

EU Internal Market Law

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A) Economic and Political Reasons for Constructing a European Single Market

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Why integrating national markets
in a single EU-wide market?

- i) **Economic** reason: the importance of transnational free trade
 - ⇒ the Ricardo's theory of comparative advantages
- ii) **Political** reason: merging Member States' markets as a step forward a deeper political European integration
 - ⇒ the "neo-functionalism"

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The Economic rationale:
the benefits of free trade

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Ricardo theory: free trade →
specialization → comparative
advantage → economies of scale

Ultimately free trade should lead to

- **maximize consumer welfare** in all the States involved (cheaper products and greater choice) and
- ensure **the most efficient use of worldwide resources**

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The problems with the basic model

- 1) General problem → conditions of perfect competition do not exist in any market
- 2) Problem specific to transnational markets → national regulators, responding to local concerns, could generate trade barriers

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International law and free trade

How could trade barriers be removed?
→ International legal cooperation

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International agreements may create

- either mutual obligations between contracting States on a multilateral or bilateral basis → **mere legal cooperation**
Example: CETA Canada-EU, NAFTA
- or a new legal entity (international organization) whose task is to pursue an objective common to the founding States → **institutional cooperation**
Examples
 - i. At regional level: EU
 - ii. At global level: WTO

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Different stages/forms of market integration

They entail different levels of intensity of integration:

- 1) Free Trade Area (ex. EFTA, NAFTA)
- 2) Customs Union
- 3) Common Market
- 4) Economic and Monetary Union
- 5) Political Union

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Free trade area vs Customs Union

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Similarities

Both FTA and CU only focus on free movement of goods

- production factors are not dealt with
- NO right of freely move across the borders for workers, undertakings, consumers and capital

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Differences (as to trade with non-MS)

- **Free Trade Area:** Trade between MS in goods originating in the area only → each state retains the power to regulate trade with non-MS
- **Customs Union:** Trade in goods between MS but irrespective of their origin → MS are no longer free to regulate trade with non-MS (power conferred upon supranational institutions)

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The European Union comprises a customs union (Art 28 TFEU)

EU regime of trade in goods

- a) internal (intra-EU) and
- b) external dimension

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The Internal Dimension (intra-EU trade in goods)

Art 28.2 TFEU → EU rules on trade between Member States equally apply to

- 1) goods originating in one EU (or EEA) Member State
- 2) goods coming from third countries "which are in free circulation in Member States" → Art 29 TFEU

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non-EU products are "**in free circulation in a MS**" (Art 29 TFEU)

- i) If import formalities have been complied with and any customs duties or charges having equivalent effect which are payable have been levied in that MS, and
- ii) If they have not benefited from a total or partial drawback of such duties or charges

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Regime applicable to intra-EU trade in goods

- "**fiscal**" or "**tariff**" barriers
→ not allowed
- "**non-fiscal**" or "**non-tariff**" barriers
→ prohibited, unless they may be justified by reasons of general interest

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Fiscal (or tariff) measures

- **Customs duties** (and charges having equivalent effect) on imports and exports of goods between MSs
→ Absolutely prohibited: Art 30 TFEU
- "**internal**" taxation
→ may not be discriminatory or protectionist: Art 110 TFEU

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Non-fiscal measures

Quantitative restrictions (QR) or measures having equivalent effects (MEEs)

→ cannot be imposed on goods

a) imported (Art 34 TFEU)

b) or exported (Art 35 TFEU) between MSs

→ unless they are justified by overriding reasons

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The External dimension

(trade in goods with third countries)

⇒ **Common Customs Tariff** (adopted by EU institutions: Art 31 TFEU)

⇒ **Common Commercial Policy** (Arts 206-207 TFEU)


EU may act either by means of regulations or entering into international agreements with third states

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Customs union and common commercial policy fall under **exclusive competence of the EU**: see Art 3(b) and (e) TFEU

"only EU may legislate and adopt legally binding acts, the MSs being able to do so themselves only if so empowered by the Union or for the implementation of Union acts": see Art 2.1 TFEU

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Customs Union vs Common Market

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Differences

Customs Union
It only allows for free movement of goods (products)

Common Market
It allows for free movement of

- **Products** (goods and services) but also
- **Production Factors** (workers and capital)

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The Political rationale: the "Functional Approach" to the European integration

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Schuman Declaration May 5th, 1950

(...) **Europe will not be made all at once**, or according to a single plan. **It will be built through concrete achievements** which first create a de facto solidarity (...)

(...) The pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development **as a first step in the federation of Europe** (...)

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Art. 1 TEU (current version)

"(...) This Treaty marks a new stage in the **process** of creating **an ever closer** union among the peoples of Europe (...)"

see also the Preamble of TEU and TFEU

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Beyond a single market

- The right to free movement associated with the **European citizenship** (Art 21 TFEU)
- The building of an **Area of Freedom, Security and Justice** (Art 67 et seq. TFEU) in particular, the European Judicial Area in civil matters (Art 81 TFEU)

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B) What is EU Internal Market Law?

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The completion and smooth functioning of the Internal Market

- 1) Any national measure impeding intra-EU movement of market participants, goods, services and capital should be dismantled
- 2) Free and effective competition should not be distorted either by undertakings or by Member States
- 3) Common rules should be enacted to the extent that market regulation is needed

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The Internal Market (from a **broad** perspective)

- 1) Free movement provisions → prohibition on any restrictive national measure
- 2) Competition rules applicable to
 - (a) undertakings → prohibition on cartels and anti-competitive agreements and on abuse of dominance and
 - (b) Member States → prohibition on State aids
- 3) EU common policies (ex. agricultural and transport sectors) and EU rules ensuring the proper functioning of the internal market (approximation of MSs' laws)

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The Internal Market's regime (from a narrower perspective)

Only rules aimed at ensuring intra-EU
free movement of

- 1) Products → goods, services
- 2) Production factors → workers, capital
- 3) Market participants → self-employed
persons, companies, consumers

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The fundamental freedoms of movement

Relevant provisions in the Treaty on the
Functioning of the European Union (TFEU):

- 1) Free movement of goods: Art 28 et seq.
- 2) Free movement of workers: Art 45 et seq.
- 3) Right of establishment: Art 49 et seq.
- 4) Freedom to provide services: Art 56 et seq.
- 5) Free movement of capital and payments:
Art 63 et seq.

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C) The ideal models of market integration

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An internal market may be arranged in different ways

The fundamental question is:
who is to set the rules?

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Two basic models

▀ **Decentralization** → negative market integration

1) **Host country** model

2) **Home country** model

National rules still apply to regulate trade, unless they are incompatible with EU principles on free movement

▀ **Centralization** → positive market integration

Only one set of rules, enacted at EU level, which replace national rules

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"Decentralized" Model

□ All matters concerning trade are regulated by national rules

□ Yet these rules are prevented from being applied if and to the extent that they are incompatible with the fundamental freedoms laid down by the TFEU

□ **Courts** have to scrutinise national laws in order to assess whether they comply with EU law

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1) **Host** country control model

The rules of the country where the economic activity takes place apply

- ❑ Trade between independent countries → this is the normal situation → each State applies its own law within its territory (territoriality principle)
- ❑ Trade within a single integrated market → the host country control has to be tempered → principle of non-discrimination

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2) **Home** country control model

- ❑ The rules of the country of origin apply, even where the economic activity takes place abroad: "the product moves together with its own rule"
- ❑ The host country does not apply its own rules to economic activities originating in a foreign country → principle of **mutual recognition** within the integrated area → the foreign rules are considered equivalent to the domestic ones → mutual recognition requires **mutual trust** between Member States

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Decentralisation = "**Negative**" integration

- EU law does not set out the norms governing intra-EU trade (ex. product standards, qualifications to practise) → both under Host and Home country models, States retain power to regulate trade
- EU law only prohibits national rules from being applied

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Decentralisation → Regulatory Competition

- If States are free to regulate trade → different national norms coexist within the integrated market and compete each other → EU principles (non-discrimination, mutual recognition) govern regulatory competition between national rules

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Regulatory competition = Competitive federalism

Economic activity within the Single Market is regulated by different national rules

But they are prevented from being applied if they result in an unjustified obstacle to intra-EU trade



The core issue then is: what is an "obstacle" (trade barrier)?

The larger that notion is, the wider the impact is on national laws (i.e. MSs' legislative choices)

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Who is to set the rules?

- The fewest constraints on States' sovereignty
 - It is for the States to regulate the market
 - The task of the EU (i.e. the central or supranational entity) is essentially to ensure the coexistence of national regulations within the integrated market
- The **judiciary** (national courts cooperating with CJEU) is the dominant player → by assessing the compatibility of trade rules with the integrated market, courts decide on the applicability of national rules

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"Centralized" Model

- ❑ Economic activities are regulated by one single set of rules, produced by the EU legislature
- ❑ These rules either replace or harmonise national rules → "Positive" integration
- ❑ They apply not only to cross-border trade between Member States but also to trade within each single country

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Who is to set the rules?

1. The most constraints on States' sovereignty → powers to regulate trade are transferred from the national to the European (central) level
2. The **(EU) legislature** is likely to play a dominant role

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D) The enforcement of freedoms of movement

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A preliminary remark

If national rules do not comply with EU freedoms of movement,

a) National legislatures have to abolish or amend these rules

b) National courts must

(i) interpret them in accordance with EU freedoms, inasmuch as it is possible, or

(ii) If it is not possible, not apply the rules

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System of Dual Vigilance

■ **A centralised “public” enforcement mechanism** (Arts 258-259 TFEU)

→ European Commission or a MS may bring an action for infringement of EU law before the CJEU

■ **A decentralised “private” enforcement mechanism** (CJEU’s case law)

→ Private parties may directly rely upon EU free movement rules in proceedings brought before national courts

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Action for infringement

■ **A “centralised” mechanism**

→ It must be brought before the Court of Justice of the European Union

■ **A “public” enforcement mechanism**

→ It is for public authorities only (European Commission, a Member State) to bring proceedings before the CJEU

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Direct effect of EU primary rules

- **A "decentralised" mechanism**
 - Courts in all Member States are competent to enforce EU fundamental freedoms
- **A "private" enforcement mechanism**
 - Claiming for the rights they derive from EU law be enforced, private parties make it possible that national courts enforce EU rules on free movement

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"The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Arts 169 and 170 EEC (now Arts 258 and 259 TFEU) to the diligence of the Commission and of the Member States"
(case 26/62, Van Gend en Loos)

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Private enforcement of EU freedoms

It is founded upon 3 main pillars:

- I. The direct effect of EU rules on free movement (*Van Gend & Loos*) which prevail on incompatible national rules (*Costa/ENEL*)
- II. The right to an effective remedy before a national court (Art 47 Charter fundamental rights; Art 19.1 TEU)
- III. The judicial cooperation between national courts and CJEU → preliminary rulings under Art 267 TFEU

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