

Basics of
EUROPEAN LAW
for English legal purposes

by

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Vorwort

Liebe Leserinnen und Leser,

Dieses Skript soll Euch, die Ihr ohnehin schon auf Deutsch sicher genug zu lesen habt, einen schnellen Überblick über das Europarecht aus englischer Sicht geben. Es gibt den Stoff zusammenfassend in der Tiefe wieder, wie er in der fachspezifischen Fremdsprachenausbildung „Introduction to English Law and Legal English“ an der Fakultät für Rechtswissenschaft der Universität Bielefeld gelehrt wird.

Um den Umfang gering zu halten, beschränkt sich die Darstellung auf das ganz Wesentliche und ist damit wohl am besten zur Nachbereitung entsprechender Vorlesungen bzw. zur Vorbereitung auf FFA-Abschlußprüfungen geeignet. Einzelne Begriffe werden deshalb nicht weiter erläutert, und zum besseren Verständnis sollte man bereits mit einigen Grundzügen des Europarechts vertraut sein. Die wesentlichen (Rechts-) begriffe werden jedoch definiert, was mit einem := gekennzeichnet ist.

Ich hoffe, das Skript hilft Euch und begleitet Euch ggf. zu einem erfolgreichen Englisch-Examen.

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European Community Law

as of March 2000.

A. Development

I. European Coal and Steel Community (ECSC)

- established by The Treaty of Paris, 1951
- => common market for coal and steel products
- creation of several organs (council, assembly, court) (1967: merger treaty: councils, commissions of EEC, ECSC, Euratom merged; later incorporated into ECT by TEU)

II. European Atomic Energy Community Treaty (Euratom)

- => specialist market for atomic energy

III. European Community (formerly European Economic Community) Treaty

- established by a separate Treaty of Rome from Euratom in 1957
- => establishment of a common market and progressive approximation of economic policies of member states => economic and monetary union
- amended and modified by later Treaties (**Amsterdam 1997**)

IV. Treaty on European Union (TEU) - Maastricht

- ⇒ “three pillars” of the EC:
 - EC Treaty
 - common foreign and security policy
 - police and judicial co-operation in criminal matters
- ⇒ general principles:
 - fundamental human rights (Art.6)
 - (- Equality
 - Proportionality)
 - subsidiarity
 - EU citizenship

B. Sources of Law

I. Primary Sources: Founding Treaties

II. Secondary Sources: EC legislation to include directives, regulations and decisions:

Art. 253 ECT requires that each legally binding act must contain a statement of reasons on which they are based, incl. reference to the **legal basis** of an act (-determines the legislative procedure to take)

1. Directives:

- binding on the member state as to the result to be achieved
- => choice of form and methods when transposing them into national law is left to the national authorities
- => no rights and obligations arise from a directive for individuals unless it is transposed to national law
- BUT: direct effect

2. Regulations:

- general application = binding in their entirety and directly applicable in all member states

3. Decisions: binding on those to whom they are addressed**III: General principles of law recognised by the ECJ****IV. International agreements with non-member-states****V. Decisions of the ECJ****C. Direct effect****I. Direct effect of treaty provisions**

Usually, international treaties are agreements between governments and do not create rights for citizens that are enforceable before national courts.

But: EC-law differs: In *Van Gend en Loos v. Nederlandse Administratie der belastingen* 1963 it was held that the treaties created a “new legal order”, which created rights for individuals which became part of their legal heritage

=> *Reyners v. Belgium* 1974: criteria for direct effect of treaty provisions: they must be

- clear and unambiguous
- unconditional
- its operation must not be dependent on further action being taken by the EC or national authorities

=> **vertical** (obligation rests on the state and there is a corresponding right on individuals) as well as **horizontal** effect (obligation can be conferred on individual as well) (+), cf. *Defrenne v Sabena* 1976

II. Direct effect of regulations

1. Direct applicability (+), they do not need national implementing legislation

2. Direct effectiveness, i.e. creation of individual rights enforceable before national courts: (+) if the criteria mentioned above (I.) are complied with.

III. Direct effect of directives

- in principle (-), because the choice of form and method of implementation is left to the member state

But: direct effect (+) if the directive is:

- clear and unambiguous
 - unconditional
 - the time limit of implementation has expired (and the member state has not transposed it into national law
- arg.: effet utile, concept of estoppel: A member state may not rely against an individual in proceedings upon its own failure to implement a directive properly and on time.
- no horizontal (only incidental/interpretative obligation), only vertical direct effect (it does not matter in what capacity the state does act in, directives can be relied on against it even if he acts as employer)

IV. Direct effect of decisions (+)**D. Primacy of EC Law**

“Twin Pillars” of direct effect and supremacy:

I. Direct effect – see above**II. Supremacy:**

Costa v Enel 1964: EC Law cannot be overridden by domestic legal provisions, regardless of whether the provision came earlier or later than EC law

=> every national court must apply EC Law in its entirety and must, accordingly, set aside any provision of national law which may conflict with it.

(regardless of form of EC law)

=> member states must repeal conflicting legislation

III. Principle of supremacy and UK Law (Consequences)

=> difficult with respect to 3 constitutional conventions:

- doctrine of parliamentary sovereignty
- doctrine of implied repeal
- principle that no parliament can bind its successor

1. UK has a dualist constitution => EC Law is incorporated into UK law by virtue of the European Communities Act 1972 (ECA)

2. Any act of parliament passed after ECA must be read as subject to directly enforceable EC rights.

E. Community Institutions**I. Commission****1. Functions**

- a) Right of legislative **initiative**
- b) Council decisions are taken on the basis of Commission proposals
- c) Guardians of the Treaty:
 - Community **watchdog** => EC law enforcement proceedings (2 stages)
 - Competition law watchdog => has the power to impose fines and penalties on individuals for breach of competition law (Art. 81, 82) – may grant exemptions for restrictive agreements under Art. 81
- d) “**Executive**” of the Community

2. Composition:

- 20 members; 5 larger states 2, others 1 commissioner
 - appointed by the governments of the member states
 - all nominees are subject to a vote of approval by the European Parliament, after which they are appointed by common accord of the governments of the member states
- => commissioners are not the representatives of national governments – they are required to act in the interest of the EU as a whole

=> commission works as a college (unanimity) under the guidance of a president (+1,2 Vice-)
=> 5 years term of office

II. Council of the European Union

Purpose: represent the interests of the member states

1. Functions:

- takes general policy decisions
- decisions to ensure objectives set out in the Treaty are attained
- jointly decides budget with parliament
- minor legislative power acc. to art. 208 ECT

2. Composition

Each member state is represented by a government minister. The government minister who attends the meeting will depend on the subject matter of the meeting.

The Presidency of the Council rotates amongst the members at six monthly intervals (=> control of the agenda of the EU).

3. COREPER

= Committee of Permanent Representatives

4. Voting:

Each country has 10-2 votes, depending on the size of their population.

Total: 87; qualified majority: 62 votes

III. European Parliament

1. Purpose: to represent the peoples of the member states

2. Composition

=> different numbers of seats per country depending on its number of population => 626 seats in total; members directly elected by the people of Europe

3. Powers and duties:

a) supervisory function

- commission is politically accountable to the Parliament
- Parliament can demand the resignation of the Commission en bloc
- appoints ombudsman who receives complaints concerning instances of maladministration in the activities of EC institutions or bodies

b) participation in the legislative process

The relevant procedure and, consequently, the Parliament's involvement in the process is governed by the Treaties:

(1) Consultation Procedure (Art. 250 ECT): Parliament gives its opinion which the Commission or Council are not obliged to follow

(2) Co-operation Procedure (Art. 252 ECT)

(3) **Co-decision Procedure (Art. 251 ECT):** Parliament is given the power to interrupt procedure (“amendments and veto”, conciliation committee)

(4) **Assent:** Veto

c) **budgetary:** Parliament jointly exercises control over the budget with the council:

- compulsory expenditure: Council has the final say
- non-compulsory expenditure: Parliament has the final say

d) **special powers** – e.g. own internal organisation

IV. European Court of Justice (ECJ)

1. Function:

Under art. 220, to ensure that, in the interpretation and application of the Treaty, the law is observed.

2. Composition

- 15 judges, 1 from each member state – must be independent and possess the qualifications required for the appointment to the highest judicial offices in their respective country
 - judges elect a president (3 yrs term office)
 - nine Advocates General (same status as judge, his duty is to present an impartial and reasoned opinion on the case, prior to the judges’ deliberations)
- Judge’s term of office: 6 yrs, re-appointable

3. Procedure: 4 stages

- a) written proceedings
 - b) investigation
 - c) oral proceedings
 - d) judgement
- => judge-rapporteur – does all the work on the case and informs the other judges by writing reports

4. Jurisdiction (Art. 220)

=> guided by the principle of effet utile (“quasi-legislative role”)

a) actions against institutions

b) preliminary rulings under Art 234:

aa) Preliminary reference:

- every national court has a **discretion to refer** (find facts/consider whether EC law is critical to outcome/consider whether the ECJ can resolve the provision of EC law with complete confidence);
- **obligation to refer** only if there is no judicial remedy against the decision of that respective court - after the ECJ’s ruling, the case will be returned to the national court

bb) *Purpose:*

- (1) Uniformity of interpretation
- (2) Familiarise national courts with EC legal order
- (3) Develop European legal order

(4) Rulings on direct effect

c) actions brought by commission/member state against another member state for failure to fulfil EC obligations

d) appeals from the Court of first instance on points of law

5. Court of First Instance

- 15 judges

- *jurisdiction*: all claims brought by natural or legal persons, staff cases; actions brought by coal and steel undertakings

- a decision of the CFI may be *appealed*, on points of law only, on three grounds:

- lack of competence of the CFI

- breach of procedure before the CFI, which adversely affects the interests of the applicant

- infringement of EC Law by the CFI

F. Free movement of goods

(goods := things of monetary value which could constitute the object of commercial transactions)

=> common market; EC shall be based upon a customs union: customs/taxes between member states are prohibited, a common custom/tax tariff for goods imported into EC is established

=> free circulation of goods

I. Art 25 prohibits customs duties or measures having equivalent effect.

A charge need not be introduced for protectionist reasons and will include any charge which is imposed on goods by reason of the fact that it has crossed a frontier. (although charges for services rendered may be permissible)

II. Internal taxation

- Art.90 **I** prohibits the imposition of internal taxes on products from other member states which are in excess of those levied directly or indirectly on similar domestic products / **II**: prohibits different tax rates where products are in competition with each other

- Art. 25 and 90 are mutually exclusive

III. Quantitative restrictions

1. Art 28 prohibits quantitative restrictions (e.g. quota) and measures having equivalent effect on imports

=> equivalent effect: *Dassonville*-formula:= all trading rules enacted by the member states which are capable of hindering directly or indirectly, actually or potentially, intra-community trade

But: *Keck*-formula: certain selling agreements (= bloße Verkaufsmodalitäten) are outside the Dasonville formula if

- they apply to all traders operating in the member state

- and the marketing of domestic and imported goods are affected in the same way

2. Art 29 contains a similar provision on exports

3. Art 30: derogations from Arts 28, 29: public morality/public policy/public health/public security

4. derogations from *cassis-de-Dijon*: obstacles to movement within the EC ... must be accepted in so far as those provisions may be recognised as being necessary in order to satisfy mandatory requirements relating, in particular, to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer

G. Competition Law

Reasons: Integration, consumer protection, efficiency

I. Art. 81:

1. application: three elements:

a) collusion between undertakings

aa) agreements between undertakings

bb) decisions by associations of undertakings

cc) concerted practices

:= a form of coordination between undertakings which, without having reached the stage where an agreement properly so called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition. => “contact” required

=> similarity of prices economically inexplicable

- e.g. price-fixing by cartels

b) collusion which must affect trade between Member States

aa) Purpose: to set boundaries for the jurisdiction of national law and EC law

bb) := (foreseeable...) influence, direct or indirect, actual or potential, on the pattern of trade between member states

c) collusion which has as its object or effect (rule of reason) the distortion of competition within the common market

2. Effect of infringement:

=> all such agreements, decisions and concerted practices are **absolutely void**.

=> commission may grant **exemptions** under Art. 81 III

II. Art. 82:

Abuse of a dominant position by one or more undertakings within the common market or in a substantial part of it shall be prohibited as incompatible with the common market, in so far as it may affect trade between member states.

1. Dominant position

:= position of economic strength enjoyed by an undertaking, which enables it to prevent competition being maintained on the relevant market by giving it the power to behave, to an appreciable extent, independently of its competitors, customers, and ultimately, of its consumers.

=> market share + market structure is relevant

=> necessity to analyse the relevant market: three perspectives:

a) product market

- interchangeable or substitutable products
- => cross-elasticity of demand / cross-elasticity of supply

b) geographical market

:= the one in which available and acceptable substitutes exist

c) temporal market**2. Abuse**

e.g.: Mergers, predatory pricing, refusal to supply, tying, excessive prices,

III. Enforcement of Arts 81 and 82

=> principle of dual vigilance => can be enforced at the community or at national level (directly effective)

H. Free Movement of workers – Art. 39

(incl. family...= dependants)

I. Worker:= someone who is in genuine and effective employment and performs services for an employer under his direction and control, in return for remuneration

II. Right to enter

- to find employment
- absolute right of entry, so it is illegal to grant only limited leave to enter

III. Right to reside

- conditional on finding employment
- workers shall be entitled to a residence permit (valid for at least 5 yrs, automatically renewable unless an event occurs which terminates the right, e.g. voluntary unemployment, departure >6 months)

IV. Right to remain

1. after having worked in the m.s. on **retirement** (employed 12 mths, resided 3 yrs)
2. = on **incapacity** (resided 2 yrs)

V. Access to employment / equality of treatment

=> Abolition of any discrimination based on nationality between workers of Member States as regards employment, remuneration and other conditions of work and employment.
=> practical barrier: conditions relating to linguistic knowledge required

VI. Exceptions

1. **Indirect discrimination** can be justified on objective grounds unrelated to nationality
2. **on grounds of public policy, ~ security, ~ health**
 - measures shall be taken on the personal conduct of the individual concerned
3. **Public service exemption**
Free movement of workers does not apply to public service (Art. 39 IV)

=> interpreted narrowly!
 => only applies to the exercise of official authority and to employees who are safeguarding the general interests of the state

I. EC Sex Equality Legislation

I. Distinction:

1. Direct discrimination

:= similar situations are treated differently or different situations are treated alike
 ⇒ always illegal (unless derogations apply)

2. Indirect discrimination

:= where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex
 ⇒ illegal unless it is appropriate and necessary and can be justified by objective factors unrelated to sex

II. Art. 141: “equal pay for male and female workers for equal work or work of equal value”

- does not cover discrimination on the grounds of sexual orientation

1.

Pay

:= ordinary basic and minimum wage or salary or any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment from his employer

(incl. pension rights, benefits – if calculated in gross salary

NOT: working conditions)

- art. 141 does not apply to working conditions other than pay

2. Equal work

- not limited to situations where the man and the woman are contemporaneously employed

3. Burden of proof:

A claimant is required to establish facts from which it may be presumed that there is discrimination, but the burden then shifts to the employer to prove that principle of equal treatment has not been violated and the burden rests on the employer to show that it can be objectively justified

III. Equal Pay Directive

supplements Art. 141

IV. Equal Treatment Directive

1. scope:

⇒ male and female workers must receive equal treatment in access to employment, vocational training and promotion in respect of working conditions (!)

e.g. dismissal on the grounds of pregnancy is direct discrimination;

2. Derogations:

- where sex is a determining factor (job can be carried out only by male/female)
- protection of women, in particular with regard to pregnancy and maternity
- positive discrimination on behalf of women where it can be shown that inequalities actually exist