

/2/ Sources of European Community / Union Law

Course: *Law of the European Union*

Filip Křepelka, *Masarykova univerzita*

(krepelka@law.muni.cz)

EC/EU law – hybrid law

- The European Communities and the European Union are hybrid of international organisation and federation.
- Therefore, their law must be hybrid of international and national laws.
- Experts often speak and write about the third type of law: supranational law. Nevertheless, this approach can deviate our attention to similarities and differences with and from both national and international laws.

National (state) laws

- National laws are addressed to individuals and legal entities under state jurisdiction.
- Principal source of law is an act - i. e. written document adopted by legislator.
- Names for these acts differ, thus indicating features of legislative process in particular countries. There are statutes (laws), codes, decrees, regulations etc.

Features of national law

- Legislator creates law which is binding for entire population. Population itself does not participated at all (monarchies, dictatorships) or participated only indirectly with their representatives in democracies.
- Law-making by whole population (referenda, plebiscites) is exceptional.
- There is a legislative authority: monarch, parliament.
- Everybody, including individuals which opposed legislation, is expected to respect it and is sanctioned if fails to do it.
- Consensus cannot be achieved, if millions of individuals should be expected to agree. Social contract theory (John Locke) shall not be absolutized to include consent of every individual.

Hierarchy of national law

- National laws of a modern countries are hierarchical.
- There is pyramid of legislation: constitution, ordinary statutes, decrees and by-laws of regional and local governments.
- In federations, primacy of federal law, if adopted within federal competences, shall be taken into considreation.
- Both federal and state laws are hierarchical.

Enforcement of national laws.

- National laws are enforced by state authorities.
- Coercion of individuals if they do not comply voluntarily is quite usual (execution of civil, administrative and criminal laws by authorities)
- Many authorities are established for enforcement of national laws (administrative agencies, courts)
- Armed forces are involved, if necessary (army, police, prisons).
- Without coercion, there is no state.

Sources of international law

- International law is addressed to countries (states).
- Principal source of international law are international treaties (conventions, agreements).
- They are binding only for contracting parties (countries which have agreed to them).
- Therefore, there is no homogenous international law. Contemporary international law is a mixture of bilateral, plurilateral and multilateral treaties.
- Basic principles of international law necessary for peaceful co-existence of nations are mandatory for all countries.
- An additional source until today is international custom.

Enforcement of international law

- International law has no mechanism of its own global enforcement. There is no universal government in contemporary world.
- Therefore, it is enforced by pressure of countries and – in the most serious cases – by international community in general. We can speak about decentralization of enforcement.
- Compliance with international law is based also on **reciprocity**. Mutual compliance is preferred if compared with absence of rules.

Hierarchy of European Law

- Primary law: treaties agreed and ratified by member states (and candidate states in cases of treaties of accession).
- Secondary law: legislative acts of institutions of the European Community and Union.
- There is also some subsidiary law (other treaties among member states) and external law (treaties with the third countries)
- fundamental rights relevant to practice of the European Communities and Union.

Primary law

- Primary law of the European Community and of the European Union are an offspring of international law.
- There are several founding treaties, treaties – amendments and treaties of accession as special type of treaties amending older ones.
- All these treaties are to be adopted by the states involved in integration process (founding, member, and candidate states).

Approval and Ratification

- Primary law, i. e. international treaties are to be concluded (adopted) by the highest state executive officials, i. e. by heads of state or heads of government and by ministers, ministers at intergovernmental conferences („summits“).
- Nevertheless, these treaties need to be ratified. They shall be approved as international obligation of particular states according to its own constitutional provisions or practice.
- Ratifications – made usually by head of state with assent of parliaments or - in case of primary law of the EC / EU – referenda.

Principal treaties

- **Treaty establishing the European Community (EC Treaty)**, adopted in 1957 in Rome (thus „Treaty of Rome“). It sets principles, institutions, secondary law, procedures, economic freedoms and specific economic policies (1st pillar).
- **Treaty on the European Union (EU Treaty)** , adopted in 1992 in Maastricht (thus „Treaty of Maastricht“). It provides rules for non-economic integration, common foreign and security policy, justice and internal matters (2nd and 3rd pillars).
- Both treaties are amended with subsequent treaties (last are Treaty of Amsterdam and Treaty of Nice) and treaties of accession.

„European Constitution“

- It was adopted in 2004. It should replace all existing primary law.
- Nevertheless, seven member states failed to ratify it due to negative results of referenda in two countries and due to lack of political will in additional five ones.
- It was no real constitution, but „Treaty establishing a Constitution for Europe“ (Constitutional Treaty).

Lisbon Treaty

- Adopted in 2007 after failure of „European Constitution“.
- The Treaty expects profound reorganisation of primary law.
- Treaty on the European Union shall be short general treaty. Treaty establishing the European Community shall be transformed into Treaty on Functioning of the European Union (Merger of the European Union and the European Community is expected).
- The treaty is in final phase of ratification process.

Direct effect of EC Treaty rules

- Self-executing rules of the Treaty establishing the European Community enjoy direct effect in legal practice of member states.
- These rules are expected and required to be applied by executive authorities and by judiciary of all member states of the European Communities.
- Therefore, they establish rights and – to lesser extent - duties for individuals.

Primacy of EC Treaty rules

- These rules enjoy priority.
- If member state law does not comply, its application shall be set aside.
- Nevertheless, formal abrogation is not required.
- The priority is absolute. EC law enjoys priority even vis-a-vis state constitution including basic rights set with them!

Case law based direct effect and primacy

- Both principles were established by case-law of the Court of Justice:
- Direct effect: van Gend en Loos 26/62.
- Primacy: Costa/Enel 6/64.
- primacy towards constitution: Internationale Handelsgesellschaft.
- Due to case-law nature and weakness of the European Community and Union, direct effect and absolute primacy are sometimes ignored and questioned by member states.

Constitution + Lisbon and primacy

„European Constitution“ expected clear provision on primacy (and thus on direct effect) of future European Union law.

Lisbon Treaty includes complicated declaration on settled case law on primacy of European Community law.

Shift from dualism to monism

- That approach of the European Community is different if compared with international law.
- International treaties in general are binding only for contracting parties - i. e. for states (countries) and international organizations. This approach is „dualism“.
- These states decide whether and, if yes, to which extent individuals can claim benefits resulting of them as rights before their administrative authorities and courts.
- Case-law of the Court of Justice thus switched from dualist practice of states to their international obligations to monism proposed by several theorists of international law.

Reluctance to accept full supremacy

- There is, however, reluctance to accept these principles by authorities of member states in all situations.
- Court and administrative authorities have accepted this supremacy only gradually – for several decades - and with objections and reservations.
- In reality, supremacy is not evident and obvious in all aspects of legal life of member states until today due to limited direct enforcement.

Law of the 2nd and 3rd pillars

- Primary law of the second (foreign and security policy) and the third (cooperation in administrative and judicial matters) pillars is not expected to be applied by authorities of member states directly towards individuals.
- Both „European Constitution“ and Lisbon Treaty expect removal of pillar structure.
- Thus, supranational approach shall be extended to these agendas.

Regulations

- are addressed to everybody – i. e. all natural persons and legal entities - under jurisdiction of the member states.
- Direct effect and priority are expected by wording of EC Treaty.
- Regulations are used if single European Community - wide rules are needed and unity shall be apparent to individuals and entities regulated of them.
- Regulations need to be accompanied with procedures, institutions and sanctions set by national law of member states.

Use of regulations, declined renaming

- Regulations are used as main legislative tool in excessive numbers in common agricultural policy, regional (cohesion) policy and common transportation policy. They are also used for coordination of social security systems and cooperation of civil judiciary of member states.
- „European Constitution“ expected new label for regulations. They should be „European laws“. The Lisbon Treaty declined this change.

Directives

- The Member states are required to introduce or maintain standards set with directives in their national law.
- The process is labelled as transposition or implementation.
- Instrument of state law can be selected by these member states. New acts, amendments of existing laws, decrees, by-laws can be adopted. Certainly, it must be law. Extralegal transposition is not regarded as sufficient.
- „European Constitution“ tried to rebaptize directives „European framework laws“. Lisbon Treaty does not adopt this change.

Liability for lack, use of directives

- Member states are liable if they fail to transpose correctly until deadline set by the directive.
- Judgements of the Court of Justice condemning member states for failure to transpose directives are frequent.
- Directives are used for tax, labour, environmental and many regulatory affairs.
- Their standards set often frameworks only. Member states are expected to choose standards within these frameworks.

Exceptional direct effect of directives

- The Court of Justice has developed the doctrine of direct effect if directive is not transposed in due time.
- Individuals can claim directly applicable rules towards state or be saved from application of rules of domestic law which shall cease to exist due to directive (judgements *Ratti* and *Marshall*).
- On the other hand, direct effect is not expected if relations among individuals shall be affected (judgement *Faccini-Dori*).
- Member states cannot also impose duties on individuals based on directives (judgement *Kolpinghuis*).

Indirect effect of directives

- Administrative authorities and courts of member states are expected to interpret their national law with aid of directives, thus acknowledging their indirect effect (judgement Marleasing).
- Directive-based national law is, however, usually applied without knowledge of relevant directives.

Decisions

- Decisions are mentioned as source of law in EC-Treaty.
- However, there are also various decisions in individual case with no general binding force.
- Some decisions, on the other hand, are binding for states in general. They often provide legislative standards similar to these set by regulations.

Recommendations and opinions

- Recommendations and opinions are mentioned in list of legal acts of the European Community.
- Recommendations are, however, not legally binding. They can enjoy, nevertheless, indirect legal effects and political importance (soft law).
- Now, open method of coordination as method for voluntary approximation of national laws and practices is encouraged.
- Opinions on various issues are also not binding.

Acts of the second and the third pillars

- There are many different documents established by EU Treaty.
- There are joint positions, joint actions and joint strategies for common foreign and security policy.
- There are decisions and framework decisions for cooperation of member states in criminal affairs.
- All these acts are binding for member states. Their effect on individuals can be indirect.
- The Lisbon Treaty expects new sources of legislation for both agendas.

Subsidiary law

- There were and are several treaties concluded by member states (sometimes not by all of them, sometimes also by non-member states) for enforced integration or cooperation.
- Several treaties have been subsequently integrated in the European Communities and the European Union („Schengen law“).

External law

- There are numerous treaties concluded by the European Communities or by both the European Community and their member states with non-member states or other international organisations.
- The Court of Justice decided for limited direct effect of these treaties in European Community and Union law and thus in law of member states.

Fundamental rights and freedoms

- The European Communities and the European Union has not its own catalogue of fundamental rights.
- Therefore, they gradually accepted standards of international law, especially European Convention of Human Rights of the Council of Europe as understood by its European Court of Human Rights.
- Accession to this system of basic rights protection is discussed for decades.
- Charter of Fundamental Rights and Freedoms was adopted together with Treaty of Nice.
- „European Constitution“ incorporated the Charter. Lisbon Treaty declares the Charter also applicable.

Linguistic regime of the European law

- Primary law is written in twenty-three authentic language versions.
- Same number of official languages (with some exceptions) is used for formulation and publication of regulations, directives and other act of the European Community and Union.
- Translation is, however, often imperfect. Anyway, there is no ideal translation. Mistakes and errors cannot be also excluded.
- How to resolve dissonances of various linguistic versions? The Court of Justice calls for comparison of language versions.

Publication of the European law

Official Journal of the European Union is official source. Publication in it is condition of validity.

Judgements of the Court of Justice are officially published in European Court Reports.

EURLex is Worldwide accessible Internet legal service of the European Union and of the Euroepan Community

- See <http://europa.eu.int/eur-lex/lex/en/index.htm>
- So-called celex numbers for identification of documents are used.

Acquis communautaire

- These words in French language denote all law of the European Community and of the European Union which is expected to be accepted and implemented by new member states.
- Acquis communautaire is huge mass of legal documents, including case-law of the Court of Justice of different level of importance.
- Burden related to membership is often understood with *acquis communautaire*.