



An introduction
to the EU legal order

Hard law/ Soft law

*Law in the European Union and
Governance effectiveness*

[Introduction]

- **Environmental Governance** (in the EU and within the Governat project you may/will use the expression “Multilevel Governance”) **is founded in law**: which law?
 - International treaties : create specific *environmental regimes* (to which the EU generally participate)
Ex: Climate change regime, the biodiversity regime
 - EU law
 - National law
 - Regional law
- The quality and style of the law and regulatory style influence the effectiveness of governance

1. The EU is a complex legal order

“The specificity of problems that arise from the combination of domestic legislations and community law comes from the fact that they are not only distinct legal orders with different foundations but also different national legislations that must be, at the same time, combined in a sufficiently coordinated if not uniformised way, in order to secure the necessary degree of uniform application necessary to the realisation of the european integration.”

Jose Mertens de Wilmars
(former president of the ECJ)

Complexity factors

- The EU is a (the most highly evolved) international organisation with a major objective: Political integration
- The EU constitutes a differentiated legal order (distinct from the national and the international)
- It has its own institutions: legislator (Parliament and Council), executive (Commission), judiciary organs (ECJ and CFI), its own decision-making procedures (note 1), own jurisdiction
- Community law = highly political law, of diplomatic nature (compromise between member states' interest) .
- The Community legal order : “new-born” in comparison with the long history of the legal orders of the Member States (up to 2000 years), and national legal traditions and cultures
- EC law structure, concepts, principles, processes are in a continuous process of development.
- Scope of EC law has extended tremendously (Environment, EMU, Immigration, Foreign Policy).

2. Core characteristics of EU legal order

- The EU is based on the rule of law
- EC Treaty –see note- (“Primary law” / constitutional nature) & derived legislation (secondary law)
- The EC Treaty = a *Traite-cadre*, meaning further legislation is needed to achieve the numerous Community objectives stated in it.
- The EC Treaty contains principles, rules and obligations for the adoption of such additional legislation (procedure, division of powers ...)
- Existence of different types of legislative acts

3. Starting with the basic : The EC treaty

- Among the **fundamental objectives** of the EU (art.2 Treaty)
 - Sustainable Development
 - High level of Environmental Protection
- The **environmental objectives** of the EU (art. 174.1 EC)
 - Preservation, Protection and improvement of Environment
 - Health protection
 - Rational use of natural resources
 - Promoting env'l policy at international level
- The **guiding principles**
 - Integration principle (Art. 6)
 - Prevention/Preventive Action (Art. 174.2)
 - Polluter's pay (Art. 174.2)
 - Fighting pollution at source (Art. 174.2)
 - Precautionary Principle (Art. 174.)
- + Subsidiarity principle & Proportionality principle;

[4. Secondary Law]

According to article 189 of EC Treaty,
Community legal standards are adopted in
the form of :

- Regulations
- Directives
- Decisions
- Recommendations

The two first ones can be considered the main
legislative instruments

[4.1. REGULATIONS]

- Regulations are true Community Law, **binding** in all their elements and directly applicable in all member states. A regulation establishes direct rights and imposes duties on private parties without interference of national law.
- Technical fields where the EU has exclusive competence
- Regulations generally can be adopted in the field of environmental protection when the subject concerns external trade of the Community.

Examples :

- Regulation 348/81 establishes a common rule applicable to the importation of products derived from whales.
- Regulation 2037/2000 on substances that deplete the ozone layer

4.2. DIRECTIVES

- Directives bind each member state to achieve a given result but leave the means and methods to individual state control.
- The Council of Ministers usually adopts directives on proposal from the Commission.
- It is the main instrument in environmental policy

Examples:

- Directive 2003/4/EC on public access to environmental information
- Directive 2003/35/EC providing for public participation in respect for drawing up certain plans and programmes relating to environment

[EU Law in theory... and practice.]

- Over the years, the EU legislative process has gained characteristics that contributed to complicate the picture.
- Changing powers of the EU institutions in decision making, new procedures
- In environmental matters: role of science that pushes to review / improve legislation
- Excessive quantity of legislation & lack of quality
- High compromise nature of EU legislation => adoption of special clauses, temporary derogations, transitional provisions, vague and unclear wording.
- Diversity of legal cultures => risk to interpretation concepts differently
- Detailedness of EC legislation => blurring between directives and regulation
- Proceduralization of European environmental Law

Key EU legislation relating to Water Policy

73/404 Directive on detergents

Prohibits marketing of detergents not meeting specified levels of biodegradability

75/440 Directive on drinking water

Standards and treatments requirements for surface waters intended for abstraction of water

76/160 Directive on the quality of bathing waters

*Values for the quality of bathing water,
particularly with the goal of reducing presence of sewage.*

76/464 Directive on water pollution

*Establishes a framework for elimination/reduction of pollution on inland,
coastal and territorial waters by dangerous substances.*

77/795 Decision on exchange of information on surface freshwater quality

Establishes common procedure for exchanging information on surface water.

78/659 Directive on the quality of waters to support fishlife

79/923 Directive on quality objectives for shellfish waters.

*Requires states to designate coastal and brackish waters needing protection
or improvement to support shellfish, and to establish pollution reduction*

80/68 Directive concerning the protection of Groundwater against Pollution

80/778 Directive on Drinking water quality.

*Establishes quality standards for water intended for drinking or for
use in drink and food manufactured.*

91/271 Directive concerning urban wastewater treatment.

*Establishes standards for the collection, treatment and discharge of urban waste water,
and controls over the disposal of sewage sludge.*

91/676 Directive concerning the protection against nitrate pollution

2000/60 Water Framework Directive.

2006/118 Directive on the protection of groundwater.

[The Uniqueness of Community law]

- EU law is
 - integrated automatically in the internal law of the member states, without any special introduction to do so
 - EU norms take their place into the internal legal order as EU norms
 - National judges have the obligation to apply and enforce EU law.
- => PRIMACY OF EU law

[The primacy of Community Law]

- The ECJ has held in several decisions that subsequent domestic legislations of the member states cannot prevail when inconsistent with Community law and that judges or member states are under a duty not to give effect to such domestic legislation.

4.3. DECISIONS

They are binding too, but they are of an individual nature

Examples

- Decision 280/2004/EC concerning a mechanism for monitoring Community greenhouse gas emissions and for implementing the Kyoto Protocol
- Decision 2004/210/EC setting up Scientific Committees in the field of consumer safety, public health and the environment
- Decision 2004/249/EC concerning a questionnaire for Member States reports on the implementation of Directive 2002/96/EC of the European Parliament and of the Council on waste electrical and electronic equipment (WEEE)

4.4. RECOMMENDATIONS & OPINIONS

According to art. 249 of the EC Treaty, they are **not binding**
They are **orientation documents** to implement and to interpret legislation

Ex: Council Recommendation of 3 march 1975 on Polluter Pay Principle

- The ECJ has considered that they are **not completely deprived of legal force**, and that the **national judges should take them into consideration to fully ensure the implementation of EC law, or when they are meant to complete the binding measures.**
- In that sense, they work too as a factor of harmonization of the law between the countries.

[ALL THE REST]

- **Strategies,**
- **Reports,**
- **White Papers,**
- **Green Books,**
- **Codes of Conducts,**
- **Implementation Guidelines,**
- **Initiatives, Plans,**
- **Declarations, Statements,**
- **Whatever the name...**

[... IS “SOFT LAW”]

- “SOFT LAW” : the expression conveys the point...

In terms of **creation, adoption** (normally produced or endorsed by the Commission) and/or **enforcement**, it is considered **hierarchically inferior** to hard law

- YET... they are considered to be

Rules of conduct which in principle have no legally binding force but may have “practical” or even legal effects.

- INCREASING phenomenon, FASHIONABLE, PROBLEMATIC
- 💣 **Not all documents published by the EU are soft law, nor policy instruments. Some have a purely informative character.**

How is EU “soft” law adopted?

Most of the time, EU soft law is adopted under the form of a

- **Resolution**

Examples:

- Common implementation Strategy for the WFD;
- Biodiversity Strategy
- Good Administration Code

- **Communication**

Examples:

- Communication of the Commission to the EP and Council on Integrated Coastal Zone Management;
- Communication of the Commission on the Report on the implementation of national measures on coexistence of GMOs and organic farming
- Communication on the Thematic Strategy for Soil Protection

[SOFT LAW from literature]

- SOFT LAW from other scientific disciplines standpoints, using their theories and analysis might be considered as “Law in context”
- Soft law can also be seen as “a starting point” in broader economic and/or political context; often, elements of soft law that have been retained and used effectively will lately be “upgraded” into hard law.

[Some concrete examples]

- a) The Environmental Action Programmes
- b) The EU Charter of fundamental Human Rights
- c) The Good Administration code
- d) The white Paper on Governance
- e) The Sustainable Strategy
- f) The implementation guidelines for the WFD

I will present only quickly a few of them

[The Environmental Action Programmes]

- Six EAP have been adopted since 1973, primarily aimed at the EU itself, rather than the Member States
 - The first five ones were not binding
- Yet**, as they can assist in the development of law since the intended actions often imply drafting legal rules, again they are not deprived of legal effects.
- The Current one, the 6th one (2002-2012) marks beginning of a new era. It is mandatory for EU and for States who have the obligation to achieve it.
 - Which sanctions if we don't achieve all of its objectives? None.

The EU charter of fundamental Rights

- Adopted in December 2000 (Nice); Art. 51 of the Charter establishes that it “*does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties*”.
- *Communication on the legal nature of the Charter of Fundamental Rights of the European Union* (COM (2000) 644 final, 11th October, 2000) declares :
 - «*It is reasonable to assume that the Charter will produce all its effects, legal and others, whatever its nature. (...) It is clear (...) that it would be difficult for the Council and the Commission, who are to proclaim it solemnly, to ignore in the future, in their legislative function, an instrument prepared at the request of the European Council by the full range of sources and European Legitimacy acting in concert.*» «*(...) likewise (...) it is highly likely that the Court of Justice will seek inspiration in it, as it already does in other fundamental rights instruments*» in such a way that «*it can reasonably be expected that the Charter will become mandatory through the Court's interpretation of it as belonging to the general principles of Community law*».

[The White Paper on Governance]

- Presents five underlying principles for “good governance” (not only environmental) at all levels of government, including the EU (the same questions on participation that may be asked at the local level or regarding environmental decision-making are also valid to the EU decision-making processes & procedures)
 - Openness
 - Participation
 - Accountability
 - Effectiveness
 - Coherence
- Generally stresses three main issues (Important to understand the philosophy of the EU Commission towards participation in EU policy making)
 - a) Accessibility, consultation and participation
 - b) Better regulation
 - c) Institutional Issues

Increasing soft law relates to regulatory styles & governance

- Soft law v/ hard law is an increasing phenomenon.
- What does the preference for these type of instruments tells us?
 - More classic modes of regulation (command and control, end-of-pipe, administrative police) might not work, or be insufficient;

To link with :

- a) the new legislative culture (flexibility and differentiation) : less and better
 - b) the principles of subsidiarity and proportionality
 - c) The way they are produced (more consultation?)
- Considered to improve the effectiveness, legitimacy and transparency of Community Action

[To remember]

- The distinction between binding and non-binding instruments
- The difficulty to draw perfect sharp lines among policy instruments (since non binding also may have legal effect)
- The existence of a specific EU legal order
- The fact that this EU legal order is not an island within the international environmental governance world.
- The fact that all the questions you may reflect on (participatory process in MLG env'l governance) is also transposable to the EU itself).

[Slam-bibliography to explore the issues]

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