

EU Constitutional Law: III. The sources of EU law

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URL: http://www.cvce.eu/obj/eu_constitutional_law_iii_the_sources_of_eu_law-en-1a399f2f-7231-45d7-a4fc-15a329eed18f.html

Publication date: 10/09/2012

III. EU Law – the Sources

1. Overview of the ‘hierarchy’ of norms in EU law.
2. Does the EU have a ‘Constitution’?
3. The role of public international law in the EU
4. Legislative, delegated and implementing Acts

1. Overview

- EU law is based upon and derives from different sources of law – both written and unwritten.
- Such sources arise from:
 - European Treaty provisions
 - Treaty on European Union (TEU)
 - Treaty on the Functioning of the European Union (TFEU)
 - Charter of Fundamental Rights of the European Union (CFR)
 - Protocols attached to the TEU and TFEU.
 - Unwritten (constitutional) general principles of law (as recognised in the case law of the European Court of Justice (ECJ))
 - International agreements entered into by the EU.
 - Legislative, delegated and implementing acts issued by the EU institutions
 - These are issued for matters in which the EU is empowered by the Treaties to take a measure and to be decided within the framework of procedures provided for in the TFEU.
 - Specific acts and decision-making procedures exist for EU foreign and security policy under the TEU (see below for further details).

Hierarchy of norms in EU law

Primary Law: Treaties and General Principles of Law / Droit primaire: traités et principes généraux de droit / Primärrecht: Verträge und allgemeine Rechtsgrundsätze

Provisions of TEU, TFEU, Charter of Fundamental Rights (CFR); protocols to these Treaties; unwritten general principles of EU law

International agreements / accords internationaux / völkerrechtliche Abkommen

Negotiated and decided under the procedure of Article 218 TFEU

Legislative acts / actes législatifs / Gesetzgebungsakte

Acts defined in Article 289 TFEU as legal acts decided by the legislative procedure (either the ordinary legislative procedure under Article 294 TFEU or one of the specific legislative procedures)

Delegated acts / actes délégués / delegierte Rechtsakte

Issued by the Commission under Article 290 TFEU as 'acts of general application to supplement or amend certain non-essential elements' of a legislative act

Implementing acts / actes d'exécution / Durchführungsrechtsakte

issued by the Commission (exceptionally the Council) under Article 291 TFEU, where uniform conditions of implementation are required in the EU

2. The Constitution of the EU – Primary Law

- Does the EU have a ‘Constitution’?
 - See: ECJ, Case 294/83 *Les Verts* [1986] ECR 1339, paragraph 23.
 - Here the European Court of Justice (ECJ) states that the former European Community (EC) is a legal system based on a constitutional charter and following the principle of the rule of law:
 - It states that the EC ‘is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty’.

Written Primary Law under Lisbon

The Treaty of Lisbon will result in two treaties and one Annex

- Treaty on European Union (TEU, the main provisions on the institutions and distribution of powers between the EU and the Member States as well as on foreign policy).
- Treaty on the Functioning of the European Union (TFEU, all technical details of institutional structure, decision-making procedures, specific policies).
- Charter of Fundamental Rights of the European Union as binding annex to the TEU.

Questions on constitutionalism

- What is the role of a **preamble of a Treaty**?
- What do we learn from Art. 48 TEU about the relation between **public international law** and **EU law**?
 - Is general public international law still applicable in the relation between Member States?
 - Why is it necessary that the MS ratify the amendments to the EU treaties ‘in accordance with their respective constitutional requirements’?
- How to join the EU?
- How to leave the EU?
- What does the analysis of the preamble of the TEU and Articles 48-50 tell us about the nature of the EU?

Preamble to the Treaty on European Union (1)

Excerpts:

RESOLVED to mark a new stage in the process of European integration undertaken with the establishment of the European Communities,

DRAWING INSPIRATION from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law,

RECALLING the historic importance of the ending of the division of the European continent and the need to create firm bases for the construction of the future Europe,

CONFIRMING their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law, (...)

DESIRING to deepen the solidarity between their peoples while respecting their history, their culture and their traditions,

Preamble to the Treaty on European Union (2)

RESOLVED to achieve the strengthening and the convergence of their economies and to establish an economic and monetary union including, in accordance with the provisions of this Treaty and of the Treaty on the Functioning of the European Union, a single and stable currency,

DETERMINED to promote economic and social progress for their peoples, taking into account the principle of sustainable development and within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields,

RESOLVED to establish a citizenship common to nationals of their countries,

Preamble to the Treaty on European Union (3)

RESOLVED to implement a common foreign and security policy including the progressive framing of a common defence policy, which might lead to a common defence in accordance with the provisions of Article 42, thereby reinforcing the European identity and its independence in order to promote peace, security and progress in Europe and in the world,

RESOLVED to facilitate the free movement of persons, while ensuring the safety and security of their peoples, by establishing an area of freedom, security and justice, in accordance with the provisions of this Treaty and of the Treaty on the Functioning of the European Union,

RESOLVED to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity,

Some Q to the preamble

Is this the preamble of a 'constitution'? What is the nature of the issues evoked in the preamble?

Why should the TEU have a preamble?
What is the legal value of one, how can it be used?

Art. 48 TEU – Treaty amendment

Art. 48 TEU

1. The Treaties may be amended in accordance with an **ordinary revision procedure**. They may also be amended in accordance with **simplified revision procedures**.

Ordinary revision procedure

2. The Government of any Member State, the European Parliament or the Commission may submit to the Council proposals for the amendment of the Treaties.

These proposals may, inter alia, serve either to increase or to reduce the competences conferred on the Union in the Treaties.

These proposals shall be submitted to the European Council by the Council and the national Parliaments shall be notified.

Art. 48 (continued)

3. If the European Council, after consulting the European Parliament and the Commission, adopts by a simple majority a decision in favour of examining the proposed amendments, the President of the European Council shall convene a **Convention** composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission.

The European Central Bank shall also be consulted in the case of institutional changes in the monetary area.

The Convention shall examine the proposals for amendments and **shall adopt by consensus a recommendation to a conference of representatives of the governments of the Member States** as provided for in paragraph 4.

The European Council may decide by a simple majority, after obtaining the consent of the European Parliament, not to convene a Convention should this not be justified by the extent of the proposed amendments. In the latter case, the European Council shall define the terms of reference for a conference of representatives of the governments of the Member States.

Art. 48 (continued)

4. A conference of representatives of the governments of the Member States [so called 'Intergovernmental Conference – IGC] shall be convened by the President of the Council for the purpose of **determining by common accord the amendments to be made to the Treaties.**

The amendments shall **enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.**

5. If, two years after the signature of a treaty amending the Treaties, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council.

Simplified revision procedures

6. The Government of any Member State, the European Parliament or the Commission may submit to the European Council proposals for revising all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union relating to the internal policies and action of the Union. (...)

Some Q to the Treaty amendment procedure

What does the procedure outlined in Article 48 TEU teach about

- The legal nature of the Treaties?
- The self-understanding of the Member States in the process?
- Should the citizens be more directly involved in Treaty amendments, i.e. by way of referendums?

Art. 49 TEU – Joining the EU

Art. 49 TEU

1. Any European State which respects the values referred to in Article 2 and is committed to promoting them may **apply to become a member of the Union.**

The European Parliament and national Parliaments shall be notified of this application. The applicant State shall address its application to the **Council, which shall act unanimously** after consulting the Commission and after receiving the consent of the **European Parliament, which shall act by a majority of its component members.** The conditions of eligibility agreed upon by the European Council shall be taken into account.

2. The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an **agreement between the Member States and the applicant State.** This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements.

Art. 50 TEU – Withdrawal

- Any Member State may decide to **withdraw from the Union** in accordance with its own constitutional requirements.
2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and **conclude an agreement with that State**, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
 3. The **Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement** or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period. (...)

Some Q on joining and leaving the EU

Is there a paradox between

- the fact that the preamble of the TEU proclaims to create e.g. a citizenship of the EU ‘common to the nationals of their countries’ and
- The fact that a Member State can decide to leave the EU and thus withdraw all benefits of that citizenship for its nationals?

Constitutionalisation of the EU?

- Historically, the question of constitutionalisation of the EU was first raised in the context of the question, whether
 - the Treaties were concluded only between the Member States and thus could only give rise to rights and obligations of states, or
 - Whether individuals could also claim rights and be held to have obligations arising from Treaty provisions?
- We will discuss these questions further when talking about what is known as direct effect and supremacy of EU law below.
- Here, it is important to note that this question was addressed by two famous cases in 1962 (*Van Gend en Loos*) and 1964 (*Costa v ENEL*) before the ECJ which are worth mentioning here for the first time:

Constitutionalisation

In case 26/62 *Van Gend en Loos* [1963] ECR 1, paras 10, 12, 13, the ECJ explained that:

‘Independently of the legislation of Member States, Community law [now Union law] not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.’

Two years later, in case 6/64 *Costa v. ENEL* [1964] ECR 1141, the ECJ explained this further stating that:

‘by contrast with ordinary international treaties, the EEC Treaty [now the TEU and TFEU] has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.’

Why did the Member States create such a new type of supranational law, in-between the traditional binary notions of national and international law?

The EU – Legal Personality

Under Article 47 TEU, the EU has ‘legal personality’. That means:

- it may enter into international agreements under the procedure laid down in Article 218 TFEU and Article 37 TEU.
- It may enter into agreements with states and private parties under its own law or a MS’s private law.

3. Public International Law

Although the creation of the EU is based on Treaties initially based on public international law, the States have thereby created a specific legal order. The EU

- is neither an organisation under international law nor
- is its constitutional basis the same as that of a state.
- The EU has a specific supranational nature.

Generally, therefore, public international law is not applicable within the EU. That means, it is neither applicable

- in establishing the legal relation between the institutions, nor
- in the relation between the EU and the MS.

Public international law

Public international law, however, governs the relation between the EU and non-Member States as well as between the EU and international organisations. Thereby:

- Public international law obligations nevertheless can be applicable as legal standard to review the legality of an act of the EU.
- In *Racke v Hauptzollamt Mainz*, the ECJ noted that ‘the European Community must respect international law in the exercise of its powers. It is therefore required to comply with the rules of customary international law’... (Case C-162/96 *Racke* [1998] ECR I-3655, paras. 45, 46. See also: Case C-290/90 *Poulsen and Diva Navigation* [1992] ECR I-6019, para. 9)

Public international law

Article 216 (2) TFEU explains this:

- agreements concluded by the Union ‘are binding upon the institutions of the Union and on its Member States’.
- As a consequence, where possible, both EU law and Member States’ law giving effect to EU law, have to comply with with international agreements concluded by the EU.

The ECJ however also showed up the limits of this:

- By concluding an international agreement, the EU institutions may not violate EU Treaty law. The ECJ stated that:
‘[i]t is also to be recalled that an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community [now Union] legal system’ (Joined Cases C-402/05P and C-415/05P *Kadi and Al Barakaat v Council and Commission* [2008] ECR I-6351, para. 282)

PIL – EU law: summary

See C-308/06 *Intertanko* [2008] ECR I-4057:

Para 51: ‘As is clear from settled case-law, the powers of the Community [now EU] must be exercised in observance of international law, including provisions of international agreements in so far as they codify customary rules of general international law.’ (C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019)

Para 42: EU institutions ‘are bound by agreements concluded by the Community and, consequently, those agreements have primacy over secondary Community legislation’ (C-61/94 *Commission v Germany* [1996] ECR I-3989; C-311/04 *Scheeps Agentuur Dordrecht* [2006] ECR I-609)

Para 45: ‘the Court can examine the validity of Community legislation in the light of an international treaty only where the nature and the broad logic of the latter do not preclude this and, in addition, the treaty’s provisions appear, as regards their content, to be unconditional and sufficiently precise.’ (C-344/04 *IATA* [2006] ECR I-403)

4. Legislation, Delegation and Implementation

Internally, EU law has a complex typology of acts.

- The TEU and TFEU distinguish between
 - legislative, delegated and implementing acts issued as either
 - regulations, directives or decisions.
- Many specific types of act exist for example in the area of CFSP, for establishing the budget and in the form of inter-institutional agreements, to name just a few.