

/3/ Sources of European Union Law

Course: *Law of the European Union*

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EC/EU law – hybrid law

- The European Communities and the European Union were and 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 undermines 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 legislators and legislative process.
- There are statutes (laws), codes, decrees, regulations etc (if translated to English).

Features of national law

- Legislator creates law as 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.
- 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.
- There is a legislative authority: monarch, parliament etc.
- Everybody, including individuals opposing the legislation, is expected to respect it and is sanctioned if fails to do it.

Hierarchy of national law

- National laws are hierarchical.
- There is a 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 consideration. 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 frequent (seizure of property, police coercion, imprisonment etc.)
- 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 are international treaties (conventions, agreements).
- An additional source is international custom.
- They are binding only for contracting parties (countries which have agreed to them).
- Contemporary international law is thus a web of bilateral, plurilateral and multilateral treaties.
- Basic principles of international law only for peaceful co-existence of nations are mandatory for all countries.

Enforcement of international law

- 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.
- We can thus describe as decentralization of enforcement.
- Compliance with international law is based also on **reciprocity**. Mutual compliance is preferred if compared with absence of rules.

Structure of European Union 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 were 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 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 until Lisbon

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

„European Constitution“

- **The Treaty establishing a Constitution for Europe** was adopted in 2004.
- It was expected to replace existing primary law.
- Nevertheless, seven member states failed to ratify it due to negative results of referenda (two countries: F, NL) or due to lack of political will.
- It was no real constitution, but „Treaty establishing a Constitution for Europe“ (Constitutional Treaty). Nevertheless, its name was expected to resemble national constitutions.

Significant changes with Lisbon Treaty: TEU and TFEU

- The Treaty of Lisbon was adopted in 2007 after failure of „European Constitution“. It entered into force in December 2009 after successful ratification by all 27 member states.
- The Treaty expected reorganisation of primary law.
- **Treaty on the European Union (TEU)** is now basic treaty.
- Treaty establishing the European Community shall be transformed into **Treaty on Functioning of the European Union** (in accordance with of the European Union and the European Community) provides details.
- Understanding requires often parallel reading of both treaties: fundamentals are in TEU and details in TFEU.

Direct effect of rules

- Self-executing rules of former TEC and now TEU+TFEU 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.
- Therefore, they establish rights and – to lesser extent - duties for individuals.

Primacy of rules of TEU+TFEU

- These rules, if self-executing (applicable directly) 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. EU/EC law enjoys priority even towards state constitutions 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 in the European (Economic) Community:
- Direct effect: *van Gend en Loos* 26-62.
- Primacy: *Costa/Enel* 6-64.
- primacy towards constitution: *Internationale Handelsgesellschaft* 11-70.

Supremacy (primacy) in „the Constitution“ and since Lisbon Treaty

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

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

Shift from dualism to monism

- That approach differs from international law.
- In general, International treaties 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 „monism“ proposed by several theorists of international law.

Reluctance to accept full supremacy

- Member states, i.e. their parliaments, courts, political and administrative authorities respect supremacy of EC/EU law.
- There is, however, reluctance to accept these principles by in all situations.
- There are of examples of ignorance of EC/EU law.
- Rarely, authorities of member states refuse clearly supremacy of EU law.
- It is consequence of weaknesses of EC/EU.

Regulations

- Regulation 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 TFEU (article 288-1).
- Regulations are used if single Europe-wide rules are needed and this unity shall be apparent to individuals and entities regulated of them.
- In many cases, regulations shall be accompanied with procedures, institutions and sanctions set by national law of member states.

Fields of application of regulations, failed rebaptizing

- 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 omitted to do it.

Directives

- The member states are required to introduce or maintain standards set with directives in their national law, see article 288-2 TFEU.
- The process is labelled as transposition or implementation.
- New acts, amendments of existing laws, decrees, by-laws can be adopted. Certainly, it must be law.
- However, extralegal transposition is insufficient.
- „European Constitution“ rebaptized directives „European framework laws“.

Fields of application of directives, liability of member states

- 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.

- 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.

Direct effect of directives in exceptional cases

- 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 against incompliant national law (judgement 148/78 *Ratti*).
- On the other hand, direct effect is not expected if relations among individuals shall be affected (judgement C-91/92 *Faccini-Dori*).
- Member states cannot also impose duties on individuals based on directives (judgement 80/86 *Kolpinghuis*).

Indirect effect of directives

- Administrative authorities and courts of member states are expected to interpret their national laws while taking into consideration of directives (judgement C-106/89 *Marleasing*).
- Directive-based national law is, however, usually applied without knowledge of relevant directives.

Decisions

- Decisions are mentioned as source of law in article 288(3)TFEU.
- However, there are also various decisions in individual cases 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 (article 288-4,5 TFEU).
- Recommendations are 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.

Former acts of the second and the third pillars of EU

- There were other documents established by EU Treaty“ joint positions, joint actions and joint strategies for common foreign and security policy, and decisions and framework decisions for cooperation of member states in criminal affairs.
- All the acts were binding for member states. Their effect on individuals can be indirect only.
- The Lisbon Treaty expects use of regulations, directives and decisions. There shall be specific decisions for expression of foreign and security policy.

Accesoric law (additional international treaties)

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

External law (international treaties with non-member states)

- There are numerous treaties concluded by the European Union (former European Communities) or/and by their members 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 gradually accepted European Convention of Human Rights of the Council of Europe as understood by its European Court of Human Rights and other international standards.
- 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 applicable similarly as primary law.

Language regime of the European Union law

- Primary law is written in authentic in twenty-three language versions.
- Similar 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.
- 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 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*.