

Introduction to Italian Law

EU Competences and Sources of EU Law

Principle of conferral

- The principle of conferral is a fundamental principle of European Union Law
- According to this principle, and all its competences are voluntarily conferred on it by its member states.
- Powers of the EU: “*derived powers*”, which have been conferred from the MS to EU;
- Article 5 TEU
 - 1. *The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.*
 - 2. *Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.*
- Article 4 TEU
 - 1. *In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.*

Categories of EU Competences

- **Exclusive Competence :**
 - “When the Treaties confer on the Union **exclusive competence** in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts” (Article 2.1 TFEU)
- **Shared Competence:**
 - “When the Treaties confer on the Union a **competence shared** with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence” (Article 2.2 TFEU)
- **Supporting competences:**
 - Competence to support, coordinate or supplement actions of the member states (Article 6 TFEU)

“Flexibility clause”

- “**flexibility clause**”: the “flexibility clause” permits the EU to decide in areas not covered specifically by the Treaties.
 - The flexibility clause was included by the fathers of the Treaties in recognition of the fact that it would be impossible to provide for all contingencies that may arise throughout the integration process. It allows the EU to act in areas where EU competences have not been explicitly granted in the Treaties but are necessary to the attainment of the objectives set out in the Treaty. It thus represents a means of adapting to new challenges.
 - The former flexibility clause (ex Article 235 of the Treaty establishing the European Economic Community (EEC Treaty) and ex Article 308 of the Treaty establishing the European Community (EC Treaty) – was retained in the Treaty of Lisbon in Article 352 TFEU
 - *“If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures”* (Article 352 TFEU)

(The doctrine of “*implied powers*”)

- The European Court of Justice's role in interpreting the Treaties which created the European Community has allowed it to clarify the division of powers between the Community and the Member States.
- Through its decision-making it *has expanded the treaty-making authority of the EC (EU) far beyond the situations provided for by express grant of powers.*
- See: *ECJ Commission v. Council (ERTA) Case C- 22/70*
 - “*The Union may conclude an agreement with one or more third countries or international organizations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope*”.

EU exclusive competences

- Article 3 TFEU
- *1. The Union shall have **exclusive competence** in the following areas:*
 - (a) *customs union;*
 - (b) *the establishing of the competition rules necessary for the functioning of the internal market;*
 - (c) *monetary policy for the Member States whose currency is the euro;*
 - (d) *the conservation of marine biological resources under the common fisheries policy;*
 - (e) *common commercial policy.*
- *2. The Union shall also have **exclusive competence** for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.*

EU *share competences*

Art. 4 TFEU

- 1. The Union shall **share competence** with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.
- 2. Shared competence between the Union and the Member States applies in the following principal areas:
 - (a) internal market;
 - (b) social policy, for the aspects defined in this Treaty;
 - (c) economic, social and territorial cohesion;
 - (d) agriculture and fisheries, excluding the conservation of marine biological resources;
 - (e) environment;
 - (f) consumer protection;
 - (g) transport;
 - (h) trans-European networks;
 - (i) energy;
 - (j) area of freedom, security and justice;
 - (k) common safety concerns in public health matters, for the aspects defined in this Treaty.

Principles of subsidiarity and proportionality

- The principle of subsidiarity and the principle of proportionality regulate the exercise of powers by the European Union (EU).
- They seek to set actions taken by EU institutions within specified bounds.
- The ***principle of subsidiarity*** is defined in Article 5.3 of the TEU. It aims to ensure that decisions are taken as closely as possible to the citizen and that constant checks are made to verify that action at EU level is justified in light of the possibilities available at national, regional or local level.
- Article 5.3 TEU
 - 3. Under the, ***principle of subsidiarity*** in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the ***principles of subsidiarity*** and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

Principles of subsidiarity and proportionality

- Under the ***principle of proportionality*** this rule, the action of the EU must be limited to what is necessary to achieve the objectives of the Treaties. In other words, the content and form of the action must be in keeping with the aim pursued.
- Article 5.4 TEU
 - “Under the ***principle of proportionality***, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality”.
- (See: *Protocol n. 2 to the Lisbon Treaty of the principles of subsidiarity and proportionality*)

Sources of European Union Law

- The E.U. is based on the *rule of law*: every action taken by the EU is founded on Treaties that have been approved democratically by its members;
- Union Law consists of so-called *primary* and *secondary law*
- There are two main types of EU law:
 - *Primary Law*;
 - *Secondary Law*;
 - (*) (*Supplementary law* and *Soft law*);

Sources of European Union Law

- *Primary law* can be seen as the supreme source of law in the European Union.
- *Primary Law* is at the top of the European legal order, and can be seen as the supreme source of law in the European Union;
- *Primary Law* is at the top of the European legal order;
 - it prevails over all other sources of EU law;
 - the Court of Justice is responsible for securing that prevalence through a variety of forms of action such as the:
 - action for annulment (Article 263 TFEU) and
 - preliminary ruling (Article 267 TFEU).

Sources of European Union Law

- **Primary law** consists mainly of the following:
 - The “*Founding treaties*”
 - The amending treaties, the accession treaties; protocols annexed to those treaties, and supplementary agreements amending specific sections of the founding treaties. (*)
 - (*) After Lisbon Treaty, the *main sources of primary EU law* of are:
 - ❖ The *Treaty of European Union* and
 - ❖ The *Treaty on the functioning of European Union Law*
 - ❖ (and according to art. 6.1 TEU: The *Charter of Fundamental Rights of the EU*)
 - The EU’s International Agreements (**)
 - (**) **European Union** has legal personality (Article 47 TEU)
 - General Principles of EU Law (***)

General Principles of EU Law

- (***) *General Principles of EU Law*
 - The general principles of EU law are general principles of law which are applied by the ECJ and the national courts of the member states when determining the lawfulness of legislative and administrative measures within the European Union.
 - Many general principles of EU law are unwritten and judgemade, even though over time many have been codified in the Treaty;
 - Many of the more institutional-type of principles can now be found in the beginning of the TEU, such as the *principle of sincere cooperation, conferral, Member State equality and the respect for national constitutional identity, subsidiarity, and proportionality; etc.*

General Principles of EU Law

- Article 6 TEU:
 - *The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.*
 - *(. . .)*
 - *2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.*
 - *3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.*
- Some other provisions, moreover, contain important principles of non-discrimination, including Articles 18, 45 and 157 TFEU.
- Several important principles of EU law, however, still have no Treaty basis and remain based on the case law of the CJEU: these unwritten principles include direct effect, supremacy and effectiveness, three of the most distinctive principles of EU law.

General Principles of EU Law

- In terms of *hierarchical status*, the general principles are usually considered part of primary law (certainly when they are codified in the Treaty);
- The hierarchical status of general principles is important for the question if principles can even trump the Treaties themselves, and thereby the will of the Member States as ‘Masters of the Treaty’.
- One of the reasons that EU law has so many general principles, and that these principles play such an important role, is that on many points the Treaties only lay down a very *limited and open framework*:
- This limited framework was primarily focussed on economic integration, and less on other legal issues such as fundamental rights. Consequently, it was often up to the CJEU to fill in the general framework, provide protection where necessary, and generally breathe life into the bare bones of the Treaties.

Secondary Law

- *Secondary law* includes acts :
 - listed in article 288 TFEU;
 - "*atypical*" acts (not listed in art. 288 TFEU): i.e. such as communications, white and green papers, etc.

EU Secondary Law

- Article 288 TFEU
- *“To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.*
 - *A **regulation** shall have general application. It shall be binding in its entirety and directly applicable in all Member States.*
 - *A **directive** shall be binding, as to the result to be achieved, upon each Member State to addressed, but shall leave to the national authorities the choice of form and methods.*
 - *A **decision** shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.*
 - *(Recommendations and opinions shall have no binding force)”*

EU Regulations

- An *EU regulation* is a legal act that becomes immediately enforceable as law in all member states simultaneously:
 - this means that when a regulation is approved at the EU level and enters into force it becomes *directly* and *immediately applicable* (*) within the countries of the EU: EU Countries do not need to create their own legislation to bring this EU legal act into force;
 - it also means that if a regulation confers rights upon individuals, then those rights can be asserted with respect to third parties and enforced in national courts;
 - for example, since the passing of the EU's regulation on *Flight Delay Compensation* on 17 February 2005:
 - minimum rights for passengers have had to be ensured in all EU countries in cases where a flight is cancelled, delayed or a passenger is denied boarding;
 - passengers have recourse to national courts if these rights are not met.
- (* *direct applicability*: generally, regulations require no implementing legislation within individual member states: they come into force by virtue of their publication in the OJEU).

EU Regulations: direct applicability

- *Commission v Italy* Case 39/72 (1972):
- *Fact:*
 - The Commission brought enforcement proceedings against Italy for failing to enforce Regulations on dairy on time. The EU wanted to stop under-production of dairy products by introducing a premium for slaughter of cows. The Italian government decreed the regulations were ‘deemed to be included’ in the decree, and reproduced them with extra procedural provisions. However, Italy failed to operate the scheme on time.
- *Judgment:*
 - The ECJ held that Italy was in breach both for delay, and also ‘the manner of giving effect’ to the Regulation. In one respect it departed from the Regulation, as it did not account for extension of time allowed for slaughter:
 - “17. ... According to the terms of article 189 and 191 of the Treaty, Regulations are, as such, directly applicable in all MS and come into force solely by virtue of their publication in the Official Journal of the Communities, as from the date specified in them, or in absence thereof, as from the date provided in the Treaty.
 - Consequently, all methods of implementation are contrary to the Treaty which would have the result of creating an obstacle to the direct effect of Union Regulations and of jeopardizing their simultaneous and uniform application in the whole of the Union”

EU Directives

- A *EU directive* is a legislative act that sets out a goal that all EU countries must achieve; Directives normally leave member states with a certain amount of leeway as to the exact rules to be adopted; Directives can be adopted by means of a variety of legislative procedures depending on their subject matter.
 - There are justifications for using a directive rather than a regulation:
 - (i) desire for “*subsidiarity*”;
 - (ii) existence in the different member States of different legal systems, legal traditions and legal processes;
 - (iii) Member States prefer to choose their own statutory wording (rather than accepting the Brussels' official terminology);

EU decisions

- A **decision** is a legal instrument which is binding upon those individuals to which it is addressed.
- A decision may have one or more addressees (one or several EU countries, one or several companies or individuals).
- A decision which specifies those to whom it is addressed shall be binding only on them.
 - For example, when the Commission's decision imposed a fine on software giant Microsoft for abuse of its dominant market position, the only company directly concerned was Microsoft:
https://ec.europa.eu/competition/antitrust/cases/dec_docs/37792/37792_4183_3.pdf
- Decisions without specified addressees may be adopted by the EU.

Recommendations, opinions and others acts

- A "*recommendation*" is not a binding act:
 - A recommendation allows the institutions to make their views known and to suggest a line of action without imposing any legal obligation on those to whom it is addressed.
- An "*opinion*" is an instrument that allows the institutions to make a statement in a non-binding fashion, in other words without imposing any legal obligation on those to whom it is addressed;
 - It can be issued by the main EU institutions (Commission, Council, Parliament), the Committee of the Regions and the European Economic and Social Committee. While laws are being made, the committees give opinions from their specific regional or economic and social viewpoint.
- In addition to the non-binding acts (*recommendations* and *opinions*) EU institutions use a number of *soft law instruments*:
 - Action plans; Common Positions Notices; Resolutions; Declarations, etc.

Hierarchy of EU secondary legislation:

- Articles 289, 290, 291 TFEU:
 - *Legislative acts* are legal acts which are adopted through the ordinary or a special legislative procedure.
 - *Delegated acts* for their part are non-legislative acts of general application which supplement or amend certain non-essential elements of a legislative act: the power to adopt these acts may be delegated to the Commission by the legislator (Parliament and the Council); The objectives, content, scope and duration of the delegation of power are defined in the legislative act;
 - *Implementing acts* are generally adopted by the Commission, which is competent to do so in cases where uniform conditions for implementing legally binding acts are needed.

EU legislative procedure:

- The European Union adopts legislation through a variety of legislative procedures: the procedure used for a given legislative proposal depends on the policy area in question.
- Most legislation needs to be proposed by the European Commission and approved by the Council of the European Union and European Parliament to become law;
- Over the years the power of the European Parliament within the legislative process has been greatly increased from being limited to giving its non-binding opinion or excluded from the legislative process altogether, to participating equally with the Council in the legislative process.

EU ordinary legislative procedure

- The *ordinary legislative procedure* is the main legislative procedure by which directives and regulations are adopted;
 - The procedure was introduced with the Maastricht Treaty as the *codecision procedure*;
 - The *codecision procedure* was amended by the Treaty of Amsterdam (: this Treaty and the Treaty of Nice greatly increased and the number of legal bases where the procedure applies).
 - It was renamed the *ordinary legislative procedure* and extended to nearly all areas such as agriculture, fisheries, transport, structural funds, the entire budget etc. by the *Treaty of Lisbon*.
 - Article 294 TFEU outlines ordinary legislative procedure in the following manner:>>>

EU ordinary legislative procedure – art. 294 TFEU

- The Commission submits a legislative proposal to the Parliament and Council. At the first reading Parliament adopts its position. If the Council approves the Parliament's wording then the act is adopted.
- If not, it shall adopt its own position and pass it back to Parliament with explanations. The Commission also informs Parliament of its position on the matter. At the second reading, the act is adopted if Parliament approves the Council's text or fails to take a decision.
- The Parliament may reject the Council's text, leading to a failure of the law, or modify it and pass it back to the Council. The Commission gives its opinion once more. Where the Commission has rejected amendments in its opinion, the Council must act unanimously rather than by majority;
- If, within three months of receiving Parliament's new text, the Council approves it, then it is adopted. If it does not, the Council President, with the agreement of the Parliament President, convenes the Conciliation Committee composed of the Council and an equal number of MEPs (with the attendance as moderator of the Commission). The committee draws up a joint text on the basis of the two positions. If within six weeks it fails to agree a common text, then the act has failed. If it succeeds and the committee approves the text, then the Council and Parliament (acting by majority) must then approve said text (third reading). If either fails to do so, the act is not adopted

EU ordinary legislative procedure

- a. Commission proposal
- b. *First reading in Parliament:*
 - Parliament adopts its position by a simple majority.
- c. The Council adopts *its position* by QMV.
 - If the Council approves Parliament's position, the act is adopted in the wording which corresponds to Parliament's position.

EU ordinary legislative procedure

- d. *Second reading in Parliament*
- Parliament receives the *Council's position* and has three months to take a decision.
- It may thus:
 - Approve the proposal as amended by the Council or take no decision; in both cases, the act as amended by the Council is adopted;
 - Reject the Council's position by an absolute majority of its Members; the act is not adopted and the procedure ends;
 - Adopt, by an absolute majority of its Members, amendments to the Council's position, which are then put to the Commission and the Council for their opinion.

EU ORDINARY PROCEDURE

- e. *Second reading in the Council*
 - If the Council, voting by a qualified majority on Parliament's amendments, and unanimously on those on which the Commission has delivered a negative opinion, approves all of Parliament's amendments no later than three months after receiving them, the act is adopted.
 - Otherwise, the Conciliation Committee is convened within six weeks.

EU ordinary legislative procedure

- f. *Conciliation*
 - The Conciliation Committee consists of an equal number of Council and Parliament representatives, assisted by the Commission. It considers the positions of Parliament and the Council and has six weeks to agree on a joint text supported by a QMV of Council representatives and a majority of Parliament's representatives.
 - The procedure stops and the act is not adopted if the Committee does not reach agreement on a joint text by the deadline.
 - If it does so, the joint text is sent to the Council and Parliament for approval
- g. *Conclusion of the procedure* (third reading)
 - The Council and Parliament have six weeks to approve the joint text. The Council acts by a qualified majority and Parliament by a majority of the votes cast. The act is adopted if the Council and Parliament approve the joint text.
 - If either of the institutions has not approved it by the deadline, the procedure stops and the act is not adopted.