



The (Non-) Implementation of EU Law

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Selected Problems of Contemporary EU Law

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Preliminary Remarks

- How to find the case-law?

<http://eur-lex.europa.eu/en/index.htm>

http://curia.europa.eu/jcms/jcms/Jo1_6308/curia

- How to quote the case-law correctly?

Date, case number, name, European Court Report (ECR), year, page, para.

ECJ 19.11.1991, Case C-6/,9/90, **Francovich**,
ECR 1991, I-5357, para.37.

Preliminary Remarks

- How to find the consolidated version of the TEU and the TFEU (including tables of equivalences)?

[http://eur-lex.europa.eu/JOHtml.do?
uri=OJ:C:2010:083:SOM:EN:HTML](http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2010:083:SOM:EN:HTML)

The Implementation of EU Law

- Transposition of EU Law
- Application of EU Law
- Enforcement of EU Law

What is to be implemented?

The Sources of EU Law

- **Primary EU Law**

- Founding Treaties (TEU, TFEU)

- Accession Treaties

- Treaty Amendments, Supplementary Treaties (incl. Annexes, Protocols)

- General Principles of EU Law (ECJ)

What is to be implemented?

The Sources of EU Law

- **Secondary EU Law art. 288 TFEU**
 - Regulations (Reg. (EC) no/year)
 - Directives (Dir. no/year/EEC)
 - Decisions
 - Recommendations & Opinions (non binding!)

What is to be implemented?

- A **regulation** shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
- A **directive** shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.
- A **decision** shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.

What is to be implemented?

International Agreements of the EU+MS

- Form an integral part of EU law
Cases Haegeman, Kupferberg
- „Mixed Agreements“
- Interpretation: wording, context, objective, clear and unconditional
- Direct applicability
Cases Pabst&Richardz, Breciani
- Association Council Decisions (ACD)
Cases Demirel, Sevince, Wählergruppe Gemeinsam

What is to be implemented?

The Sources of EU Law

- Case-law of the ECJ

The Interplay of Legal Orders Art 19 TEU

(1) The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.

Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

The Interplay of Legal Orders Art 19 TEU

- (3) The Court of Justice of the European Union shall, in accordance with the Treaties:
- (a) rule on actions brought by a Member State, an institution or a natural or legal person;
 - (b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions;
 - (c) rule in other cases provided for in the Treaties.

The Interplay of Legal Orders Art 267 TFEU

The Court of Justice of the European Union shall have jurisdiction to give **preliminary rulings** concerning:

- (a) the interpretation of the Treaties;
- (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

The Interplay of Legal Orders Art 267 TFEU

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal **may**, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal **shall** bring the matter before the Court.

The Interplay of Legal Orders Art 267 TFEU

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

(Urgent Preliminary Ruling Procedure)

The ECJ decides

- whether the case is still pending
- whether a specific question on EU law is raised

BUT the ECJ

- does not answer general or hypothetical questions
- does not submit opinions (exceptions, though)

The ECJ ...

- Decides on the validity of EU law
- Interpretes EU law
- Judgments are binding
- Does NOT decide on whether national law is in compliance with EU Law

CILFIT criteria*

A domestic court** of last instance is **not** required to make a **preliminary reference**,

- where the question of interpretation is irrelevant,
- where the ECJ has already ruled on the point, or in a case
- where the interpretation of Community law is self-evident (i.e. correct interpretation of the relevant provision is so obvious that it is beyond any reasonable doubt).

* ECJ 6.10.1982, Case 283/81, *CILFIT*, ECR 1982, p. 3415, para. 21,10, 16.

** “court“ ECJ C-54/96 *Dorsch Consult*: - established by law, permanent, - compulsory jurisdiction, - procedure inter partes, applies rules of law, - independent.

All language versions! Courts of all MS incl. ECJ share this conviction!

Challenges to the Law Applicant

Principle of sincere cooperation: Art 4 (3) TEU

Pursuant to the principle of sincere cooperation, the Union and the MS shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The MS shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The MS shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

Challenges to the Law Applicant

- Is EU Law decisive?
- What are the EU law questions at stake?
- Has the ECJ already ruled on the interpretation?
- Is there an obligation to refer the case?
- What is a „court“ in terms of art. 267 TFEU?

Challenges to the Law Applicant: Reference

- Abstract summary of the decisive legal questions
- Reasoning: facts of the case, applications of the parties, legal framework
- Specific use of the interpretation
- Forward the files -> registered letter to LUX
- Stay the domestic legal proceedings

The Interplay of Legal Orders: Consequences

- Legal positivism
- Hierarchy of Norms
- Principle of Legality
- Case-law
- Cooperation with the ECJ

What is EU Case-Law about?

- Effects of EU law
- EU law – domestic law – international law
- Protection of fundamental rights & freedoms
- Interpretation of policy fields
- General principles of EU law

FR of ECHR and constitutional traditions common to the MS art 6(3) TEU

Direct Effect of EU Law

Van Gend & Loos

- Art. 12 EEC (then art 25 EC now: art. 30 TFEU)
„Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature.“
- Art. 267 TFEU (ex-art. 234EC/177 EEC)

Van Gend & Loos

- What is the legal nature of EU law?
- What does direct applicability mean?
- Which legal order sets the prerequisites for the direct application of EU law?
- Which legal acts are directly applicable?
- Which prerequisites have to be fulfilled for a norm is directly effective?

Direct enforceability- applicability - effect

- **Direct enforceability** = EU norm is in force and thus the norm is part of the domestic legal order (no transformation required)
- **Direct applicability** = enforceable norms, which confer rights (obligations) on the individual
- **Direct effect** = natural and legal persons can invoke their Communautarian rights before domestic courts /authorities

Direct Effect of EU Law

Van Duyn

- Art. 45 TFEU (ex-art. 39 EC/48 EEC):
free movement of workers

"1. Freedom of movement for workers shall be secured within the Union...

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the member states, as regards employment,...

3. It shall entail the right, subject to limitations justified on grounds of public policy, public safety or security...;

(a) to accept offers of employment actually made,...

(c) to stay in a member state for the purpose of employment in accordance with the provisions governing the employment of nationals of that state laid down by law,..."

Van Duyn

- **Directive 64/221/EEC**

"Measures taken on grounds of public policy or of public security shall be based exclusively on the personal conduct of the individual concerned." =>

- **The ECJ recognises the direct effect not only of the provisions of the Treaties (Article 45 TFEU“ex Article 39/48 EC”), but also of the directives laid down for their application (Article 3 Directive 64/221/EEC).**
- **It interprets the notion of 'public policy' as a justification for derogating from a fundamental principle of Community law: the freedom of movement of workers.**

Supremacy

Costa/ENEL

- Article 37 (ex art 31)
 1. Member States shall adjust any State monopolies of a commercial character so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States. The provisions of this Article shall apply to any body through which a Member State, in law or in fact, either directly or indirectly supervises, determines or appreciably influences imports or exports between MS. These provisions shall likewise apply to monopolies delegated by the State to others.
 2. Member States shall refrain from introducing any new measure which is contrary to the principles laid down in paragraph 1 or which restricts the scope of the articles dealing with the prohibition of customs duties and quantitative restrictions between Member States.

Uniform Application

Simmenthal II

- „DIRECT APPLICABILITY OF COMMUNITY LAW MEANS THAT ITS **RULES MUST BE FULLY AND UNIFORMLY APPLIED**
- DIRECTLY APPLICABLE PROVISIONS ARE A **DIRECT SOURCE OF RIGHTS AND DUTIES** FOR ALL THOSE AFFECTED THEREBY, WHETHER MEMBER STATES OR INDIVIDUALS;
- ANY **NATIONAL COURT WHOSE TASK IT IS AS AN ORGAN OF A MEMBER TO PROTECT THE RIGHTS CONFERRED UPON INDIVIDUALS** BY COMMUNITY LAW.“

Principle of Precedence

Simmenthal II

Provisions of the Treaty and directly applicable measures

- render automatically inapplicable any conflicting domestic provision ...
- preclude the valid adoption of national norms to the extent they would be incompatible with EC law.
- Recognition of such norms corresponds to the denial of the effectiveness of obligations undertaken ... thus would imperil the very foundations of the Community.

Simmenthal II

- Why is the ECJ still competent to decide on the matter?
- The relationship between EU and domestic law?
- Please explain the principle of precedence
- Who decides on the compliance between national and supranational law?

General Principles of EU Law

Derive from common legal principles of the MS or gen. pr. of Int. Law

- **Fundamental Rights** (*Cases Stauder, Int. Handelsges., Nold*)
- **Principle of proportionality** -> art 5 TEU, Protocol 2
- **Principle of subsidiarity** -> art 5 TEU, Protocol 2
- **Principle of legal certainty** (non-retroactivity, legitimate expectations)
- **Principle of equality before the law**

Principles of Equivalence and Effectiveness

...it is for the domestic legal system of each Member State to **designate** the **courts** and tribunals having jurisdiction and to **lay down** the detailed **procedural rules** governing actions for safeguarding rights which individuals derive from Community law, provided, first, that such rules are **not less favourable** than those governing similar domestic actions (principle of equivalence) and, secondly, that they do **not render virtually impossible or excessively difficult the exercise of rights** conferred by Community law (principle of effectiveness)

See, inter alia, Case 33/76 *Rewe*, ECR 1976, 1989, para 5, and Case C-255/00 *Grundig Italiana*, ECR 2002, I-8003, para 33.

Mistakes in the Implementation of EU Law

Terminology

ECJ 3.7.1986, Case 66/85, *Lawrie Blum*, ECR 1986, 2121, para 16 et seq

Since freedom of movement for workers constitutes one of the fundamental principles of the Community, the term '**worker**' in Article 48 may not be interpreted differently according to the law of each MS but has a Community meaning. Since it defines the scope of that fundamental freedom, The Community concept of a 'worker' must be **interpreted broadly** (Case 53/81 *Levin*).

17 That concept must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship, however, is that for a **certain period** of time a person performs services for and under the **direction** of another person in return for which he receives **remuneration**.

Mistakes in the Implementation of EU Law

Temporary Effect of EU Law

ECJ 2.10.1997, Case C-122/96, *Saldanha*, ECR 1997, I-5325, para 14

In view of the fact that the Act of Accession contains no specific conditions whatsoever with regard to the application of **Article 6** of the Treaty, the latter provision must be regarded as being immediately applicable and binding on the Republic of Austria from the date of its accession, with the result that it **applies to the future effects of situations arising prior to** that new Member State's **accession** to the Communities. From the date of accession, therefore, nationals of another Member State can no longer be made subject to a **procedural rule which discriminates on grounds of nationality**, provided that such a rule comes within the scope *ratione materiae* of the EC Treaty.

=> Para 24

Mistakes with regard to art 267 TFEU

- Violation of the obligation to refer
- Multiple References
- Inadmissible questions
- Questionable withdrawal

Non-Implementation: Consequences

- **Infringement Procedure art 260 TFEU**
 1. If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to **take the necessary measures to comply** with the judgment of the Court.
 2. If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.
- If the Court finds that the Member State concerned has **not complied** with its judgment it may **impose a lump sum or penalty payment** on it.

Non-Implementation: Consequences

- **Infringement Procedure art 260 TFEU**
3. When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned has **failed to fulfil its obligation to notify measures transposing a directive** adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.
- If the Court finds that there is an infringement it may impose a **lump sum or penalty payment** on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment.

Non-Implementation: Consequences

- **Infringement Procedure**

ECJ 9.12.2003, Case C-129/00, *COM vs Italy*, ECR 2003, I-14637, para 29

A Member State's failure to fulfil obligations may, in principle, be established under Article 226 EC whatever the agency of that State whose action or inaction is the cause of the failure to fulfil its obligations, even in the case of a constitutionally independent institution

(Case 77/69, *Commission vs Belgium*, ECR 1970, ECR 237, para. 15)

Non-Implementation: Consequences

- **Infringement Procedure**

ECJ 9.12.2003, Case C-129/00, *COM vs Italy*, ECR 2003, I-14637, para 41

In the light of the foregoing considerations, it must be declared that, by failing to amend Article 29(2) of Law No 428/1990, which is construed and applied by the administrative authorities and a substantial proportion of the courts, including the Corte suprema di cassazione, in such a way that the exercise of the right to repayment of charges levied in breach of Community rules is made excessively difficult for the taxpayer, the Italian Republic has failed to fulfil its obligations under the EC Treaty.

Non-Implementation: Consequences

- **Infringement Procedure**

ECJ 9.12.2003, Case C-129/00, *COM vs Italy*, ECR 2003, I-14637, para 41

Domestic jurisprudence may represent the ground of an infringement, considering

- rank of the decision
- structural failure to comply
- implication of domestic decisions on the objectives of the Treaties

Non-Implementation: Consequences

- **State Liability**

ECJ 30.9.2003, Case C-224/01, *Köbler II*, ECR 2003, I-10239, para 32

In international law a State which incurs **liability** for breach of an international commitment is viewed as a single entity, **irrespective of whether** the breach which gave rise to the damage is attributable to the **legislature, the judiciary** or the **executive**. That principle must apply a fortiori in the Community legal order since all State authorities, including the legislature, are bound in performing their tasks to comply with the rules laid down by Community law which directly govern the situation of individuals

(*Brasserie du Pêcheur* and *Factortame*, cited above, para 34).

Non-Implementation: Consequences

- **State Liability**

ECJ 30.9.2003, Case C-224/01, *Köbler II*, ECR 2003, I-10239, para 32, 59

Member States are obliged to **make good damage** caused to individuals by infringements of Community law for which they are responsible is also applicable where the alleged **infringement stems from a decision of a court** adjudicating at **last instance** where the rule of Community law infringed is intended to **confer rights on individuals**, the breach is **sufficiently serious** and there is a **direct causal link** Between that breach and the loss or damage sustained by the injured parties.

Non-Implementation: Consequences

- **State Liability**

ECJ 30.9.2003, Case C-224/01, *Köbler II*, ECR 2003, I-10239, para 59

In order to determine whether the infringement is sufficiently serious when the infringement at issue stems from such a decision, the competent national court, taking into account the specific nature of the judicial function, must determine whether that infringement is **manifest**. It is for the legal system of each Member State to designate the court competent to determine disputes relating to that reparation.