

§ 2 The European Union as an organisation

I. The legal nature of the European Union

1) The European Union as first representative of a new form of organisation

- a new form of organisation which has emerged in the process of European integration
- an association of states without historic precedent, more developed and powerful than all other associations under public intern. law
- main features: sophisticated institutional system with federal and unitarian elements, far-reaching competences, comprehensive exercise of supranational public power, highly developed legal system with powerful court of justice, legal framework for a geo-regional internal market, own currency, own citizenship

2) The debate on the legal nature of the European Union: "compound of states", "compound of states and constitutions" or supranational union?

- the state-centred "Staatenverbund" doctrine of the German Federal Constitutional Court - Maastricht judgement of 1993 (BVerfGE 89, 155); Lisbon judgement of 2009 (BVerfGE 123, 267)
- the "unconventional" approach of some scholars: Union, states, Treaties and constitutions as a constitutional unity
- the union-centered approach of a general theory of the supranational union

3) The supranational union as a dynamic non-state but state-like organisation of supranational geo-regional integration

- more than an intern. or supran. organisation, a confederation or a combination of both but not yet a federal state

II. The state as a member of the European Union

1) The unaffected sovereignty of the state

- no "shared sovereignty" since sovereignty is absolute and therefore indivisible - a DOCTRINAL DISPUTE in the 1990s and 2000s
- unlimited public power (including the legal power - not the right! - to break Union law)
- unlimited legal capacity at public international law
- ultimate control over all public power exercised on the state territory

2) The member states as the "masters of the treaties" ["Herren der Verträge"]

- the power to impose any changes on the Union and its policies by acting as collective and amending the founding treaties
- only the collectivity of the member states, not the indiv. member state has this power

3) Important basic rights and duties of the member state

- the right to participate in the Union's institutions
- the *duty to respect, implement, execute and enforce Union law* (art. 4(3) sub-sect. 2 EU Treaty)
- the duty to evince *loyalty* towards the Union and the other member states (principle of sincere cooperation, art. 4(3) EU Treaty)
- the right to the *loyalty and solidarity* of the Union and the other member states
 - e.g. within the Common Foreign and Security Policy (cf. art. 32(1) EU Treaty)
 - e.g. in case of terrorist attacks (222 FEU Treaty)
 - e.g. in case of economic or financial emergency (ESM Treaty)
 - e.g. in case of mass influx of refugees and migrants (→ Greece 03.2020)

- the right to the *respect of the national constitutional identity* (art. 4(2) EU Treaty)
- the right to the respect of the *equality of the member states* (art. 4(2) EU Treaty)

4) Accession, secession and expulsion of member states

- high requirements and long, complicated procedure for accession (cf. art. 49 EU Treaty)
- right to secession (with option of secession agreement, art. 50 EU Treaty; example: Brexit 2020)
- risk to be expelled, as a last resort, in case of material breach of treaty (by termination of the Treaties by the other member states under art. 60(2) lit. a Vienna Convention on the Law of Treaties)

III. The institutional framework of the European Union

- see overview in art. 13 EU Treaty

1) The Union's institutions

- every institution adopts own *rules of procedure*
- principle of mutual sincere cooperation (art. 13(2) EU Treaty)
 - cooperation is regulated in *interinstitutional agreements* (cf. art. 295 FEU Treaty)
- a) European Council (art. 15 EU Treaty, 235 et seq. FEU Treaty)
 - with **President of the European Council** (art. 15(5,6) EU Treaty)
 - the leading political institution
 - composition: heads of state or government, own President, President of Commission
 - decides usually by consensus,
 - meets twice every six months
- b) Council of the European Union (art. 16 EU Treaty, 237 et seq. FEU Treaty)
 - the most powerful institution, in particular in legislation and budgeting (jointly with EP)
 - assisted by a General Secretariat and a Committee of Permanent Representatives of the governments of the member states (art. 16(7) EU Treaty, 240 FEU Treaty)
 - composition: one representative of each member state at ministerial level
 - decides usually by qualified majority (55 % of member states, representing 65 % of population)
 - in some cases by simple majority (15 member states) or unanimous vote
- c) European Parliament (art. 14 EU Treaty, 223 et seq. FEU Treaty)
 - with **European Ombudsman** (art. 228 FEU Treaty)
 - the only directly democratically legitimized institution
 - no dominant role but important powers in legislation and budgeting (jointly with the Council) and of political control
 - regressively proportional representation of the citizens (art. 14(2) EU Treaty)
- d) European Commission (art. 17 EU Treaty, 244 et seq. FEU Treaty)
 - with **President of the European Commission** (art. 17(6) EU Treaty)
 - with **High Representative for Foreign Affairs and Security Policy** (art. 18 EU Treaty)
 - promotes European public interest
 - takes initiatives, participates in legislative procedure, has own legislative and executive powers, executes budget, ensures member states' compliance with Union law
 - submitted to vote of consent and, possibly, motion of censure of European Parliament (art. 17(7, 8) EU Treaty)
- e) Court of Justice of the European Union (art. 19 EU Treaty, 251 et seq. FEU Treaty)
 - European Court of Justice (= ECJ) and General Court
 - composition of the ECJ: one judge from each member state + 8 advocate-generals
 - mission: "*shall ensure that ... the law is observed*"; strong impact of judicial development of law

- f) **European Central Bank** (art. 282 et seq. FEU Treaty)
 - constitutes together with the central banks of the member states the *European System of Central Banks (ESCB)* and with those of the Euro states the *Eurosystem*
- g) **European Court of Auditors** (art. 285 et seq. FEU Treaty)

2) The advisory bodies

- a) **Economic and Social Committee** (art. 301 et seq. FEU Treaty)
- b) **Committee of the Regions** (art. 305 et seq. FEU Treaty)
 - represents the interests of regional and local governing entities

3) Other institutions, agencies and bodies

4) The principle of institutional balance

- ECJ, case 138/79, Roquette Frères / Isoglucose
- the equivalent to the principle of separation of powers in the state

IV. The competences of the European Union

1) The principle of specific attribution of powers [principle of conferral] (art. 5(1, 2) EU Treaty)

- the need of a specific legal basis for every measure of the Union
 - no competence of competences [Kompetenz-Kompetenz] of the Union!
- competences regulated in detail in Part Three FEU Treaty
- principle in practice relativised by the often criticised generous interpretation of competence clauses and recognition of *implied powers* by the European Court of Justice

2) The limitation of the exercise of the Union's competences by the principles of subsidiarity and proportionality (art. 5(1, 3, 4) EU Treaty)

- procedural rules for the principles' application in special protocol
- principle of subsidiarity only applies to non-exclusive competences
- principle of subsidiarity not justiciable in practice
 - therefore focus on obligation to justify use of competences and on consultation

3) The most important competences

- distinction between exclusive competences, shared competences and competences of support, coordination and supplementation of the actions of the member states
- supranational competences in the fields of economic policy, monetary policy, commercial policy, agriculture policy, competition policy, consumer protection policy, environmental policy, cohesion policy, asylum policy and approximation of laws
- competence to participate in and to coordinate the Common Foreign and Security Policy of the Union and the member states (→ intergovernmental cooperation)

V. The fundamental values of the European Union

- the importance of common fundamental values in a supranational union
 - the need for homogeneity of value systems as a basis for supranational integration
 - in particular: the need for effective rule of law in the Union and the member states
- the fundamental value clause (art. 2 EU Treaty):
 - directly binding law with which all EU institutions and member states must comply

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

- the defence of the European common fundamental values against threats in the member states:
the art. 7 proceedings (cf. art. 7 EU Treaty)
 - step 1: Council determines (with 4/5 majority) clear risk of a serious breach
 - step 2: European Council determines (unanimously) existence of a serious and persistent breach
 - step 3: Council suspends (with qualified majority) certain rights of the member state (incl. access to internal market)
 - problem: thresholds for steps 1 and 2 unrealistically high...
 - note that art. 7 EU Treaty does not exclude, as a last resort, the suspension of the membership and, finally, the expulsion of the member state under art. 60(2) lit. a, 62 Vienna Convention on the Law of Treaties!
- the present fundamental value crisis in Hungary and Poland
 - in 2017 also such a crisis in Romania
 - numerous attempts to neutralise const. courts, eliminate independence of the judiciary, weaken the rule of law, convert public media to propaganda instruments and restrict the democratic freedoms
 - several interventions of the European Court of Justice against "reforms" in Hungary and Poland
 - art. 7 proceedings against Hungary and Poland even until 2023 without results

VI. The citizen in the European Union

- see Diagram 2