e)	The Relationship Between Article 110(1) and (2)	625
		(f)	Article 110(1) and (2): The Determination of Similarity	626
		(g)	Article 110(2): The Determination of Protective Effect	628

÷

DETAILED CONTENTS | xxiii

	(h) Taxation: The Broader Legal Perspective	630
	(i) Taxation: The Broader Political Perspective	- 631
4	The Boundary Between Articles 28–30 and 110–113	632
	(a) Levies Imposed on Importers	632
	(b) Imports Taxed but not Made by the State of Import	633
	(c) Selective Tax Refund	634
5	Conclusions	635
6	Further Reading	636

6 Further Reading

19	FR	EE MOVEMENT OF GOODS: QUANTITATIVE RESTRICTIONS	637
	1	Central Issues	637
	2	Directive 70/50 and Dassonville	638
	3	 Discriminatory Barriers to Trade (a) Import and Export Restrictions (b) Promotion or Favouring of Domestic Products (c) Price Fixing (d) Measures which Make Imports more Difficult or Costly (e) National Measures versus Private Action (f) Summary 	 640 641 644 645 646 647
	4	 Indistinctly Applicable Rules: Cassis de Dijon (a) Foundations: Cassis de Dijon (b) Application: The Post-Cassis Jurisprudence (c) Indistinctly Applicable Rules: Article 35 (d) Indistinctly Applicable Rules: The Limits of Article 34 	 647 649 650 651
	5	 Indistinctly and Distinctly Applicable Rules: Keck and Selling Arrangements (a) Keck: Selling Arrangements (b) Keck: Static and Dynamic Selling Arrangements (c) Keck and Selling Arrangements: Two Qualifications 	 654 655 656
	6	Indistinctly and Distinctly Applicable Rules: Product Use	659
	7	The Current Law: Summary	661
	8	 The Current Law: Assessment (a) Market Access as Overarching Principle (b) Market Access as Slogan (c) Summary and Choices 	662 665 667
	9	 Defences to Discriminatory Measures: Article 36 (a) Public Morality (b) Public Policy (c) Public Security 	 668 668 670

1.1

xxiv | DETAILED CONTENTS

-

		(d) Protection of Health and Life of Humans, Animals, or Plants	672
		(e) Other Grounds for Validating Discriminatory Measures	674
		(f) The Relationship Between Harmonization and Article 36	676
	10	Defences to Indistinctly Applicable Rules:	
		The Mandatory Requirements	677
		(a) The Rationale for the Mandatory Requirements	677
		(b) The Relationship Between the Mandatory Requirements and Article 36	677
		(c) The Mandatory Requirements: Consumer Protection	678
		(d) The Mandatory Requirements: Fairness of Commercial Transactions	680
		(e) The Mandatory Requirements: Public Health	680
ж.		(f) Other Mandatory Requirements	681
		(g) Mandatory Requirements and Harmonization	684
		(h) Summary	684
	11	Free Movement of Goods and Cassis: The Broader Perspective	684
		(a) The Commission's Response to Cassis	684
		(b) Problems with Realizing the Cassis Strategy	686
		(c) Problems Flowing from the Cassis Strategy	687
	12	Conclusions	689
	13	Further Reading	690

1

2	0 FR	EE MOVEMENT OF CAPITAL AND ECONOMIC AND MONETARY UNION	693
	1	Central Issues	693
	2	Free Movement of Capital	694
		(a) The Original Treaty Provisions	694
		(b) The Current Provisions: The Basic Principle	694
		(c) The Current Provisions: The Exceptions	696
	3	EMU and the European Monetary System: Early Attempts	698
	4	Economic and Monetary Union: The Three Stages	699
		(a) Stage One and the Delors Report	699
		(b) Stage Two and the Treaty on European Union	699
		(c) Stage Three and the Legal Framework	700
	5	EMU: Economic Foundations	701
		(a) The Case For EMU	701
		(b) The Case Against EMU	702
		(c) EMU: Economics, Politics, and Law	703
	6	EMU: Monetary Union and the ECB	703
		(a) ECB and ESCB	704
		(b) Monetary Policy	705
		(c) Policy Issues: Central Bank Independence	705

DETAILED CONTENTS | xxv

.

.

7 EMU: Coordination of Economic Policy	70
(a) Multilateral Surveillance Procedure	70
(b) Excessive Deficit Procedure	70
(c) Policy Issues: Effectiveness of Economic Policy Coordination	70
8 Conclusions	71
9 Further Reading	71
FREE MOVEMENT OF WORKERS	71

1	Central Issues	715
2	Article 45: Direct Effect	716
3	 Article 45: Worker and the Scope of Protection (a) Definition of 'Worker': An EU Concept (b) Definition of 'Worker': Minimum-Income and Working-Time Requirements (c) Definition of 'Worker': Purpose of the Employment (d) Definition of 'Worker': The Job-Seeker (e) Scope of Protection: New Member States 	 718 719 720 723 726 728
4	 Article 45: Discrimination, Market Access, and Justification (a) Direct Discrimination (b) Indirect Discrimination (c) Obstacles to Access to the Employment Market (d) Internal Situations (e) Objective Justification 	 728 729 729 730 732 733
5	 Article 45(4): The Public-Service Exception (a) The Meaning Determined by the Court, not the Member States (b) The ECJ's Test for Public Service (c) Application of the ECJ's Test (d) Discriminatory Conditions of Employment within the Public Service are Prohibited 	734 735 737 740
6	 Directive 2004/38: Right of Entry and Residence of Workers and Their Families (a) Formal Requirements for Workers (b) Job-Seekers and the Unemployed (c) The Right of Permanent Residence (d) Conditions for Exercise of the Right to Residence 	741 741 745 746
7	 Regulation 1612/68: Substantive Rights and Social Advantages (a) Regulation 1612/68 (b) Article 7(2) of Regulation 1612/68 (c) Article 7(3) of Regulation 1612/68 and Educational Rights for Workers (d) Article 12 of Regulation 1612/68: Educational Rights for Children 	746 748 750 751

xxvi | DETAILED CONTENTS

1

	(e) Rights of Families as Parasitic on the Workers' Rights	752
	(f) Family Members in an Internal Situation	754
	8 Directive 2004/38: Public Policy, Security, and Health Restrictions	755
	(a) Three Levels of Protection	755
	(b) Article 27: General Principles	755
	(c) Article 28: Expulsion	756
	(d) Article 29: Public Health	759
	(e) Article 30: Notification of Decisions	759
	(f) Article 31: Procedural Safeguards	759
	(g) Articles 32–33: Duration of Exclusion Orders and Expulsion	760
	9 Free Movement of Workers: Current Assessment	760
	10 Conclusions	762
	11 Further Reading	763
22	FREEDOM OF ESTABLISHMENT AND TO PROVIDE SERVICES	764
	1 Central Issues	764
	2 Differences and Commonalities Between the Free Movement of Persons,	
	Services, and Establishment	765
	(a) Comparing the Treaty Chapters	765
	(b) Are the Freedoms Horizontally Applicable?	767
	(c) The 'Official Authority' Exception	769
	(d) The Public Policy, Security, and Health Exceptions	770
	(e) Legislation Governing Entry, Residence, and Expulsion	770
	3 The Right of Establishment	770
	(a) The Effect of Article 49	771
	(b) The Scope of Article 49	773
	(c) Establishment of Companies	779
	(d) Summary	788
	4 Free Movement of Services	788
	(a) The Effect of Article 56 TFEU	790
	(b) The Scope of Article 56	792
	(c) Justifying Restrictions on the Free Movement of Services	800
	(d) Are Non-Discriminatory Restrictions Covered by Article 56?	806
	5 General Legislation to Facilitate Establishment and Services: Recognition of	
	Professional Qualifications	809
	(a) The Initial Sectoral Harmonization/Coordination Approach	809
	(b) Introduction of the Mutual Recognition Approach	809
	(c) Directive 2005/36 on the Recognition of	011
	Professional Qualifications	811
	(d) Situations not Covered by the Legislation	812

-

DETAILED CONTENTS xxvii

	6 General Legislation The Services Direction	to Facilitate Establishment and Services: ve	813
	7 Conclusions		816
	8 Further Reading		817
	o running		
.3	CITIZENSHIP OF THE	EUROPEAN UNION	819
	1 Central Issues		819
	2 Introduction		820

Introduction

- 3 The Rights of Free Movement and Residence of EU Citizens
 - Did Article 20 Create an Autonomous and Directly Effective Right? (a)
 - (b) Did Articles 20 and 21 Change the Law Concerning 'Wholly Internal Situations'?
 - (c) Did Articles 20 and 21 Create Rights for EU Nationals Who are neither Economically Active nor Economically Self-Sufficient to Claim Substantive Equality of Treatment with Nationals of a Host Member State?
 - (d) Did Articles 20 and 21 Otherwise Enhance the Rights of EU Citizens to Challenge Restrictive Member State Measures?
 - Summary (e)

.

1

- 4 Political Rights of Citizenship
- 5 Directive 2004/38 on the Rights of Free Movement and Residence for

823

824

829

833

845

846

848

		EU Citizens and their Families	850
	6	Conclusions	852
	7	Further Reading	852
24	EQ	UAL TREATMENT AND NON-DISCRIMINATION	854
	1	Central Issues	854
	2	EU Anti-Discrimination Law: Origins and Context	855
	3	Equal Treatment and Non-Discrimination: The Legal Framework	856
	4	 The Origins: Article 157 TFEU and the Principle of Equal Pay for Women and Men (a) The Social and Economic Underpinnings of Article 157 (b) The Breadth of Article 157: The Definition of Pay 	857 858 860
	5	 Article 19 TFEU and the Article 19 Directives (a) The Race Directive 2000/43 (b) The Framework Employment Directive 2000/78 (c) The Proposed New Article 19 Directive on Equal Treatment 	867 868 870 873
	6	 The Gender Directives (a) The 'Recast' Equal Treatment Directive 2006/54 (b) The Social Security Directive 79/7 	873 874 881

xxviii | DETAILED CONTENTS

5

100

1.0

-

		(c) The Pregnancy Directive 92/85	884
		(d) Directive 2004/113 on Access to and Supply of Goods and Services	887
		(e) Parental Leave	889
		(f) Directive 2010/41 on the Self-Employed	890
	7	The General Principle of Equal Treatment and Non-Discrimination	891
*	8	Common Provisions and Concepts of EU Anti-Discrimination Law	895
		(a) Direct and Indirect Discrimination	895
		(b) Exceptions and Justifications	898
		(c) Positive Action	909
		(d) Remedies	915
		(e) Mainstreaming	920
	9	Conclusions	921
	10	Further Reading	922
25	AF	SJ: EU CRIMINAL LAW	923
	1	Central Issues	923
	2	Maastricht to Lisbon	924
		(a) Maastricht: Three Pillars	924
		(b) Amsterdam: Three Pillars Modified	925
	3	Rationale	925
		(a) Rationale for the Three-Pillar Structure	926
		(b) Rationale for Subject Matter Comprising AFSJ	926
	4	Lisbon Treaty: General Principles	931
		(a) Objectives	932
		(b) Treaty Architecture	932
		(c) Competence	932
		(d) Article 67 TFEU	933
		(e) Institutions	934
		(f) Union Courts	936
		(g) UK and the AFSJ	937
	5	Criminal Law and Procedure: Pre-Lisbon	939

6 Criminal Law and Procedure: Post-Lisbon	940
(a) Criminal Law	941
(b) Criminal Procedure	942
(c) Crime Prevention	943
(d) Criminal Investigation and Prosecution	943
(e) Criminal Prosecution and the European Public Prosecutor	944
(f) Crime and Police Cooperation	945
7 Criminal Law and Procedure: Objectives	945

DETAILED CONTENTS | xxix

6

.

8	Criminal Law and Procedure: Challenges	946
	(a) Member State Acceptance	946
	(b) Mutual Recognition	947
	(c) Mutual Recognition and the European Arrest Warrant	948
	(d) Mutual Recognition and the European Evidence Warrant	952
	(e) Substantive Criminal Law	954
9	Conclusions	956
10	Further Reading	957

26	CO	MPETITION LAW: ARTICLE 101	959
	1	Central Issues	959
	2	Competition Law: Objectives	959
	3	Article 101: The Treaty Text	960
	4	Article 101(1): Undertakings	961
	5	Article 101(1): Agreements, Decisions, and Concerted Practices	962
		(a) Agreements	962
		(b) Concerted Practice	965
	- 6	Article 101(1): Object or Effect of Preventing, Restricting, or	
		Distorting Competition	970
		(a) Nature of the Problem	970
		(b) Experience in the United States	971
		(c) The Academic Debate in the EU	972
		(d) The Case Law	973
		(e) Summary	982
	7	Article 101(1): The Effect on Trade Between Member States	983
	8	Article 101(1): The De Minimis Doctrine	983
	9	Article 101(3): Exemptions	984
		(a) Individual Exemption	984
		(b) Block Exemption	987
	10	Article 101: Competition and Non-Competition Considerations	987
		(a) Article 101(1)	988
		(b) Article 101(3)	988
	11	Article 101: Vertical Restraints	989
		(a) The Economic Debate	990
		(b) The Commission and Vertical Restraints	992
		(c) Exclusive Distribution	994
		(d) Selective Distribution	995
		(e) Franchising	999
		(f) Exclusive Purchasing	1000

1.1

.

XXX | DETAILED CONTENTS

	(g) Th	ne Block Exemption			1001
	(h) Su	ımmary			1005
12	Comp	petition Law: Enforcement			1005
	(a) Th	ne Traditional Approach and the Modernizatio	n White	Paper	1005
	(b) Th	ne New Regime			1006
	(c) Ju	dicial Review			1007
	(d) Da	amages Actions			1008
13	Concl	lusions			1009

14 Further Reading

N 16

10.0

27	COMPETITION LAW: ARTICLE 102				
	1	Central Issues	1011		
	2	Dominant Position: Defining the Relevant Market	1012		
		(a) The Product Market	1012		
	~	(b) The Geographic Market	1015		
		(c) The Temporal Factor	1017		
		(d) The Commission Notice on Market Definition	1017		
	3	Dominant Position: Market Power	1018		
		(a) Single Firm Dominance	1018		
		(b) Joint Dominance	1022		
	4	Abuse: Three Problems of Interpretation	1024		
		(a) Who is Article 102 Designed to Protect?	1025		
		(b) What Kinds of Behaviour are Abusive?	1025		
		(c) Abuse of which Market?	1026		
	5	Abuse: Particular Examples	1026		
		(a) Abuse and Mergers	1026		
	r	(b) Abuse and Refusal to Supply	1028		
		(c) Abuse and Price Discrimination	1033		
		(d) Abuse and Predatory Pricing	1038		
		(e) Abuse and Selective Pricing	1040		
	6	Defences: Objective Justification, Proportionality, and Efficiency	1041		

~

1010

- 7 Article 102: Reform
- 8 Conclusions
- 9 Further Reading
- 28 COMPETITION LAW: MERGERS
 - 1 Central Issues

.

- 2 Merger Control: The Policy Rationale
 - (a) Arguments against Mergers
 - (b) Arguments in Favour of Mergers

1047

1048

DETAILED CONTENTS | xxxi

		3	Regulation 139/2004: Jurisdictional Issues	1049
			(a) Concentration: General	1049
			(b) Concentration: Joint Ventures	1050
			(c) Concentrations with an EU Dimension	1051
			(d) The Relation Between EU and National Merger Control	1052
			(e) Residual Role for Articles 101 and 102 TFEU	1054
		4	Regulation 139/2004: Procedural Issues	1055
			(a) Prior Notification	1055
			(b) Suspension Pending Investigation	1055
			(c) Investigation	1055
			(d) Investigation and Enforcement	1056
		5	Regulation 139/2004: The Substantive Criteria	1056
			(a) Market Definition	1056
			(b) The Test	1057
			(c) Horizontal Mergers: Non-Coordinated Effects	1058
			(d) Horizontal Mergers: Coordinated Effects and Collective Dominance	1062
			(e) Vertical and Conglomerate Mergers: Coordinated and	
			Non-Coordinated Effects	1067
			(f) Concentration and Efficiencies	1067
			(g) Concentrations and Failing Firms	1068
			(h) The Relevance of Non-Competition Considerations	1068
			(i) Remedies	1069
-		6	Judicial Review	1069
		7	Conclusions	1070
		8	Further Reading	1070
	29	TF	HE STATE AND THE COMMON MARKET	1072
		1	Central Issuess	1072
		2	The State and the Market: General Principles	1072
			(a) The General Principle: The Competition Ethos	1072
			(b) The Qualification: Services of General (Economic) Interest	1073
		3	Public Undertakings and Article 106	1074
			(a) Article 106(1)	1075
			(b) Article 106(2)	1080
			(c) Article 106(3)	1082
			(d) Article 106 and National Courts	1083
			(e) Summary	1084
		4	The State, Articles 4(3) TEU, 101, 102, and 34 TFEU	1084
		5	State Aids: Policy Development and Reform	1085
			(a) The Commission and the Development of Policy	1085
			(b) Reform	1087

(6-

· · ·

DETAILED CONTENTS xxxii

6	State Aids: The Substantive Rules and Article 107		
	(a) Definition of State Aid	1087	
	(b) Article 107(2)	1093	
	(c) Article 107(3)	1094	
	(d) The Block Exemption	1099	
. 7	State Aids: The Procedural Rules and Articles 108 and 109	1099	
	(a) Review of Existing State Aids	1100	
	(b) The Procedure for New State Aids: Notification and Preliminary Review	1100	
	(c) The Procedure for State Aids: Detailed Investigation and Enforcement	1101	
	(d) Exceptional Circumstances: Article 108(2), Paragraphs 3 and 4	1103	
	(e) Article 109: Implementing Regulations	1103	
	(f) Challenge to Commission Decisions	1103	
	(g) Aid that has not Been Notified	1104	
	(h) Recovery of Unlawful Aid	1106	
8	State Aids, Market Integration, and Regional Policy	1108	
	(a) The Relationship Between Article 34 and Articles 107–109	1108	
	(b) The Relationship Between National and EU Regional Policy	1109	
9	Conclusions	1110	
10	Further Reading	1110	

