

EC INTERNAL MARKET LAW

Additional material 1 The Law of the European Union

- **Terminology:** The whole of the law of the European Union is called the *Union law*. The *Community law* was the most important part of it. It was the law of the European Communities (European Community [EC] and European Atomic Energy Community [EURATOM]). With the Treaty of Lisbon, the distinction between Community law and Union law has been abandoned; the European Community (EC) does not exist any longer. The term *European law* describes all the law of all European international and supranational institutions, including the statute of the Council of Europe, the European Convention (Convention for Protection of Human Rights and Fundamental Freedoms) and other international treaties which have been prepared by the Council of Europe). The law of the European Union is by far the largest and most important part of European law.

A. The sources of Union law

I. Primary law

- corresponds to the constitutional law in a constitutional state
 - enjoys primacy vis-à-vis secondary law
 - is the basis for secondary law
- 1) The founding treaties (EU Treaty, FEU Treaty, EURATOM Treaty)¹
 - include the relevant protocols (which are parts of the treaties)
 - 2) Charter of Fundamental Rights of the European Union
 - read together with art. 6(1) EU Treaty
 - 3) General principles of law
 - unwritten parts of Union law, "discovered" by the European Court of Justice; the ECJ orientates itself by the common legal traditions of the member states but takes into account the particularities of Union law
 - in particular principles reflecting aspects of the rule of law (principle of proportionality etc.) and fundamental rights
 - 4) Complementing customary law (rare) and general rules of international law (DISPUTED.)

II. Secondary law

- the law that has been created by the institutions of the Union, based on the primary law
 - depending on the procedure of adoption, there is a distinction between *legislative acts* (art. 289(3) FEU Treaty) and *non-legislative acts* (in particular *delegated acts* under art. 290 and *implementing acts* under art. 291 FEU Treaty)
 - no sources of law: decisions in the context of the Common Foreign and Security Policy (art. 25 et seq. EU Treaty) and, formerly, in the context of the Judicial Cooperation in Criminal Matters (art. 34 EU Treaty [Nice Version]); these decisions are binding but no legal norms
- 1) Regulation (art. 288 sub-section 2 FEU Treaty)²
 - general rules with *direct effect* in the member states
 - corresponds to an act of parliament in national law
 - 2) Directive (art. 288 sub-section 3 FEU Treaty)
 - general rules that first have to be *implemented in the legal order of the member states*; binding, as to the result to be achieved, but leaves the choice of form and methods to the national authorities
 - corresponds to framework legislation in national law
 - there are various precautions in Union law to assure effective compliance:
 - obligation to implement by law (not by administrative practice or administrative provisions)
 - obligation of all national institutions and authorities to interpret the national law in conformity with the directions
 - direct application in case of late or inadequate implementation, if the directive is unconditional and sufficiently precise
 - possible state liability in case of late or inadequate implementation (→ leading case *Francovich*)
 - 3) Decision (art. 288 sub-section 4 FEU Treaty)
 - binding regulation in an individual case; binding only upon those to whom it is addressed
 - corresponds mainly to an administrative act in national law

¹ Formerly (until the Treaty of Lisbon came into force): EU Treaty, Treaty establishing the European Community [EC Treaty] and EURATOM-Treaty.

² Formerly art. 249 sub-sect. 2 EC Treaty.

- 4) Recommendation and opinion (art. 288 sub-sect. 5 FEU Treaty)
 - not legally binding
- 5) Other legal acts
 - international treaties concluded by the Union (formerly by the European Communities)
 - decisions according to special provisions in the Founding Treaties

B. The characteristic features of Union law

I. *Autonomy*

- a separated legal order, apart from the legal orders of the member states and from international public law [DISPUTED]
(→ leading case *van Gend & Loos*)
- autonomous vis-à-vis the national law of the member states, but dependent on the will of the community of all member states as a whole (the so-called "masters of the treaties")

II. *Unity*

- uniform validity and application in all member states without regard to the specific features of the national law

III. *Direct effect within the member states*

- in particular direct application of primary law

IV. *Primacy over national law*

- leading cases *Costa/ENEL* and *Internationale Handelsgesellschaft*
- in case of conflict, institutions and authorities of the member states are not allowed to apply the conflicting national law
- primacy in application, no (hierarchical) primacy in validity: the conflicting national law must not be applied but is not void
- also primacy over national constitutional law
- conflicts may be avoided by interpreting national law in conformity with Union law
- in case of a possible conflict, the ECJ decides about the validity and interpretation of Union law in a preliminary ruling (art. 267 FEU Treaty)³

C. The execution of Union law

I. *As a rule: Execution by the member states*

1) Indirect execution by the member states

- in particular: indirect execution of directives
- first implementation in the national legal order, then execution of the relevant national law
- lawyers in the member states will not necessarily notice that the national law, they are dealing with, implements EU law

2) Direct execution by the member states⁴

- in particular: direct execution of regulations and decisions
- execution of the European legal norm without intermediate national law

II. *As an exception: Execution by the Union*

- in particular in the field of competition law (art. 101 et seq. FEU Treaty⁵), when monitoring state aids (art. 107 et seq. FEU Treaty⁶) and when managing European funds
- mostly by the European Commission

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³ Formerly art. 234 EC Treaty.

⁴ In case of overdue or insufficient execution, the Commission or another member state may take an action for failure to fulfil obligations under art. 258 et seq. FEU Treaty (formerly 226 et seq. EC Treaty), which will initiate *infringement proceedings*. If the ECJ has stated an infringement and the member state does not comply with the judgement, the Court, on application of the Commission, may impose a *lump sum* or penalty payment on the state (art. 260(2) FEU Treaty, formerly 228(2) EC Treaty).

⁵ Formerly art. 81 et seq. EC Treaty.

⁶ Formerly art. 87 et seq. EC Treaty.