EUROPEAN UNION/EUROPEAN COMMUNITY LAW

Brief History and Background

The Treaty of Paris, signed in 1951, established the first inter-European community, namely the European Coal and Steel Community. Although this only dealt with two commodities, it represented the first step in establishing a more ambitious scheme of European economic co-operation. Following two world wars, during which Europe was the principal victim, the leaders in Europe became much more aware of their weakness as a whole, compared to the power possessed by the US and the Soviet Union. They realised that the only way to increase Europe's power on the world stage was to co-operate with each other, and their efforts to do so culminated in the Treaty of Rome, signed in 1957 by France, Germany, Italy, Belgium, the Netherlands and Luxembourg. France and Germany, being the largest countries, had the biggest influence in the early years, and this influence can still be found today in some areas of the EU where business is conducted through the French language as opposed to English which is the language of the majority of every-day business within the Union.

Ireland became a member of the European Community in 1973, following a referendum to amend the Irish Constitution to allow for membership. The amendment was needed in order to allow a law-making body, other than the Oireachtas, to make laws for Irish citizens. The United Kingdom and Denmark joined at the same time. The Community was further extended by the membership of Greece in 1981, Spain and Portugal in 1986 and Finland, Sweden and Austria in 1995, bringing the total membership to fifteen, where it remained for almost ten years. In recent years the membership rose to twenty-five when the following ten countries joined; Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia. In 2007, two new members, Romania and Bulgaria, brought the final total to twenty-seven, more than double the size of the Community which Ireland joined in 1973, and also a significantly different community in many respects. At present there are three candidate countries; Croatia, the former Yuogoslav Republic of Macedonia, and Turkey. It is expected that Croatia will become the 28th member in 2013.

On joining the Union, the provisions of all existing Treaties are ratified and therefore become encompassed in the domestic law which is in force at the time of entry. Each subsequent Treaty must also be ratified by each Member State. In Ireland, because of the provisions of the Irish Constitution, a referendum of the people must be held on each such occasion, in accordance with those provisions. Thus, the people of Ireland may accept or reject any treaty. In recent years, the people have exercised this right by rejecting both the Nice Treaty and the Lisbon Treaty on the first referendum for each. Both were accepted following a second referendum.

The provisions of all Treaty Articles have direct effect on all member states. This was established in the landmark case ***Van Gend en Loos v Nederlandse Administratie der Belastingen (1963)*** where it was stated:

> ‘the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights .... Independently of the legislation of the 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’

Thus, the provisions of all treaties must be incorporated into the domestic law of each Member State. This is not optional, it is a mandatory condition of membership of the Union. Although Ireland as a Member State must accept the provisions of all treaties, sometimes exercising the right of the Irish people can result in some amendments being made to the original treaty presented for acceptance. This could be said of the most recent treaty, the Lisbon Treaty, where the people of Ireland achieved a small victory. However, if the treaty had not been accepted, the status of Ireland’s membership may have changed.

EU law is supreme and must be adhered to, even in the light of contradictory domestic law. The operation of the EU is based on its laws. Those laws are created either through the Treaties or any amendments to them, or through the legislative powers given to the Institutions and are enforceable to a greater or lesser extent, in or against Member States of the European Union. A new fiscal Treaty has been introduced in 2012 and must be presented to the people of Ireland once again to either accept or reject, as is their right.

Sources of EU Law

EU law falls broadly into two categories; Primary Legislation and Secondary Legislation.

- Primary Legislation comes from the Treaties, known as ‘**Treaty Law’**
- Secondary Legislation comes from the law-making powers given to the Institutions of the European Union under Article 249.

Table of Treaties:

- Treaty of Paris 1951 - established the European Coal & Steel Community
- Treaty of Rome (EEC)1957 – established the European Economic Community – considered to be the foundation Treaty and therefore is referred to as simply ‘the Treaty’*****
- The Single European Act (SEA)1986
- The Maastricht Treaty on European Union (EU Treaty) 1992
- The Amsterdam Treaty 1997
- The Nice Treaty 2002
- The Lisbon Treaty 2009

*****All references to ‘the Treaty’ in these notes refer specifically to the Treaty of Rome, commonly known and regarded as the principal Treaty.

The first treaty, i.e. the Treaty of Paris which came into force in 1952, is the only treaty to have a limited life. This treaty was to be in force for a period of fifty years, therefore it expired in 2002 and is no longer applicable. All essential or relevant provisions from this treaty have been incorporated into the 1957 Treaty.

When the Treaty of European Union (TEU, Maastricht) came into force on November 1st 1993, it became legally correct to refer to the EEC as the 'European Community'. The word 'economic' was dropped to reflect the fact that there has been a change in emphasis towards non-economic provisions such as citizenship. It also became usual to refer to the European Union at the expense of the European Community. Nowadays, the community is commonly referred to as the European Union or EU.

The TEU was adopted into Irish law, following a referendum in 1992, by the European Communities (Amendment) Act 1992.

The Single European Act was accepted into Irish law in 1986, following a referendum to amend the Constitution by adding a new provision to an existing Article – Art. 29.4.3. The SEA provided for a number of important amendments. The ultimate aim of the SEA was to achieve a SINGLE EUROPEAN MARKET by the end of 1992.

To do this over 300 new Community laws were required and one of the important provisions of the SEA introduced majority voting in the Council of Ministers. As well as introducing changes in Community institutional procedures, the SEA established a Second European Court (Court of First Instance) and introduced provisions dealing with European political co-operation. This meant that Community Member States would agree common positions on foreign policy matters. This co-operation does not include military aspects of European defence because of the fact that Ireland wishes to remain a neutral nation (as laid down in the Irish Constitution).

The European Union has built up a significant body of legislation and case law over the fifty-plus years of its existence. This is referred to as the *acquis communitaire*, i.e. the existing law of the Community.

Foundations of the European Union

Aims of the European Community Treaty (EC Treaty)

The EU is founded on the general principles of liberty, democracy, human rights and fundamental freedoms and, most importantly, the rule of law. The union began in the 1950s with only six founder members and, over half a century, membership has grown to twenty-seven countries, with a combined population of almost half a billion (495 million), making it the 3rd largest in the world after China and India. It is the largest law-making organ in the world, the biggest trading power and also a major donor of financial and technical assistance to poorer countries, both within and outside the Union.

The ultimate goal of the EU is to bring political stability and economic prosperity to all its citizens. The development and enlargement of the Union over the fifty-year period of its existence can be described as moving more and more towards the ultimate goals and aims on which the Union was founded, namely;

> ' The EU shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities..... to promote throughout the Union a harmonious and balanced development of economic activities, sustainable and non-inflationary growth

respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among member states.'

The twenty-seven members, although culturally and traditionally diverse, must be united in their commitment to peace, democracy, the rule of law and respect for human rights, if the ultimate goals of the Union are to be achieved. As a Union, they can more effectively exert their collective influence by acting together on the world stage. The Union has thus created a new way of coming together to manage the joint interests of all Member States, the most important goal of the founding members in the aftermath of war.

The overall aims of the EU are supported and brought into effect by the enactment of appropriate legislation, which all Member States must follow. The most important legislation is to be found in the provisions of each Treaty, which constitutes primary legislation, and further supported by secondary legislation, which is legislation enacted by the Institutions of the Union. Thus, the rights and freedoms outlined below originate in either of these sources of legislation.

Citizenship of the Union

Every person holding the nationality of a Member State shall be a citizen of the Union and shall enjoy the rights conferred by the Treaty and shall be subject to the duties imposed thereby. Citizenship of the Union is therefore mandatory; there is no provision for opting out. However, the Treaty of Amsterdam amended the EC Treaty to reflect the fact that citizenship of the European Union complements as opposed to replaces national citizenship. A person who is an Irish citizen is at the same time a citizen of the EU, or more commonly referred to as a Union citizen. Similarly a Polish, French, or any other citizen of a Member State, is simultaneously a Union citizen. Citizens of the Union may vote in elections for members of the Parliament and have the right to petition the Parliament and to apply to the Ombudsman.

All Union citizens residing in a Member State of which they are ***not*** a national have the right to vote and stand as candidates in both municipal elections and elections to the European Parliament in ***that State***. The Ombudsman is empowered to act as a conciliator between citizens and the Union administration, and can in certain circumstances, refer a case to the European Parliament. Every Union citizen also has the right to write to any of the EU Institutions, including the Ombudsman, in their own language and to receive a reply in their own language. There are currently twenty-three different languages used within the Union.
The Irish language has only very recently been officially accepted as a language of the European Union, so Irish citizens may now communicate in Irish if they wish.

Free Movement of Goods

One of the essential elements of the 'common market' is the series of freedoms which constitute the foundation of the community. One of the most important such freedoms is the free movement of goods. The Treaty does not provide a definition of 'common market', but Article 23 states that:

'The Community shall be based upon 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.'

The 'Customs' Union was completed in 1968 and accepted by the existing members at that time and was based on two important principles; firstly, customs duties between Member States were to be abolished and secondly, a common customs tariff was to be applied in relation to third countries (i.e. non-members of the Union). A goal of the Union was, and is, to achieve free circulation of goods and non-discrimination between domestic and foreign products of the Member States. All members must also refrain from introducing any new customs duty on imports or exports between themselves. In practice, the principle of free circulation is enforced by the European Court of Justice, however, this principle is given a broad meaning, thereby allowing some flexibility.

Case: ***Industria Gomma v Ente Nazionale per la Cellulose (1974)***
This case involved a tax on cardboard egg containers charged to egg importers for the benefit of a national organisation set up for the promotion of production of paper and cellulose in Italy. This represents an example of a charge having 'equivalent effect' as outlined in the Article.

Agriculture
The operation and development of the common market for agricultural products is to be accompanied by the establishment of a common agricultural policy (CAP) among the Member States.

Free Movement of Workers
This is the second most important of the 'freedoms' envisaged in the foundation of the Union, and represents one of the factors of production. All obstacles to the free movement of these factors must be removed if a common market is to be achieved.

The free movement of workers is to be secured within the EU. This right entails, subject to limitations justified on the grounds of public policy, public security or public health, the right to accept offers of employment actually made, to move freely within the Union for this purpose, to stay in a Member State for the purpose of employment, and to remain in the Member State after having been employed in that state. The EU seeks to promote comprehensive economic integration and these provisions apply to all workers of the Member States, regardless of occupation.

It constitutes a fundamental right of workers, and their families. Mobility of labour within the Community must be one of the means by which the worker is guaranteed the possibility of improving his or her standard of living and working conditions. This freedom also aims to promote their social advancement. Thus it is more than an economic policy or aim, but seeks to raise the standard of living that every citizen of the Union can aspire to. It is not confined to employment of workers, but also extends to their families and confers the right of residence on each citizen, which means the right to stay indefinitely in the host country.

The principle of non-discrimination must be extended to the dependants of workers, and is not limited to the right of residence, but must encompass the whole treatment afforded to national dependants, including education, training, welfare and housing.

The principle of non-discrimination does not, however, apply to employment in the Public Service. Other limitations are based on the grounds of public policy, public security or public health, but any such limitations must be justified by the Member State.

Right of Establishment
Freedom of establishment includes the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, firms and companies.

Free movement of Services
Restrictions on the freedom to provide services within the EU are to be progressively abolished. Services include activities of (a) an industrial character; (b) a commercial character; (c) craftsmen; and (d) the professions. The harmonisation process has been lead by the medical profession as the principles of medicine are much the same across member states. Particular difficulties have been experienced however for certain professions, most notably lawyers, but also accountants, teachers and others, because of different traditions and customs, and because the principles of these professions differ among member states. The progress on facilitating free movement has therefore been slow for some professions and services.

Free movement of Capital
Another important factor of production, the free movement of capital is also essential to achieving a common market. Member states are to progressively abolish between themselves all restrictions on the movement of capital belonging to persons resident in Member States.

The Irish Constitution and Community Law

Supremacy of Community Law
The European Union's Treaties state that Community law must take precedence over the domestic law of Member States. This requirement posed a number of problems in Irish law. The Irish Constitution states that Ireland is a sovereign, independent and democratic nation. It also states that justice must be administered in courts established by law, by judges appointed in the manner provided by the Constitution and that the ***sole and exclusive power of making laws*** for the State is vested in the Oireachtas.

Because of the provisions of the Irish Constitution it was necessary to hold a Constitutional Referendum to enable Ireland to join the European Community. Article 29.4.3° was inserted into the Constitution after its terms were approved in the 1972 Referendum. This article authorised the Irish State to join the European Community. It also provided that no provision of the Constitution could be invoked to invalidate any act necessitated by membership of the Communities or to prevent any European Community law from having full force and effect in Irish law. Basically therefore, Article 29.4.3° meant that Community law would take priority over Irish domestic law where there was conflict.

It can be seen therefore that European Community Law has become part of Irish domestic law and it has introduced a vast amount of commercial and economic law which affects our daily lives. In relation to the Irish legal system it has established that the Court of Justice of the European Community is the final court of appeal in relation to all matters which fall within the competence of the European Communities. By joining the EC, the State has ceded its independence and sovereignty in relation to certain areas. Areas which have been affected by European Community law include employment law, competition law, social welfare law, recognition of professional qualifications, and the control of production in the agricultural sector.

In a landmark case, ***Costa v ENEL (1964)***, the ECJ clarified the 'supremacy' of EU law in the following statement:

> 'By contrast with ordinary international treaties, the EC Treaty has created its own legal system which ..... became an integral part of the legal systems of the Member States and which their courts are bound to apply. By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity ... and real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights.... and thus created a body of law which binds both their nationals and themselves .... It follows that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.'

Following the ruling in this case, there can be no question that EU law is supreme in all respects. However, this was not always readily accepted in the early days of membership, and more importantly, was not supported by the Irish Constitution, as is evidenced by the case that follows.

Community Law Prevails

The move towards a Single European Market was accelerated in 1986 by the signing of the Single European Act (SEA). In Ireland the European Community's (Amendment) Act 1986 was passed in December of that year to give effect to the provisions of the SEA. However, before the Act was ratified by Ireland, Barrington J., in exercising his right to statutory interpretation as enshrined in the Irish Constitution, granted an interlocutory injunction in his home on Christmas Eve 1986 to prevent ratification of the Act, on the grounds that it was unconstitutional.

When this case ***Crotty -V- An Taoiseach (1987) IR 713*** was heard subsequently, the High Court upheld the validity of the 1986 Act. This decision was appealed to the Supreme Court, where it was decided that the provisions of Title 111 of the SEA were ***unconstitutional.*** These were the provisions dealing with European political co-operation. Because of this Supreme Court decision, a Referendum was held in May 1987 to amend the Constitution by adding a new provision to Article 29.4.3° which authorised the State to sign the SEA.

The European Union is based on the rule of law. That means that everything that it does is derived from treaties which are agreed on and accepted voluntarily and

democratically by all Member States. Previously signed treaties are changed and updated as required, to reflect developments in society. In particular, when new members wish to join the Union, the founding treaties must be amended to allow this. Because of the entry of such a large group in 2004, a new treaty was introduced in order to make special provisions for such enlargement of the Union. This is the Nice Treaty which came into force in 2002, before the ten countries were accepted as members in 2004.

The combined Treaties 1957-2009 are the primary source of law in the Union. The provisions of each treaty are directly applicable to all Member States. Each treaty must be ratified by each Member State and cannot come into force until it has been so ratified by all Member States. Hence, the date on which the Treaty is signed and accepted by the relevant authorities representing each Member State is often considerably earlier than the date when the Treaty actually comes into force. The most recent example, the Treaty of Lisbon, was signed on 13 December 2007, but did not come into force until it was finally ratified by all Member States in 2009.

Based on the Treaties, EU Institutions can adopt legislation, which is then implemented by the Member States.

The power to make or to enact laws is shared between different Institutions and is explained in the following section.

Hierarchical structure of the European Union:
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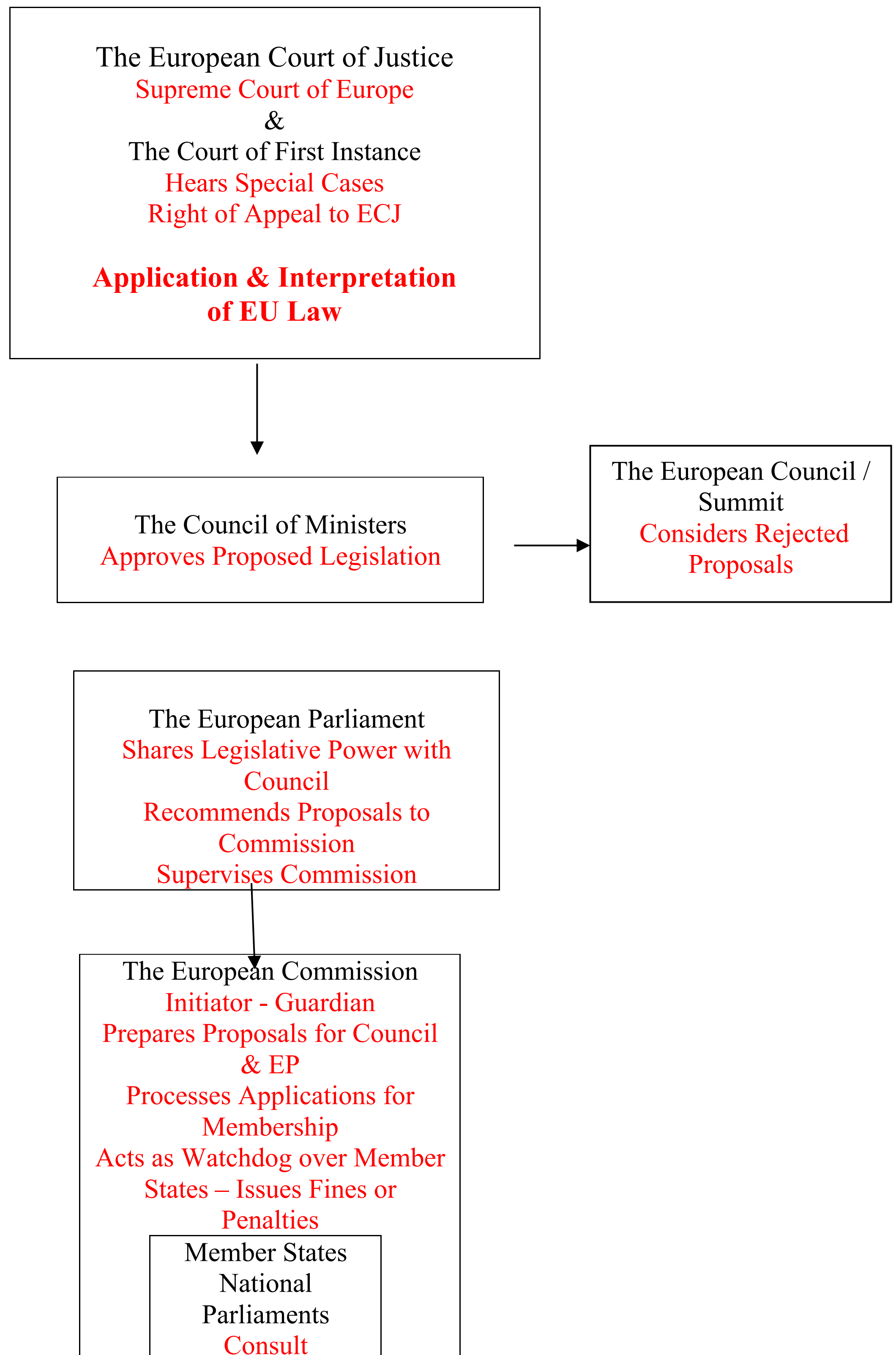

COMMUNITY INSTITUTIONS:

The EU has two very important functions;

1. It makes law, either through the Treaties or through secondary legislation
2. It provides adjudication on those laws applicable to all Member States

The European Union is run by its Institutions, and each Institution has a key role in achieving these functions, and their powers and interrelationships are extremely important in achieving the overall goals of the Union.

There are a number of European Community institutions which operate together to make laws and arrive at decisions, the most important of which are the European Commission, the Council of Ministers, the European Parliament, and the European Court of Justice (including the Court of First Instance). The Nice Treaty, accepted by the Irish People in a second referendum in October 2002, has changed some aspects of the Institutions' operations, and there are some further changes in the Lisbon Treaty. However, as this Treaty has yet to be properly assessed and documented, the function and roles of these four Institutions can only be examined up to and including the Nice Treaty.

(i) **The Commission**

The Commission is the executive body of the European Union, commonly known as the Civil Service of the EU. Presently, it is headed by twenty-five Commissioners appointed by the mutual agreement of the Member States. Each Member State has one national member on the Commission and, until recently, the five larger countries (Germany, France, Spain, Great Britain and Italy) had two each. However, following the passing of the Nice Treaty, with effect from 2005, the Commission comprises one national per Member State. The five larger countries thus lost the power of proposing a second member of the Commission. As there are now fewer Commissioners than there are Member States, the Commissioners will be selected by a system of rotation that will be fair to all countries.

Commissioners are independent, both of their National State and of the Council of Ministers. Prior to the Nice Treaty, the President of the Commission was appointed by the Member States after consultation with the European Parliament. However, from 2005, both the President and the body of Commissioners are chosen by the European Council acting by qualified majority after approval by the European Parliament.

Each Commissioner has a personal staff which is known as a cabinet. The cabinet provides a valuable link between the Commissioner on the one hand and other Commissioners, Institutions, Member States and the public on the other.

The staff of the Commission comprise of a Secretariat-General, a legal service, a statistical office, a number of Directorates-General and a small number of specialised services.

Each Commissioner has responsibility for a certain area, known as "a portfolio", such as Agriculture, Transport, Energy. Portfolios are allocated by the President and may be changed during the five year term of Commisioners.

Despite having specific portfolios and areas of responsibility, Commissioners are obliged to act with collective responsibility and that includes pursuing the overall aims of the Union as laid down in the various treaties.

The Treaties assign a number of specific duties to the Commission:

(1) Guardian of the Treaties.
(2) Executive arm of the European Communities.
(3) Initiate European Union policy.
(4) Defend the interests of the Union in the Council of Ministers.
(5) Issue proceedings against Member States.
(6) Make proposals.
(7) Fine individuals and companies.

The Commission ensures that provisions of the Treaties and decisions of the Institutions are implemented properly. If a Member State refuses to comply with the Commission's instructions, the Commission may refer the matter to the European Court of Justice.

The Commission plays a major role, both in the executive and legislative business of the European Union. It initiates European Union policy by submitting proposals to the Council of Ministers and the European Parliament for consideration. It takes the wide ranging interests of the individual Member States into account and must decide on the common or general interests. Thus it cannot, or should not, be unduly influenced by any one Member State. The ultimate goal of the Commission is to uphold the interests of the European Union as a whole, and to find satisfactory solutions to common problems. One of their roles therefore can be said to be to act as a ‘mediator’ between Member States.

The Commission represents the European Union when dealing with non-Member States and international organisations such as GATT or the UN. It also considers applications for EU membership. All such applications must be processed by the Commission and when the application has been officially accepted, then the country applying becomes a ‘candidate’ country. Negotiations generally take several years to complete, as is the case with the three existing candidate countries. Since the Nice Treaty in 2002, all new Member States must fulfil the necessary conditions of membership before their application can be successful. It is the responsibility of the Commission to assess the suitability of applicants, and to determine whether all conditions have been fulfilled.

(ii) The Council of Ministers:

The Council of Ministers consists of one representative, at ministerial level, from each Member State. Although the official representative is the Foreign Minister for each Member State, in practice, the particular minister or senior civil servant from each

country who would attend the Council Meetings would vary depending upon the topic under discussion e.g. if the matter in hand was Agriculture, then the Agricultural Ministers would sit on the Council. The Council of Ministers is the formal legislative body of the Community as no major proposals can be implemented without its consent. In practice, it acts on Commission proposals.

If the European Parliament, as indicated below, wishes to exercise more authority in the legislative process, it has to be as a reduction of that held by the Council. Some politicians see the control of national parliaments over their government ministers as being the democratic control element of the Community. The Council of Ministers represent their respective governments, and therefore are seen to represent national interests as opposed to European. In contrast, MEPs represent citizens and are thus more independent of government.

The presidency of the Council of Ministers rotates among the member states for a period of six months each.

Summit:

Twice a year, there is a meeting of the Heads of Government of all of the Member States. This is called the European Council or sometimes, the Summit. Particularly difficult decisions are often arrived at during these meetings. For example, where a Commission proposal had failed to gain widespread acceptance at an earlier Council of Ministers meeting, the matter may be raised again and passed at a Summit meeting.

The decision-making system by qualified majority changed in 2005. Now, a qualified majority will be obtained if:

(a) the decision receives at least a specified number of votes (the qualified majority threshold) **and**

(b) the decision is approved by a majority of Member States.

The number of votes allocated to each Member State has been changed. While the number of votes has been increased for all Member States, the increase is higher for the most populated Member States. The highest number of votes for any one country is 29 and this is the number that has been allocated to France, Germany, Italy and the UK. The lowest number of votes is 3 and applies to Malta. All others are somewhere in between. It is not sufficient that a majority of votes are received in favour of any proposal, the decision must also be approved by a majority of Member States. This ensures that the bigger countries can't combine their votes to favour any decision.

The Nice Treaty also provides for the possibility for a member of the Council to request verification that the qualified majority represents at least 62% of the total population of the European Union. If this condition is not met, the decision will not be adopted. However, this condition applies only if verification is requested.

(iii) The European Parliament:

Prior to 1979 MEPs were appointed by each Member State, however, since then elections to the European Parliament are held with each Member State using its own national electoral system. This effectively changed the character of the European Parliament, and it can now be said that MEPs, having been elected by the people in their own Member State, therefore represent the citizens of that Member State. Collectively, the European Parliament represents the interests of all European Union citizens. As a result of this change, MEPs have sought to increase the role and power of the European Parliament to effect change in EU legislation. They have not only become more professional, but the change can also be seen in the demands they have made to increase their power in order to become an effective, working Parliament. Their powers have increased steadily over the years, and at the expense of the Council of Ministers whose powers have diminished.

Elections occur every five years in each Member State. The last election for the European Parliament was held in 2009.

The Parliament is presided over by a President, assisted by fourteen Vice Presidents. Elected members, regardless of nationality, organise themselves into groups based on political, social and economic philosophies.

The Parliament operates by way of twenty standing committees, each of which specialises in some particular aspect of the Community's activity such as Agriculture, Energy or Transport.

The European Parliament now shares legislative power with the Council of Ministers. Legislation is proposed by the Commission with the European Parliament and Council of Ministers sharing the power to enact it.

Legislative powers of the Parliament have been increased by the Single European Act 1986 (SEA) and the Treaty on European Union 1992 (TEU), allowing the Parliament to have a more active role in the legislative process.

The Parliament enjoys a supervisory role over the Commission which is obliged to defend and justify its position in public debate before the European Parliament.

The Nice Treaty has introduced a new distribution of seats in the European Parliament in light of the joining of the new member states in recent years. The maximum number of seats had increased from 626 to 732, and was further increased to 785. The number of seats allocated to the current Member States has been brought down. Only Germany and Luxembourg retain the same number of MEP's. The number of seats is based on population, however, it is not proportionate across Member States.

Germany has the highest number of seats (99), while Malta had the lowest number (5), but is now equal to Luxembourg, Cyprus and Estonia with 6 seats. Next to Germany are Italy, France and the UK, each having 72 seats, followed by Spain and Poland with 50 seats each. So these are the six biggest countries within the EU. All other countries fall somewhere in between. The Lisbon Treaty introduced some more changes in the allocation of seats, and the total seats have been reduced back down to

737 for the 27 Member States. But the number has been consistently between 700 and 800 since the last two countries joined.

(iv) The European Court of Justice and the Court of First Instance:

The European Court of Justice has a final say on all issues involving Community Law and the implementation of the treaties. It has roughly the same function in relation to Community Law as our Supreme Court has to Irish law. Its function is to ensure that the Community Law is observed in the interpretation and implementation of the Treaties. The National Courts of the Member States must accept its decisions and there is no right of appeal against any such decisions.

The main influences in the early formative years of the Court were the German, but more predominantly the French legal traditions. This is shown in the fact that the working language of the Court is French.

Under the various Treaties, the Court of Justice and the Court of First Instance have the following functions:

(a) Where treaty obligations are being ignored, the Commission or other Member States may take action in the Court against the offending State.

(b) Community Institutions may also take action in the Court against other Community Institutions, as may Member States, private individuals or companies.

(c) The Court also has a role in giving preliminary rulings on interpretation of the treaties or the Acts of the Community Institutions. Many of the cases which come before the Court have originated in the Member States. This is because any national court can refer any point of Community law to the Court of Justice under Article 177 of the EC Treaty.

Judges sitting on the European Court of Justice are chosen from the Member States with their consent. Thus, the Court of Justice is composed of one judge from each Member State. The court sits in Luxembourg. It should not be confused with the European Court of Human Rights. It should also be remembered that the European Court of Justice can only deal with matters which are covered by the treaties which are the basis for the European Community. It therefore deals with economic and commercial matters primarily, and could not be used to challenge domestic law in relation to a social matter.

The Court of First Instance was established by the SEA and came into operation in 1989. The CFI is attached to the European Court of Justice (ECJ) and has a wide jurisdiction with a possible appeal to the ECJ itself on a point of law. The CFI is not a separate institution. It shares not only the same building as the ECJ in Luxembourg, but other facilities such as the library and administrative services. There are 25 judges appointed to the CFI, one from each member state, and they have a six year term of office.

There were three categories of cases that formed the original jurisdiction of the CFI:

1. Staff Cases, where employees of the Committee have a dispute with regard to their employment;
2. Cases brought under the European Coal and Steel Community Treaty concerned with production and prices; and
3. Most importantly, competition cases brought under either Article 230 or Article 232 (ex 175 EC).

The Nice Treaty has made major reforms to the Union's legal system. The main provisions concerning the **Court of First Instance** are to be found in this Treaty. The Treaty also sets out the distribution of responsibilities between the Court of Justice and the Court of First Instance.

In addition to the Institutions above, which are the principal Institutions of the Union, there are other Institutions which were established to carry out specific functions within the Union, but are not directly involved in the legislative process. These include; the Court of Auditors, the Economic and Social Committee and the Committee of the Regions. It is not necessary to examine the functions or roles of these secondary Institutions for the purpose of completing this course.

Sources of Community Law:

The Irish Constitution 1937 represents our fundamental law. However, where a conflict exists between the Constitution and European Union Law, then European Union Law prevails. It was for this reason that a referendum was held in 1972 before Ireland joined the Community to amend the Constitution to provide that nothing in the Constitution could be used to invalidate any provision of Community Law. A referendum has subsequently been held to allow the provisions of each new treaty to be incorporated into our domestic law. Consequently, in Ireland's case, the provisions of the Treaties are not immediately applicable, as they must first be ratified by a majority vote in a referendum of the people.

Membership of the Community means that the Member States must accept Community Law without question and embrace it in its own internal domestic law. In the event of any conflict between National and Community Law, then Community law would prevail.

The combined Treaties 1957 – 2009 represent the primary source of European Union law throughout the entire Union.

Primary Sources of Law:

The primary sources of law are the treaties which are signed by the Member States. These treaties become automatically part of the domestic law of the Member State upon ratification (signing by the Member State) and do not require separate laws to be introduced by the domestic Parliaments (in Ireland the Oireachtas).

The treaties set out broad objectives and the specific details of these objectives are introduced by the Council, Parliament and the Commission by way of secondary sources of law:

The supremacy of EU law was illustrated earlier in the case ***Costa v ENEL (1964)***

Secondary Sources of Law:

Article 249 of the Treaty states:

> 'In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make Regulations and issue Directives, take Decisions, make Recommendations, or deliver Opinions'

Thus, the Council and the Commission, and the European Parliament jointly with the Council, are given law-making powers under the provisions of the treaties. These rules of law which can be brought in by these Institutions are known as secondary sources of law and consist of the following:

(1) Regulations:

Regulations are of general application and are binding in their entirety (totally). They are immediately applicable in Member States without further legislation. Regulations have as their aim, the uniformity of law throughout the Community. An example of a Regulation is Regulation No. 1612/68/EEC on freedom of movement. There are now numerous such Regulations in place in the Irish legal system, and enforced in the Irish Court system.

(2) Directives:

Directives are general in scope also but are addressed to Member States. Directives involve the Member States in making such changes in their own internal laws as are necessary to bring them into line with Community requirements. Each Member State can decide how to make the necessary changes in its own laws and avail of EU derogations (exceptions), provided the desired result is achieved. The main use of directives is to bring the laws of the Member States into line on relative topics. A time limit in order to enable the Member States to alter their laws in line with the directives is usually set.

State Liability for non-implementation

One method open to EU citizens of gaining a remedy based on EU law is to sue the State for its failure to implement a piece of legislation where it was obliged to do so. This is mainly relevant to Directives, because they normally require a national law to give effect to them.

Case: *Francovich v Italy (1991)*
The case concerns the State's (Italy) liability for failing to implement a Directive.
Held: It was held by the ECJ that the Italian State would be liable for their failure to implement the Directive if the following three conditions were fulfilled:

1. The Directive gave rights to individuals
2. Those rights were identifiable within the wording of the Directive

3. There was a causal link between the failure to implement and the damage caused to the individual.

Ms Francovich won her case and secured a remedy.

This principle has been applied to all subsequent cases and the ECJ added a further principle; that the breach must be sufficiently serious in order to be able to apply this principle to all forms of Community law.

(3) Decisions:

Decisions of the Council or Commission are binding immediately and totally ***upon those to whom they are addressed.*** They do not have a general application to all Member States. Such decisions take effect directly and it is not up to the Member States to implement them. These are the usual means by which the Commission or other Institutions of the Union deal with individual cases, particularly in the area of competition policy.

(4) Recommendations and Opinions:

Recommendations and opinions merely express the Council's and Commission's views. They are not binding, merely persuasive. Because they are not binding, they are considered to be less important than the previous instruments, however, they can be a very useful source where a second opinion is desired.

Article 177 Referrals:

Article 177 of the Treaty of Rome 1957, which established the EC, allows for a type of case stated (legal question agreed to be referred to a higher court) to the European Court of Justice from any court or tribunal of any Member State which is required to deal with a Community law problem. This means that any Irish court or tribunal can obtain the advice of the European Court of Justice on a particular Community law point to enable the court or tribunal reach a decision which is in accordance with the Treaty of Rome.

Murphy –v- Bord Telecom Eireann (1988) ILRM 53

The question which arose was whether a female applicant who did work which was of greater value than that performed by a male employee whom she compared herself, came within the definition of "like work" now under the ***Employment Equality Act 1998.***

Article 119 of the Treaty of Rome contains the principle of equality of pay for men and women engaged in equal work. The Irish High Court asked the European Court of Justice to decide whether Article 119 covered a case where a worker was engaged in work of higher value than that of a person with whom a comparison is made.

Held: (European Court of Justice) – the phrase "equal work" must be taken to mean work of at least equal value and that would cover a case where the work engaged is of a higher value than that of the person with whom the comparison is being made.

The Irish High Court then applied the European Court of Justice decision in this case.

A court or tribunal of any Member State is not, however, obliged to refer questions relating to Community law to the European Court of Justice. This is because each domestic court or tribunal is empowered to apply the decisions of the European Court of Justice and, indeed, must do so as all the decisions of the European Court of Justice in relation to any area of Community law are binding precedents which must be followed in each Member State. There is no appeal from a decision of a domestic court or tribunal to refer a question of Community law to the European Court of Justice.

COMPETITION LAW:

Competition law has always played an important part in Community law. One of the main goals of Competition law is to protect consumers and smaller firms from large aggregations of economic power, whether in the form of the monopolistic dominance of a single firm or of agreements whereby rival firms co-ordinate their activity so as to act as one unit. A further objective of Competition law is to help in the creation of a single European market. Competition law in Articles 81 and 82 is just one aspect of the rules set up by the EU to regulate the single market. The aim is to ensure that there is as free a market as is possible, but with sufficient regulation to ensure that the market is not abused in any way by any undertaking.

A final objective may be to enhance efficiency, in the sense of maximising consumer welfare and achieving the maximum allocation of resources.

Article 81 EC (formerly Article 85 EC): is the principal weapon to control anti-competitive behaviour by cartels:

"The following shall be prohibited as incompatible with the common market; all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to their usage, have no connection with the subject matter of such contracts".

Undertakings: the Treaty does not provide a definition of the word, but the competition authorities have taken a broad view of it. It basically covers any entity which is engaged in commercial activity and has been held to include: corporations, partnerships, individuals, trade associations, state-owned corporations and co-operatives. Article 81 is aimed at private bodies, known as undertakings. It is not there to deal with the activities of governments or the public sector, they are dealt with by other parts of the Treaty.

Agreements, Decisions and Concerted Practices: Article 81(previously Article 85) states that there must be an agreement, decision or concerted practice in order for the practice to be caught by the competition rules. If the rules on competition law only operated where an explicit, formal agreement was made then they would be of little practical use and therefore, it is necessary to have provisions which are designed to catch less formal species of agreements. There is now a significant amount of case law on what amounts to an 'agreement, decision or concerted practice'.

The Object or Effect of Preventing, Restricting, or Distorting Competition: Article 81 captures all agreements, decisions and concerted practices which have as their object or effect the prevention etc. of competition. The problem is that all contracts concerning trade impose restraints in some manner and that an agreement may have features which both enhance and restrict competition. Thus, the European Court of Justice must balance the pro and anti-competitive effects of a given agreement to determine whether it is caught within Article 81. Where the anti-competitive quality of an agreement is not evident from its objects, then one must press further and consider its effects.

The Effect on Trade Between Member States: In order for the Article to apply, the agreement etc. must have an effect on trade between Member States. This is of significance since if it is not satisfied, the matter will remain within the jurisdiction of the relevant Member State. The Court of Justice has adopted a broad test and applied it in a similar fashion. The ability to focus on potential or indirect effects on trade means that it will be very rare for the Community to lack jurisdiction. Proof that the agreement had an actual impact on trade is not necessary, provided that it was capable of having that effect. However, an agreement will not be caught by Article 81(1) if it does not have an appreciable impact on competition or on inter-state trade – this is known as the **De Minimis** doctrine.

Even if an agreement is held to be within Article 81(1) it can gain exemption under Article 81(3) (formerly 85(3)). In order to do so, it must satisfy four conditions:

1. it must contribute to improving the production or distribution of goods or promoting technical or economic progress;
2. it allows consumers to receive a fair share of the resulting benefit;
3. it must contain only restrictions which are indispensable to the attainment of the agreement's objectives; and
4. it cannot lead to the elimination of competition in respect of a substantial part of the products in question.

Exemptions can be granted on an individual basis, or there can be block exemptions which exempt categories of agreement.

Case 1: ***Suiker Unie v Commission (1975)***

The meaning of 'Concerted Practice'

Sugar producers in the EU had decided only to import into Holland with permission from the main Dutch producers. Doing this meant that there was less pressure on the Dutch sugar producers to compete than there would have been had the other producers just imported into the country without their permission. They were accused of engaging in a concerted practice, but claimed they were not because there was no agreement between the different sugar producers to do this.

Held: The ECJ held that it was not necessary for there to be a specific understanding in order for this to be a concerted practice. It just needed to involve some sort of contact, whether it be direct or indirect, which led to the action (like price fixing) taking place. A concerted practice allows competitors to fix a position in the knowledge of what others are going to do.

Case 2: *<u>Consten v Commission (1966)</u>*

This case concerned an agreement between a supplier and their distributor for products to be sold in France. An agreement was made between them that the distributor would not sell outside France, and in return the supplier agreed to make agreements with its other European distributors that they would not sell in France. The agreement was challenged under Article 81 when another distributor, from Germany, started selling the products in France at a lower price.

Held: The ECJ decided that the agreement was contrary to Article 81, and in doing so, it made several important points:

- Article 81 could apply to vertical agreements (as this one was) as well as horizontal ones.
- The fact that this agreement had streamlined and increased distribution of the product in question was irrelevant.
- The important point here was that the agreement had harmed the Single European Market by an attempt to repartition along national boundaries.

Article 82 (formerly Article 86):

"Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or unfair trading conditions
(b) limiting production, markets or technical development to the prejudice of consumers
(c) applying dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

Article 82 is concerned with the control of market power and is usually applied in circumstances where a single, dominant firm is abusing its market power by, for example, charging unfair selling prices. However, Article 82 does not prohibit market power or monopoly *per se*. It prohibits specifically the ***<u>abuse of market power.</u>***

Dominant Position: The Product Market

Article 82 requires that the undertaking or undertakings be in a dominant position before the prohibitions on abusive behaviour are applicable. The Article does not provide any formalistic definition of what is to constitute dominance, and therefore the application of this term necessitates an economic analysis. Dominance can only

be assessed in relation to three essential variables: the product market, the geographical market, and the temporal factor.

The determination of the relevant **product market** is crucial. Other things being equal, the narrower the definition of the product market the easier it is to conclude that an undertaking has the requisite dominance. The general approach of the Commission and the Court to the definition of the product market has been to focus upon interchangeability: the extent to which the goods or services in question are interchangeable with other products e.g. if the price of beef increases significantly how readily will buyers switch to lamb or pork.

Case 3: ***United Brands Company –v- Commission [1978]***
Definition of 'Dominant Position'

United Brands produced bananas. An initial issue concerned the definition of the relevant product market. United Brands argued that bananas were part of a larger market in fresh fruit, and produced studies designed to show that cross-elasticity (interchangeability) between bananas and other fruits was high. The Commission contended that cross-elasticity was in fact low, and that bananas were a distinct market because they had specific qualities which made other fruits unacceptable as substitutes.

Held – the banana market is a market which is sufficiently distinct from other fresh fruit markets.

Legal principle arising: a dominant position was defined as being a position of economic strength which allowed two things; (i) the dominant undertaking to hinder effective competition and (ii) the undertaking to act independently of its competitors and consumers.

This case is one of the most important in competition law, as it covers all types of abuse, as outlined in (a) to (d) above.

In order to determine whether an undertaking has the requisite dominance for the purposes of Article 82 it is necessary to make some judgement as to the relevant **geographical market** in which it operates. Some types of goods or services can be supplied over a wide area; others may be supplied within a narrower area, because of technical or practical reasons which render wider distribution problematic. Transport costs are a factor of obvious importance in this regard.

Markets may also have a **temporal** quality or element to them. Thus, a firm may possess market power at a particular time of year, during which competition from other products is low because these other products are only available seasonally.

Dominant Position: Market Power

Once the Court has defined the relevant product, geographical and temporal elements of the market, it then has to decide whether the undertaking is dominant within that market. The legal test employed by the Court of Justice comes from the **United Brands** case:

"The dominant position…..relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers."

The actual size of the **market share** possessed by the undertaking will clearly be central to the determination of whether it has market power. Precisely what market share will serve to render an undertaking liable will depend on the circumstances of the case e.g. in the **United Brands** case 40-45 percent was considered sufficient.

Another factor to be considered is whether there are **barriers to entry** i.e. a measure of how difficult it is for new undertakings to enter a market.

United Brands were dominant because the relevant product market was 'bananas' specifically, and not 'fruit' generally. They had less than 50% of the total market, but this was deemed sufficient to be dominant in this case.

Other cases:	Dominance:
Hoffman la Roche v Commission (1979):	70-80% share in the market
British Airways v Commission (2004):	39.7% share in the market, where the nearest competitor, Virgin, had 5.5%

In the second case above, BA have only around half of the market share as the first case, however, it was deemed to be a dominant position relevant to the nearest competitor.

Abuse of a Dominant Position:

It is not enough that an undertaking has a dominant position in a market - it must also ***abuse*** that dominant position. Dominance alone is ***not*** a breach of Article 82. Certain forms of abuse are outlined in Article 82 but these are not exhaustive. Examples of abuse of a dominant position include predatory pricing (reducing prices to a point where an undertaking is making a loss which it can sustain in order to force competitors out of a market) and price discrimination (where the same product is sold at different, non-cost related prices or where the goods are sold at the same price, even though there are real cost differences involved) e.g. where discounts or rebates are given in an attempt to tie customers to the producers.

Article 82 has no equivalent to Article 81(3) – thus, if there is an abuse of a dominant position under Article 82 there is no exemption. Once caught by the Article there is no way of arguing that the behaviour or conduct should be exonerated through an equivalent to the exempting provisions of Article 81. Unlike Article 81, Article 82 tends to involve just one company abusing a strong position in the marketplace that they are operating in. Occasionally it can involve several companies working together to produce a combined dominance.

In order for a breach of Article 82 to occur, four elements are required:

- An undertaking
- A dominant position
- Abuse of that dominant position

- Effect on trade between Member States

If ***all of these elements*** are present, then there is a breach of Article 82.

In the early years of our membership of the EU, many semi-state bodies fell into the category of 'dominant undertaking', such as the ESB, An Post etc. And even if they abused that position in the Irish market, they did not commit any breach of Article 82 unless it affected trade between Member States.

Articles 81 and 82 are not designed to regulate competition ***within*** individual Member States, only ***between*** them. The following is an example where inter-state trade was affected, and therefore there was a breach of Article 82.

Case 4: *Radio Telefis Eireann v Commission (1991)*

This case involved the refusal to supply; RTE and BBC refused to license TV listings information to competitors, therefore preventing competition for TV listings magazines.

Held: The ECJ held that this represented abuse under Article 82.

Statutory Legislation

The provisions of Articles 81 and 82 are further supported by the ***Competition Act 2002***. This statute was introduced in order to prohibit anti-competitive agreements and practices and to prohibit the abuse of a dominant position.

Competition Authority

The Irish Competition Authority is appointed by the Minister for Enterprise, Jobs and Innovation. Its main tasks are:

- To grant licences
- To grant certificates
- To carry out investigation into breaches of competition law
- To take legal action in respect of any anti-competitive practice
- To study and analyse practices relating to competition
- To advise public authorities on matters of competition

An undertaking found to qualify for an exemption under Article 81 (3) may be granted a licence or certificate by the CA.
The CA is also tasked with monitoring undertakings within the State to ensure compliance with all competition law. It is recognised that some practices that could be deemed to be anti-competitive under Articles 81 and 82 can be a necessary part of business. Consequently, the CA may issue licences in certain situations to anti-competitive agreements. Such licences effectively grant exemptions from the provisions of the 2002 Act.

Competition Authority v O'Regan (2007)

The Supreme Court held that to be guilty of anti-competitive behaviour or market abuse by tying the purchase of one product to the purchase of other products, it must be shown that the tied products were separate and distinct products from the perspective of consumer demand. An independent product market must exist for each of the products.
In this particular case, it was held that a stabilisation scheme was not a commercially saleable product – it was an in-house service provided by the Irish League of Credit Unions for its members and there was no evidence of such a scheme being bought or sold on the open market, either in the State or anywhere in the world.

Right of Action

Any person who is aggrieved in consequence of any agreement, decision or concerted practice, or abuse of a dominant position, has a right of action for relief against any undertaking which has been a party to this agreement. There are a number of reliefs which the court may grant:

1. An injunction
2. A declaration that the agreement is void
3. Damages
4. Exemplary damages

Enforcement of Competition Law

Investigations into breaches of competition law may be either compulsory or voluntary.

In order to enforce Competition Law, the Commission has extensive investigative powers, notably:

(a) The Commission can request all information that is necessary to enable it to carry out its task from governments, competent authorities in the Member State such as the Office of Fair Trading, undertakings and associations of undertakings.
(b) The Commission may conduct general enquiries into whole sectors of the economy if economic trends suggest that competition in the common market is being restricted or distorted.
(c) The Commission may undertake all necessary on-the-spot investigations including entering premises, examining and copying business records and conducting oral examinations. Example: Dawn raids carried out by the Irish Competition Authority.

Before undertaking such investigations the officials of the Commission are required to produce written authorisation in the form of a Decision specifying the subject matter and purpose of the investigations.

The undertakings are required to comply with the legitimate demands from the Commission. If they fail to do so or give false information, they may be fined, as information cannot be withheld even if it is self-incriminating.

Suspicion of an infringement of Article 81 or 82 allows the Commission to carry out an investigation without warning.

National Panasonic (UK) Ltd v Commission (1980)

Suspecting an infringement of Article 81 (a concerted practice), the Commission carried out a compulsory investigation of NP UK without warning.

Held: The ECJ held that the Commission was entitled to investigate without prior notice where a breach was suspected. In this case, a concerted practice was found.

Fines and Penalties

The Commission has power under Regulation 1/2003 to impose fines for breaches of Articles 81 and 82 (EC). These can be up to one million euro or 10 per cent of the undertaking's global turnover, whichever is greater. The largest fine imposed to date has been that imposed by the Commission against those in the Vitamins Cartel in 2001 where a fine of over 855 million euro was imposed. In 2002 the European Commission imposed fines totalling 478 million euro on four companies which operated a long-running cartel on the market for plaster-board, a product which is widely used in the building industry and by DIY practitioners. Substantial fines have also been imposed on the US firm Microsoft.

None of the fine is paid to the party injured by the anti-competitive activity. Such victims must seek a remedy in their national courts. The size of the fine will depend on factors such as the nature and duration of the infringement, the economic importance of the undertakings and whether the parties have already infringed the Community's competition policy.

To provide more transparency in the calculation of fines, the European Commission adopted a number of guidelines in 1997. Although not specifically granted under Regulation 1/2003, the ECJ has held that interim measures can be granted provided they were:

1) Indispensable,
2) Urgent
3) Necessary to avoid serious or irreparable damage to the party seeking the action or where there is a situation which is intolerable to the public interest.

There are many more cases relating to competition law which you will find by browsing on a suitable website.

The website with the most up to date information on the European Union in general is **www.europa.eu**

Note:
When answering questions based on European Union law, it is best not to quote figures specifically, as such figures are changing constantly. For example, the population at the point in time when it was last measured is 495 million, however, population by its nature is never static, so any such data quoted can only ever be approximate. The same applies to the number of Member States, the number of MEPs, Commissioners and voting rights etc.

For up to date data at any time, you can refer to the above site, where you can also obtain much more information on the European Union in general, and not specifically relating to law.