

European Legislation

Lecture Title: Unwritten sources of EU Law,
Competences of EU Law and the Principle of
Supremacy

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Diploma in Law (Malta)



Part I: Sources of EU Law



Written Sources

- Primary Sources
 - Founding Treaties – Treaty of Paris, Maastricht Treaty
 - Amending Treaties
 - Accession Treaties
 - Annexes, Declarations and Protocol
- Secondary Sources
 - Regulations
 - Directives
 - Decisions
 - International Agreements
 - Recommendations and Opinions



Unwritten Sources

- Decisions of the CJEU
- General principles of EU Law
- General principles of International Law



Decisions of the CJEU

- Unwritten source
- Jurisprudence which fills in the lacunae created by the law
- Impossibility of the legislator to cater for every provision



Fundamental Rights

- Unwritten source of EU Law
- Suspension of a Member State
- Charter of Fundamental Rights of the EU – not of general application to national law
- The European Convention on Human Rights and Fundamental Freedoms



General Principles of Law

- Developed by the CJEU
 - Human Rights
 - Other general principles of law

Why were they developed?

- ✓ Avoid denial of justice
- ✓ Fill gaps in EU law
- ✓ Strengthen coherence of EU law



Human rights

Right to property

Right to carry on an economic activity

Right to an effective judicial remedy

Protection of family life, home and family correspondence

Freedom of expression

Freedom of religion



Other General Principles of Law

- Proportionality
- Equality
- Legal certainty and non-retroactivity
- Legitimate expectation
- Natural Justice



• Part II: Competences



Competence of EU Law

- General Principle – EU given competence according to the Treaties
- Prior to Lisbon Treaty – Difficult to decipher the areas of competence
- Regulations existed but not a complete classification – CJEU had a greater role



Impetus for reform

- **Clarity:** The treaty provisions on competence were unclear, jumbled and unprincipled
- **Conferral:** Clear demarcation lines of EU competence are required
- **Containment:** EU's powers should be limited
- **Consideration:** Rethinking of the EU's powers

- **Lisbon treaty – scepticism on the EU project**



Lisbon Treaty

- Principle of conferral – Article 5(1) of the TEU
- Lisbon Treaty created three categories of competence:
 - Exclusive competence
 - Shared competence
 - Actions to support, coordinate or supplement Member States
- Competence is determined according to subject-matter
- Areas of exclusive competence by Member States – still expected to legislate with loyalty towards other Member States



Exclusive competence

- Only the EU may legislate and adopt legally binding acts
- 2 exceptions:
 - Member States can only act if empowered to do so by the Union or
 - To implement Union acts
- Complete harmonization of laws



Areas of exclusive competence

- Art. 3 TFEU
 - Customs union
 - Competition rules
 - Monetary policy for the MSs whose currency is the euro
 - Conservation of marine biological resources under the common fishing policy
 - Common commercial policy

External Exclusive Competence - Conclusion of specific international agreements in these areas – EU alone with third countries and international organisations



Shared competence

- The EU and MSs may legislate and adopt legally binding acts
- Only if the EU has not exercised its competence to act, or if the EU has decided not to exercise its competence



Areas of shared competence

- Article 4 TFEU:
 - Internal market
 - Certain aspects of social policy
 - Economic, social and territorial cohesion
 - Agriculture and fisheries
 - Environment
 - Consumer protection
 - Transport
 - Trans-European networks
 - Energy
 - Area of freedom, security and justice
 - Certain aspects of common safety concerns in public health matters



Support, coordinate or supplement

- Both have powers but EU's power is only to support, coordinate supplement
- The EU action does not supersede the MSs' competence
- No Harmonisation



Areas of support, coordination and supplement

- MS competences supersedes
- Areas
 - Protection and improvement of human health
 - Industry
 - Culture
 - Tourism
 - Education, vocational training, youth and sport
 - Civil protection
 - Administrative cooperation



Criticism

- Lack of clarity and clear classification
- Areas which overlap
 - Competition rules (EC) vs Internal market rules (SC)



Principle of subsidiarity

- The main principle in determining EU competence
- 3 main tests
 - Union takes action only if the MSs cannot achieve the objectives set out
 - Union can better achieve these objectives because of its scale or effects
 - Union should not go beyond what is necessary to achieve the desired objectives
- Principle of subsidiarity does not apply in exclusive competence





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- Part III: Principle of supremacy



Supremacy of Union Law

- Founding treaties were silent on this principle
- Which law prevails in case of conflict between National and EU Law?
 - **EU LAW IS ABSOLUTE AND UNCONDITIONALLY SUPREME**
 - All sources of EU law prevail over national laws



Development by CJEU

- Developed by the CJEU in *Flaminio Costa v Enel* (Case 6/64)
- “By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and a capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States of the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves”



Rationale for supremacy

- A uniform common market could not be achieved if EU Law is subordinate to national law of the various states.
- National courts are required to give effect to EU law
- 1. Contractarian Argument: Flowed from the Accession Agreements – by transferring certain competences to the EU, Member States have limited their sovereignty.
- 2. Functional Argument: Aims of integration and cooperation would not be achieved if one MS refuses to give effect to Union Law. Uniformity.
- 3. Analytical Argument: In practice the direct applicability of EU Law would be meaningless if MS were permitted to nullify the effects of EU Law by national legislation



Does EU Law prevail over all laws? What about constitutional rights or Human Rights?

- *Internationale Handelsgesellschaft vs Einfuhr (1970) (C-11/70)*
- Not even a constitutional provision could override the supremacy of EU Law.
- Not even a fundamental human right
- *Ciola v Land Vorarlberg – 1999* – Not even administrative acts



What if the national law pre-dates the EU Law?

- *Amministrazione delle Finanze dello Stato v Simmenthal Spa* – 1978
- Supremacy of EU Law applied irrespective of whether the national law pre-dated or post-dated EU Law. Even if that law was enacted prior to entry into force of EU law in that MS



Is the Court required to nullify the national law first?

- *Simmenthal case* – Not necessary to nullify the national law first
- Not requiring the national court to invalidate or annul the provision of national law but rather to refuse to apply it
- Eventually, to ensure legal certainty, an express repeal of conflicting pre-existing legislation may be required (*Commission v. France, C-167/73*)



Should the national judge declare the national provision as null and void?

- *C-22/97, Ministero delle Finanze* – No. National Judges must disapply inconsistent national provisions, whilst ensuring that any rights conferred by EU Law are enforced under the domestic procedure
- May suspend the inconsistent provisions of national law as an interim measures

Is the doctrine of supremacy applicable to res judicata?

- Is the national judge obliged to review and set aside a judgment of the national courts which has become final and thus has acquired the status of res judicata, if incompatible with a subsequent judgment of the CJEU?

Kapferer cases – C-234/04

- **NO!**
- The principle of res judicata prevails
- Ensures stability of law, legal certainty and sound administration of justice

BUT ...



What if allocation of exclusive competences is at stake?

- *C-119/05 – Lucchini* – related to state aid incompatible with the common market – CJEU imposed a restriction on res judicata over the principle of spuremacy
- It ruled that a national judgment that had become final but was in flagrant violation of the division of competences between EU and Member States was in breach of EU Law and could no longer enjoy the status of res judicata!

Declaration 17

- The Treaty of Lisbon contains no article formally enshrining the supremacy of Union law over national legislation, but a declaration was attached to the Treaty to this effect – Declaration No. 17
- “.... *The Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law*”
- Council Legal Service opinion – not being included in a Treaty shall not in any way change the existence of the principle



Role of the CJEU

- Importance of case law for the principle of supremacy





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