



APPUNTI LUISS

European Internal Market

Appunti

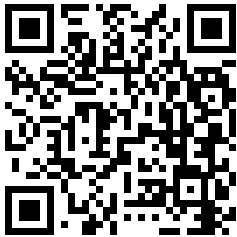
A.D.

A.a. 2014/2015. Gli appunti costituiscono l'intero materiale d'esame per i frequentanti. Il loro studio è quindi sufficiente per la preparazione dell'esame (salvo modifiche nel programma operate dal prof. Gallo). Per i non frequentanti occorre invece lo studio del manuale.

Nell'anno accademico 2014/2015 i frequentanti hanno potuto accedere al pre-appello che consisteva in un esame scritto con domande a risposta aperta.

Gli appunti comprendono la spiegazione di tutti gli argomenti trattati durante il corso, il testo degli articoli più importanti e l'estratto dei casi trattati (sia parte di fatto che parte di diritto). Comprendono anche alcune nozioni presenti esclusivamente nel libro, che non costituiscono quindi programma d'esame per i frequentanti, ma sono utili per la comprensione degli argomenti spiegati in classe.

Per una preparazione ottimale consiglio di portare gli appunti in classe durante la lezione in modo da seguire più facilmente le spiegazioni del prof. Gallo.



Part I: Introduction to the course

1. A Brief overview on the concept of EU Internal Market

- Internal market = **EU substantive law**, advanced law.
- NOT substantive law = **Institutional law**, covering the functioning of EU institutions + the architecture of the EU + constitutional principles of the EU law.
- While the functioning of the market is a dynamic part of the law, the institutional part has had just a few amendments in the past years. This happens because it takes a long time to amend the Treaties.
- **Freedom of movement/circulation** is a key concept around which the whole internal market evolves.
- Circulation regards:
 - **persons** including: workers (not self employed); EU citizens; non EU citizens who arrive in the EU; together with the relations between EU citizens and non EU citizens.
 - **goods**: products must comply with certain standards;
 - **services/establishment** including the set up of a company (self employed workers);
 - **capitals**;
- **Social and economic constitution of the EU** → EU provides a set of rules aiming at regulating the market having impact also on the social dimension.
- EU is an **atypical and original international organization**. It is a real organization but it has some important differences:
 1. the law of the EU has a strong *impact on national states*, even stronger than national laws (on the contrary of international law). For example :the principles of EU law win on constitutional law; the subjects of the law are not just states but also individuals.
 2. the EU legislations covers potentially every topic, so it is characterized by the *broadness of the area of interest*. EU is a very advanced system of freedom of circulation. It is different from NAFTA, MERCOSUR or the Council of Europe because it covers also fundamental rights.

Van Gend en Loose Case (1963)

FACTS - Van Gend en Loos, a postal and transportation company, imported urea-

formaldehyde from West Germany to the Netherlands. The Dutch customs authorities charged them a tariff on the import. Van Gend en Loos objected, submitting that the tariff was contrary to EC law on the basis of article 30 TFEU. Van Gend en Loos paid the tariff but then sought to retrieve the money in the national court (Tariefcommissie). The Tariefcommissie made a request for a preliminary ruling to the European Court of Justice, asking whether article 30 conferred rights on the nationals of a member state that could be enforced in national courts.

JUDGEMENT- It is a fundamental judgment distinguishing the features of EU law. The case is about non discrimination between national products and importing products. It is a question of preliminary ruling → national court asks for interpretation to the **European Court of Justice (ECJ)**. The question is: can individuals invoke EU legislation before the national courts? The answer is yes.

- The court held that since the object of the Treaty of Rome was to establish a common market, for the **benefit of individuals**, the treaty is more than a typical international agreement. Not only does it create mutual obligations between states, but it is capable of **giving individuals rights** in the national courts.
- Two **reasons** were given:
 - the first was that a failure to recognise a concept of direct effect would not give sufficient legal protection to individuals
 - the second was that individual enforcement was an effective supervisory mechanism. The availability of supervision and legal application of article rights by individuals, the Commission and member states is described by Stephen Weatherill as being one of "dual vigilance".
- **Individuals** can invoke a directive and ask to delete the unlawful national law. → EU imposes obligations but creates also rights.

"The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields and the subjects of which comprise not only member states but also their nationals. Independently of the legislation of member states, community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the treaty, but also by reason of obligations which the treaty imposes in a clearly defined way upon individuals as well as upon the member states and upon the institutions of the community" —Judgment of the Court of 5 February 1963.

2. Brief remarks on the Lisbon Treaty

The Lisbon Treaty established new Union competencies in various fields. With the Lisbon Treaty we had some important **amendments**:

- Two treaties (TEU and TFEU) were to replace the previous framework. Each treaty was to have the "same legal value";

- Greater role of the EU Parliament, more democratic elements; Lisbon concerned itself both with reforms to all the main EU institutions and with considerable institutional innovation, such as the introduction of the High Representative;
- Abolition of the three pillars and their replacement with a single framework;
- Extension of the principle of qualified majority to areas traditionally covered by the unanimity principle;
- Access to CEDU (art.6);
- Charter of fundamental rights → same legal status of the Treaties.

The Lisbon Treaty however made **no direct changes** on the topic of Internal Market.

3. Brief remarks on the response offered by the EU to the sovereign debt crisis

- The origin of the crisis is connected with the real estate crisis in the US + the crisis that involved the Lehman Brothers bank. It had a strong impact in the EU.
- The EU needed to help some member state to pay its debt (Greece, Cyprus, Ireland, Spain, Portugal).
- The central actor in solving the crisis is **Troika** (IMF, EU Commission, EU Central Bank), an entity composed by states but not by the EU. It operates in the frame of international agreements which do not pertain to EU: such as the European Financial Stability Facility (EFSF) and the European Stability Mechanism (ESM). They were subscribed by not all member states, and they are not EU law. However they contribute to EU policy and must comply with EU law.
- The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (known as **Fiscal compact**) was signed by 25 member States and entered in force on 1 January 2013.

Part II: Internal Market and the freedom of movement

1. A concrete perspective on the interplay between internal market and freedoms of movement

For most of the history of the Union, its central policy has been the creation of the **Internal Market** (single market or common market). The internal market has ambitions beyond interstate trade: it aims to merge the markets of the member states into one large market, which entails a greater degree of **uniformity** of structure and conditions. The concept of internal market is strictly connected with the concept of **freedom of movement**. It regards:

- 1) goods;
- 2) persons;
 - a) citizenship rights
 - b) non citizenship rights (ex. family reunification)
- 3) services and establishment (ex. lawyers);
- 4) capital (ex. telephonic investment).

2. The EU Internal Market more in depth

Behind the Internal Market there is the German theory of **ORDO-LIBERALISM**.

- The theory was developed by the school of Freiburg in the first half of the 20th century.
- According to this theory the State must create a proper legal environment for the economy and must maintain a healthy level of competition. The regulation of economic activity is seen as essentially about the regulation of public and

private power:

- on the one hand, **competition** law is necessary to prevent private power becoming dominant enough to challenge the State.
- on the other hand, **individual economic rights** are a normative good in themselves and an important bulwark against tyranny.
- Ordo-liberalism aims to the creation of a **free market**, a liberal economy protected by constitutional principles. The main concern is a political one: the **protection of a free and equal society**.
- In this way the market acquires a **social dimension**. The crucial idea is that more market means more *well-being*. This ensures the peace among States → so market *is a way to maintain peace*.

Together with this approach there is the idea of **optimal allocation of resources** (theories of Ricardo and Pareto), connected with the **NEW-LIBERALISM**.

- According to this theory there will always be a balance between offer and demand in the market, so EU will ensure that all factors of production are allocated in the optimal way among the EU States.

According to ordo-liberals and neo-liberals there was the need of a **federation of States** with an international authority to limit governments' economic powers and assure international order.

Ordoliberalism + optimal allocation of resources = Internal Market.

3. Legal sources in the TFEU on internal market

Most legal provision on the Internal Market are in the **TFEU**, while the TEU covers institutional matters. The legal sources are in *Part III - Union policies and Internal Actions*. Title I is dedicated to the Internal Market. The main aim of these provisions is to **integrate different national markets** into a single common EU market.

Article 26

1. The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the

Treaties.

2. *The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.*

This article is called "umbrella treaty article".

Par. 1 aims to the establishment of the **internal market**.

Par. 2 regards the creation of an **area without internal frontiers**. Both of the objectives must be reached in "accordance with the provisions of the Treaties".

Article 26 prohibits restrictions to the free movement of goods, persons, services and capital. But what shall we consider a **restriction**?

To answer to this question we must refer to an ongoing debate between **2 different views** that emerge from the jurisprudence of the ECJ. They were developed by 2 famous *Advocates General*:

- Miguel Poiaras **Maduro**, a Portuguese academic, who adopts an approach based on the conception of the market linked to SOCIAL ECONOMY;
- Francis **Jacobs**, from UK, who adopts a more NEOLIBERAL APPROACH of the market.

The great distinction between the two theories lies in the concept of **discrimination**.

- For Maduro, EU must ask to internal authority to abolish internal regulation if it *discriminates between national products and products coming from other EU member States*. The same happens for the other factors of production. The only parameter to be used is that of discrimination, so we need a comparison between products and between legislation of the different member states.

- On the contrary for Jacobs, the comparison is irrelevant. *Any national regulation which restricts access to the market and cross-border movement must be abolished, regardless to the discriminatory effect*. So the appropriate test is not the one of discrimination, but the one which considers if there is a substantial restriction on the access to the market. Treaty=tool for deregulation and trade facilitation.

ECJ said that if we adopt Jacob's approach we can have some problem. No problem if we use Maduro's approach. The reason is that EU is not only about the market, so we

must pursue a balance between market aim and non-market aims, such as protection of public health.

The instrument to do so is **justification**: a national measure which restricts the access to the market can be justified → the social concern prevails over the market concern.

In the *Title II - Free movement of goods* par. 1 there is a **general provision** that applies not only to goods:

Article 28

*1. The Union shall comprise a **customs union** which shall cover all trade in goods and which shall involve the prohibition between Member States of **customs duties on imports and exports and of all charges having equivalent effect**, and the adoption of a common customs tariff in their relations with third countries.*

2. The provisions of Article 30 and of Chapter 2 of this Title shall apply to products originating in Member States and to products coming from third countries which are in free circulation in Member States.

The first part of the article deals with the concept of **custom union**. It is about import/export within the EU. The second part regards the relation with other states, with regard to external products, to eliminate the **competitive advantage** among the member states.

Article 29

*Products coming from a **third country** shall be considered to be in free circulation in a Member State if the import formalities have been complied with and any customs duties or charges having equivalent effect which are payable have been levied in that Member State, and if they have not benefited from a total or partial drawback of such duties or charges.*

Free circulation applies not only to products originated in the EU, but also to products that come in the EU from third States, after the application of the external charges. The imposition of the charge must be done only by the State of entrance, then the product can freely circulate in the EU. This is connected with the **mutual trust** between the member States. All controls on the products must be done once.

Article 30

Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature.

EXTERNAL TAXATION: This was a transitory provision. Now customs duties have been abolished and so happened also for charges having equivalent effect. The prohibition is a **general rule** → no exceptions.

CUSTOM CHARGE= duty on a product on the sole condition that it crosses the national border.

- it is a charge determined on the basis of a tariff
- specifying the rate of duty to be paid by the importer to the host state
- it is prohibited because it is **protectionist** → it makes the imported good more expensive than the rival domestic product.

CHARGE HAVING EQUIVALENT EFFECT - CEE (Statistical Levy Case)

- any pecuniary charge → fiscal;
- however small → there is no de minimis;
- whatever its designation and mode of application → it doesn't matter how the State describes the charge. If it is a way to circumvent the prohibition, the Court must consider it a charge having equivalent effect;
- imposed unilaterally on domestic or foreign goods by reason of the fact that they cross a frontier;
- absolute prohibition: even if is not imposed for the benefit of the State, is not discriminatory or protective in effect and if the product on which the charge is imposed is not in competition with the domestic product.
- for example health control impose a *pecuniary charge* → the price of the product becomes more expensive. As a result the imported/exported product would be discriminated.

Steinike und Weinlig Case (1977)

FACTS - The German company Steinike und Weinlig imported citrus concentrates from Italy and from third countries to the Federal Republic of Germany. The juices were then processed by the firm into basic materials for the soft drinks industry. The German competent federal agency asked for a contribution intended to finance a "Fund for sales promotion in the German Agricultural and Food Industry". The German company claimed before the national Court the invalidity of the contribution, regarded as a charge having equivalent effect to a customs duty, prohibited by article 30 TFEU. The national judge made request of preliminary ruling to the ECJ.

JUDGEMENT - The Court stated that a charge having an effect equivalent to a customs duty is:

- any tax demanded at the time of or by **reason of importation** and which results in the same restrictive consequences on the free movement of goods as a customs duty, by **altering the cost price of that product** (*pecuniary charge*);
- that it is **imposed exclusively on the imported product** whilst the internal taxation is imposed on both imported and domestic products (*discriminatory element*);
- moreover, the fact that the charge is applied at the stage of marketing or processing of the product subsequent to its crossing the frontier is **irrelevant**.

Bauhuis Case (1977)

FACTS - Bauhuis, the plaintiff, in accordance with Dutch law paid fees for veterinary and public health inspections when he imported from Member States and exported to Member States swine for breeding, bovine animals, and horses. He brought an action for a refund contending that the fees charged were contrary to Community law because they had an effect equivalent to a customs duty. The court referred the question to the ECJ.

JUDGEMENT - The Court stated that:

- any **pecuniary** charge, **whatever** its designation and mode of application, which is imposed **unilaterally** on goods by reason of the fact that they **cross a frontier** and which is not a customs duty in the strict sense, constitutes a charge having equivalent effect.
- no regard for the health reasons behind the charge.

Article 30 is different from Article 110. They both contribute to free movement, but while the first is about external taxation, the second prohibits discriminatory INTERNAL TAXATION on foreign goods and is not a general provision (unlike

article 30).

Article 110 TFEU

*No Member State shall impose, directly or indirectly, on the products of other Member States any **internal taxation of any kind** in excess of that imposed directly or indirectly on similar domestic products.*

*Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford **indirect protection** to other products.*

Par. 1 of this article regulates internal taxation. Member states cannot impose taxes on products of other member states, unless they impose the same tax on **similar** national products. The scope is to prevent protectionism. The two key concepts are:

- discrimination (once again Maduro's approach);
- similarity ---but what kind of criteria shall we use to define the similarity of the products?

Outokumpu Oy Case

FACTS - Finland had established a rather complicated system of electricity duties which varied according to the method of generation so that a lower level of duty was imposed on electricity produced in Finland by environmentally friendly methods. Imported electricity on the other hand was subject to a flat rate exercise duty calculated as an average of the electricity duties imposed on domestically produced electricity. The consequence was that even if the imported electricity had been produced by environmentally friendly methods in Sweden it was taxed more heavily than electricity produced by the same method in Finland.

JUDGEMENT - EU law does not restrict the freedom of the States to establish a tax system which differentiates between certain products, even products that are similar on the basis of objective criteria, such as the nature of the raw materials used or the production processes employed. However such differentiation is compatible with EU law only if it pursues objectives which are themselves compatible with the Treaties: they must avoid any form of discrimination, direct or indirect, against imports from other member states or any form of protection of competing domestic products. In this case the Treaty does not preclude a different level of taxation varying according to the way electricity is produced and the raw material used for its production, in so far that this differentiation is based on environmental considerations. But the Treaty is infringed where the taxation on the imported product and on the national product is calculated in a different way on the

basis of different criteria, which lead to higher taxation being imposed on the imported product.

Par. 2 refers to "indirect protection", in order to avoid an infringement of EU law for products that are not similar but are in competition (ex. beer and wine).

4. Competence to legislate derived from TFEU provisions

Chapter 3- Approximation of laws

Article 114

*1. Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the **approximation of the provisions** laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.*

While article 26 tends to integrate the market, article 114 aims to harmonize the law. It provides that **EU institutions have the power of regulation** the field of internal market.

Article 115 provides analogous powers for harmonization concerning free movement of persons and direct taxation, but by unanimity in the Council.

The leading case interpreting article 114 is:

Tobacco Advertising I

FACTS - A EU Directive adopted on the ground of article 114 established a ban on all Tobacco advertising in media other than television. This included sponsorship of sport by tobacco firms, tobacco advertising in magazines, and even tobacco advertising on ashtrays, parasols and posters in cafes. The argument was that the laws on tobacco advertising varied from state to state, which resulted in obstacles to free movement and distortion of competition. Company based in States where there was no ban were claimed to have a competitive advantage. However there were a number of objections to the directive:

1. the distortion of competition was claimed to be marginal;
2. there were certainly some obstacle to free movement where magazines were concerned. But there is no obstacle for example when advertising in cinema is concerned;

3. for some of the goods involved the level of interstate trade was negligible;

4. the Directive was claimed to be a covert health protection measure, rather than being primarily aimed at improving the operation of the market. (this was prohibited according to art. 168.5 TFEU that permits the Union to take public health measures, but "excluding harmonization").

Germany asked for the annulment of the Directive.

JUDGMENT - The Court of Justice provides a framework of legal principle which define the scope of art. 114.

a) measures based on that article must contribute to removing obstacles to interstate trade or distortion of competition;

b) while there is no de minimis for obstacle to movement, harmonization to remove distortion is only possible when those distortion are "appreciable" (otherwise art.114 would provide an open-ended harmonization power);

c) it is acceptable to harmonize to prevent future obstacle arising, but those future problems must be likely;

d) provided that a measure does in fact contribute to free movement or undistorted competition, it is not invalid just because it also contributes to public health. On the contrary, the Union must take other interests into account when deciding how obstacles should be removed.

The Court applied these principles to the Directive and found that the claimed distortion of competition were not significant and a number of the provisions of the Directive did not in contribute to free movement. So the Directive was annulled.

Tobacco Advertising II

FACTS - A new Directive was adopted to replace the one annulled in the previous case. The idea behind the Directive was the same, but it was more limited. It confined itself generally to printed media and radio, where it could be shown that there actually was a cross-border trade in goods or provision of radio services. It created a greater degree of uniformity than the previous Directive in some areas, while leaving other matters alone. Nevertheless, objection were still raised.

JUDGMENT - This time the ECJ found the Directive to be valid, because it confined itself to matters relevant for interstate trade. The judgment also qualified that:

a) a Directive does not need to pursue both the removal of obstacles to free movement and undistorted competition. Either is enough.

b) the article 168.5 ban on harmonization for public health prevents that article to be used for this purpose, but it does not prevent incidental harmonization within the context of internal market.