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Course: Law of the European Union

[4] Legislative, administrative and judicial procedures

Making primary law

Founding treaties and treaties amending them, including treaties of accession (primary law) are concluded at intergovernmental conferences and ratified by the member or the candidate states according to their constitutional provisions (approval of ratification made by head of state by parliament and/or people).

Conclusion and ratification is expected by both international (Vienna convention on Law of Treaties) and state (constitutional) laws.

Making secondary law

Therefore, the only genuine legislation is the creation of various legal documents of secondary law (regulations, directives, decisions and legislative acts of 2nd and 3rd pillars of the European Union).

Legislative institutions of the European Communities and the European Union are the European Parliament (weaker position), the Council (stronger position), the Commission (monopoly on proposals), the Economic and Social Committee and the Committee of Regions as advisory bodies and – in several cases – the European Central Bank.

Legislative procedures

Treaty establishing the European Community provides for several basic legislative procedures. They are frequently modified by special legislative rules established in particular provisions of the Treaty on competences. Approximately thirty different types of legislative procedures can be identified.

Treaty on the European Union provides for several law-making procedures for the 2nd and 3rd pillars. There are also several different legislative procedures

Simplification of legislative procedures was demanded for decades. It was proposed in the Treaty establishing a Constitution for Europe and is expected in Lisbon Treaty.

Democratic deficit

Legislative procedures in the European Union are often without appropriate involvement of the only directly elected body: the European parliament. Sometimes, its role is reduced to consultation.

The only or the principal legislative body in many cases is the Council. Its members-ministers of member states are controlled only slightly by their own national parliaments.

Democratic deficit is often criticised. It doubtful, however, whether it can be removed. Firstly, the Member States do not want to diminish significantly their power embodied in the Council and to strengthen role of the European

Parliament. Secondly, we can question, whether the European Parliament could fill the gap due to limited level of political integration in the European Union.

Key legislative procedures can be distinguished by the role of the European parliament. There are (1) codecision, (2) cooperation and (3) consultation.

There are also legislative procedures entirely without participation of the European Parliament by the Council only.

Some legislation is made solely by the Commission.

Several pieces of legislation require unanimity in the Council, the rest requires qualified majority (votes of different weight of the Member States).

Codecision procedure

Proposal is made by the Commission. It is discussed by both the European parliament and the Council. Advisory committees can be required to give opinion. If there is no consensus after several procedural steps (the first, the second, the third reading) achieved, mixed conciliation committee will be called to prepare compromise solution. The European Parliament can, however, reject all results.

The codecision was extended heavily in last decade to cover majority of legislative competences of the European Community. For example, legislation for free movement of workers, social security for them, the internal market or environment protection is enacted in codecision procedure. The procedure was introduced by the Maastricht Treaty.

Cooperation procedure

Cooperation procedure was introduced by the Single European Act as a partial step to limit democratic deficit. Many steps resemble codecision procedure. Nevertheless, the refusal of the European Parliament can be overruled by the Council if decided unanimously by it.

The use of the procedure is limited extent now for legislation in area of economic and monetary policy.

Consultation

The European Parliament must be consulted. However, its opinion can be ignored by the Council.

Legislation for agriculture or for competition is enacted in the procedure.

The Council only

The Council (ministers of the Member States) decides on proposal of the Commission. Legislation on taxation, language regime, foreign and security policy (2nd pillar), or cooperation in criminal matters (3rd pillar) are legislation adopted by the Council only. The Parliament is not involved at all.

Commission Legislative activity

If expected by regulations or by the Treaty, the Commission enacts detailed regulations. Detailed regulations for agriculture and customs can be mentioned.

2nd and 3rd pillars legislation

There is no monopoly of the Commission to propose joint positions, joint actions, framework decisions or 3rd pillar decisions. Unanimity in the Council is usually required. The European Parliament is not involved.

Administrative procedures (1st pillar)

Administrative procedures serve day-to-day application of European Community law (usually can be referred as administrative law) by administrative authorities of both European Community and the Member States while acting as agents of European Community law.

European level

There are no general rules for proceedings (there is no administrative code of the European Community).

Special administrative procedures are established in for various agendas of the Commission (competition, state aids, regional policy) or special agencies (Office for Harmonization on Internal Market).

Nevertheless, the Court of Justice completed or replaced these rules with several procedural principles (audiatur et altera pars etc.)

Major part of the EC/EU law administered by authorities of the Member States.

National procedures usually apply. Many Member states have their own administrative procedure codes or special rules.

Nevertheless, non-discrimination (equal treatment) and effectivity (effet utile) are required generally by the European Community. Special rules are sometimes harmonised or unified by directives.

Only few regulations of the European Community provide for comprehensive procedural rules. .

Judicial procedures (mainly 1st pillar)

Judiciary contributes to proper application of law in all modern states with rule of law and democracy.

Judiciary is expected to be independent from political pressures and influence. In the European Community, the role of judiciary is crucial.

Case-law of the Court of Justice contributed significantly to development of European Community law. Courts and tribunals of member states have become an important instrument for application of European Community law in all member states due to their independence.

Nevertheless, judiciary of the European Community as such is limited: the Court of Justice as the supreme court. Other courts (the Court of First Instance and

new The Civil Service Tribunal) are established for management of selected less important agenda.

The Court of Justice decides mainly on constitutional matters and contributes to uniform application of European Community law by national courts and tribunals.

Significant part of European Community law is applied by the courts of the Member States. Especially administrative courts (taxation, social security, environment protection, competition, regulatory affairs, customs, asylum etc.) and civil courts (judicial cooperation, labour, company and consumer protection) are involved in its application.

Judicial procedures of courts of the European Community of general importance are following ones:

Action for Infringement

The Commission starts with diplomatic communication with particular member state. Later, it opens investigation whether legislation and practice of this member state complies with requirements of European Community law (i. e. the Treaty, regulations and directives).

If there is no satisfactory result, the Commission can bring case before the Court of Justice. The Court of Justice investigates and hears both participants and decides whether the European Community law was infringed or not.

If the judgement - which declares the existence of an infringement - is not obeyed by the member states, the Commission can ask the Court of Justice for penalty payments (fine). These fines are quite rare, nevertheless, they are expected to be used more frequently in future.

The investigation and action for infringement can be also initiated by another Member State. It is rare.

Action for annulment

The procedure covers judicial review of administrative decisions (the Commission and other agencies) and „constitutional review“ of European Community legislation – regulations and directives. Two-month limit is set for action for annulment.

If the piece of legislation or administrative decision is found contrary to law - breach of superior substantive rules, lack of competence, principal procedural failure or misuse of discretionary power - it shall be declared void.

Action for failure to act

Actions for failure to act can succeed if duty to act established by European Community law is ignored by relevant European Community institution.

Preliminary ruling

Preliminary ruling seems to be the most important and the most specific judicial procedure in the European Community.

Preliminary ruling contributes to homogenous application of European Community law by the courts and tribunals of member states.

Every court - broadly defined state or public judicial authority - can request for preliminary ruling the Court of Justice.

Requests for preliminary rulings shall be submitted if it is necessary for clarification of the meaning of applicable European Community law.

Provisions of the Treaty establishing the European Community, provisions of directives and regulations are to be interpreted by the Court of Justice. The request for preliminary ruling shall not be submitted if the provision can reasonably be interpreted in only one way (*acte clair*) or has already been interpreted by previous judgements of the Court of Justice (*acte éclairé*).

The Court of Justice provides authoritative (binding) answer to question(s) submitted to it by national court or tribunal. The Court of Justice checks the necessity of the answer for decision of requesting court or tribunal of member state. It does not decide, however, on facts.

Nevertheless, courts and tribunals of member states are expected to follow case-law of the Court of Justice. There is continuous debate about binding force of such case-law. Anglo-american (precedent theory) and continental approaches (lack of precedents) clash.

National courts of the last instance when no remedy available for re-thinking of conclusions in law – constitutional courts, supreme courts and supreme administrative courts - are required to request for preliminary ruling if unclarity of applicable European Community law occurs. Nevertheless, there are only limited sanctions if this requirement is ignored.

Preliminary ruling is surrogate to appeals or complaints which are available for parties of proceedings of courts of federations.

Almost all important doctrines and principles of European (Economic) Community law has been established by the Court of Justice in judgements based on requests for preliminary ruling.

Some other judicial procedures: (1) actions for compensation (non-contractual liability), (2) action concerning civil service, (3) actions based on an arbitration cause. Partly adjudicated by the Court of First instance and the Court of Civil Service. Their decisions can be appealed.