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European Public Policy

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Lesson 8

Policy instruments of the European Union

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SZÉCHENYI 2020



HUNGARIAN
GOVERNMENT

European Union
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Fund



INVESTING IN YOUR FUTURE

European Union powers and competences

Public policy is a system of regulatory decisions, legislative actions, funding priorities, and other courses of action. The EU has a number of formal and informal means available for **promoting its policies**. The five forms of legal instruments, each with a different effect on the member states' legal systems. Some are directly applicable in place. Formal legislation includes **Regulations, Directives, and Decisions**, which have the force of law, and **Recommendations and opinions**, which amount to formal suggestions to member states, but with no obligations attached. However, the informal, or 'soft law' means are no less important, especially in areas where the legal basis in the Treaties is comparatively weak.

The legal instruments, which substantiate the common policies, have legal effect only if a Treaty provision empowers the competent institutions – the European Parliament and the Council – to enact them (principle of conferral or of attribution of powers of national legislation), while others permit the progressive adjustment of that legislation to Community provisions.

The **European Union is based on the rule of law**. This means that every action taken by the EU is founded on treaties that have been approved democratically by its members. EU law helps to achieve the objectives of the treaties and put EU policies into practice.

The EU can only legislate within the **limits of the powers** assigned to it. The **Treaty of Lisbon** clearly sets out **divisions of competency** between the EU and member states. Competences that have not been transferred to the EU remain in the exclusive power of the Member States.



Where is the dividing line between EU competencies and those of the Member States.

The **EU is constrained by the Treaties** by which it was established, and **it can only make laws** where it has **the legislative competence** to do so. As a basic principle, the EU and its institutions do not have the power to decide on their legal basis and competencies. The treaties establishing the EU do not confer on the Union institutions any general power to take all measures necessary to achieve the objectives of the treaty but lay down the extent of the

powers to act. As a basic principle, the EU and its institutions do not have the power to decide on their legal basis and competencies.

Articles 2 to 6, and article 352(1) of the Treaty on the Functioning of the European Union (TFEU) set out those areas in which the EU may contribute to law-making.

Article 2 of the TFEU clarifies the **division of competences** between the EU and the Member States. Under the **principle of conferral**, the EU may only act within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives provided therein. Any areas of policy not explicitly agreed in treaties remain the domain of the member states. These competencies are divided into 3 main categories:

- exclusive competences;
- shared competences;
- supporting competences.

(1) When the treaties confer on the Union exclusive competence in a specific area, only the **Union may legislate and adopt** legally binding acts (Article 2(1), TFEU).

(2) When the Treaties confer on the Union a competence shared with the Member States in a specific area, the **Union and the Member States may legislate and adopt legally binding acts in that policy area** (Article 2(2), TFEU).

(3) In certain areas and under the conditions laid down in the treaties, the **Union shall have the competence to carry out actions to support, coordinate or supplement the actions of the Member States**, without thereby superseding their competence in these areas (Article 6, TFEU). Legal consequences flow from that categorisation.

The Lisbon Treaty clearly sets **out divisions of competency** between the EU and member states. In doing so, it highlights the areas of exclusive competency for the Union (where the EU acts), areas of shared competency (where both the EU acts as a whole and member states can act alone) and supporting competence areas where the EU is only tasked with providing support to member states.

Three principles determine how and in what areas the EU may act

conferral – the EU has only that authority conferred upon it by the EU treaties, which have been ratified by all member countries

proportionality – the EU action cannot exceed what is necessary to achieve the objectives of the treaties

subsidiarity – in areas where either the EU or national governments can act, the EU may intervene only if it can act more effectively

Exclusive competence (TFEU, Art. 3): customs union; competition rules necessary for the functioning of the internal market; monetary policy for the MSs whose currency is the euro; Conservation of marine biological resources under the fisheries policy; commercial policy

Shared competence (TFEU, Art. 4): internal market; social policy, limited to the aspects defined in the TFEU; economic, social and territorial cohesion; agriculture; fisheries; environment; consumer protection; transport; trans-European networks; energy; area of freedom, security and justice; common safety; concerns in public health matters; research; technological development and space development; co-operation and humanitarian aid

Competence to support, coordinate or supplement actions of the MSs (TFEU, Art. 6): protection and improvement of human health; industry; culture; tourism; education; vocational training; youth and sport; civil protection; administrative co-operation

Only the EU may legislate and adopt legally binding acts regarding the customs union, the



common commercial policy, competition rules and monetary policy for countries that use the euro. The EU shares jurisdiction with member states in areas including internal market rules, aspects of social policy, economic, social and territorial cohesion, agriculture and aspects of fisheries, environment,

consumer protection, transport, trans-European networks, energy, freedom, security and justice, aspects of public health, facets of research and technological development and space, and elements of development co-operation and humanitarian aid. The EU supports, coordinates, or supplements actions of the member states in the areas of culture, tourism, education, vocational training, youth and sport policies. Without entailing harmonization of member states' laws in these areas, the EU can pass legally binding acts on the basis of the provisions specific to them, and the member states will be constrained to the extent stipulated by such acts.

For instance, [Article 194 of the Treaty on the Functioning of the European Union](#) states that **energy is a shared competence** between EU countries and the EU. However, each EU country maintains its right to 'determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply'.

The creation of separate category – **'competence to provide arrangements within which EU Member States's coordinate policy'** – and its placement after shared power, but before the category of supporting, coordinating and supplementary action is marked particularly in relation to the social policy since certain aspects of social policy fall within the category of supporting, coordinating and supplementary action, even though they are not

within the relevant list. *'The Union may take initiatives to ensure coordination of Member States' social policies.* (Art. 5(3)) The most natural lineage would seem to be Article 156 of the TFEU which empowers the Commission to encourage co-operation between member states and facilitate coordination of their action in all fields of social policy, albeit through soft measures.¹

The legal sources of European Union law

There are three distinct types of EU law: primary legislation, secondary legislation, and case law. Together the body of European law is called the *acquis communautaire*.

I. The EU founding treaties as the primary source of EU law

Every legislation taken by the EU is founded on the Treaties. The treaties are legal instruments created directly by the Member States, set out EU objectives, rules for EU institutions, how decisions are made and the relationship between the EU and its members. The founding treaties and the Charter of Fundamental Rights of the European Union, which has had the same legal value as the treaties since the Treaty of Lisbon entered into force (Article 6(1), TEU). The treaties are negotiated and agreed by all the EU countries and then ratified by their parliaments, sometimes following a referendum.

The EU can pass laws only in those areas where its members have authorised it to do so, via the EU treaties. The treaties specify who can pass laws in what areas: the EU, national governments, or both.

II. The EU legal instruments as the secondary source of EU law

EU law made by the Union institutions through exercising the powers conferred on them is referred to as secondary legislation, the second important source of EU law. It consists of legislative acts, non-legislative acts (simple legal instruments, delegated acts, implementing acts), non-binding instruments (opinions,



¹ Dostal, P.: Multi-Speed European Union, p. 88.

recommendations) and other acts that are not legal acts (e.g. interinstitutional agreements, resolutions, declarations, action programmes). ‘Legislative acts’ are legal acts adopted by the ordinary or special legislative procedure (Article 289, TFEU).

These legislative and non-legislative acts can take very different forms. The most important of these are listed and defined in [Article 288 of the TFEU](#). In the way of **binding legal acts**, it includes **regulations, directives and decisions**. In the way of **non-binding legal acts**, the list includes **recommendations and opinions**.



Many other legal acts do not fit into specific categories. These include **resolutions, declarations, action programmes** and **White and Green Papers**. There are considerable differences between the various acts in terms of the procedure involved, their legal effect and those to whom they are addressed; these differences will be dealt with in more detail in the section on the ‘means of action’. The creation of secondary Union legislation is a gradual process. Its emergence lends vitality to the primary legislation deriving from the Union treaties, and progressively generates and enhances the European legal order.

The various types of EU secondary legislation

The legal acts that enable the Union institutions to impinge furthest on the domestic legal systems are the regulations. Two features highly unusual in international law mark them out.

1. **Their Union nature**, which means that they lay down the same law throughout the Union, regardless of international borders, and apply in full in all Member States.
2. **Direct applicability**, which means that the legal acts do not have to be transposed into national law but confer rights or impose obligations on the Union citizen in the same way as national law.

The **Regulation** is a legal act directly applicable to all EU countries as soon as they enter into force, without needing to be transposed into national law. They are binding in their entirety on all EU countries, and designed to ensure the uniform application of EU law in all the member states. Regulations supersede national laws incompatible with their substantive provisions

A **Directive** is binding on the Member States as regards the objective to be achieved but leaves it to the national authorities to decide on how the agreed Union objective is to be incorporated into their domestic legal systems. The reasoning behind this form of legislation is that it allows intervention in domestic economic and legal structures to take a milder form.

Transposition into national law must take place by the deadline set when the directive is adopted (generally within 2 years). When a country does not transpose a directive, the Commission may initiate [infringement proceedings](#).

Decision: Decisions are binding in their entirety. Where those to whom they are addressed are stipulated (Member States, natural or legal persons), they are binding only on them and address situations specific to those Member States or persons.

Recommendation allow the EU institutions to make their views known and to suggest a line of action without imposing any legal obligation on those to whom it is addressed. They have no binding force.

An **opinion** is an instrument that allows the EU institutions to make a statement, without imposing any legal obligation on the subject of the opinion. An opinion has no binding force.



Alongside the legal acts provided for in the treaties, the Union institutions also have available



a variety of other forms of action for forming and shaping the EU legal order. The most important of these are resolutions, declarations and action programmes.

Resolutions. Resolutions may be issued by the Parliament, the European Council and the Council. They set out jointly held views and intentions regarding the overall process of integration and specific tasks within and outside the EU. Resolutions relating to the internal working of the EU are concerned, for example, with basic questions regarding political union, regional policy, energy policy and economic and monetary union.

Declarations. There are two different kinds of declaration. If a declaration is concerned with the further development of the Union, such as the declaration on the EU, the declaration on democracy and the declaration on fundamental rights and freedoms, it is more or less equivalent to a resolution. Declarations of this type are mainly used to reach a wide audience or a specific group of addressees. The other type of declaration is issued in the context of the Council's decision-making process and sets out the views of all or individual Council members regarding the interpretation of the Council's decisions.

Action programmes. These programmes are drawn up by the Council and the European Commission on their own initiative or at the instigation of the European Council and serve to

put into practice the legislative programmes and general objectives laid down in the treaties. If a programme is specifically provided for in the treaties, the Union institutions are bound by those provisions when planning it.

White Papers and Green Papers are also of considerable importance in the Union.

White Papers are published by the Commission and contain concrete proposals for EU measures in a specific policy area. Examples of this include the White Papers on services of general interest (2004), on a European communication policy (2006), or on the future of Europe (2017).

Green Papers are intended to stimulate discussion on given topics at the EU level and form the basis for public consultation and debate regarding the topics dealt with in the Green Paper. They may give rise to legislative developments that are then outlined in White Papers.

III. The supplementary sources of EU law

The supplementary sources include the case-law of the Court of Justice of the European Union, international law and the general principles of law.

The **case-law** of the CJEU Its judgments provide an official and legally binding interpretation of EU law and, as such, are referred to as a source of law.

All publicly available information and documents relating to cases can be consulted in the case-law database.

Want to know more? You can access and download the [Court of Justice Case-law information brochure](#).

Publication and communication



Legislative acts are published in the [Official Journal of the European Union](#), L series (L = legislation). They enter into force on the date specified in them or, if no date is specified, on the 20th day following their publication.

Jurisdiction

The Court of Justice of the European Union



Since the establishment of the *Court of Justice of the European Union* in 1952, its mission has been to ensure that 'the law is observed' 'in the interpretation and application' of the Treaties. As part of that mission, the Court of Justice of the European Union:

- reviews the legality of the acts of the institutions of the European Union,
- ensures that the Member States comply with obligations under the Treaties, and
- interprets European Union law at the request of the national courts and tribunals.

The Court thus constitutes the judicial authority of the European Union and, in cooperation with the courts and tribunals of the Member States, it ensures the uniform application and interpretation of EU law.

The Court of Justice has a role similar to that of courts existing in the member states. It is responsible for ruling on legal disputes between member states, between the EU and member states, between EU institutions and authorities, as well as between individual citizens and the EU. Judges in member states can turn to the Court of Justice to rule on questions of interpretation widened the jurisdiction of the Court to assist with that task.

The Court of Justice of the European Union, which has its seat in Luxembourg, consists of two courts: the Court of Justice and the General Court (created in 1988). The Civil Service Tribunal, established in 2004, ceased to operate on 1 September 2016 after its jurisdiction was transferred to the General Court in the context of the reform of the European Union's judicial structure.

As each **Member State has its own language and specific legal system**, the Court of Justice of the European Union is a multilingual institution.

Pursuant to Article 15(3) of the Treaty on the Functioning of the European Union, the Court of Justice of the European Union has, by its **decision of 26 November 2019**, any EU citizen and any natural or legal person has a right of access to the documents of the Court of Justice of the European Union.

Further Reading

Borchardt, Klaus-Dieter: The ABC of European Union law. Luxembourg: Publications Office of the European Union, 2010

Available at:
https://www.ab.gov.tr/files/ardb/evt/1_avrupa_birligi/1_2_kurumlar/the_abc_of_the_european_union_law.pdf

Ziller, Jacques: Advanced Introduction to European Union Law. Edward Elgar Publishing, 2020

Dostál, Petr: Multi-speed european Union: Diferentiated Integration and Spatial Development in Public Opinion. Czech geographic society, 2010



QUESTIONS

What are the competences of the EU? Where are they defined?

What does 'shared competence' mean?

What is the legal act of the Union?

What is meant by EU law?

What are the primary and secondary sources of European Union law?

What is the direct applicability of EU law?

What does the CJEU do?