

EUROPEAN UNION LAW

concerning §§ 8 and 9 of the course

Diagram 4

The law of the European Union

- **Terminology:** The whole of the law of the European Union is called the *Union law*. Formerly, 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, which was signed in 2007 and came into force in December 2009, 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 but does not represent itself a constitution (DISPUTED)
 - enjoys primacy of validity 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)
 - do not include the declarations (which are only aids to interpretation)
 - 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 in the way of judicial further development of law; the ECJ orientates itself by the common legal traditions of the member states, the ECHR and other international treaties concluded by the member states as sources of inspiration but takes into account the particularities of Union law
 - in particular principles reflecting aspects of the rule of law (principle of legality, principle of proportionality, legal certainty and protection of legitimate expectations, right to be heard at the court, state liability for illegal acts of public authorities etc.) and fundamental rights (cf. art. 6(2), now art. 6(3) EU Treaty)
 - 4) Complementing customary law (rare) and general rules of international law (DISPUTED.)
 - note that customary law cannot legitimate any deviation from the Treaties

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); they are binding but no legal norms
- 1) Regulation (art. 288 sub-section 2 FEU Treaty)
 - 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
 - there are various *precautions in Union law to assure effective compliance*:
 - obligation to implement by law, not by administrative practice or administrative provisions (ECJ, case C-361/88, TA-Luft)
 - obligation to refrain during the implementation period from taking measures liable to compromise the result prescribed (ECJ, case C-129/96, Inter-Environnement Wallonie)
 - obligation of all national institutions and authorities to interpret the national law in conformity with the directions (ECJ, case 79/83, Harz)
 - direct application in favour of the citizen in case of late or inadequate implementation, if the directive is unconditional and sufficiently precise (ECJ, case 148/78, Ratti)
 - possible state liability in case of late or inadequate implementation (ECJ, joint cases C-6/90 and 9/90, Francovich)

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

- 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/decision in national law
 - a decision directed to a member may be applied directly in favour of the citizen if it is unconditional and sufficiently precise (ECJ, case 9/70, *Leberpfennig*)
- 4) Recommendation and opinion (art. 288 sub-sect. 5 FEU Treaty)
 - not legally binding
- 5) International treaties concluded by the European Union
 - enjoy primacy over other secondary law (cf. art. 216(2) FEU Treaty)
 - also mixed agreements concluded by the Union and its member states with a third party
- 6) Other legal acts
 - decisions according to special provisions in the Treaties, rules of procedure, binding interinstitutional agreements (cf. art. 295, phrase 2 FEU Treaty)
 - *not* a source of law but an aid to interpretation: *soft law*

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 ECJ, case 26/62, *van Gend & Loos*)
 - courts of the member states not entitled to declare invalid any secondary Union law (ECJ, case 314/85, *Foto-Frost*)
- 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 (see already ECJ, case 26/62, *van Gend & Loos*)

IV. *Primacy over national law*

- an elementary rule of the game of supranational integration, elaborated by the ECJ (→ leading cases 6/64, *Costa/ENEL*, and 11/70, *Internationale Handelsgesellschaft*) and confirmed by the member states in all reform treaties and accession treaties
- 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 (ECJ, case 11/70, *Internationale Handelsgesellschaft*)
- 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)

C. The execution of Union law

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

- execution according to the national law, which, however, is strongly influenced by European standards (so-called *Europeanisation of administrative law*)
- 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 states²
 - 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 Treaty), when monitoring state aids (art. 107 et seq. FEU Treaty) and when managing European funds
- mostly by the European Commission
- note the right of the citizen to good administration (art. 41 ChFR)

(Datei: Diagram 4 (EU Law))

² 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, 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).