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Primary and Secondary Sources of EU Law

Practical analysis of EU Legal Instruments

Tomasz KRAMER

Lecturer

European Centre for Judges and Lawyers, EIPA Luxembourg



learning and development - consultancy - research



EIPA - 2011 / Sources of EU
Law

Outline

- **Written Sources of law**
 - Primary law I: The Treaties
 - Secondary law (Legislative and Non-Legislative)

- **Unwritten Sources of law**
 - Rulings of the Court of Justice
 - Primary law II: The General Principles

- **The Hierarchy of Sources**

PRIMARY SOURCES OF EU LAW - I

the treaties

Founding Treaties

- Treaty establishing the European Coal and Steel Community (**ECSC**) 1952-2002
- Treaty establishing the European Economic Community (**EEC**) 1957
- Treaty establishing the European Atomic Energy Community (**Euratom**) 1957

First Amending Treaties

- **Merger Treaty** establishing a single Commission and Council - 1967
- **Single European Act**, amended EEC Treaty, introducing QMV (SEA) 1987

Landmark Developments

- Treaty establishing the European Union (**Maastricht Treaty**) 1993
 - EEC Treaty changed to Treaty Establishing the European Community
 - Introduced new forms and fields of intergovernmental co-operation (the Treaty establishing the European Union)
 - Introduced the 3 Pillar system
- **Amsterdam Treaty**: Revised, consolidated and renumbered TEC and TEU - 1999
- **Nice Treaty**: Mainly reformed EU institutions (Commission, voting in Council, etc.) in preparation for enlargement – 2003

Most Recent Development

- **Lisbon Treaty**: Mainly reforms EU institutions, includes Freedom Security and Justice in co-decision procedure and gives CJEU competence in all areas except

Lisbon Treaty system of binding acts

TREATIES ON EUROPEAN UNION AND FUNCTIONING OF EU

LEGISLATIVE ACTS
(REGULATIONS/DIRECTIVES/DECISIONS)
ordinary procedure (= codecision) + special proc.

DELEGATED ACTS

non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act

Commission

Parliament or Council can object and/or revoke delegation

IMPLEMENTING ACTS

where uniform conditions for implementing legally binding Union acts are needed

Commission

under the control of the Member States

OTHER ACTS

specific cases / CFSP

OR

Council

SECONDARY SOURCES OF EU LAW

- Law made by the European Institutions in the exercise of the powers conferred on them by the Primary Law
- Requires an explicit reference to the relevant provisions of Primary Law on which it is based (Legal base)

Legislative and non-legislative acts

- **Legislative Acts** (Art. 289 TFEU)

- Regulations
- Directives
- Decisions

- **Non-legislative Acts**

- Delegated Acts (Art. 290 TFEU)
- Implementing Acts (Art. 291 TFEU)
- Recommendations
- Opinions
- etc.

SECONDARY SOURCES OF LAW:

Regulations

- Measures of general application, applicable to all Member States and with the aim to *harmonise*
- Binding in their *entirety* upon and *directly applicable within* all Member States
- *Automatically* become part of the national legal systems without the need for separate national legislative procedures to enter regulations into national law
- MS *must* adopt measures (legal, institutional, human and budgetary resources) allowing application and enforcement
- MS may *not obstruct* the direct applicability inherent in regulations – May require adaptation of existing laws and practices

SECONDARY SOURCES OF LAW:

Directives

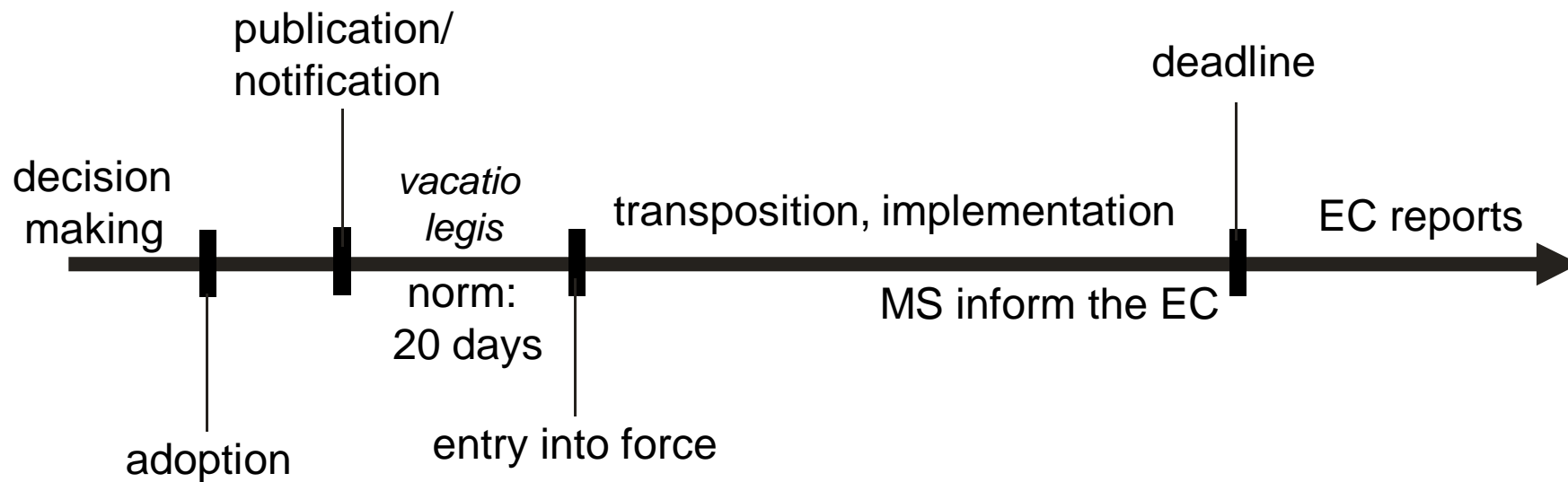
- Can be addressed to a single, a group or all Member States and are *binding upon* the Member States to whom they are addressed
- Set rules and *objectives* to be achieved, while leaving some choice to the Member States as regards form and method of implementation
- Member States must implement directives, i.e. 1) *transposition*, 2) adopt *implementing measures*, and 3) establish *administrative and enforcement capacities*
- Approximated legislation must be *applied and enforced in compliance with* the Directive, Treaty provisions, General Principles and interpretations developed by CJEU
- Late, wrongful or non-implementation may have *consequences* (direct effect, state liability, infringement procedure...)

SECONDARY SOURCES OF LAW:

Decisions

- Are *directly* applicable and binding in their *entirety* upon those to whom they are addressed (individuals or Member States) – If no addressee: General applicability
- Are thus *directly enforceable* in the Member States
- Must be notified to the addressees
- Are adopted by the Council, but
 - the latter may delegate power to the Commission to take decisions (Art. 290 TEU)
 - the Treaty empowers directly the Commission to take decisions in certain areas (e.g. competition, cf. Art. 105 TFEU, and state aid, cf. Art. 108 TFEU)

Timeline of Secondary EU Law



Delegation of Powers with the Lisbon Treaty

- **Introduction of two different avenues for delegation powers to the European Commission:**
 - **Implementing Acts** : routine and technical implementing measures to be adopted by the Commission, under the control of the Member States executives, with possible referral to Council and Parliament (Art. 291 TFEU)
 - **Delegated Acts** : implementing measures to be adopted by the Commission touching on the prerogatives of the legislative institutions, under the direct control of EP and Council (Art. 290 TFEU)

Implementing Acts (Art. 291 TFEU)

- Member States shall adopt all measures of national law necessary to implement legally binding Union acts
- Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases ... on the Council
- ... The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers

Implementing Acts (Art. 291 TFEU)

- Member States are responsible for the implementation of the Union law
- Commission is entrusted this role of implementation, when uniform conditions for implementation are necessary (the Council may also exercise implementing powers in some specific cases).
- It is therefore the Member States which have to control the Commission when the latter exercises its implementing powers.

Delegated Acts (Art.290 TFEU)

- **A legislative act may delegate to the Commission the power to adopt non-legislative acts**
 - to supplement or amend certain non-essential elements of the legislative act.
 - objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts
 - The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power.

- **Legislative acts shall explicitly lay down the conditions to which the delegation is subject; these conditions may be as follows**
 - the European Parliament (AM) or the Council (QM) may decide to revoke the delegation
 - the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act

The ex-3 pillar structure of the EU

EC Law

EU

C
F
S
P

Intergovernmental
cooperation

EC

Community Approach

E
C
S
C

E
U
R
A
T
O
M

JH
A
/
P
C
C
M

Intergovernmental
cooperation

Secondary law before Lisbon Treaty

A need for simplification of EU Acts!!!

Title V CFSP	Community Treaties	Title VI PJCC
<ul style="list-style-type: none">■ <i>Common Strategy</i>■ <i>Joint Action</i>■ <i>Common Position</i>■ <i>Decision</i>	<p><i>Acts of Council or EP & Council:</i></p> <ul style="list-style-type: none">■ <i>Regulation</i>■ <i>Directive</i>■ <i>Decision</i> <p><i>Implementing Acts (usually COM):</i></p> <ul style="list-style-type: none">■ <i>Regulation</i>■ <i>Directive</i>■ <i>Decision</i> <p><i>Non binding acts:</i></p> <ul style="list-style-type: none">■ <i>Recommendation and opinion</i>	<ul style="list-style-type: none">■ <i>Framework decision</i>■ <i>Decision</i>■ <i>Convention</i>■ <i>Common Position</i>

The new legislative framework (I)

Categories of legal acts, as defined by the EU Constitution (Art. I-33)

Legislative acts:

- European Law
- European Framework Law

Non-legislative (or executive acts) acts:

- European regulation
- European decision

Non binding acts:

- Recommendations
- Opinions

The new legislative framework (II)

The new legal framework under the Treaty of Lisbon

The traditional distinction between Primary and Secondary Law is maintained:

- **Primary Law**
 - The Treaties ('Founding' and 'Modifying')
- **Secondary Law** - two novelties introduced by the Reform Treaty:
 - The legal instruments used in the present 2nd and 3rd Pillars are abolished
 - The distinction between legislative and non-legislative acts, introduced by the European Constitution, is brought in

Secondary Law Instruments – changes brought by the Lisbon Treaty, the Second Pillar

- Former Article 12 TEU: The Union shall pursue the objectives set out in Article 11 TEU by...
 - defining the principles of and general guidelines for the common foreign and security policy,
 - deciding on common strategies,
 - adopting joint actions,
 - adopting common positions,
 - strengthening systematic cooperation between Member States in the conduct of policy
- Since the entry into force of the Lisbon Treaty, these types of instruments are not adopted anymore, apart from general guidelines and decisions defining actions and positions (cf. Art. 25 TEU)

Secondary Law Instruments – changes brought by the Lisbon Treaty, the Third Pillar

☐ Former Article 34 TEU:

- Common positions: define the approach of the Union to a particular matter
- Framework decisions: binding upon MS as to the result to be achieved, for the purpose of approximation of laws, leave some choice as to form and methods to the MS. No direct effect
- Decisions: for any other purpose, binding, no approximation of national laws
- Conventions: legally binding, recommended to the MS for adoption in accordance with their respective constitutional requirements

☐ Now relevant article again = Article 288 TFEU

Status of the instruments adopted before the Lisbon Treaty?

- They are not null and void, they still have legal effects until they are replaced or amended
- The new instruments adopted after the entry into force of the Lisbon Treaty will be adopted in the form of the acts listed by Article 288 TFEU

OTHER SOURCES OF EU LAW (I)

Recommendations and Opinions (listed in Art. 288 TFEU)

- May be issued by Council, Commission, Agencies, Parliament
- Non-binding
- Content as well as actions by EU institutions according to such documents are always subject to CJEU review

Other non-binding Sources (not listed in Art. 288 TFEU)

- Notices and Guidelines
- Resolutions
- Communications
- Proposals
- Resolutions
- Preparatory documents (e.g. White papers, Green papers)

etc.

OTHER SOURCES OF EU LAW (II)

- EU case law
- General principles of EU law
- International Treaties

CJEU and GC Case law



Procedures:

- **Infringement cases:** Enforcement of the Law (against Member States)
- **Preliminary rulings:** Interpretation of EU Law (need for uniform meaning of the law)
- **Judicial review:** Review of the Legality of legal acts/inaction including

appeals of
Commission decisions
or inaction

cases concerning
validity, competence
and procedure

staff cases
(European Civil Service Tribunal)

Sources of EU Law - Summary

Primary sources:

- Foundation Treaties
- Amending Treaties
- Accession Treaties
- Protocols, appendices to the Treaties

Other sources:

- Jurisdiction of the CJEU
- General Principles
- International Treaties

Secondary sources:

- Regulations
- Directives
- Decisions

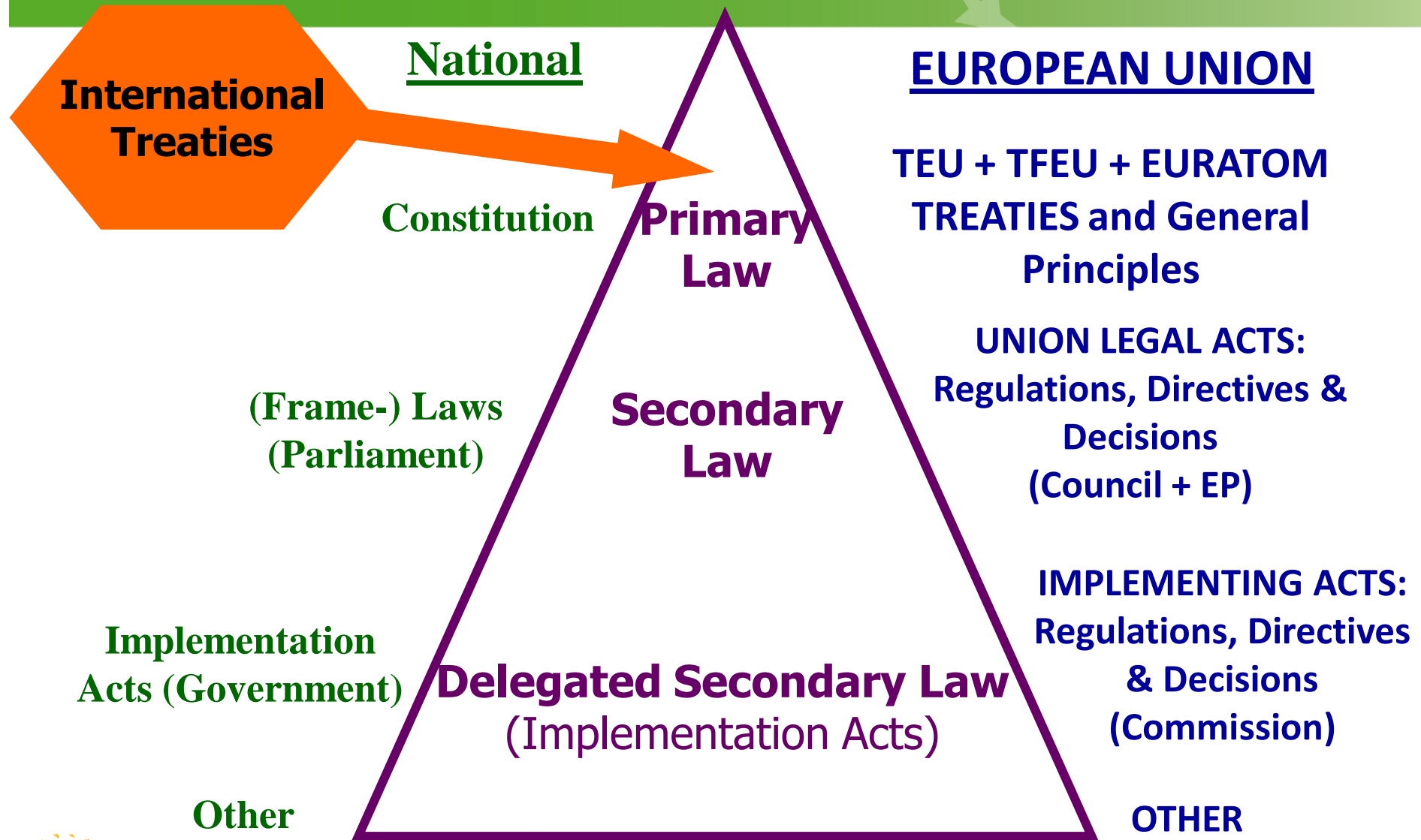
- Delegated Acts
- Implementing Acts

- Recommendations
- Opinions
- Etc.

+NB Acts of former 2nd and 3rd pillar (insofar as they are still in force)!

EU LEGAL FRAMEWORK

the hierarchy of norms





Do You Have Any Questions?

**We would be happy to
help.**



Tomasz KRAMER

Lecturer

Tel: +352 426 230 209

Fax: +352 426237

Email: t.kramer@eipa.eu



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