

EUROPEAN UNION LAW
LOYOLA UNIVERSITY CHICAGO SCHOOL OF LAW
Course # 568 - Section 246
FALL TERM 2008
Tuesdays/Thursdays 3:00 -4:15
Room 601

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The European Union Law course is intended to provide students with a basic understanding of the European Union, its structures, goals, areas of control, achievements and future hopes. As an economic/trade area the EU is becoming the second largest economy and the largest trading partner for the U.S. This area of the world is the top choice for where U.S. businesses invest. Laws, rules and regulations promulgated in Europe have direct impact on U.S. businesses as they desire to do business or sell products in that area. The harmonization of laws there in areas such as competition law, health and safety, technical standards, banking and other financial services and consumer protection to name just a few will be of interest to these U.S. businesses. Lawyers to these U.S. companies need to understand the EU community structure, law-making processes and substantive law.

There have been significant accomplishments in connection with economic and monetary union in the area of single currency and single monetary policy which are of interest world wide. In 2004 the EU completed multiple accessions; adding 12 new countries to the Union. How is accession accomplished? Has it been successful? Are there long term problems inherent in the institutional form of the EU; a “democratic deficit” as some critics assert?

The first half of this course will emphasize constitutional and institutional issues and general principles. After that we will explore a range of issues surrounding the “Internal Market” including the free movement of capital and the economic and monetary union. Finally, if time permits, we will explore an area having greater and greater impact, not only on trade within the European Community, but on U.S. businesses within the U.S. and worldwide, that being competition policy and enforcement.

European Union Law is considered (with reason) to be a heavy reading course. This is only to be expected when students are learning an entirely different legal system with different substantive and procedural laws. Assignments will include text materials, additional cases and perhaps other outside materials. The following syllabus should be regarded as a guide that may be adjusted in various ways as the course progresses. I expect that you will prepare for class carefully, attend regularly, and participate freely.

REQUIRED TEXTS: **Bermann, Goebel, Davey & Fox, Cases and Materials on EUROPEAN UNION LAW (Thomson West 2d ed. 2002)**
(Referred to as “BGDF” in assigned readings.)

Bermann, Goebel, Davey & Fox, EUROPEAN UNION LAW Selected Documents (ThomsonWest, 2002 ed.) (Referred to as “Supp” in assigned readings.)

Bermann, Goebel, Davey & Fox, 2004 Supplement to Cases and Materials on EUROPEAN UNION LAW (and Selected Documents 2002 Edition) Second Edition (Thomson West 2004 ed.) (Referred to as “2004 Supp” in assigned readings .)

TWEN:

Students are required to sign up for the TWEN page for this course. You will find this syllabus, READING ASSIGNMENTS, any changes or announcements, supplemental materials, etc.

ASSESSMENT: Your final grade in this 3 credit course will be assessed based upon class participation and performance on the final examination.

I. Class Participation Assessment: Actively participating in the classroom discussions is an important part of the learning experience for both the student and the class as a whole. There is a direct correlation between strong class participation and a good grade on the final examination. Students are REQUIRED to pick up their name card before each class, display it during class and return it at the end of class to the Professor. This is true even if you are late – go to the front of class and pick it up! For each class various members of the class will be assigned primary responsibility to presenting cases and other materials. All students, however, are expected to be fully prepared to participate. Participation, other than those with assignments, will be first of all on a volunteer basis, but if there is inadequate participation on a full class basis, I may randomly call on class members. Participation will be evaluated not only on a “quantity” basis, but also on a “qualitative basis”. It is recognized and acknowledged that this is both a subjective evaluation and based upon meeting the policies set forth below. Grades may be raised on a positive basis, but also may be dropped in accordance with the policies of the law school.

II. Final Examination - The final exam will be three hours long. Information about the type of exam will be discussed in the final review session. During the exam students may bring in any materials that they wish. The rule is “you may bring in anything except another person” – this is intended to be a fully open book *examination*.

LAPTOP POLICY: Students may take notes during class using a laptop. Students should be considerate of their neighbors when making the choice to take notes this way. Except to the extent requested by the Professor, students may not use the network during class. Use of laptops for any purpose other than note taking will result in a penalty against that class’ participation grade, and, for a second offense, an on-going prohibition against that student using a laptop in the classroom for any purpose.

OFFICE HOURS: I will regularly be in my office on Tuesdays and Thursdays from 11 a.m. until 5 p.m. Obviously I will be there other times, but the above times are definite and you are invited to stop. More formal appointments can be made by pre-arrangement. You can always count on my availability immediately after class hours. I hope to see you if you have questions about the course or for any other matter for which I can be of service.

SYLLABUS

NOTE: The following is meant to be a summary of the topics presented. This syllabus will be updated and completed as the course progresses. We will cover the material in the order presented in the syllabus; it will be the student's responsibility to be appropriately prepared for the lectures. Please note that the references in the Bermann, Goebel, Davey & Fox ("BGDF") textbook to treaty sections, declarations, communications, and to directives and regulations of the Council or Commission contained in the European Union Law Selected Documents by Bermann, Goebel, Davey & Fox ("Supp." or "2004 Supp") are also assigned, even though not specifically mentioned here. The order of the material is not expected to change, but any changes and/or additions will be announced and posted on the course TWEN site. **The reading assignments set forth in this Syllabus are listed for the associated topic. My estimate for the readings relating to the next two classes will be posted on the TWEN site after each class.** If you wish to read ahead, the syllabus listing of readings tells you what portions of the text we will be covering, but not necessarily the timing.

PART I - CONSTITUTIONAL AND INSTITUTIONAL ISSUES

Assignment for Class One: After a discussion of class policies and procedures we will cover Topic 1 and begin Topic 2 during the first class. Read BGDF xvii-xxiii and 3-74. Skim the Treaty Establishing the European Community and the Treaty on European Union, the two treaties with which the book is primarily involved (found in Supp 4-164). In the 2004 Supp take note of the additions to Chapter 2 of the Text and Supp (pages 15-34)

Topic 1 Brief History and Development of the European Union: From EEC to EU

Objective: We will briefly trace the historical development from a European Economic Community towards a fully-fledged European Union. There have been a series of changes throughout the treaties following (Single European Act, the Treaty on European Union, the Treaty of Amsterdam and the Treaty of Nice) which will be discussed. The so-called "pillar structure" introduced by the Treaty on European Union and the changes to this structure in the Treaty of Amsterdam will be analyzed.

Readings:

Topic 2 The Institutions

Objective: Article 7 of the EC Treaty mentions five principal institutions which are entrusted with carrying out the tasks of the Community: the Council, the Commission, the European Parliament, the Court of Auditors and the Court of Justice. In this topic we shall discuss the role which each of these institutions plays and the way in which they interrelate. It is important in this context to realize that the Community does not conform

to any rigid separation-of-powers doctrine of the type which has shaped many domestic political systems. It is therefore impossible to describe any one of the institutions as the sole legislator or the sole executive. Furthermore, it should be noted that the institutional balance within the Community is not static but dynamic. It has changed as a result of the subsequent Treaty revisions discussed in the previous topic. In particular, the role played by the European Parliament in policy making has evolved considerably over the years.

Topic 3 Law-Making Procedures and the Legal Sphere Occupied by the Community and Its Laws

Objective: This topic will deal with the different decision making or law making procedures with the EC. The various revisions of the EC Treaty introduced a series of new (complex) law making procedures and have basically strengthened the influence of the European Parliament in the legislative process. It should be noted, however, that the proliferation of different law making procedures is far from ideal. We will examine, in this connection, the role of the various institutions under these procedures. The second portion of this topic will investigate the reach and limitations of Community Law. Over time the scope has gone beyond mere economic matters. Where are the boundaries? Whose law applies? How do national law and Community laws interact?

Readings: BGDF 75-128

Topic 4 The Role and Powers of the European Court of Justice (ECJ) and the Court of First Instance (CFI); Judicial Review of Community Acts; The Preliminary Ruling Procedure

Objective: We have seen that the various sources of Community law lay down the rules of the Community game. This body of law confers rights upon and imposes obligations on all players falling within its scope of application – the member states, the Community institutions and even individuals. If one of these players infringes the rules of the Community game, the rights of other players may be jeopardized. The treaties have entrusted the European Court of Justice and its stablemate, the Court of First Instance and in some cases even national courts with the task of referee. What role does the judiciary play in the Community structure? What are the competencies of the European Court of Justice, the Court of First Instance and National courts? We will answer the questions of which court should hear the matter? What is mandatory and what is discretionary? Who can refer questions? In order to provide adequate remedies when the rules of the Community game have been broken, the Treaties have introduced a unique but rather complex system of judicial protection. This system stipulates which particular actions are possible under the Treaties, who can be a party to such actions, what the conditions for admissibility of the actions are and before which court a particular action must be brought. Every developed legal system has certain mechanisms for challenging the procedural and substantive legality of such measures. There are a number of ways in which measures adopted by the Community institutions can be challenged, but the main method is by the procedure for annulment contained in Article 230 EC Treaty. This is a complex provision, especially with regard to the requirements for standing of private individuals. In this topic an attempt will be made to unravel and explain some of the complexities of the procedure for annulment and the reasons for the ECJ's reluctance to grant standing.

In the second part of this topic we shall discuss one particular action, namely the preliminary ruling procedure. This procedure set out in Article 234 of the EC Treaty, is a unique judicial mechanism. Not only does it ensure a uniform application and interpretation of Community law throughout the now 15 (going to 25) member states, it also permits national courts to function as Community courts in the application of Community law and lays down the relationship between the Community and national legal systems. The importance of the preliminary ruling procedure was certainly not envisaged by the draftsmen of the Treaties. In the more than forty years of Community existence, more than half the cases which have come before the ECJ have arisen out of this procedure. In addition, most of the key concepts on which the Community legal order is based, supremacy, direct effect, state liability in damages, have been developed within the framework of the preliminary ruling procedure.

Readings: BGDF 129-192 and 352-380

Topic 5 The Relationship Between Community and Member State Law

Objective: According to the ECJ, the Community constitutes a “new legal order” which confers rights and imposes obligations not only on the member states and the Community institutions but also on individuals. The two key foundations on which the Community legal order is based, namely the principle of the supremacy of Community law over national law and the principle of direct effect of Community law can be traced back to two early judgments of the ECJ in the 1960s, Case 6/64 *Costa v. ENEL* and Case 26/62 *Van Gend and Loos*, both covered in our readings. One of the main factors motivating the ECJ to develop these principles was to enhance the effectiveness of Community law at national level by strengthening the protection of the rights which Community law confers upon individuals. In later case-law, the ECJ has continued to play the role of the champion of the rights granted to individuals by applying the principle of direct effect not only to provisions of the EC Treaty but also under certain conditions to measures of secondary legislation. In this topic we will look at some of the most central general principles of law developed to implement the EC regime. First we will discuss the Direct Effects Doctrine and results of this doctrine in practice. Another central concept is the Doctrine of Supremacy of Community Law. This doctrine deals with the question of priority between Community and national law in the event of conflict. There is no express Supremacy Clause in favor of federal over state law and so the answer to these issues of supremacy over conflicting state law was left to the case law of the ECJ.

Readings: BGDF 238-280

Topic 6 Enforcement of Community Law; National Remedies; Enforcement Proceedings Against the Member States

Objective: The Commission is the so-called “Guardian of Community Law”. One of the important tasks of the Commission is to ensure that both the member states and private undertakings do not act contrary to Community law. Under Article 226 of the EC Treaty, the Commission can, as a last resort, bring an action before the ECJ against a member state which, after having been given the opportunity to mend its ways, persists in violating Community law. The Commission has a discretionary power in deciding whether to initiate proceedings before the Court. In the past, judgments by the ECJ condemning a member state were often not executed. The only action available to the

Commission was to ask the ECJ to condemn the member state for not having carried out its judgment. The Treaty on European Union gave the ECJ the power to impose a lump sum or penalty payment on a member state which fails to comply with one of its judgments. In addition to the foregoing, it should be understood that the vast majority of day-to-day enforcement of EC law and policy rests in the hands of Member State officials through national courts and agencies. We will see that the law that the Member State enforces, if it comes from a Community directive, looks to the State official as if it is national law. This being so, the administration takes on the institutional and procedural steps of the Member State.

Readings: BGDF 385-449

Topic 7 Fundamental Rights, Human Rights and Transparency

Objective: In evaluating the legality of Community measures, we have looked at general principles such as proportionality, equality, legal certainty and the protection of legitimate expectations, but in addition to these principles certain “basic” or “fundamental” rights have grown up relating to a set of “rights” pertaining to the political, social and personal interests of those who are subject to Community law. In this topic we will discuss how this human rights dimension has come about and what it means.

Readings: 203-220

Topic 8 Free Movement of Goods

Objective: Treaty of Rome provided for Free Movement of Goods through creation of a customs union and elimination of quantitative restrictions on imports and exports and of measures having an equivalent effect. This principle applies not only to goods produced in a Member State, but also to goods originating in non-member countries after an importer has brought them into a member, paying customs duties under Common Customs Tariff. Articles 23-25 deal with attempts by States to impose custom duties or charges that have an effect equivalent to custom duties, so as to make foreign goods more expensive than their domestic counterparts. Articles 90-93 regulate attempts to give domestic goods preferential treatment by way of discriminatory or protective internal taxation. A State also may try to reduce the amount of foreign goods by imposing quantitative restrictions (such as quotas) or measures having an equivalent effect. Articles 28-30 address this problem.

Readings: 452-463 and 475 -525

Topic 9 Free Movement of Persons

Objective: Article 3(c) is the fundamental freedom: Free Movement of Persons. This was to allow free movement of labor within the Member States and, as to citizens of the Member States, to abolish any nationality-based discrimination regarding employment, remuneration and other conditions of work. Article 39 guarantees nationals of Member States the right to move freely within the territory of the EU to accept offers of employment, to seek employment in other Member States, to remain within a Member State for the purpose of employment and to remain in Member States after employment has ended. States may restrict this freedom for reasons of public policy, public security,

public health or public service. Articles 40-42 elaborate on these freedoms and authorize Community legislation relating to worker rights and protection.

Readings: 575-629

Topic 10 Free Movement of Services and Right of Establishment

Objective: Article 3(c) in its enumeration of the four freedoms that lie at the heart of the Common Market, refers to “free movement of...services.” The Treaty guarantees not only the mobility of individual service providers – the persons covered by the Freedom of Movement of Persons – but of firms. It captures firm mobility in the concept of “freedom of establishment,” that is the ability of a business (in European terminology, an “undertaking”) created in one Member State to conduct business in the others. Moreover, to achieve genuine firm mobility and the welfare gains that come from it – both selective advantage and economies of scale and scope – this freedom must be more than formal. Firms must have the right not only to organize themselves on the territory of Member States, but to obtain equal access to licenses, regulatory approvals and all the other products of governmental intervention in the economy.

Readings: 653-658 and 662-712

Topic 11 Intellectual Property Rights; Protection of, and as a Barrier to Free Movement of Goods

Objective: The exercise of industrial and commercial property rights such as trademarks, patents and copyright must inevitably restrict competition; indeed their very purpose is to give their owners some protection against competition by giving monopoly rights for a certain period of time as a reward for creative endeavor or acquired goodwill in the created product. These rights are recognized in Articles 30 and 295 EC. But, the Court of Justice has drawn a distinction between the existence of industrial property rights and their exercise. The mere existence of industrial property rights cannot infringe Articles 81 and 82 EC; an improper or abusive exercise of these rights can. The same principle has been applied to patents and copyright.

Readings: 744-783