

Course: *Law of the European Union*

**[4] Legislative, administrative  
and judicial procedures**

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# Creation of primary law

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

Genuine legislative activity is creation of various legal documents of secondary law (regulations, directives, decisions and legislative acts of 2nd and 3rd pillars).

- Legislative institutions 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

- EC Treaty provides for several basic legislative procedures. They are frequently modified by special legislative provisions on particular competences.
- More than 30 different of legislative procedures can be identified.
- EU Treaty provides for several law-making procedures for the 2nd and 3rd pillars. There are also several different legislative procedures
- Simplification was demanded for decades. It was proposed in „European Constitution“ and is expected in Lisbon Treaty.

# Democratic deficit

- Legislative procedures are often without appropriate involvement of the only directly elected body: the European parliament. It plays often limited, or no role.
- The Council is often the only or the first legislative body. Its members-ministers of member states are controlled only loosely by national parliaments.
- Democratic deficit is often criticised. It doubtful, however, whether it can be removed. Firstly, Member States do not want to diminish significantly their power.
- Secondly, the European Parliament can hardly fully act as normal parliament due to poorly integrated politics in the European Union.

# Different legislative procedures

- Key legislative procedures can be distinguished with role of the European parliament.
- There are (1) codecision, (2) cooperation and (3) consultation.
- There are also legislative procedures entirely without the European Parliament (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 asked to give opinion. If there is no consensus after several procedural steps (the 1st, the 2nd, the 3rd reading) achieved, conciliation committee will be called to prepare compromise solution. The European Parliament can, however, reject results.
- The codecision was extended 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, internal market or environment protection is adopted with it.
- The procedure was introduced by the Maastricht Treaty.

# Cooperation procedure

- Many steps resemble codecision procedure.
- Nevertheless, the refusal of the European Parliament can be overruled by the Council if decided unanimously by it.
- Cooperation procedure was introduced by the Single European Act as small step to limit democratic deficit.
- The use is limited now: for legislation in area of economic and monetary policy.



# Consultation procedure

- The European Parliament must be consulted. Failure to do it can be questioned by the Court of Justice.
- 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. The Parliament is not involved at all.
- 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.

# Commission Legislative activity

- If expected by regulations or by the EC Treaty, the Commission enacts detailed regulations.
- Areas affected: agriculture and customs.

# 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.

# Expected changes

- Lisbon Treaty makes codecision procedure the most important legislative procedure of the European Union. The European Parliament thus becomes gradually normal legislative assembly.
- Requirement for unanimity in the Council is suppressed. Qualified majority voting is simplified.
- Parliaments of member states are consulted. They can indicate refusal. Such arrangement shall halt unnecessary legislation of the European Union.

# Administrative procedures

- From national law point of view, European Union law belongs mostly to administrative law.
- Administrative procedures serve day-to-day application of European Union law by administrative authorities of both European Union and member states while acting as agents of European Community law.

# Procedures for proper European administration

- 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.)

# Administration of European Union law by authorities of member states

- Most European Union laws are applied by member states.
- National procedures usually apply. Many Member states have their own administrative procedure codes or special rules.
- Member states are left to decide on their administration (procedural autonomy).
- 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.
- Few regulations provide comprehensive procedures.



# Judicial procedures

- 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 Union, the role of judiciary is crucial.
- Case-law of the Court of Justice contributed significantly to development of European Union law. Courts and tribunals of member states have become an important instrument for application of it in all member states due to their independence.
- Judiciary is most important for the 1st pillar. In other pillars, role of the Court of Justice is limited.

# Distribution of powers in European Union judiciary

- 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.

# Judicial procedures of member states

- Majority of European Union laws is adjudicated by judiciary of member states.
- Codes of procedure (civil, criminal, administrative, special) are thus applied.
- Organisation of judiciary, available appeals and complaints depend on member states.
- Principles of equality and effectivity shall be, however, observed.
- Connection between adjudication by courts of member states and judiciary of the European Union is preliminary ruling.

# 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 EC 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.
- The investigation and action for infringement can be also initiated by another Member State. It as, however, rare.

# Fines imposed by the Court

- If the judgement which declares infringement is not obeyed by the member state,
- 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.
- Such penalization is the instrument of last resort for coercion of member states.

# 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 law, lack of competence, principal procedural failure or misuse of discretion - it shall be declared void.

# Preliminary ruling - description

- Preliminary ruling is the most important and the most specific judicial procedure in the European Community.
- Preliminary ruling is surrogate to appeals or complaints which are available for parties of proceedings of courts of federations.
- Preliminary ruling contributes to homogenous application of European Community law by the courts and tribunals of member states.
- Important doctrines and principles of European (Economic) Community law has been established by the Court of Justice in judgements from preliminary ruling.

# Preliminary ruling: conditions for request

- Every court (broadly defined: state or public judicial authority) can request the Court of Justice.
- Requests for preliminary rulings shall be submitted if it is necessary for clarification of the meaning of applicable European Union law (1st pillar). The Court of Justice checks the necessity of the answer for decision of requesting court or tribunal of member state.
- Provisions of the EC Treaty, 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 judgement of the Court of Justice (*acte éclairé*).



# Result of preliminary ruling

- The Court of Justice provides authoritative (binding) answer to question(s) submitted to it by national court or tribunal. It does not decide on facts.
- Other courts and tribunals of member states are also 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.

# Duty to request

- National courts of the last instance when no remedy available for re-thinking of law – constitutional courts, supreme courts and supreme administrative courts - are required to request for preliminary ruling if described conditions are met.  
Nevertheless, there are only limited sanctions if this requirement is ignored.

# Several other judicial procedures:

- (1) actions for compensation (non-contractual liability),
- (2) actions 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.
- Action for lack of prescribed activity.