DETAILED CONTENTS

Table of Abbreviations *xxxiii*
Acknowledgements *xxxvi*
Table of Cases *xxxviii*
Table of Treaties, Instruments, and Legislation *cxxi*
Lisbon Table of Equivalences *cxxxix*

1 THE DEVELOPMENT OF EUROPEAN INTEGRATION 1

1 Central Issues 1

2 European Integration: Theories 2

3 European Integration: Background 4

4 EEC and Euratom Treaties 5
(a) EEC: Founding and Objectives 5
(b) Geographical Reach of the Community: Enlargement 7
(c) Community Decision-Making: Intergovernmentalism and Supranationalism 7

5 Single European Act 10
(a) Institutional Changes 11
(b) Substantive Changes 11
(c) Reaction and Assessment 12

6 Maastricht Treaty 13
(a) The Three-Pillar Structure 13
(b) The Common Provisions 14
(c) Changes to the Community Treaties 14
(d) Common Foreign and Security Policy 15
(e) Justice and Home Affairs 15
(f) Reaction and Assessment 15
(g) Further Enlargement 16

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

(c) CFSP and PJCC 20
(d) Enhanced Cooperation 20
(e) The Charter of Rights 20
(f) Enlargement 21
(g) Reaction and Assessment 21

9 Constitutional Treaty 21
(a) From Nice to Laeken 21
(b) Convention on the Future of Europe 22
(c) IGC and (Non-)Ratification 23
(d) Reaction and Assessment 24

10 Lisbon 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

11 Conclusions 28

12 Further Reading 29

2 THE INSTITUTIONS 31

1 Central Issues 31

2 The 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 The Council 41
(a) Composition 41
(b) Presidency of the Council 42
(c) Committee of Permanent Representatives 43
(d) Council Secretariat 44
(e) Powers of the Council 44
(f) Role of the Council 45

4 The European Council 47
(a) Composition 47
(b) Presidency of the European Council 47
(c) Rationale 48
(d) Role 48
(e) Role of the European Council 49

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
(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
(b) Committee of the Regions 68

10 Agencies 69

11 Conclusions 70

12 Further Reading 71

3 COMPETENCE 73

1 Central Issues 73

2 Impetus for Reform 74

3 Lisbon Strategy 75
(a) Categories and Consequences 75
(b) Express and Implied Power 75

4 Exclusive Competence 78
(a) Basic Principles 78
(b) Area Exclusivity 78
(c) Conditional Exclusivity 79

5 Shared Competence 83
(a) Basic Principles 83
(b) Pre-Emption 84
(c) Scope and Variation 85

6 Supporting, Coordinating, or Supplementary Action 85
(a) Basic Principles 85
(b) Scope and Variation 86
(c) Legal Acts, Harmonization, and Member State Competence 87
7 Economic, Employment, and Social Policy 88
(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

4 INSTRUMENTS AND THE HIERARCHY OF NORMS 103

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

5 LEGISLATION AND DECISION-MAKING 121

1 Central Issues 121

2 Legislative Initiative: Principle and Practice 121

3 Legislative Acts: The Ordinary Legislative Procedure 123
(a) Pre-Lisbon 123
(b) Ordinary Legislative Procedure 123
(c) Ordinary Legislative Procedure: Stages in the Process 126
(d) Ordinary Legislative Procedure: Practical Operation 127
(e) Ordinary Legislative Procedure: Power Dynamics 128
(f) Ordinary Legislative Procedure: Normative Foundations 129

4 Legislative Acts: Special Legislative Procedure 130

5 Legislative Acts: Council Voting Requirements 131
(a) Pre-Lisbon 131
(b) Post-Lisbon 132

6 Delegated Acts: Enactment and Control 134
(a) Pre-Lisbon: The Rationale For Comitology 134
(b) Post-Lisbon Delegated Acts: Demise of Comitology 135
(c) Evaluation 136

7 Implementing Acts: Enactment and Control 139
(a) The Lisbon Schema 139
(b) Evaluation 141

8 Enhanced Cooperation: Conditions and Use 142

9 EU Decision-Making: Process and Reality 143
(a) The Temporal Dimension 143
(b) The Inter-Institutional Dimension 144

10 EU Democracy: Argument and Evaluation 149
(a) The Nature of the Argument 150
(b) Evaluation: The Empirical Frame of Reference 150
(c) Evaluation: The Normative Frame of Reference 152

11 Conclusions 155

12 Further Reading 156

6 NEW FORMS OF GOVERNANCE 158

1 Central Issues 158

2 Introduction 158

3 The New Approach to (Technical) Harmonization 162

4 The Lisbon Agenda and the Open Method of Coordination 163

5 General EU Governance Reform Initiatives 167
(a) Subsidiarity and Proportionality 168
(b) Better Regulation and the Commission's White Paper on Governance 170

6 Appraising the Move Towards New Forms of Governance 175
7 Conclusions 178
8 Further Reading 178

7 THE NATURE AND EFFECT OF EU LAW: DIRECT EFFECT AND BEYOND 180
1 Central Issues 180
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 THE APPLICATION OF EU LAW: REMEDIES IN NATIONAL COURTS 218
1 Central Issues 218
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

(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

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

9 THE 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

10 EU INTERNATIONAL RELATIONS LAW 302

1 Central Issues 302

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

9 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 Treaty Procedures 353
(c) The ECJ and Mixed Agreements 354
(d) The ECJ and the CFSP 356

10 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 360
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 366
(a) The ECHR as a Source of Special Significance for EU Law 366
(b) Other International Human Rights Instruments 367
(c) National Constitutional Traditions 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 382
(b) Member States as Agents of the EU 382
(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

12 ENFORCEMENT ACTIONS AGAINST MEMBER STATES 408

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

14 Further Reading 440

13 PRELIMINARY RULINGS 442

1 Central Issues 442

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
(d) Relationship Between National Courts 447
(e) National Court Raising EU Law of its Own Volition 448

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 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

14 REVIEW OF LEGALITY: ACCESS 485
1 Central Issues 485
2 Article 263(1): Bodies Subject to Review 485
3 Article 263(1): Acts Subject to Review 486
(a) General Principles 486
(b) Non-Existent Acts 489
(c) Limitations on Review 489
4 Article 263(2)–(3): Standing for Privileged and Quasi-Privileged Applicants 490

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 REVIEW 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

7 The Consequences of Illegality and Invalidity 553
8 Conclusions 555
9 Further Reading 556

16 DAMAGES ACTIONS AND MONEY CLAIMS 557
1 Central Issues 557
2 Discretionary Acts 557
(a) The General Test 557
(b) Legislative and Non-Legislative Discretionary Acts 558
(c) Superior Rule of Law 559
(d) Flagrant Violation/Serious Breach 561
(e) Assessment 564
(f) Summary 564
3 Non-Discretionary Acts 565
(a) The General Principle: Illegality, Causation, Damage 565
(b) Application of the General Principle 565
(c) The Meaning of Illegality 566
(d) Summary 567
4 Official Acts of Union Servants 568
5 Valid Legislative Acts 569
(a) The Nature of the Problem 569
(b) The Case Law 570
6 Causation and Damage 571
(a) Causation 571
(b) Damage 573
7 Joint Liability of the EU and Member States 574
(a) Procedural Issues 574
(b) Substantive Issues 575
8 Contract 577
9 Restitution 578
10 Conclusions 579
11 Further Reading 580

17 THE SINGLE MARKET 581
1 Central Issues 581
2 Economic Integration: Forms and Techniques 581
(a) Forms of Economic Integration 581
(b) Techniques of Economic Integration 582

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

9 Conclusions 609

10 Further Reading 609

18 FREE MOVEMENT OF GOODS: DUTIES, CHARGES, AND TAXES 611

1 Central Issues 611

2 Articles 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 Articles 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

(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

19 FREE MOVEMENT OF GOODS: QUANTITATIVE RESTRICTIONS 637

1 Central Issues 637

2 Directive 70/50 and *Dassonville* 638

3 Discriminatory Barriers to Trade 640
(a) Import and Export Restrictions 640
(b) Promotion or Favouring of Domestic Products 641
(c) Price Fixing 644
(d) Measures which Make Imports more Difficult or Costly 645
(e) National Measures versus Private Action 646
(f) Summary 647

4 Indistinctly Applicable Rules: *Cassis de Dijon* 647
(a) Foundations: *Cassis de Dijon* 647
(b) Application: The Post-*Cassis* Jurisprudence 649
(c) Indistinctly Applicable Rules: Article 35 650
(d) Indistinctly Applicable Rules: The Limits of Article 34 651

5 Indistinctly and Distinctly Applicable Rules: *Keck* and Selling Arrangements 654
(a) *Keck*: Selling Arrangements 654
(b) *Keck*: Static and Dynamic Selling Arrangements 655
(c) *Keck* and Selling Arrangements: Two Qualifications 656

6 Indistinctly and Distinctly Applicable Rules: Product Use 659

7 The Current Law: Summary 661

8 The Current Law: Assessment 662
(a) Market Access as Overarching Principle 662
(b) Market Access as Slogan 665
(c) Summary and Choices 667

9 Defences to Discriminatory Measures: Article 36 668
(a) Public Morality 668
(b) Public Policy 670
(c) Public Security 671

(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
(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

20 FREE 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

7 EMU: Coordination of Economic Policy 707
(a) Multilateral Surveillance Procedure 708
(b) Excessive Deficit Procedure 708
(c) Policy Issues: Effectiveness of Economic Policy Coordination 709
8 Conclusions 712
9 Further Reading 712

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

(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 Professional Qualifications 811
(d) Situations not Covered by the Legislation 812

6 General Legislation to Facilitate Establishment and Services: The Services Directive 813

7 Conclusions 816

8 Further Reading 817

23 CITIZENSHIP OF THE EUROPEAN UNION 819

1 Central Issues 819

2 Introduction 820

3 The Rights of Free Movement and Residence of EU Citizens 823

(a) Did Article 20 Create an Autonomous and Directly Effective Right? 824

(b) Did Articles 20 and 21 Change the Law Concerning 'Wholly Internal Situations'? 829

(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? 833

(d) Did Articles 20 and 21 Otherwise Enhance the Rights of EU Citizens to Challenge Restrictive Member State Measures? 845

(e) Summary 846

4 Political Rights of Citizenship 848

5 Directive 2004/38 on the Rights of Free Movement and Residence for EU Citizens and their Families 850

6 Conclusions 852

7 Further Reading 852

24 EQUAL 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 857

(a) The Social and Economic Underpinnings of Article 157 858

(b) The Breadth of Article 157: The Definition of Pay 860

5 Article 19 TFEU and the Article 19 Directives 867

(a) The Race Directive 2000/43 868

(b) The Framework Employment Directive 2000/78 870

(c) The Proposed New Article 19 Directive on Equal Treatment 873

6 The Gender Directives 873

(a) The 'Recast' Equal Treatment Directive 2006/54 874

(b) The Social Security Directive 79/7 881

(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 AFSJ: 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

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 COMPETITION 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

(g) The Block Exemption 1001
(h) Summary 1005

12 Competition Law: Enforcement 1005
(a) The Traditional Approach and the Modernization White Paper 1005
(b) The New Regime 1006
(c) Judicial Review 1007
(d) Damages Actions 1008

13 Conclusions 1009

14 Further Reading 1010

27 COMPETITION LAW: ARTICLE 102 1011

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
(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

7 Article 102: Reform 1041

8 Conclusions 1043

9 Further Reading 1043

28 COMPETITION LAW: MERGERS 1046

1 Central Issues 1046

2 Merger Control: The Policy Rationale 1047
(a) Arguments against Mergers 1047
(b) Arguments in Favour of Mergers 1048

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 THE 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 State Aids: The Substantive Rules and Article 107 1087
(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
Index *1113*