EU LEGAL ACTS
HIERARCHY, SEPARATION OF POWERS AND MODEL RULES

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Course Outline

Session I - The Hierarchy of Norms: Constitutionalizing Institutional Practice

Session II - EU Legal Acts: Beyond A Formal Separation of Powers

Session III - EU Executive Rule Making Procedures: Towards Model Rules?
Session I

The Hierarchy of Norms: Constitutionalizing Institutional Practice
EU Law In Search of Order?

- Legal Instruments
- Procedures
- Actors
- Representation
- Participation
"The very language of modern democracy, its grammar, syntax and vocabulary, revolve around the state, the nation and the people ... The Union, it is generally accepted, is not a state. The result is a description of oranges with a botanical vocabulary developed for apples."

Session I

Institutional Oranges

Or

Revamping EU Legal Instruments

Why, How and Where?
WHY?

Simplification of instruments and procedures

Clarification and better explanation to citizens?

More powers to the EP (legislature) and Commission (executive)

Democracy and Efficiency

Benign *vignette* or unintended consequences?
Hierarchy

A ranking of acts according to the democratic legitimacy of their authors and adoption procedures.

Precedence of legislative over executive acts in case of conflict.
Pre-Lisbon Typology and Ranking: Art 249 and 202 EC

- Regulations
- Directives
- Decisions
- Recommendations and opinions (soft)
- Powers of implementation (comitology)
A Flurry of Legal Instruments

More than 30 different types of act in addition to initial catalogue Art 249 TEC

A whole series of other instruments (guidelines, framework programme, implementing decision etc) elsewhere in the Treaties

More added in practice (decision as a general rule, declarations, resolutions, conclusions etc)

Pillar structure added to proliferation of legal instruments (common strategy, common position, joint action, framework decision etc.)
Legislative Procedures

- Complexity of different types and locations
- A *sui generis* procedure in which decision-making is the result of interaction between national and Union levels and between various Union institutions (Council, Commission, European Parliament)
- Laid down in Treaties in provisions granting Union competence to legislate in a particular policy area
- More than 22 (!) different procedures for adoption of legislative acts with different institutional constellations
- Four main ones: co-decision, assent, cooperation and advisory
- Budgetary procedure
- Procedures under Title V (CFSP)
- Procedures under Title VI (JHA)
- Procedures relating to negotiation and conclusion of international agreements
The excessive system of legal instruments (30+)
Can they be reduced and given names that indicate their content more clearly?

The excessive number of decision-making procedures (22+)
Can they be reduced?
Can they be split into ‘legislative’ and ‘non-legislative’ procedures?
"Community Legislation": term of convenience

- Referred to in institutional practice (eg Rules of Procedure)
- Never defined in abstract terms by Court
- All binding acts of general application
- But no relation with *categorization* or *legal effects* of instruments in general
Formalized, derived source of law (excluding Treaty provisions and general principles of law)

Binding (excluding, e.g., recommendations and opinions)

Of general application, i.e. normative (excluding, e.g. decisions in individual cases)

Adopted directly on the basis of Treaty provisions (excluding acts adopted on the basis of delegation in secondary sources of law)
Limits of informal definition

- Complex definition and imperfect coverage
- Shades of grey and ill adapted for politics
- No overall definition on basis of:
  - who adopts legislation (actor),
  - how legislation is adopted (procedure),
  - what separates the content of legislation from other types of regulation (substance)
Possible definitions?

- **Typological** definition: regulations and directives the closest but can also be adopted under authorization in secondary legislation (not Treaty)

- **Authorship** definition: No one legislature (Council; EP and Council; Commission)

- **Procedural** definition: Wide variety of procedures depending on legal basis. Not a single legislative procedure.

- **Substance** based definition: which criteria?
Legislation amounts to *expression of original political will* as opposed to implementation of pre-defined goals? (Principle of conferred powers)

Legislation involves *basic and fundamental political choices* as opposed to technical and detailed issues reserved for non-legislation? (Can be detailed rules of legislation)

Legislation does *not include* internal measures, administrative or budgetary acts, acts concerning inter-institutional or international relations, even when such acts satisfy the four formal legal characteristics of Community legislation identified above?
Hierarchy of Norms in the EU: Treaty History

- 1984 Draft Treaty on the European Union
- 1992 Treaty on European Union (Maastricht)
- 1996 Intergovernmental Conference (IGC)
- 2002-2003 European Convention
- 2004 Constitutional Treaty adopted
- 2009 The Lisbon Treaty entered into force
Where? Typology and Hierarchy

- Article 249 EC → Article 288 TFEU
- Article 202 EC → Articles 290 and 291 TFEU
- Three categories of acts post-Lisbon
  - Legislative
  - Delegated
  - Implementing

- Non standard acts remain (in principle non binding)
Defined according to their adoption procedure, rather than substance.

The relevant procedures

- Ordinary legislative procedure (OLP)
- Special legislative procedures (SLP)

Kept old typology (regulations, directives, decisions, NOT Law, Framework Law etc)

Overlapping typology across categories legislation, delegation, implementation
Only legal acts adopted according to OLP or SLP are legislative acts
- Formal definition, ignores substance
- Distinction between legislative and non-legislative acts
  - E.g. Regulation 1/2003
- Legislative acts not regulatory acts for the purposes of Article 263(4) TFEU (*Inuit case*)
  - SLP with consultation of EP and democratic legitimacy
Article 290 TFEU - Delegated Acts

- A new category of acts to delegate technical details
- Non-legislative acts of general application which ‘supplement’ or ‘amend’ certain ‘non-essential elements’ of the legislative act
- Meant to eliminate excessive detail in EU legislation
- Adopted only by the Commission, not the Council
- Controlled by the EP and the Council (who can retrieve the power to legislate)
- Sunset clause –limited duration
The meanings of ‘supplement’ ‘amend’ and ‘non-essential elements’

‘essential elements’ – Case C-355/10 Parliament v. Council

The effectiveness of the ex ante and ex post controls contained in Article 290 TFEU compared to the pre-Lisbon Comitology controls for delegated legislation

Are the controls listed in article 290 TFEU exhaustive or illustrative?
Article 291 TFEU - Implementing Acts

- Only when uniform conditions for implementation required
- Enacted by the Commission (or the Council)
- Based on ‘legally binding Union acts’
- New Comitology rules according to OLP
  - Historic victory for the EP
- No formal role for the Council in Comitology
Legal issues

- Article 291 (2) – ‘uniform conditions’
- Clarifying the difference between implementing and delegated acts
  - Case C-427/12 Commission v. EP and Council
- Are implementing acts regulatory acts under Art. 263(4) TFEU?
  - Case T-262/10 Microban v. Commission
Incomplete/Messy Categorization and Hierarchy

- Reduction in the number of instruments
- Clarification of the differences between the instruments
- BUT Certain acts do not fit the categories of legislative, delegated and implementing acts
- Non-legislative acts directly based on the Treaty make up a significant proportion of rules adopted by the institutions of the Union.

19 different procedures (28 different TFEU legal bases) of acts adopted by the Council on basis of TFEU (about half adopted under SLP)
- Telling the difference between legislative and delegated acts is at times far from simple
- The distinction between delegated and implementing acts is also hazy
Apples and Oranges?

- Simplification as a factor promoting democracy?
- Citizens need clarity and to understand scope and legitimacy of legal instruments
- Citizens must know who does what within the Union
- Transparency and openness for legislation?
- Transparency and openness for non legislation?
- Analogy with the Nation State (intelligent design)? OR EU as evolving ‘unidentified political object’
- Institutional power shifts: from the Council to the EP? And from the Council to the Commission?