



**DR. JUR. KLAUS KAMMERER**

### Column 10

This column focuses on the **legal sources** of the European Union, which, as supranational law and in the form of various legal norms – subordinate to primary law (secondary and tertiary law) – take precedence over the constitutional and statutory law of the Member States, with their direct effect, the principle of primacy of application, and the obligation to implement legal acts subject to reservations or discretionary powers into national law.

The fact that Union citizens often perceive these legal principles, in their actual application, as antagonistic to established traditions and their concrete living conditions may be illustrated by the image of the Union as a "bureaucratic monster" – often effectively portrayed in the media. The impact of European legal norms on the living conditions of Union citizens and the conditions of the real economy therefore has a significant influence on policy as a policy-making task. The facts thus created also form the "backdrop" against which we – in the legal sociological sense – must always accompany our presentation with a critical view of the Union, its policies, and the law enacted by the Union's institutions.

*"All law is created for the sake of mankind" (Hermogenian, Digest 1.5.2)*

#### **Hermogenian, Digest 1.5.2**

Cum igitur hominum causa omne ius constitutum sit, primo de personarum statu ac post de ceteris, ordinem edicti perpetui secuti et his proximos atque coniunctos applicantes titulos ut res patitur, dicemus.

*Since, therefore, all law has been established for the sake of men, we will speak first of the status of persons and then of others, following the order of the perpetual edict \*) and applying the titles next to and connected to them as the situation permits.*

*\*) Consolidated, final version of the praetorian edict created through legal development and laid down by the jurist Julian around 130 AD under Emperor Hadrian*

The mental reservations of those subject to the law and their mistrust of the “bureaucrats” of the European Commission – taken up, reinforced, and often abused by populist currents on the political fringes – may be illustrated by the following excerpt from **Martin Walker’s** crime novel – **Bruno, Chef de Police**:

*Excerpt from the crime novel by Martin Walker:*

### **Bruno, Chef de police**

..... **Bruno** (full name: Bruno Courrèges), chief of police in the town of Saint Denis in the Périgord, looked at the caves in the limestone cliffs beyond the small stream that flows into the Vézère in front of the town. These eerie caves with their ancient drawings and paintings attracted scientists and tourists from all over the world to this valley, which the tourist office calls the 'cradle of humanity' because it was supposedly the longest continuously inhabited cultural area in Europe. People had lived here for 40,000 years; ice ages and heat waves, floods, wars and famines had not been able to drive them away. Bruno understood the connection with this place, although he could imagine that there were caves worth seeing with unique petroglyphs elsewhere.

Down on the riverside he saw the crazy Englishwoman, watering her horse after her morning ride. As always, she was extremely carefully dressed, wearing shiny black boots, beige jodhpurs and a black jacket. Reddish-brown hair grew out from under her black riding cap like a foxtail. Bruno wondered why everyone called her the crazy Englishwoman. To him she seemed perfectly reasonable, and she also seemed to run her little guesthouse very well. Even her French was quite understandable, which could not be said of most of the other English people who had settled here.

He looked at the road that followed the river, saw the first farmers driving their trucks to the weekly market and decided that it was time to start his shift. He pulled his cell phone out of his pocket and dialed the familiar number of the station hotel. "Did they turn up at your place, Marie?" he asked. "They were at the Saint-Alvère market yesterday, so they must be in the area." "No, Bruno. There were only the guys from the museum project and a Spanish truck driver here," the landlady replied. "Remember? The last time they were here and didn't find anything, they wanted to rent a car in Périgueux to throw you off their trail. Damn Gestapo."

Bruno played a game of cat and mouse with the **EU-Inspectors** who were trying to enforce food hygiene regulations in the French markets. As a representative of the police municipale, he felt primarily obliged to his community, its market and mayor, rather than to the **written laws of France**, especially if these actually came **from Brussels**. There was nothing wrong with hygiene, but the farmers of the municipality of Saint-Denis had been making their **pâté de foie gras** and their **rillettes de porc** for centuries, and they did not like the fact that some foreign bureaucrats were dictating to them the conditions under which they could sell their **foie gras** and their spread made by braising and stirring leftover pork meat and fat for a long time. So Bruno, together with other members of the regional police municipale, had developed a complex early warning system to alert the market traders in good time when checks were expected.

The inspectors - commonly known as the Gestapo in an area of France that had strongly resisted the German occupation - had made their first inspection visit to the markets of the Périgord in a car with red Belgian number plates. ....

*Acts of violence against them were unnecessary as long as the local early warning system could ensure that the non-EU-compliant goods had disappeared from the markets by the time the inspectors arrived. The inspectors subsequently changed their tactics. They arrived by train and stayed in the hotels at the stations. But they were recognized at first glance by the hoteliers, and they all had plenty of cousins and suppliers who made **crottins** from goat's cheese and **foie gras**, jams and cooking oils flavored with walnuts or truffles, butter and yoghurt, **pâtés** and **mousses** and **confits**, thanks to which the Périgord was considered the heart of French gastronomic culture - at least for local patriots like Bruno and his only superior, the mayor of Saint-Denis, as well as all the elected City councilors of the municipality and even for Montsouris, the communist. Bruno therefore also saw it as his official mission to protect neighbors and friends from the "**idiots from Brussels**", who could only imagine mussels and French fries as good food and then ruined fine potatoes with ready-made mayonnaise.*

.....

## I. Legal History – The *ius commune* and the General Principles of Law in the European Legal Tradition

European law, like the national law of the Member States, is rooted in the tradition of **Roman law** and its reception. The legal concepts of Roman law, its maxims, and terminology have found their way into European law and the case law of the ECJ as time-tested principles and rules from the era of the *ius commune*. These maxims are applied as "general principles of law common to the legal systems of the Member States":

### **Article 340 TFEU (ex Article 288 TEC)**

*In the case of non-contractual liability, the **Union** shall, in accordance **with the general principles common to the laws of the Member States**, make good any damage caused by its institutions or by its servants in the performance of their duties.*

*Notwithstanding the second paragraph, the **European Central Bank** shall, in accordance **with the general principles common to the laws of the Member States**, make good any damage caused by it or by its servants in the performance of their duties.*

.....

**Article 188 of the Euratom Regulation** contains a congruent provision (see the Consolidated Version of the Treaty establishing the European Atomic Energy Community – 2016/C 203/01)

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12016A/TXT>

*THE TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY  
(2016/C 203/01)*

### **Article 188 Euratom Regulation**

*In the case of non contractual liability, the Community shall, in accordance **with the general principles common to the laws of the Member States**, make good any damage caused by its institutions or by its servants in the performance of their duties.*

.....

The ***ius commune***, in its original form, prepared by the glossators of the early Middle Ages and later adapted to the modern needs of the time in codifications, was the subject of the **reception** of Roman law, originating in Italy (Bologna) in the 13th century and extending into the early modern period, encompassing all European countries that are now Member States of the Union (see **Hermann Lange**, Roman Law in the Middle Ages, Volume I – The Glossators, Munich 1997, Chapter 8, Summary, § 53 II; **Lange / Kriechbaum**, *ibid.*, Volume II – The Commentators, Munich 2007, Chapter 6, § 88 – Country Overview).

These legal principles continue to shape the legal awareness of judges and Advocates General appointed to the ECJ, trained in different national legal systems. They play a significant role in the process of a general part of Community law that has emerged from judicial practice and continues to develop (**Kaser/Knütel**, Roman private law, 18th edition 2005, § 1 marginal numbers 38, 39).

A substantial part of our *fundamental rights* can be derived from ancient sources in the *ius commune*. But it was only with the French Revolution, and via North America, that a corresponding thinking and legal awareness emerged that determines our current legal thinking.

The **Opinion** and the **grounds of the judgment** in *J. Nold v European Commission* (**Case 4/73** – Opinion of 28 March 1974 and judgment of 14 May 1974) are evidence of how far the roots reach back into the received law of Roman antiquity, and how strongly the values and moral concepts already secured by Roman law still shape our conceptions of law and justice today – here as European customary law:

<https://curia.europa.eu/juris/showPdf.jsf?text=&docid=88476&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=5003017>

**Opinion of Mr. Advocate-General Alberto TRABUCCHI at the European Court of Justice on 28 March 1974 – CASE 4/73 – Page 512 right column / Page 513 left column / Page 514**

*The plea of discrimination is clearly unfounded. The terms of business authorized by the Commission are in fact based on objective criteria which rule out any possibility of discrimination against coal wholesalers. All those who satisfy the objective conditions required have the right to qualify for direct purchase.*

*The submission of violation of fundamental rights, put forward by the applicant, must be considered insofar as the right invoked is protected by the system. As emerges from the case law of*

this Court, the **fundamental rights** generally recognized by the Member States form an integral part of our Community system, which, by drawing inspiration from the **common traditions of the Member States**, guarantees respect for these rights within the limits of the powers conferred on the Community and in accordance with the objectives assigned to it. It is therefore necessary to establish first of all whether the fact that the contested rules may have the effect of depriving the applicant undertaking (J. Nold) of the possibility of direct access to supplies of Ruhr coal can constitute a violation of one of those fundamental rights which, because of their prime importance, must be protected by the Community legal order.

.... The question raised, expressed in more concrete and realistic terms, can lead us to examine whether the power which the Commission undoubtedly holds to authorize rules which producers have freely drawn up for the purposes of fixing their conditions of sale, has been exercised in a manner which does not offend against general principles which, even if not expressly laid down in the Treaty, are an integral part of the Community order. It will be necessary to examine in particular whether there has been any violation of the general principle of **protection of property** which is recognized by all the Constitutions of the Member States and which, without doubt, is also an integral part of the Community order.

... After the specific statements on the matter which this Court has already clearly expressed, it is perhaps unnecessary to recall that, if the task of the Court of Justice as an institution is that of ensuring that in the application of the Treaties the law is observed, this means that the Court should be **particularly sensitive** when dealing with problems which concern those **fundamental rights** forming the basis of every civil society.

**The respect for liberty, for property ownership, the declaration of principles of equality, of non-discrimination, of proportionality** — to cite only a number of those which are really fully recognized — **form a part of that concept of law which governs and forms the framework for the whole Community system** and from which that system, even in its application to individual cases, may never deviate.

..... In short, **it is always a question of those principles *quarum causa omne ius constitutum est*: we find them in the ancient laws, as the written basis of human society, we find them in the codes of the nineteenth century, which were conceived precisely for the purpose of setting out the validity of those declarations in the form of Articles; we now find them more formally proclaimed in modern Constitutions, among which is Article 14 of the German Constitution invoked in this case. The acts of the Community authorities must all respect these principles and the duty of the Court is to ensure that they are fully applied. But it is for the very purpose of ensuring fundamental respect for these rights that their exercise must be regulated. Recognition by the Constitution does not mean that the subject matter is no longer subject to any rules, but that the rules must be inspired and limited by an effective and essential recognition of the principles.**

.....

<https://curia.europa.eu/juris/showPdf.jsf?jsessionid=A72058B00FE022BD08859623C29A7B73?text=&docid=88495&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3335795>

European Court of Justice, judgment of 14. Mai 1974 — CASE 4/73 - Law

**Reasons for the decision .....**

**2. As to the objection based on an alleged violation of fundamental rights**

12 The applicant asserts finally that certain of its fundamental rights have been violated, in that the restrictions introduced by the new trading rules authorized by the Commission have the effect, by depriving it of direct supplies, of jeopardizing both the profitability of the undertaking and the free development of its business activity, to the point of endangering its very existence. In this way, the Decision is said to violate, in respect of the applicant, a right akin to a proprietary right, as well as its right to the free pursuit of business activity, as protected by the Grundgesetz of the Federal Republic of Germany and by the Constitutions of other Member States and various international treaties, including in particular the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the Protocol to that Convention of 20 March 1952.

13 As the Court has already stated, **fundamental rights form an integral part of the general principles of law**, the observance of which it ensures. In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States.

Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law. The submissions of the applicant must be examined in the light of these principles.

14 If rights of ownership are protected by the constitutional laws of all the Member States and if similar guarantees are given in respect of their right freely to choose and practice their trade or profession, the rights thereby guaranteed, far from constituting unfettered prerogatives, must be viewed in the light of the social function of the property and activities protected there under. ....

## II. The Sources of Law – Primary and Secondary Supranational Union Law

In this chapter, we examine the nature of law, the characteristics of Union law as supranational law, and secondary and tertiary law as secondary law. Two further chapters (Chapters III and IV) are devoted to directives as secondary law. They are of particular importance due to the issues associated with their regulatory relationship and implementation into national law.

Supranationality means that Union law – as we have already presented and discussed thematically in previous columns – is legally binding and enjoys primacy over national law, including constitutional law. Union law has direct effect and not merely as transformed law.

Secondary and tertiary supranational Union law consists primarily of the legal acts adopted by the Union institutions on the basis of primary law (see Article 288 TFEU for a list). In contrast to binding regulations, directives, and decisions, recommendations and opinions – despite their legal nature – are only non-binding measures. The same applies to measures referred to as guidelines or communications. The legal nature of a measure adopted by an EU institution, as well as of a customary law provision, is determined not by its formal designation, but by its subject matter and substantive content. A hierarchy within secondary EU law exists between

so-called basic acts, which – as delegated or implementing acts – authorize the adoption of non-legislative acts (Article 290(3) TFEU, Article 291(2) TFEU). A legislative act always requires the participation of the European Parliament (Article 289 TFEU, Article 294 TFEU).

## **1. Primary EU law**

We have already become acquainted with primary EU law in previous columns and presented its specific significance.

In brief: Primary EU law consists of the EU Treaty and the FEU Treaty, together with the protocols and annexes annexed to them (Article 51 TEU). Furthermore, the Charter of Fundamental Rights is part of primary law, ranking equally with the treaties, including in its legally binding nature (Article 6(1), first subparagraph TEU). Additional sources of law may include subsequent additions and amendments to international treaties, as well as customary law, which supplements or amends written primary law in the same way.

The general principles of law (already mentioned in the first chapter), as unwritten law developed by the ECJ in its case law, also belong to primary law, consisting of the legal principles associated with the rule of law, such as the principle of legality of administration, the principle of legal certainty and the protection of legitimate expectations, as well as the principle of proportionality. All sources of law are legally equal to the Union Treaties.

## **2. Secondary and tertiary law – regulations, decisions, recommendations, opinions, and protocol declarations as legal acts**

### **2.1. Regulations**

A regulation has general application. It is binding in its entirety and directly applicable in every Member State – see Article 288(2) TFEU. General application means that the regulation – like a national law – has an abstract, general effect because it is applicable to objectively determined situations and produces legal effects for generally and abstractly defined groups of persons. Regulations generally apply to the entire Union; exceptionally, the validity of a regulation may be limited to one Member State or individual Member States. However, there must be objective reasons for such a limitation, otherwise the regulation would violate the general principle of equality.

This comprehensive binding nature of a regulation, in contrast to the effect of a directive, is expressed in the fact that a regulation is also binding with regard to the means and forms to

be used, and not only with regard to the result to be achieved. Furthermore, it has direct effect in every Member State and therefore becomes part of the legal systems applicable in the Member States upon its entry into force.

Authorities and courts must apply a regulation ex officio, without the need for a national implementing act, such as an implementing law. Conflicting national law is superseded by the primacy of Union law and remains inapplicable.

This is a distinct question from their direct applicability. Whether regulations are directly applicable depends on the extent to which the provisions establish clear and unconditional obligations. This must be examined in each individual case. Direct applicability is not precluded if a regulation empowers national administrative authorities to issue specific administrative acts. However, a regulation may also stipulate that – similar to a directive – a national legislative implementing act is still required (so-called limping regulation).

A similar situation applies to measures adopted to implement a regulation in order to specify a discretion contained therein within the limits of those provisions. They must not thwart their direct applicability, conceal their nature under EU law, and must adhere to the inherent limits of the discretion conferred.

Regulations may contain **rights** or **obligations for individuals**, which must be determined through interpretation. The content of the regulation can produce not only vertical effects in the relationship between citizens and the state, but also horizontal effects between citizens themselves.

For example, **Regulation EC 261/2004** regulates claims for damages in the event of a flight delay or cancellation and creates specific grounds for claims for the citizens affected.

[https://eur-lex.europa.eu/resource.html?uri=cellar:439cd3a7-fd3c-4da7-8bf4-b0f60600c1d6.0004.02/DOC\\_1&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:439cd3a7-fd3c-4da7-8bf4-b0f60600c1d6.0004.02/DOC_1&format=PDF)

**REGULATION (EC) No 261/2004 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 February 2004** establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91

## 2.2. Decisions

A decision is binding in its entirety on those to whom it is addressed – Article 288(4) TFEU. It therefore has individual validity and constitutes a single act. It can be addressed to individuals, natural or legal persons (so-called *individual-directed decisions*) or to Member States (so-called *state-directed decisions*) and binds them individually, similar to a domestic administrative act. The addressees of an *individual directed decision* must either be explicitly named or at least individually identifiable. For this purpose, it is sufficient that the addressees can be identified in terms of number and identity. This must be a limited number of persons, whose circle is determined at the time of adoption and cannot be expanded in the future for legal reasons (in contrast, a regulation is addressed to an indefinite number of persons). A *state directed decision* can require an individual Member State, for example, to recover from a company aid granted in violation of Union law. Decisions do not always have to be addressed to specific addressees. However, if this is the case, they generally have a normative character unless their meaning and purpose merely indicate a programmatic character (Article 288(4) TFEU).

Acts within the scope of *organizational powers* can also be adopted in the form of a decision. Each Union institution has the power to regulate its internal organization by decision, such as rules of procedure, statutes, or rules of procedure, or to establish staff regulations.

Decisions are binding in their entirety and have direct effect. With regard to both *individual-directed* and *state-directed* decisions, the regulatory relationship is exhausted by the – vertical – relationship between the Union and the addressee(s). As with directives, a horizontal effect of decisions directed at states is rejected, since, due to the lack of an addressee to private individuals, no direct obligations can arise from them for this group of persons. Private individuals cannot therefore rely on such a decision in legal disputes. However, the decisions are subject to review of legality by the ECJ in the context of a validity reference (Article 267(1)(b) TFEU) or in the context of an action for annulment (Article 263 TFEU).

### **2.3. Recommendations and Opinions**

As we already saw in *Column No. 5 – Presentation by Prof. Dr. Claudia Schubert on European Labor Law* – recommendations and opinions are not binding – Article 288(5) TFEU. They merely suggest a certain course of action to their addressees – Member States or individuals – but do not create a direct legal obligation. The addressees are therefore free to follow or disregard the "advice" contained in a recommendation or opinion.

However, recommendations and opinions are by no means irrelevant from a legal perspective. Thus, the review of validity in the *preliminary ruling procedure* also extends to acts of the Union

institutions (Article 267 (1) lit. b TFEU) and thus also to recommendations and opinions – according to the case law of the **ECJ** in the case *Kingdom of Belgium v European Commission* – **RS C-16/16 P**, judgment of 20 February 2018 \*).

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62016CJ0016>

\*) **ECJ Case 16/16 P** – Kingdom Belgium / European Commission, Judgment 2018-02-20

Due to the **duty of loyalty to the Union** arising from Article 4 (3) TEU, Member States must take recommendations and opinions into account. They must also be observed if they are intended to supplement binding Union provisions (regulations, directives, decisions). The courts of the Member States refer to them accordingly when interpreting domestic legal provisions adopted for their implementation.

#### **2.4. Minutes of Declarations**

When adopting an act of secondary legislation, the Council, the Commission, or individual Member States often make statements that are recorded in the minutes of the Council meeting. In contrast to the introductory recitals – which are now found in almost all legal acts – the so-called minutes of declarations are not part of the legal act in question. The ECJ therefore rightly assumes in its established case law that minutes of declarations by a Member State cannot be used in the interpretation of a legal act. However, the Court of Justice takes into account statements in the minutes of the European Commission when interpreting a provision of secondary law, provided that the interpretative result remains within the limits of the wording of the provision in question.

#### **2.5. On the interchangeability of legal acts**

The **form of the legal acts** that the institutions may adopt is prescribed by the Treaties. For example, it may be expressly provided that the empowered institution must adopt either a directive or a regulation to achieve the desired regulation. Due to *the principle of conferral*, the acting institution cannot deviate from this prescribed legal form.

However, numerous provisions – in the sense of a discretionary clause – contain several alternative courses of action. This means that they do not prescribe a specific type of legal act in individual cases, but instead allow, for example, the adoption of *directives or regulations* (Article 46 (1) TFEU). In other cases, the treaties empower the Council and Parliament to adopt *all appropriate provisions* in the ordinary legislative procedure (Article 294 TFEU). Even more

generally, the treaties provide for authorizations that allow these institutions to adopt *regulations* or *measures* in the legislative procedure (Article 18 (2), Article 114 (1), second sentence, TFEU). Article 296 (1) TFEU even provides that the choice of the form of action is left to the *discretion* of the empowered institution if the treaties do not specify the legal act to be adopted. The institution must then choose the form of action that is most appropriate in terms of structure and legal effect in order to fulfill the assigned task appropriately and expediently.

However, the choice of legal act is subject to the **principle of proportionality** (Article 5 (4) TEU, Article 296 (1) TFEU – *general principle of law in Union law, national constitutional law, administrative law and private law*). This means that the form of action

- it must be *suitable* for achieving the desired objective or for promoting its achievement;
- it must also be *necessary*, i.e., no less drastic measure can be considered that would achieve the same result. This applies both to individuals, whose civil liberties must be protected wherever possible, and to the Member States and their competences. Thus, the adoption of a directive, which leaves Member States regulatory discretion, may be preferable to the adoption of a regulation.
- Finally, the chosen form of action must be *proportionate* to the desired outcome (*means-end relationship – principle of proportionality in the narrower sense*). In practice, however, regulations increasingly appear to be preferred over directives in order to avoid their typical implementation problems, which is worthy of criticism.

By the *Interinstitutional Agreement of December 22, 1998*, the Union institutions *Parliament, Council and Commission* followed a request from the governments of the Member States, in accordance with a declaration annexed to the Treaty of Amsterdam, and established **guidelines for the drafting quality** of Union legal acts. These require that legal acts be drafted in a clear, simple, precise manner and have a standard structure – *title, preamble, enacting terms, and, where appropriate, annexes*.

According to the **ECJ** (order of March 5, 1999 in **Case C-153/98 P - GUÉRIN AUTOMOBILES v COMMISSION**, paragraphs 9 to 11 and 13 to 15), Union law does not require legal acts to be accompanied by **information on legal remedies**.

In this case, the *appellant* alleged a violation of the *general Community law principles* of protection of legitimate expectations, legal certainty, respect for the rights of the defence, and the right to effective judicial protection, as well as the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms, due to the failure to provide information on legal remedies. Information on the available legal remedies and the time limits within which they could be lodged was necessary to give effect to the right to judicial protection.

The ECJ rejected these arguments in its assessment (see paragraphs 13 to 15), referring to Articles 189, 190, 191, and 192 of the EC Treaty. These provisions precisely define the nature and system of legal acts that may be adopted by the Community institutions and do not impose a general obligation on them to inform the addressees of those acts of the available legal remedies and the time limits within which they may be lodged. While such an obligation to provide information exists in most Member States, it is generally established and regulated by the legislature. In the absence of an express Community provision, there is therefore no general obligation for Community administrations or courts to inform Community citizens of the available legal remedies and the conditions under which they may lodge them.

However, this decision is incomprehensible given the Union's commitment to the **rule of law**.

Article 296 (2) TFEU requires that legal acts state the **reasons** on which they are based and refer to proposals, initiatives, recommendations, requests, or opinions. This obligation to state reasons serves, on the one hand, to facilitate self-regulation by the adopting body, usually the *Council*, the *European Parliament*, or the *Commission*. On the other hand, it enables those affected to review the measure in legal and factual terms, thus providing **effective legal protection**. Depending on the type of legal act and the circumstances in which it is adopted, the statement of reasons must be clear and coherent and contain a description of the reasons that led the body to adopt the act. Since the statement of reasons is also relevant for the interpretation of secondary legal acts, slogan-like, general formulations or mere repetitions of the wording of the legal basis are not sufficient.

According to Article 5 (1) TEU, the *principle of conferral*, the adoption of formal acts of secondary law requires a contractual legal basis. This legal basis does not necessarily have to be explicitly stated, but must be evident from the circumstances, i.e., from other evidence, such as the recitals. To the extent that the secondary legislation is based on several Treaty provisions as legal bases, the choice of legal basis must be based on objective, judicially verifiable factors, including, in particular, the objective and content of the legal act. Only in exceptional cases may the legal act be based on multiple legal bases.

This is the case if the legal act simultaneously pursues several objectives or comprises several components that are inextricably linked.

The absence of a statement of reasons or a reference renders the legal act defective and, as a breach of an essential procedural requirement, may constitute grounds for an **action for annulment** before the ECJ (Article 263 TFEU).

The EU Treaties do not provide for direct sanctions against Member States to **enforce legal acts** to compel them to comply with them (an exception is the first sentence of Article 126 (11) TFEU, which allows the Council to impose a fine on a Member State in the event of non-compliance with certain Council decisions within the framework of *Economic and Monetary Union*). However, the *Commission* can enforce regulations, directives, and decisions against Member States by bringing an **action before the ECJ** (Article 258 TFEU). In addition, *individuals* have the option of bringing legal action before national courts and invoking the direct effect of a directive or decision addressed to the Member State, provided that the legal act in question is *directly applicable*.

If a directive addressed to a Member State does not have direct effect, under certain circumstances the individual may have a **claim for state liability** under EU law against the defaulting Member State if they have suffered damage as a result of the incorrect, late, or non-implementation of the directive. This claim must be asserted before the national courts. The new rule of law mechanism also allows for the withholding of EU funds from a Member State in the event of serious deficiencies in the rule of law that jeopardize the correct use of funds.

The *Council* can provide for **coercive measures** against individuals in regulations adopted by it alone or jointly with the *European Parliament*. These include fines and penalty payments. A *fine* is a payment obligation imposed on a person for violating a legal provision binding on them, and is intended to prevent a repetition. A *penalty payment* is intended to encourage a person to comply with the obligation imposed on them.

Such decisions of the Council or Commission that impose a payment obligation are *enforceable titles*. However, **compulsory enforcement** against states is excluded (Article 299 (1) TFEU). Enforceability against *individuals* requires that the decision contains a clear, unconditional, and final demand for payment, which precisely specifies the amount to be paid, its type (currency), amount, and addressee. Compulsory enforcement is carried out in accordance with the civil procedural provisions of the Member State in whose territory it takes place (Article 299

(2) sentence 1 TFEU). The enforcement order is issued by the public authority designated by the government of the Member State (in Germany, this authority is the Federal Minister of Justice). Enforcement can only be suspended by a decision of the ECJ or a national court (Article 299 (4) sentence 1 TFEU).

### **3. Secondary and Tertiary Law as Derived Union Law – *European Customary Law* and *General Legal Principles***

#### **European Customary Law**

*European customary law* is part of the unwritten Union law at all legal levels. It is based on a general and consistent practice of the relevant legal entities, who comply with this practice out of a general conviction that they are obligated to act in this way based on a legal principle. Only the Member States and the Union itself can be considered as *acting legal entities* practicing a specific practice. European customary law with the status of *primary* Union law cannot arise without a **practice of the Member States** based on a corresponding legal conviction. This is because any amendment or addition to primary law, even through customary law, is bound by the corresponding will of all **Member States**. Primary law customary law can therefore only arise through a corresponding practice of the Member States as "masters of the treaties"; only their legal conviction is decisive.

Second, according to the *principle of conferral of powers*, the **Union institutions** may only act in accordance with the Treaties, i.e., primary law. Derived customary law at the level of secondary or tertiary law can arise from a corresponding practice by the Union institutions, from state practice, or from consistent conduct by the Union and Member States, provided it is consistent with primary law. The practice must be based on the conviction that it conforms to a generally legally binding rule. The legal conviction must be held by the legal entities acting in each case, i.e., the legal entities practicing the practice.

#### **General Principles of Law**

The *general principles of law*, whose legal history and significance we have already learned about, are derived by the **Court of Justice of the European Union** through *comparative legal evaluation*. The competence to derive them as legal principles from the synopsis and comparison of Member State provisions is based on Article 19 (1) sentence 2 TEU, which states that the Court of Justice shall ensure that the law is observed in the interpretation and application of the Treaties.

Due to the *principle of conferral*, legal principles can only be developed within the competence of the Union. Points of reference in the Union Treaties can be found in Article 340 (2) TFEU and in the old version of Article 6 (2) TEU. These principles include, independently of the Charter of Fundamental Rights, fundamental rights (Article 6( 3) TEU), the principle of proportionality, principles such as good faith (in particular the principle of forfeiture), legality of administration, legal certainty and the protection of legitimate expectations, the prohibition of retroactivity, particularly of criminal laws, the right of access to files, and the principle of confidentiality of legal advice. The rules governing the Union's non-contractual liability are also governed by the general principles common to the legal systems of the Member States (Article 340 (2) TFEU), as are the Union rules on withdrawal and revocation of Union legal acts.

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*Chapters III and IV of the next column, No. 11, are devoted to directives and their implementation into national law, as well as questions of interpretation consistent with the directives, before we turn – in the final column of this series – to legal protection in the European Union.*

*(signed)* Dr. Kammerer.