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Law of the European Union / European Community Law

Topic 2: Institutions and the secondary sources of EC law.

Lecture 3 (of 3):

Creation, Legal Basis and Interpretation of EC Law

Aim:
To outline the procedures under which secondary EC law may be made and delegated and the issue of legal base; and discuss how EC Law is interpreted.

Objectives:
After carefully studying the following notes and other prescribed readings for this lecture, you should be able to:

1. Evaluate the extent, if at all, to which the democratic deficit of the EC has been reduced by the implementation of and the '*post-Amsterdam*' extension to the co-decision procedure;
2. Discuss the importance of the correct legal base when enacting secondary legislation.
3. Explain why there are various methods of interpreting EC Law; note examples of the 'ordinary meanings of words' being employed by the ECJ to decide some cases and discuss in detail, with appropriate examples, contextual and the teleological methods of interpretation.

The Validity of Law-Creating Procedures.

All secondary legislation has to be created validly if it is to be effective. Any procedural impropriety of a Community Institution, such as failing to consult the European Parliament when required, for example, may lead to annulment of the secondary legislation via the ***Art.230*** procedure: *Case 138/79*, *Roquette Frères v. Council*; and *Case 139/79*, *Maizena v. Council*.

Moreover, validity of the law-creating procedure is inseparable from the voting requirements of the Community Institutions involved in the procedure in question.

Shaw[1] provided a starting point for discussing the validity of Community legislation by noting that:

> ... certain basic conditions which a valid legal act of the [Community] institutions must satisfy ... are in part contained in the [EC] Treaty, and can in part be derived from the case law of the Court of Justice. The principle of judicial control is made clear in ***Article 230 EC*** which declares:

[1] ***Shaw, J***. *Law of the European Union*, 2/e. Basingstoke: Macmillan Press, 1996, p140 [Now 3/e, 2000].

> 'The Court of Justice shall review the legality of acts adopted [by the Community Institutions] on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.'

Accordingly, there are four 'basic conditions which a valid legal act of the institutions must satisfy', viz;

(i) 'the Institution adopting an act must have competence or the legal power to act;'
(ii) Under ***Art.253EC***, every legal act must contain an adequate statement of reasons. This provision requires Regulations, Directives and Decisions adopted by the Council, by the Commission or by the Council and Parliament jointly to refer to any proposals and opinions required to be obtained under the Treaty, and to contain a statement of reasons. 'A statement of reasons facilitates the process of judicial review, allowing any interested parties, and the Court where appropriate, to discover at a glance the circumstances which enjoined the adopting institution to act'.[2]
(iii) The principles of subsidiarity and proportionality as provided for in ***Art.5EC*** must be respected.
(iv) An act which conforms to the first three conditions may still, nevertheless, 'infringe against a range of additional principles which bind the [Community] lawmakers,' given that ***Art.230(2)EC*** refers to the possibility of infringing ' ... any [other] rule of law.'

Moreover, every legal act requires a legal basis, and reference must normally be made in the recitals to the concrete enabling power, generally to be found in the Treaty itself, but in the case of delegated legislation, located in an enabling legislative act. [Further discussion of the importance of legal basis follows, infra].

I. Types of Law-Creating Procedures

Prior to the adoption of the Single European Act the *consultation* procedure was the essential legislative procedure of the EEC. Under this, the Council would have a duty merely to consult the European Parliament prior to acting unanimously and enacting legislation. The Single European Act added two other procedures to the EC Treaty, the <u>*co-operation*</u> procedure and the <u>*assent*</u>. The most recent of the new procedures - and the procedure that has assumed far greater importance following the coming into force on 1st May 1999 of the Treaty of Amsterdam - the ***co-decision*** procedure, was added by the ***Treaty on European Union*** ('Maastricht').

The co-operation procedure is now provided for in ***Art.252 EC*** and the co-decision procedure is provided for in ***Art.251 EC***. The procedure referred to in ***Art.251*** is of particular significance in that it has reduced the 'democratic deficit' of the EC. The significance of the co-operation and the co-decision procedures is examined in detail below.

The consultation, co-operation, assent and co-decision procedures apply to the Council acting as the legislative institution. (The Commission has a relatively minor legislative role under ***Art.211***).

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[2] ibid., p142; and see <u>Case 24/62</u>: <u>Commission v. Germany (*Brennwein*)</u> [1963] ECR 63

Legislative Procedures Involving the Council

(1) The Basic or Consultation Procedure.

Irrespective of the legislative procedure under consideration, the general rule is that the Commission is responsible for proposing legislation and the Council for enacting it: and, for example, under ***Articles 37, 94*** and ***308EC***, providing that the European Parliament is consulted prior to the Council enacting the legislation, then the essential procedural requirements are met.

Art.37EC provides for the need of the Commission to consult the Economic and Social Committee; it also requires for the Council to act unanimously and then by way of qualified majority at various stages in the construction of the Common Agricultural Policy: but these are additional procedural requirements and they do not detract from the basic, or consultation, procedure, under which the Council is required to consult the European Parliament. Thus, ***Art.37(2)*** provides that:

> Having ... consult[ed] the Economic and Social Committee ... the Commission shall submit proposals for working out and implementing the common agricultural policy ...
>
> The Council shall, on a proposal from the Commission and after *consulting the European Parliament,* acting by a qualified majority, make regulations, issue directives or take decisions ...

Referring to the consultation procedure, ***Shaw***[3] noted, *inter alia*, that:

> This model dates from the original Treaty of Rome, but is still used for certain provisions, and has been introduced in new areas of competence where the Member States have sought to minimise parliamentary input.
>
> [Finally] Consultation of the ECOSOC and the Parliament means just that: there is no obligation on the part of the Council to follow the opinion. However, the Council must actually receive the opinion[4], not simply ask for it. A measure adopted by the Council before it receives the Parliament's opinion can be annulled for breach of an essential procedural requirement. ...

Changes Implemented by the Treaty of Amsterdam

The Treaty of Amsterdam included new provisions requiring consultations of the European Parliament - and they ranged from a new ***Art.13EC*** on non-discrimination, through Articles 128 and 130EC on the new ***Title VIII*** on ***Employment*** to the new ***Art.133(7)EC*** on the ***Common Commercial Policy***.

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[3] op cit., 1st edn., 1993, pp77-78

[4] Of course, the EP must reply without unnecessary delay if it is to meets its duty of genuine co-operation. Failure to do so may permit the Council to enact the provision without infringing the procedural requirement: *Case C-65/93*, *EP v. Council*.

(2) The Co-operation Procedure: Art.252

This procedure was introduced by the ***Single European Act 1986. Bright*** notes that:

> "The changes to the EC Treaty made by the Single European Act extended the circumstances in which a qualified majority vote is sufficient, thereby reducing the need for unanimity and speeding up the process of legislation. This applied principally to harmonisation measures for the completion of the single market and which now have been transferred by the Treaty of Maastricht to the co-decision procedure".

In effect, the co-operation procedure appends a second reading of proposed legislation in the European Parliament onto the existing consultation procedure. In essence, the Commission still initiates the proposals that the Council enacts – but in this procedure, the Council then has to adopt a *common position* that results from its favoured action and the different opinion of the European Parliament. This common position is then sent back to the Parliament for adoption. A time limit (which can be up to four months) is imposed on the Parliament if it is to react to this second reading. Of the variety of procedural possibilities that can then arise (Parliament: (i) approves the common position; (ii) it proposes amendments; (iii) it rejects the common position; and (iv) it fails to reply within three months), the elements of significance to note are that if the Parliament proposes amendments which the Council doesn't agree to, or Parliament rejects the adoption of the measure, it can be adopted by the Council only on a *unanimous* vote.

The co-operation procedure '*post-Amsterdam*' is confined to provisions on economic and monetary union.

(3) The Co-decision Procedure: Art.251EC

In common with the term 'co-operation' the term "co-decision" is not used in the EC Treaty. Nevertheless, it is the popular name for the procedure introduced by the ***Treaty on European Union***: 'co-decision' was the term used in a draft of the TEU. Prior to the coming into force of the Treaty of Amsterdam, the procedure largely followed the Co-operation Procedure. However, the procedures diverged where Parliament indicated by an absolute majority of its members that it intended to reject the common position. ***In the co-decision procedure the Council has no power to legislate by acting unanimously***: the Parliamentary veto overrides the Council's attempt to legislate; the power relationship has altered in favour of the democratically elected Institution, the ***European Parliament***.

The simplified co-decision process of adopting and enacting secondary legislation '*post-Amsterdam*' is, according to ***Mathijsen***[5], "best … described on the … familiar basis of the three classical phases in Community legislation: the Commission proposal, the role of Parliament and the Council decision".

The process begins with the Commission submitting its proposals both to the Parliament and to the Council. In the simplest of cases, where the Parliament does not make any amendments, or all the proposed amendments are accepted by the Council, the Council can then adopt the act and so bring the procedure to an end.

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[5] ***Mathijsen. P.S.R.F.*** A Guide to European Union Law, 8/e. London: Sweet & Maxwell, 2004, p59

However, Parliament can, if it chooses to do so, make amendments and submit them to the Council. In such circumstances, the Council adopts, by a qualified majority, a "common position" which is communicated to the Parliament for the latter to amend, approve or reject. Approval ends the procedure as does failing to take a decision within three months – in which case the act that accords with common position is deemed to have been approved. The procedure also ends if Parliament decides by an absolute majority of its component members to reject the common position.

<u>*Amendments*</u> have to be sanctioned by an <u>*absolute majority of the number of MEPs*</u> (i.e., at present, a minimum of 393 of the current 785 MEPs) and communicated to the Council and the Commission with the latter being required to deliver an opinion on the amendments. If the Commission raises no objections, then the Council can, within three months, approve all the amendments and adopt the act. If, however, the Commission has issued a negative opinion, then the Council has to be unanimous if it is to approve the amendments.

If necessary, a ***Conciliation Committee***, composed of an equal number of members from the Council and Parliament, may be convened to try and agree a joint text. Failure to reach agreement also brings to an end the process of adopting the proposed legislation.

The Treaties of Amsterdam and Nice considerably extended the fields of application of the co-decision procedure both to existing Treaty provisions and in respect of new Treaty provisions. Indeed, <u>***the cooperation procedure has been replaced by the co-decision procedure in all areas other than four within the field of Economic and Monetary Union***</u>.

Legislative Role of the Commission

Whereas the Commission has had established, original legislative powers in some instances (see, for example, <u>*Joined Cases 188-190/80*</u>, <u>*France, Italy and U.K. v. Commission*</u> [1982] ECR 2545), the principal legal focus is on the Commission's exercise of its powers for implementing legislation which has been *delegated* to it by the Council under ***Art.202 EC***.

The procedures for the exercise of such implementing powers were recognised by the ECJ in <u>*Case 25/70*</u>, <u>*Köster*</u>, and were later specified in ***Council Decision 87/373***. The practice of the Council delegating implementing powers to the Commission, powers which are to be exercised in conjunction with committees of national civil servants having varying degrees of influence over the executive process, is known as '<u>***comitology***</u>.'

> "As set out in Council Decision 87/373 (OJ 1987 L197/33), comitology now takes three basic forms, with a number of variants. The least intrusive Committee is the ***Advisory Committee*** (<u>*Procedure I*</u>), to which the Commission submits a draft of the measures it proposes to adopt. The Commission must take 'the utmost account' of the opinion delivered by the Committee, but is not prevented by a negative opinion from adopting the measure. Under <u>*Procedure II*</u>, the draft is considered by a ***Management Committee***, which has the power, by a qualified majority, to delay the adoption of the measure by the Commission, during which time the Council itself can adopt a different decision by a qualified majority. The most restrictive type of Committee is the ***Regulatory Committee*** (<u>*Procedure III*</u>), where the support of a qualified majority of the committee is required for the Commission draft. If there is

not sufficient support, the power of decision reverts to the Council, but if this institution does not act within three months, the Commission may adopt the act. The three procedures themselves incorporate a number of variants, and the delegating power granted by the Council will specify which procedure and variant applies in each case.

"The Parliament unsuccessfully attempted to challenge the Council's Decision formalising the structures of comitology (Case 302/87, Parliament v. Council (Comitology) [1988] ECR 5615), but its attempt failed on the procedural question of its standing to bring annulment actions under Article [230]EC[6] before the Court of Justice, rather than an examination of the merits of its arguments. To protect the Parliament's interests, the Commission has agreed that draft measures going before the Committees will be forwarded to the Parliament for information."[7]

{Legislative Processes
That the legislative process within the EC is still strongly intergovernmental in nature there is no doubt. It is a process of negotiation and compromise. A high level of secrecy tends to surround the law-making process: this, and not open debate, has been the norm. Furthermore, the minimal, consultative, role of the European Parliament in the general legislative powers of ***Arts.94*** [ex. Art.100] and ***308*** [ex. Art.235] does nothing to lessen the democratic deficit within the EC. Accordingly, the more extensive use of the co-decision process following the Treaty of Amsterdam represents only a partial, albeit welcome, reduction in the democratic deficit of the European Community and Union**}**.

(II) Legal Basis of Legislation

Whereas a major inter-Institutional function is the law-creation process with, in essence, the Commission proposing legislation and, eventually, the Council having the responsibility for enacting it, disputes between these institutions have arisen when the Commission proposed that the measure, a Directive, say, should be based on a particular Treaty Article – i.e., a particular legal basis - but the Council then enacted it under a different Article and, perhaps, a different legal basis. With reference to such a situation, ***Shaw***[8] has expressed the opinion that:

> In so far as disputes exist between the Community's more and less supranational institutions (e.g. between the Commission and the Council), disputes between the institutions *may* also conceal an element of dispute between the interests of the Member States and those of the Community.

However, differences of opinion are not to be construed as originating solely in differences of political opinion as:

> Under the system governing Community powers, the powers of the institutions and the conditions on their exercise derive from various specific provisions of the Treaty, and the differences between those provisions, particularly as regards the involvement of the European Parliament, are not always based on consistent criteria. [Case 242/87, Commission v. Council (ERASMUS) [1989] ECR 1425 @ 1452].

[6] A position subsequently reversed in Case C-70/88, Parliament v. Council (Chernobyl) [1990] ECR I-2041
[7] Extracted from ***Shaw, J***, op cit., 1st edn., pp85-86. (See now 2/e, p161); and see fn.4, *supra*.
[8] op cit, 1st edn., p93

Nevertheless, the implementation of a Directive on the wrong legal basis - perhaps because of the wrong voting procedure and, thus, the inappropriate input of a particular institution or because the objectives of the Directive were inappropriate to the Treaty article(s) on which it was based - have led to litigation before the ECJ and to annulment of the Directive. This has happened in several cases including: *Case C-300/89*, *Commission v. Council* (The Titanium Dioxide Case) (1991). Here, the Commission proposed that ***Directive 89/428*** on the Titanium Dioxide industry should be based on ***Art.95EC*** ('old' ***Art.100aEEC***) as it related to the *harmonisation of rules relating to an industrial process*. By contrast, the Council, acting *unanimously*, adopted it under Art.175EC (then the 'original' *Art.130sEEC*) on the basis that the Directive related to *environmental protection*.
Held: The ***ECJ*** agreed with the Commission that ***a measure which contributed to the establishment of the internal market*** and which also contained environmental protection measures should be based on Art.95 ('old' ***Art.100aEEC***), and so subject to ***qualified majority voting***. This decision was derived from ***Art.95(3)*** which required internal market legislation to have a high level of environmental protection; and Art.175(2) which provided that '***environmental protection requirements shall be a component of the EC's other policies***'. [**N.B.**: The 'old' Art.130s required unanimity in Council and only consultation of the EP]

A later case, *Case C-155/91*, *Commission v. Council* (*Framework Directive on Waste*), decided that a Directive which had as its ***principal objective*** *protection of the environment* was correctly based on Art.[175(1)EC], and not the internal market provision in Art.95EC. The ECJ decided that the principal purpose of the Directive was in respect of environmental management rather that securing the internal market objective of the free movement of waste. Accordingly, ***most environmental legislation could***, henceforth, ***be adopted under qualified majority voting***.

The basic principle underpinning legal base was expressed in *Case 45/86*, *Commission v. Council* (*Generalised Tariff Preferences*) where the ECJ expressed the opinion that:

> the choice of a legal basis for a measure may not depend simply on an institution's conviction as to the objective pursued but must be based on objective factors which are amenable to judicial review.

That the ECJ initially refused to extend *locus standi* to Parliament was the outcome of *Case 302/87*, *Parliament v. Council* (*Comitology*). However, this position was reversed in *Case C-70/88*, *European Parliament v. Council of the European Communities* (*Chernobyl*) where the Parliament was allowed to challenge the Council's adoption of ***Art.31 Euratom*** as the legal basis of a regulation regarding the marketing of foodstuffs affected by radiation from the Chernobyl nuclear power station accident in 1986. Parliament succeeded in its case before the ECJ that Art.100a EC was the correct legal basis.

(See also *Case C-84/94*, the EC ***Working Hours Directive*** Case, (1996) The Times, 21st November; [1996] ECR I-5755 where the Directive was based on 'old' Art.118a which related to health and safety at work).

In October 2000, in *Case C-376/98*, *Federal Republic of Germany v. European Parliament and Council*, the ECJ annulled ***Council Directive 98/43***, which aimed to ban totally the

sponsorship and advertising of tobacco, on the grounds that the Treaty articles on which it was based – 'old' ***Arts.100a(1)***, ***57(2)*** and ***66EC*** - were not suited to the objectives of the Directive.

More recently, in *Case C-176/03*, *Commission v Council* (*'Environmental Crimes'*), the Council had adopted a framework decision on protection of the environment through criminal law under the '*third pillar*' of the Union (JHA). However, the Commission challenged this contending that as it was a measure to protect the environment it should have been based on ***Art.175*** of the Community pillar.
Held: The ECJ said that it was their task to ensure that acts which, according to the Council, fell within the 'third pillar' did not encroach upon the powers conferred by the EC Treaty on the Community. To that end, it was necessary to ascertain whether provisions of the framework decision affected powers of the Community under Art.175EC inasmuch as those articles could have been adopted, as the Commission maintained, on the basis of Art.175EC. The ECJ concluded that both the aim and content of specified provisions of the framework decision had as their main purpose protection of the environment. Accordingly, ***the framework decision could have been properly adopted on the basis of Art.175EC***.

(III) Interpretation of EC Legislation

If the courts of a Member Sate of the EC hear a case containing an element of European law, then they might refer questions of interpretation, or validity, of EC law to the Court of Justice for a preliminary ruling. Under this ***Article 234EC*** procedure (ex. ***Art.177***), the ECJ can, *inter alia*, interpret EC law but it does ***not*** apply it: that is a matter for the national courts. Under the other heads of its jurisdiction, the ECJ has both to interpret and apply the law. Whether it is a provision of an Article of the EC Treaty or a legislative enactment made under the Treaty the methods of interpretation are, in essence, the same.

In *Case 283/81*, *CILFIT*, the ECJ noted three features that have to be taken into account when interpreting EC Law, viz;

- Community law is drafted in different languages [**N.B.:** There are now **23** official languages of the EU] all of which are equally authentic.
- Community law uses terminology which is particular to it. Accordingly, legal concepts may not have the same interpretation in Community law as in the laws of Member States; and
- "Finally, every provision of community law must be placed in its context and interpreted in the light of the provisions of community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied". (*Para.20, CILFIT*)

1. Literal Interpretation

"[T]he characteristic features of community law and the particular difficulties to which its interpretation gives rise"[9] does ***not*** mean that the ECJ ***neve***r resorts to literal interpretation. For example, in *Case 152/84*, *Marshall*, it was said that the reason why a Directive could

[9] Para.17, CILFIT

not be enforced by one person against another (i.e., there was no concept of horizontal direct effect) was because Directives were addressed to, and binding on, Member States, only; and in Case 59/85, Netherlands State v Reed, it was stated that rights specifically conferred on a spouse under a Regulation[10] did not extend to a cohabitee. Indeed, as ***Brown and Kennedy*** point out[11]:

> Every court must begin from the words of the text before it ... but exceptionally the [ECJ] may be led to disregard the plainest of wording in order to give effect to what it deems the overriding aims and objects of the Treaties. In other words the literal interpretation is displaced by the contextual or teleological approach [see infra], although the court may speak rather in terms of looking to "the spirit" of the text in question.

2. Historical Interpretation

A second method of interpretation which might be used by the ECJ is that of *historical interpretation*. A crude analogy in English law would be that of the *Mischief Rule*. Suffice it to say that this is a method that this is little used by the ECJ. Indeed, ***Professor Pescatore***, who was one of the negotiators of the EC Treaty, was dismissive of the notion of accessing records of the negotiations for use in interpreting Treaty provisions on the basis that: "It is not … on the intentions of the contracting parties that agreement is reached, but on the written formulas of the Treaties and only on that".

However, given the difficulty in making extensive use of the ordinary meanings of words in a multi-lingual Community, and the deemed inappropriateness of the historical method, the forms of interpretation that have prevailed are:

3. Contextual Interpretation

Briefly***, the contextual approach*** …

> " … involves placing the provision in issue within its context and interpreting it in relation to other provisions of Community law. The Treaties, in particular the EC Treaty, set out a grand design, or programme, and it is natural to stress the interrelationship of the individual Treaties and their provisions as component parts of the total scheme. Not seeing the wood for the trees is, for the Court, a cardinal sin."[12]

Brown & Kennedy go on to note[13] that judgments of the ECJ "abound with references such as –

"*The context of all the provisions establishing a common organisation of the market*": Case 190/73, Van Haaster;

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[10] ***Regulation 1612/68***, Art.10(1)

[11] ***Bown, L.N and Kennedy, T*** Brown & Jacobs The Court of Justice of the European Communities, 5/e. London: Sweet & Maxwell, 2000, p324

[12] ***Brown, L.N. and Kennedy, T***. The Court of Justice of the European Communities, 5/e. London: Sweet & Maxwell, 2000, p334.

[13] Ibid.

"*The general scheme of the Treaty as a whole*": Cases 2 & 3/62, Gingerbread case;
…
"One must have regard to the whole scheme of the Treaty no less than to its specific provisions": Case 22/70, ERTA case;
"The context of the Treaty": Case 23/75, Rey Soda; [and]
"Article [31EC] … must be considered in its context in relation to the other paragraphs of the same article and in its place in the general scheme of the Treaty:" Case 59/75, Manghera".

4. The Purposive or Teleological Approach (i.e., divining the '*spirit and intention*' approach)

This final method is, probably, the most favoured approach and is entirely different from that employed in statutory interpretation in English law. That the methods of interpretation employed by the ECJ differ from those applied by the English courts was noted by ***Lord Denning*** in Bulmer v Bollinger[14] where he said that:

> ***The [EC] Treaty*** is quite unlike any of the enactments to which we have become accustomed ... It lays down general principles. It expresses its aim and purposes. All in sentences of moderate length and commendable style. But it lacks precision. It ***uses words and phrases without defining what they mean***. An English lawyer would look for an interpretation clause, but he would look in vain. There is none. *All the way through the Treaty there are gaps and lacunae*. These have to be filled in by the judges, or by regulations or directives. It is the European way ... Seeing these differences, *what are the English courts to do when they are faced with a problem of interpretation*? **They must follow the European pattern**. No longer must they argue about the precise grammatical sense. **They must look to the purpose and intent** ... They must divine the spirit of the Treaty and gain inspiration from it. If they find a gap, they must fill it as best they can ... These are the principles, as I understand it, on which the European Court acts.

Brown & Kennedy[15] then illustrate how Case 22/70, Commission v. Council (the ERTA case) provides a good example of a deviation from the literal approach to "the spirit" of the text in question by noting that 'despite the apparently exhaustive wording of Article [249 EC]' the ***ECJ*** **Held**, in this case, that the aim of ***Article 230EC*** [an action for annulment: see the final lecture notes in the syllabus; Topic 4, Lecture 3] was to subject to judicial review all measures taken by the institutions designed to have legal effect. Accordingly, the Court stated that: "*It would be inconsistent with this objective to interpret the conditions under which the action is admissible so restrictively as to limit the availability of this procedure merely to the categories of measures referred to by Article 249*."

Lord Denning had noted the difficulty of relying on a literal interpretation of Community provisions given the absence in the Treaties of definitions of terms used. Indeed, some of the terms undefined in the Treaty of Rome (as amended) include such major concepts as:

"charges having equivalent effect" [see notes on free movement of goods];

[14] [1974] Ch 401 @ 425
[15] Op cit., fn 11, p324

"worker" [see notes on free movement of persons];
"abuse of dominant position" [see notes on 'new' Art.82EC, Competition Law]; and
"general principles common to the laws of the Member States" [see the lecture notes for Topic 3, Lecture 3, General Principles of EC Law].

Whereas the wording of secondary legislation is more tightly drafted than Treaty provisions, suffice it to say that problems of interpretation still arise and the provisions are subject to the same methods of interpretation as for Treaty provisions.

With regard to ***teleological interpretation***:

> "The term teleological is applied to an interpretation which is based upon the purpose or object of the text facing the judge. This approach, which is increasingly favoured by the Court, is peculiarly appropriate in Community law where, ... , the Treaties provide mainly a broad programme or design rather than a detailed blue-print."[16]

In essence, reiterating ***Brown & Kennedy's*** point[17] that "Every court must begin from the words of the text before it", but then demonstrating how recourse may have to be had to the teleological approach and beyond, is the following extract from *Case 53/81*, *Levin*, where it was deemed appropriate..

> "to have recourse to the generally recognised principles of interpretation beginning with the ordinary meaning to be attributed to those terms in their context and in the light of the objectives of the Treaty".

More recently, and also illustrating the point that when initial attempts at interpretation are unsuccessful it may be necessary to discover the purpose and context of the provision in question, is the extract from *Case 245/01*, *RTL Television*, where it was said that:

> "[t]he provision in question must therefore be construed by reference to the purpose and general scheme of the rules of which it forms part".

The Levin and RTL Television cases have illustrated that the teleological approach cannot always be separated from the contextual approach and any 'teleological interpretation' may, in fact, be more accurately described as a 'purposive or teleological and contextual approach'. In essence, and modifying a note made by ***Fairhurst***[18]:

> "… the contextual approach considers a specific [element] of a provision in the context of all the [elements] of that provision [or EC Treaty], whereas the teleological approach goes outside the actual provision [or EC Treaty] and considers the whole purpose, the aims and objectives, of the Community and the Union"

[16] ibid., p317
[17] *Supra*, p7.
[18] ***Fairhurst, J***. Law of the European Union, 6/e. Harlow: Pearson Longman, 2007, p162

References

Arnull, A. *The European Union and its Court of Justice, 2/e.* Oxford: OUP, 2006, Ch.16;
Brown, L.N. and Kennedy, T. *The Court of Justice of the European Communities*, 5/e. London: Sweet & Maxwell, 2000, Ch.14;
Fairhurst, J. *Law of the European Union*, 6/e. Harlow: Pearson, 2007, Chs.4 & 5;
Kaczorowska, A. *European Union Law*. London: Routledge-Cavendish, 2008, Ch.6; and Ch.7 (pp242-244)
Steiner, J & Woods, L. *Textbook on EC Law*, 9e. Oxford: OUP, 2006, Ch.3;

Typical Workshop Questions

1. To what extent, if at all, has the introduction to the EC Treaty of the co-decision legislative process progressively reduced the democratic deficit since its introduction, via the TEU, to date?

2. "The methods of interpretation adopted by the ECJ appear to have liberated the Court from the customarily accepted discipline of endeavouring by textual analysis to ascertain the meaning of the language of the relevant provision".

[***Sir Patrick Neil***, '*The European Court of Justice: a case study in judicial activism*'. European Policy Forum 1995, 47]

Discuss.

3. With reference to illustrative examples of the jurisprudence of the Court of Justice of the European Communities, discuss the issues involved both in deciding the legal basis of secondary legislation and in the ramifications of enacting secondary legislation on the wrong legal basis.

4. Cases before the ECJ on the choice of legal basis for the enactment of secondary legislation containing measures providing environmental protection have proved problematical.

With reference to decided cases, discuss the issues raised and explain how the choice of correct legal basis is decided.