INDEX

Abanulo, A. 266n, 291n
acte claire doctrine 65
Adams, J. 328n, 332n, 339n
Advocates-General
equal treatment litigation
direct discrimination, burden of proof 251
direct effect of Article 6 252–4
equal pay 245–7
formal equality and substantive justice 247–50
homosexuals 245, 248, 249–50
indirect discrimination 250–1
burden of proof 251–2
position on 244–57
pregnancy and motherhood 250
principle of efficiency and principle of comparability 254–7
transsexuals 245, 248–9, 286
judicial co-operation, role in 447–9
Sunday trading litigation
Conforama and Marchandise in 113–14, 116–17
impact on scope of Article 28 120–1
proportionality principle, co-operation in application of 118–20
role in 108–9
significance of choice in Torfaen 109–10
Stoke-on-Trent 115, 116–17
Torfaen 109–13, 116–17
Alter, K. J. 12, 18n, 432, 435n, 439n, 451n, 468n
Althen, R. 359n
Andenas, M. 442n, 491n
Armstrong, K. 2n
Arnulf, A. 76n, 121n, 152, 153–4, 225n
Askham, Tony 43n, 45n, 52, 63, 64, 98n, 143
Attorney-General powers of 96–8
Sunday trading litigation, and 96–9
Auer, M. 446n
Auld Committee 60
Bacon, Francis 438n
Bagilhole, B. 170n, 194n, 285n, 476n
Barnard, C. 3, 142n, 151n, 165n, 176n, 181n, 199n, 216n, 219n, 220n, 258n, 266n, 273n, 282n, 285n, 286n, 287n, 290n, 291n, 458, 487n
Beloff, Michael 217, 221, 229, 428n, 432n
Beal, H. 325n, 337n, 338n, 339n, 355n, 358n, 363n, 364n, 369n, 375n, 379n, 383n, 417n
Beatson, J. 316n, 325n, 363n, 364n, 375n
Beaumont, P. 26n, 57, 407n
Bell, M. 264n, 285n
Beloff, Michael 217, 221, 229, 428n, 432n
Boch, C. 273n, 278n, 280n, 281n, 287, 289n
Bowers, J. 198n

© Cambridge University Press  www.cambridge.org
**Index**

<table>
<thead>
<tr>
<th>Page</th>
<th>Text</th>
</tr>
</thead>
<tbody>
<tr>
<td>522</td>
<td><strong>private law</strong> 31–2, 34–5, 38&lt;br&gt;<strong>see also</strong> good faith and unfair contract terms</td>
</tr>
<tr>
<td></td>
<td><strong>consumer organisations</strong>&lt;br&gt;collective redress 32, 299, 326&lt;br&gt;Consumers' Association 299, 380, 402–13&lt;br&gt;injunctions 413, 436&lt;br&gt;legitimacy of 408&lt;br&gt;right to take action 356, 384, 405–7, 413, 464, 470, 495</td>
</tr>
<tr>
<td></td>
<td><strong>consumer protection</strong> 7, 346–50&lt;br&gt;doorstep selling 8&lt;br&gt;private law rules 10&lt;br&gt;product liability 8&lt;br&gt;resale of goods at a loss 160–2&lt;br&gt;<strong>see also</strong> Good faith and unfair contract terms&lt;br&gt;contracts of employment 361–2&lt;br&gt;Coote, B. 347n&lt;br&gt;Craig, P. 149n, 150, 163&lt;br&gt;Curtin, D. 218n</td>
</tr>
<tr>
<td></td>
<td><strong>damages</strong>&lt;br&gt;breach of statutory duty, for 72–3&lt;br&gt;cross-undertakings in, Sunday trading litigation 62–3, 73, 79–80, 83, 85–6&lt;br&gt;<strong>see also</strong> market freedoms</td>
</tr>
<tr>
<td></td>
<td><strong>dual burden rules</strong> 58&lt;br&gt;<strong>see also</strong> market freedoms&lt;br&gt;doorstep selling 8&lt;br&gt;dual burden rules 58&lt;br&gt;Duina, F. 456n&lt;br&gt;Ellis, E. 221n, 286n, 440n, 442n, 443n, 455n, 459n&lt;br&gt;Employment Appeal Tribunal 274–5</td>
</tr>
</tbody>
</table>
employment contracts 361–2
environmental protection 7
equal burden rules 57–9, 100
equality 29, 30, 31
Equal Opportunities Commission
European Court of Justice, before
220–1
generally 175, 176, 216–17, 463, 483, 484
international co-operation 221–2
judicial review 216–17
locus standi 216–17, 491
powers 216–17
public sector employment 186
'repeat player', as 217
status 216
strategy 217–20
equal treatment litigation
acquis communautaire, failure to recognise 228–9
Advocates-General
direct discrimination, burden of proof 251
direct effect of Article 6 252–4
equal pay 245–7
formal equality and substantive justice 247–50
homosexuals 245, 248, 249–50
indirect discrimination 250–1
burden of proof 251–2
position of 244–57
pregnancy and motherhood 250
principle of efficiency and principle of comparability 254–7
transsexuals 245, 248–9, 286
appellants
anonymity for 173
arguments in the courts 176–216
financial resources 175–6
role of 172–6
strategy 174–5, 475
see also sedes personae below
burden of proof 251–2
collective bargaining arrangements 180, 200–2, 233
comparability principle 170, 209, 214–15, 253, 254–7, 272
compensation 208–10, 214–15, 243–4, 268
adequacy of 209
statutory upper limit 253
continuous employment requirement 282, 283
costs of 288–91
Court of Appeal 275–6
denial of EC’s competence 226–8
direct discrimination 169, 178, 485–6
burden of proof 251
European Court of Justice 265
pregnancy and motherhood 196, 197–8
Directive
direct effect of Article 6 203–4, 207–10
Advocates-General, and 252–4
Commission, and 244
post-contractual 210–13
principle of effectiveness 213–16
principle of equivalence 213–16
vertical direct effect of Article 5
170, 203, 204–7
effectiveness, principle of 213–16, 256, 257
efficiency, principle of 170, 254–6, 271
emotional aspect 173–4
Employment Appeal Tribunal 274–5
equal pay
Advocates-General, and 245–7
arrears of pay 213–16
collective bargaining arrangements 180, 200–2, 233
comparability principle 170, 209, 214–15, 253, 254–7
equal treatment in social security payments distinguished 176, 178–81
equal work 259
European Commission 237–9
equal treatment litigation (cont.)
   homosexuals 173, 188, 190–1, 239
   indirect discrimination 191–4, 200–2, 235
   justifications 193
   male comparator 176–8, 259, 285–7
   meaning of ‘pay’ 168–9, 180n, 260
   notion of 259–60
   part-time employees 192–4, 271–2
   pensionable age 182–4, 235, 239
   redundancy payments 178–81, 238
   sedes materiae of European law 176–84
   transparency principle 291
   equivalence, principle of 213–16, 227–8, 270–1
   ethnic origin 171
European Commission
   direct effect of Article 6 244
   effective and adequate judicial protection 242–4
   equal pay 237–9
   equal treatment as general principles of substantive justice 239
   indirect discrimination
   integration of 240–2
   objective justifications 241–2
   position of 236–44
   respondents, and 237
European Court of Justice 258
   direct discrimination 265
   EOC before 220–1
   homosexuals 263–4
   indirect discrimination 265–8
   judicial protection 268–72
   position of 257–72
   pregnancy and motherhood 258, 262, 265, 277
   reference to 175–6

sedes materiae, extending scope of application 259–64
transsexuals 263, 289
European legal background 167–71
formal equality and substantive justice 247–50
gender reassignment see transsexuals below
generally 7, 30, 31, 37–8, 165–6, 429, 430, 431, 455, 456, 483–5, 491–4
homosexuals 169, 189, 190–1, 236, 289, 484
Advocates-General, and 245, 248, 249–50
ECJ, and 263–4
equal pay 173, 188, 190–1, 239
travel concessions 173, 190–1
House of Lords 276–7
indirect discrimination 169, 219–20, 228, 484–5
Advocates-General, and 250–2
burden of proof 251–2
Commission, and 240–2
continuous employment requirement 282, 283
equal pay 191–4, 200–2, 235
European Court of Justice 265–8, 291
integration of 240–2
intention, and 282
justification requirement 198–202
objective justifications 199–202, 241–2, 267, 290–1
part-time employees 192–4, 235, 266, 282–3
pregnancy and motherhood 196
industrial tribunals
lack of representation in 175
policy-making in 274
referrals to ECJ 175, 274
‘institutional alchemy’ 16, 17, 39, 40
judicial protection
Commission, and 242–4
direct effect of Article 6 207–10
ECJ, and 268–72
effective and adequate 242–4
post-contract 210–13, 260
sanctions 208, 252–4, 498–9
judicial review 243, 261
justification requirement
equal pay 193
indirect discrimination 198–202,
241–2, 267, 290–1
legal doctrine 284–91
legal protection, development of
202–4
legal structure 166–72
‘legal structuring’ 16, 17, 39, 40
losers’ strategy 225–6
male comparator
equal pay 176–8, 259, 285–7
pregnancy and motherhood 195,
197, 287
market forces defence 290
national consensus, shaping 470
national courts 261
co-operation and
co-responsibility 283–4
Court of Appeal 275–6
defence of powers of 230–2
disharmonies 281–3
Employment Appeal Tribunal
274–5
European legal requirements
and national facts 277–80
House of Lords 276–7
industrial tribunals 175, 274
loyal application of EC law
280–1
pregnancy and motherhood
278–9
references to ECJ 272–4
national law on equal treatment
167–71
part-time employees
compensation for unfair
dismissal 282–3
equal pay 192–4
indirect discrimination 192–4,
235, 266, 282–3
pension schemes 271–2
redundancy pay 282–3
paternalism 288
pay see equal pay above
pensions 223–4
occupational pension schemes
178–81, 227
part-time employees 271–2
as pay 169, 178, 179–80, 238
pensionable age 182–4, 204–7,
235, 239
police officers 169, 184–8, 242,
286, 288
positive discrimination 198–9
pregnancy and motherhood
169–70, 194–8, 288,
289–90, 485
Advocates-General, and 250
direct discrimination 196, 197–8
dismissal 210–13
ECJ, and 258, 262, 265, 277
indirect discrimination 196
job applicants 174
male comparator 195, 197, 287
national courts 278–9
private autonomy, intervention in
233–5
public policy, and 184–8
public sector, discrimination in
169, 170, 184–8
quotas 198–9
racial origin 171
reconstruction of 40
redundancy payments 178–81, 238
part-time employees 282–3
references, failure to provide 174,
210–13
remedies 167, 498–9
development of 202–4
sanctions 208, 252–4, 498–9
respondents 222
acquis communautaire, failure to
recognise 228–9
autonomy of, defence of 233–6
Commission, and 237
construction of law on equal
treatment 224–36
denial of EC’s competence 226–8
losers, strategy 225–6
national courts, defence of
powers of 230–2
equal treatment litigation (cont.)
national methodology to set aside European law, defence of 232–3
status quo ante of EC law, defence of 229–30
UK government 222–4
retirement age 182–4, 204–7
right to equal treatment 491–4
sanctions 208, 252–4, 498–9
sedes materiae
European law, of 176–84
extending scope of application 218, 236, 259–64
sedes personae 169, 184–8, 218, 257, 286
social policy 30
social security payments 169, 176, 178–81, 223–4, 227, 260
statistical evidence 291
strategy
applicants, of 174–5, 475
losers, of 225–6
Sunday trading ban, and 67–8
trade unions 217, 221, 428, 465
collective bargaining
arrangements 180, 200–2, 233
financial resources 176
transsexuals 169, 188, 236, 239, 286, 289, 484
Advocates-General, and 245, 248–9, 286
dismissal 173, 189–90
ECJ, and 263, 289
UK courts, and 34, 38
victimisation 174, 211, 255
Erhard-Jacquè, R. 439n, 447n
European Civil Code 19, 32, 39
European Commission
equal treatment
direct effect of Article 6 244
effective and adequate judicial protection 242–4
equal pay 237–9
general principles of substantive justice, as 239
indirect discrimination
integration of 240–2
objective justifications 241–2
position on 236–44
'motor of integration', as 103–4
powers 103
single market integration 103
Sunday trading, and 103–8
watchdog, as 103, 104–5
European Court of Justice
communication with national courts 12–17, 426–7
effects of poor communication 453–8
structure of ECJ, and 449–52
vertical versus horizontal 446–52
equal treatment litigation
direct discrimination 265
homosexuals 263–4
indirect discrimination 265–8
judicial protection 268–72
position on 257–72
pregnancy and motherhood 258, 262, 265, 277
sedes materiae, extending scope of application 259–64
transsexuals 263, 289
good faith doctrine, and 445–6
implementation of decision in national courts
loyalty 454
over-fulfilment 453–4
rejection 455
judicial activism 47, 122
judicial co-operation, and 12–17, 437–58
jurisprudence constante 121
precedent, doctrine of 121–2
Sunday trading litigation
judicial activism 47, 122
Keck 159–64
precedent, doctrine of 121–2
stare decisis doctrine 121, 125–6
Stoke-on-Trent, ruling in 124–5
Torfaen
judgment in 126–30
reasoning in 122–3
European legal order
access to justice 485–7, 494–6
**acte claire** doctrine 65

‘constitutional charter’ 7, 8, 38

content of, delimiting 482–8
direct effect doctrine 5, 7–10, 12, 15

horizontal effect 8, 9, 15
vertical effect 7, 8, 9
directives, generally 8, 29
equality 29
equal treatment litigation 483–5
generally 5–7
integration programme 6
judicial co-operation see Judicial co-operation
justice in 29–30
mutual relationship between UK and EC law 488
Open Method of Co-ordination 19
organised law-enforcement
communication skills of litigants 465–74
European elite, formation of 471–4
failure, causes of 476–7
generally 4, 11, 15–17, 27, 41–2, 460–2
imbalances and incapacities in 460–79
instrumental exploitation of EC law 462–5
national consensus, shaping of 468–71
professionalism, need for 425, 477–9
professional skills of litigants 465–74
research into 16–17
successful strategies 474–6
political legitimacy
challenging 17–24
customer law 26
discovery procedure, and 21–2
generally 4, 11, 24–6, 27, 42
input legitimacy 18–19, 20
labour law 25–6
legitimacy gap 17–20, 500–2

legal-judicial responses 20–4

Open Method of Co-ordination 19
output legitimacy 18, 19, 20
private law 25
trade law 24–5
political rights
consumers, access to justice for 494–6
equal treatment, right to 491–4
generally 425–6, 479–80
market freedoms, right to 488–91
remedies and rights
distinguished 481–2
‘rights rhetoric’ and the English legal system 496–7
subjective rights, as 480–2
private law 3, 4, 5, 10–11, 25, 30, 38
access to justice, and 485–7
religion, and 491
remedies
equal treatment litigation 167, 202–4, 208, 252–4, 498–9
generally 481–2, 497, 502
good faith litigation 499–500
judicial review 72
national remedies, and 500
preliminary injunction 23
rights distinguished 481–2
sanctions 23, 208, 252–4, 498–9
state liability 23
Sunday trading litigation 497–8
scope of 479–82
delimiting 479
Sunday trading litigation, effect of 482–3
supremacy doctrine 5, 8, 9, 12, 15, 116
social policy, and 9–10
UK legal order, and 34
UK courts, and 33–6
Evans, John 47–8
exclusion clauses see good faith and unfair contract terms
Fenwick, H. 290n
Ferrers, Earl 408n
Flynn, L. 188n, 286n
### Index

| Forte, A. D. | 371n |
| Franzen, M. | 446n, 451n |
| Fredman, S. | 177n, 197n, 199n, 200, 228n, 234n, 267n, 285n, 286n, 289n, 290n |
| Friedman, D. | 325n, 363n, 364n, 375n |
| Galanter, M. | 45, 69, 217 |
| gender discrimination | see Equal treatment |
| gender reassignment | see Transsexuals |
| Gerber, D. | 489n |
| Gerstenberg, O. | 17n |
| Goff of Chieveley, Lord | 34, 35, 78, 86, 143, 150, 294 |
| Gold, S. | 362n |
| Golub, J. | 432n, 433n, 450 |
| good faith and unfair contract terms | administrative redress 300 |
| breach of contract, excluding liability for 315, 320–3, 391–3 |
| business liability 328 |
| civil law position 38, 294, 295, 298 |
| collective redress 298–9, 300, 326 |
| common law position 38, 292, 294, 297, 299–324, 369 |
| incorporation of exclusion clause 302, 323–4 |
| statutory test, and 354–5 |
| concept of 'good faith' | 329–32, 359 |
| 'deals as consumer' | 329–32, 359 |
| definition of 'unfair term' | 365 |
| delay, exclusion of liability for 392 |
| deletion of clauses 398–9 |
| delivery in consignments 394 |
| Director-General of Fair Trading 356, 377–9, 380–1 |
| disclosure of documents 381 |
| effective legal protection, and 298–9 |
| employment contracts 361–2 |
| enforcement contracts 393 |
| English law, in 293–6 |
| entire agreement clauses 388–9, 393 |
| European law 293–7 |
| influence of 323–4 |
| exclusion clauses 388, 391–2 |
| construction of 296, 300 |
| contra proferentem rule 309–14, 324, 364, 376 |
| control of 309–14 |
| fundamental breach, excluding liability for 315, 320–3, 391–3 |
| negligence, excluding liability for 314, 315–20, 369 |
| special cases 314–23 |
| control of 293, 324–6 |
| incorporation of 296, 297, 299 |
| common law position 302, 323–4 |
| control of 301–9 |
| course of dealing, by 307–9 |
| notice, by 302–7 |
| signature, by 301–2 |
| ‘surprise clauses’ 301, 307 |
| tickets 303, 304–6 |
| no contrary rule of law requirement 300 |
| First National Bank 395, 413–21, 464 |
| Court of Appeal decision 417–18 |
| essence of the conflict 415 |
| High Court judgment 416–17 |
| House of Lords judgment 418–21 |
freedom of contract 297
misuse of 325–6
fundamental breach, excluding liability for 315, 320–3, 391–3
general clause on 293
generally 7, 10, 41, 292–3, 430, 435–6, 456, 464, 474
general variation clauses 386, 387, 388
good faith test 370–4, 387–99
hidden terms 386–7
indemnification clauses 393
individual redress 300, 359
injunctions 356, 377–9, 381, 413, 436, 499–500
installation in consignments 394
legal doctrine 297
legitimate expectations 420, 422, 487
limitation clauses 313–14
common law 323–4
contra proferentem rule 314
control of 293, 323, 324–6
incorporation of 323
litigation 5, 7, 38
reconstruction of 40, 297
misrepresentation 324–5
national consensus, shaping of 470–1
negligence, excluding liability for 314, 315–20, 369
objective interpretation 295–6, 354, 369
Office of Fair Trading (OFT)
alleged ineffectiveness of 407
application of good faith test 387–99
deletion of clauses 398–9
Director-General of Fair Trading 356, 377–9
enforcement role 339
generally 294, 297, 383–4, 399–401, 413, 436, 495
Guidance on Unfair Terms 397
interpretation of ‘good faith’ 384–7
powers 298
sole and proper representative of consumer interests, as 409–10
penalty clauses 388
plain and intelligible language requirement 389–91, 396
preventive control of unfair terms 376–9
procedural fairness 416–17, 419–20, 421
procedural good faith 296, 297, 307, 413, 416, 418, 422, 485
substantive good faith distinguished 363–5
transparency requirement 364, 374–6, 413
public bodies, collective redress 299, 326
reasonable expectations test 347–50
reasonableness test
appeal to courts’ respect for decisions of lower courts 350–2
burden of proof 335, 359
commercial contract cases 339, 340–3
consumer contract cases 339, 343–6
generally 297, 332–4, 358, 370n
guidelines for application 335–40
statutory and common law unreasonableness, relationship between 352–4
terms partly reasonable and partly unreasonable 350
time of application 334–5
remedies 499–500
injunctions 356, 377–9, 381, 413, 436, 499–500
Secretary of State for Trade and Industry, ex parte the Consumers’ Association 402–13, 467–8
alleged ineffectiveness of OFT 407
applicants 403–4
good faith and unfair contract
terms (cont.)
  Directive, discretion under
    408–9
  DTI 407–8
  legitimacy of consumer
    associations 408
  legitimate interest of applicants
    404–5
  OFT as sole and proper
   representative of consumer
    interests 409–10
  reasoning of High Court 410–12
  right to take action 405–7
  set-off, restriction of right to 392
  signed statements 393–4
  significant imbalance test 365–70
  small businesses 328, 356
  special notice test 352–3
  standard business terms and
    conditions 293, 328–9, 344, 358–9
  control of 293, 298, 300, 355, 359
  core terms 358, 360, 415, 419
  First National Bank 413–21
  standards of good faith 298–9
  subjective interpretation 295–6, 363–4, 369
  substantive fairness 418, 420
  substantive good faith 299, 376, 416, 418, 422–3, 486
  procedural good faith
    distinguished 363–5
  ‘surprise clauses’ 301, 307, 418
  test of fairness
    good faith test 370–4, 387–99
    significant imbalance test
      365–70
  see also reasonableness test above
  time limits on claims 392
  transparency principle 319–20,
      364, 374–6, 413
  Unfair Contract Terms Act 1977
    (UCTA)
    business liability 328
    conflict with UTCCR 357–9
    consumer protection 346–50
    contracts of employment 361–2
core terms 358
  ‘course of business’ 329–32
  ‘deals as consumer’ 329–32, 359
  freedom of contract, and 297
  generally 297, 324–6
  individually negotiated terms
    359
  intensity of control 358
  limitation and exclusion clauses,
    control of 293
  objective 325, 358
  reach of control 358
  reasonable expectations test
    347–50
  reasonableness test
    burden of proof 335, 359
    commercial contract cases 339, 340–3
    consumer contract cases 339, 343–6
    generally 297, 332–4, 358, 370n
    guidelines for application
      335–40
    terms partly reasonable and
      partly unreasonable 350
    time of application 334–5
  regulatory approach 328
  scope 326–9, 359
  small businesses 328
  standard business terms and
    conditions 293, 328–9, 344, 359
  terms rendered ineffective 332–3
Unfair Terms in Consumer
  Contracts Regulations
    (UTCCR)
1999 Regulations
  conformity with Directive
    382–3
  consumer, definition of 381
  Consumers, Association 299
  disclosure of documents 381
  enforcement bodies 380–1
  generally 299, 355, 379–80
  public bodies 299
  seller or supplier, definition of
    381
  substantive changes 381–2
<table>
<thead>
<tr>
<th>Page</th>
<th>Index</th>
</tr>
</thead>
<tbody>
<tr>
<td>351</td>
<td>index</td>
</tr>
</tbody>
</table>
Joerges, C. 9n, 21–3, 25, 26n, 37, 480, 481
Johnson, N. 223n, 432n, 470n
Jowell, J. 148n
judicial activism, Sunday trading litigation 47, 122
judicial co-operation
Advocates-General, role of 447–9
communication between ECJ and national courts 12–17, 426–7
effects of poor communication 453–8
structure of ECJ, and 449–52
vertical versus horizontal 446–52
conflict between lower and higher courts 432–6
European integration, attitude to 437
European legal boundaries for national parliament 455–8
generally 4, 11–15, 27, 41, 425, 426–7
good faith doctrine, and 445–6
improvements in 458–60
legal pragmatism of UK courts 436–7
national conflict resolution 427–32
power of judiciary, increase in 427–32
preliminary reference procedure, and 11, 13, 14
proportionality principle, and 438, 440–4
transparency principle, and 439n
judicial notice, doctrine of 142–3, 151
judicial review
democratic character of 15n
development of 427
Equal Opportunities Commission 216–17
equal treatment litigation 243, 261
grounds of 147–8
locus standi 92–5
associational standing 94
representative standing 94
proportionality principle, and 147–8
remedies 72
Sunday trading litigation 72–3, 92–5
justice 29–30, 38
distributive 30, 31
substantive 30, 239
Kaye, T. 344n
Keeling, D. T. 2n, 15n, 34n
Keep Sunday Special Campaign 89–95, 469, 473–4, 489
Kentridge, J. 234n
Kilpatrick, C. 3n, 13, 16–17, 34n, 39, 176n, 218n, 434n, 435n, 450, 451, 454n, 455n, 471n, 498n
Koopmans, T. 34n, 35n, 119
Krimphove, D. 194n, 207n
labour law
generally 7, 9, 10, 13, 14, 15, 27, 37
legitimacy of judicial co-operation in 25–6
research into 16
see also equal treatment litigation
Lairg, Q. 146n
Lardy, H. 286n
Lawson, R. 339n
Legrand, P. 10n
Lenz, C. 33n, 433n, 470n
Lester, A. 148n, 450n
Levitski, J. 232n
limitation clauses see good faith and unfair contract terms
Luckhaus, L. 178n, 224n, 273n, 492n
McCrudden, C. 283n
Macdonald, E. 373n
McIlroy, J. 428n, 475n
McKendrick, E. 38n, 487n
MacQueen, H. 371n, 487n
Maduro, M. 12n, 20, 164, 466n, 480
Maggs, C. 361n
Maher, I. 13n, 466n
Mancini, G. F. 2n, 15n, 34n, 180n
mandamus 73
Markesinis, B. S. 35n, 36n
market forces defence 290
market freedoms 2, 5, 7, 24, 29, 30–1, 488–91
negative rights 3, 29
social welfare, and 18
maternity see pregnancy and motherhood
Matthews, Pauline 170n, 217n, 218, 219n, 220–1
Mattli, W. 11n, 12n, 15n, 433n
Menon, A. 20–2, 480, 481
Meyer, F. C. 19n
Michaels, R. 488n
Miller, C. 359n, 360n, 366n, 378n
Moffat, G. 178n, 224n, 273n, 492n
Moore, S. 281n, 289n
Moran, E. 198n
More, G. 29n, 37n, 192n, 424n, 489n, 491n, 493n
Morgan, J. 424n, 477n, 484n, 500n, 501n
Morris, P. 184n, 273n, 286n
Mortelmans, K. 110, 156–7, 158
motor accessories defence 46–7, 49
Müller-Graff, P.-C. 494n
Mummary, J. 473n, 484n, 491n
Mussler, W. 489n
Napier, B. 213n
negative rights 3, 29
Niglia, L. 26n
Norton, P. 427n, 475n
Novitz, T. 3n
Office of Fair Trading (OFT)
alleged ineffectiveness of 407
application of good faith test 387–99
deletion of clauses 398–9
Director-General of Fair Trading 356, 377–9, 380–1
enforcement role 339
generally 294, 297, 383–401, 413, 436, 495
Guidance on Unfair Terms 397
powers 298
sole and proper representative of consumer interests, as 409–10
see also good faith and unfair contract terms
Oliver, P. 60n, 160n, 163
Olson, M. 460n, 461
Open Method of Co-ordination 19
organised law-enforcement communication skills of litigants 465–74
European elite, formation of 471–4
failure, causes of 476–7
generally 4, 11, 15–17, 27, 41–2, 460–2
imbalance and incapacity in 460–79
instrumental exploitation of EC law 462–5
national consensus, shaping of 468–71
professionalism, need for 477–9
professional skills of litigants 465–74
research into 16–17
successful strategies 474–6
Palmer, N. 315n, 339n
Pannick, David 217
Parry, D. 359n, 360n, 366n, 378n
part-time employees
equal treatment litigation compensation for unfair dismissal 282–3
equal pay 192–4
indirect discrimination 192–4, 235, 266, 282–3
pension schemes 271–2
redundancy pay 282–3
paternalism 23, 288
pensions
generally 223–4
occupational pension schemes 178–81, 227
part-time employees 271–2
as pay 169, 178, 179–80, 238
pensionable age 182–4, 204–7, 235, 239
Petersmann, E.-U. 15n
Pfeiffer, T. 408n, 494n
Pflug, H.-J. 369n
police officers, equal treatment 169, 184–8, 242, 286, 288

political legitimacy
challenging 17–24
consumer law 26, 32
discovery procedure, and 21–2
generally 4, 11, 24–6, 27, 42
input legitimacy 18–19, 20
labour law 25–6
legitimacy gap 17–20, 42, 500–2
legal-judicial responses 20–4
Open Method of Co-ordination 19
output legitimacy 18, 19, 20
private law 25
trade law 24–5

political rights
consumers, access to justice for 494–6
equal treatment, right to 491–4
generally 22, 425–6, 479–80
market freedoms, right to 488–91
negative rights 3, 29
positive rights 29
remedies and rights distinguished 481–2
‘rights rhetoric’ and the English legal system 496–7
subjective rights 23, 480–2
Powell, Ray 91
precedent, doctrine of 121–2
pregnancy and motherhood
equal treatment, and 169–70, 194–8, 288, 289–90, 485
Advocates-General, and 250
direct discrimination 196, 197–8
dismissal 210–13
ECJ, and 258, 262, 265, 277
indirect discrimination 196
job applicants 174
male comparator 195, 197, 287
national courts, and 278–9
preliminary reference procedure
conflict between lower and higher courts 432–6
democratic character of 15, 425
dispute resolution, use for 427–32, 488
generally 2–4, 11, 13, 14, 16, 19–20, 27, 33
Prentice, Derrick 408n
prerogative orders 72
private law
access to justice, and 485–7
consumer law 31–2
European legal order, and 3, 4, 5, 10–11, 25, 30, 38
generally 27, 292
legitimacy of judicial co-operation in 25
remedies 72
product liability 8
proportionality principle
Advocate-General, and 114–15, 118–20
balancing test 87, 88, 132
Community law, in 130–1
co-operation in application of 118–20
ECJ, and 101–2, 125
English law, in 146–51
free movement of goods, and 131–3
generally 60, 63, 87, 88, 427, 434
judicial co-operation, and 438, 440–4
judicial review, and 147–8
national courts, and 64, 67, 125, 140–2, 145–51
necessity test 87–8
question of fact, as 66, 67, 124, 133, 136, 142
Stoke-on-Trent 67, 124, 125
Torfaen 66, 124, 133
Wednesbury unreasonableness 147–8, 149
public sector, discrimination in 169, 170, 184–8
Radbruch, G. 34n, 438n, 470n
Ramsden, David 63, 68
Rawlings, R. 91, 92, 95n, 471n
Rawls, J. 5n
reconstruction of cases 39–41
redundancy payments
  equal treatment litigation 178–81, 238, 282–3
part-time employees 282–3
Reich, N. 3n, 18n, 22–3, 30n, 167n, 199n, 373n, 449n, 461n, 480n, 481, 494n, 501n
Reifner, U. 295n, 470n, 487n
remedies
  equal treatment litigation 167, 202–4, 498–9
  sanctions 208, 252–4, 498–9
generally 481–2, 497, 502
good faith litigation 499–500
judicial review 72
national remedies and EU
time remedies 500
preliminary injunction 23
prerogative orders 72
private law 72
rights distinguished 481–2
sanctions 23, 208, 252–4, 498–9
state liability 23
Sunday trading litigation 497–8
repeat players
  definition 45
  Equal Opportunities Commission 217
  Sunday traders 44–5
resale of goods at a loss 159–64
retirement age 182–4, 204–7, 235, 239
see also pensions
Reynolds, F. 327n, 328n, 329n, 357n, 368n
rights see political rights
Rose, Dinah 217, 221
Rostow, E.V. 15n
Roth, W.-H. 26n, 446n
Rott, P. 380n, 495n, 500n
Samuel, R. 295n, 470n
sanctions 23, 208, 252–4, 498–9
see also remedies
Sandholtz, W. 16
Schalla, E. 37n, 469n
Scharpf, Fritz W. 1, 17–20, 21
Schiek, D. 291n
Schwab, M. 460n
Sciarra, S. 13, 16, 17, 25, 33n, 39, 437n, 471n
Sedley, S. 432n
sex discrimination see equal
treatment litigation
Shapiro, M. 438n
Sharpston, E. 458
Shaw, J. 260n, 291n, 424n, 489n
shopping hours 43
  Auld Committee 60
  Scotland 60
see also Sunday trading litigation
Shrubsall, V. 286n
Skidmore, P. 3n, 188n, 273n, 286n, 287n
Slaughter, A.-M. 12, 454n, 468n
Smith, L. 33n
Sobich, P. 357n, 376n, 378n, 379n
social policy 7–8, 30, 31
  internal market, and 7–8, 9–10
  supremacy doctrine, and 9–10
social security payments
equal treatment litigation 169, 176, 178–81, 223–4, 227
see also pensions
Soskice, D. 428n
Stanbrook, Ivor 98n
stare decisis doctrine 121, 125–6
state liability 23
Stein, Eric 1, 11
Steiner, J. 157, 158, 232, 277n
Steyn, J. 295n, 372n
Stone Sweet, A. 12, 16, 454n, 468n
Storme, M. 10n
Stratigaki, M. 428n, 456n, 476n
Streit, M. 489n
Stuyck, J. 10n, 19n, 30n, 293n, 373n, 386n, 445n, 446n, 486
subsidiarity principle 104
substantive justice 30
Sunday trading litigation
  Advocate-General, and
    Conforama and Marchandise
      113–14, 116–17
      horizontal perspective 115–16
    impact on scope of Article 28
      120–1
Sunday trading litigation (cont.)
proportionality principle, and
114–15, 118–20
role 108–9
significance of choice in Torfaen
109–10
Stoke-on-Trent 115, 116–17
Torfaen 109–13, 116–17
Article 28
scope of 120–1
use of 43–95
Article 234, use of 49–53
Attorney-General
powers of 96–8
role of 96–9
balancing test 87, 88
Conforama and Marchandise 64, 86–7
Advocate-General, and 113–14, 116–17
European Commission, and 107
national courts, and 77–8
Dassonville formula 56, 116, 123, 161, 163
mechanical application of
criticism of 46, 154–7
support for 152–4
qualifying 157–8
defences
European defence 46, 47–9, 50, 54–5, 66, 67, 74–6, 431, 434, 465, 466–7
motor accessories defence 46–7, 49
delaying proceedings in national
courts 49–50, 53–4
direct effect, and 81–2
dual burden rules 58
employment of workers on Sunday, and 64–5, 101, 107, 113, 124, 125, 133–5, 153
equal burden rules 57–9, 100
European Commission
Conforama and Marchandise, and 107
‘motor of integration’, as 103–4
position of 103–8
Stoke-on-Trent, and 108

Torfaen, and 105–6
watchdog, as 104–5
European Court of Justice
Conforama and Marchandise
124, 125
Keck 159–64
precedent, doctrine of 121–2
stare decisis doctrine 121, 125–6
Stoke-on-Trent, ruling in 124–5
Torfaen
judgment in 126–30
reasoning in 122–3
European defence 46, 47–9, 50, 66, 67, 74–6, 431, 434, 465, 466–7
issues of substantive law 54–5
European legal order, effect on
482–3
Europe, effect on 465
failure of European collaboration 64–5
government policy
deregulation 99
Francoivich, and 101
Stoke-on-Trent, and 101–2
support for national law 100–1
injunctions 47, 49, 50, 55, 62, 70, 77
interim relief 82–3
judicial activism 47, 122
judicial notice, doctrine of 142–3, 151
judicial review 72–3, 92–5
justicification requirement 100, 106, 108, 114, 117, 123
co-operation in application of
test 118, 119
Keck, and 162–4
Keep Sunday Special Campaign
89–95, 469, 473–4, 489
local authorities 43–4
breach of statutory duty, liability for 69, 71–5
budget constraints 83
civil proceedings for injunctions 47, 62
cross-undertakings in damages 62–3, 73, 79–80, 83, 85–6
dilemma for 69
duty to enforce law 62, 71–5, 83, 89
‘one-shotters’, as 69
professional planning and
co-operation 69–71
market freedoms, right to 487–91
motor accessories defence 46–7, 49
national consensus 469
national courts
Conforama and Marchandise, and 77–8
delaying proceedings in 49–50, 53–4
proportionality principle, and 64, 67, 125, 140–2
Shops Act, determination of objective of 133–5
ECJ’s approach to Article 28, and 135–6
Torfaen, interpretation of 63–4, 126–51
necessity test 87–8
proportionality principle 60, 63, 87, 88, 427, 434
Advocate-General, and 114–15, 118–20
balancing test 87, 88, 132
Community law, in 130–1
cooperation in application of 118–20
ECJ, and 101–2, 125
English law, in 146–51
free movement of goods, and 131–3
judicial review, and 147–8
national courts, and 64, 67, 125, 140–2, 145–51
necessity test 87–8
question of fact, as 66, 67, 124, 133, 136, 142
Stoke-on-Trent 67, 124, 125
test as defined in Torfaen 133
Torfaen 66, 124, 133
Wednesbury unreasonableness 147–8, 149
quantitative restrictions 55–6
reconstruction of 40
reference to ECJ 65–6
remedies 497–8
resale of goods at a loss litigation, and 159–64
rule of law, and 96–9
sex discrimination 67–8
Shops Bill 1986 45, 47, 89, 90, 95, 99, 431, 457
stare decisis doctrine 121, 125–6
Stoke-on-Trent
European Commission, and 108
government policy, and 101–2
judgment in 142–5
local authorities’ position 89
proportionality principle 67, 124, 125
ruling of ECJ 124–5
supremacy of Parliament, and 138–9
Van Gerven, and 115, 116–17
strategy 45–6, 475
European aspects 49
legal considerations 62–3
supremacy of Parliament, and 136–40
Torfaen
Advocate-General, and 109–13, 116–17
choice of advocate-general 109–10
Commission, and 105–6
construction of Article 28 in 59–61
difficulties arising out of judgment in 126
European Commission, and 105–6
interpretation of Article 28 126–30
jurisprudence of ECJ, in 129–30
national courts, interpretation in 63–4, 126–51
proportionality test 66, 124, 133
purposive interpretation of ruling 61–2
reasoning of ECJ 122–3
<table>
<thead>
<tr>
<th>Index</th>
<th></th>
</tr>
</thead>
</table>
| Sunday trading litigation (cont.)  
restrictive effects of 128  
threshold definition in 110–13, 117  
the traders  
campaign for deregulation 43, 45  
financial considerations 47  
generally 44  
nature of 44  
repeat players, as 44–5  
victory for 67–9  
*see also* shopping hours  
supremacy doctrine  
generally 5, 8, 9, 12, 15, 116  
social policy, and 9–10  
Sunday trading litigation, and 136–40  
UK legal order, and 34  
Szyszczak, E. 199n, 233n, 281n  
Tenreiro, Mário 366, 406  
Terrett, S. 287n  
Teubner, G. 373n, 409n, 428n, 432, 471n, 486n  
Thomas, R. 427n  
Threlfall, M. 477n  
Tonner, K. 10n  
trade law 24–5  
protectionism 24–5  
*see also* market freedoms  
trade unions  
equal treatment litigation 217, 221, 428, 465  
collective bargaining arrangements 180, 200–2, 233  
financial resources 176  
transparency principle 319–20, 364, 374–6, 413, 439n  
transsexuals  
equal treatment litigation 169, 188, 236, 239, 286, 289, 484  
Advocates-General, and 245, 248–9, 286  
dismissal 173, 189–90  
Treitel, G. 301n, 303n, 308n, 334n, 353, 419, 487n  |
| unfair contract terms *see* good faith  
and unfair contract terms  
United Kingdom  
legal methodology 35–6  
legal traditions of courts 33–5  
Van Gerven, W. 23, 246–8, 254, 259–60, 268, 445, 447, 449n, 459n, 466n, 469n, 492n  
*Conforama* and *Marchandise* 113–14, 116–17  
impact on scope of Article 28 120–1  
proportionality principle 118–20, 441, 442–3, 444  
*Stoke-on-Trent* 115, 116–17  
Sunday trading litigation 109, 110–21, 122, 132, 151, 153, 154, 156, 157, 159, 160  
*Torfaen* 109, 110–13, 116–17  
Vaughan, Arthur Hugh 43n, 45n, 49, 61, 64, 224  
Volcansek, M. 438n  
Waddington, L. 285n  
Wagner, C. 359n  
Wallace, C. J. 33n  
Watson, R. 386n  
Watts, P. 362n  
Weatherill, S. 3n, 19n, 20–2, 26n, 29n, 34n, 37, 39n, 57, 96n, 99n, 307n, 313n, 323n, 331, 331n, 335n, 353n, 358n, 372n, 404n, 407n, 426n, 443n, 460n, 461n, 480, 481, 493n  
Weiler, Joseph 11, 12, 19n, 29n, 37, 113n, 163, 454n, 468n, 482n, 491n  
Weisbrod, B. 461  
Whincup, M. 404n  
White, E.L. 105, 107, 122, 154–5, 156, 157  
Whittaker, S. 10n, 292n, 294n, 344n, 373n, 413n, 422n, 486n, 487n, 495n  
Whittle, R. 264n |
<table>
<thead>
<tr>
<th>Name</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Wieacker, F.</td>
<td>10n</td>
</tr>
<tr>
<td>Wilberforce, Lord</td>
<td>35n</td>
</tr>
<tr>
<td>Wilhelmsson, T.</td>
<td>38n, 376n, 460n, 486n, 487n</td>
</tr>
<tr>
<td>Wilkinson, H.</td>
<td>378n</td>
</tr>
<tr>
<td>Willett, C.</td>
<td>38n, 354n, 357n, 360n, 363n, 366n, 368n, 371n, 373n, 376n, 486n</td>
</tr>
<tr>
<td>Will, G.</td>
<td>33n, 433n, 470n</td>
</tr>
<tr>
<td>Wintemute, R.</td>
<td>287n</td>
</tr>
<tr>
<td>Woods, L.</td>
<td>232, 277n</td>
</tr>
<tr>
<td>Wynn, M.</td>
<td>198n, 200n, 234n, 265n, 279n, 283n, 284, 288n, 290n</td>
</tr>
<tr>
<td>Yates, D.</td>
<td>315n</td>
</tr>
<tr>
<td>Zimmermann, R.</td>
<td>292n, 294n, 344n</td>
</tr>
</tbody>
</table>