



B- LAND

Promote and Strengthen Business Development Skills in Rural Communities

Module 3

Legal aspects of entrepreneurial activity

Developed by UTH



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Learning Outcomes

Level according to the Competence Framework (IO1): High

Upon completion of this learning module, learners will have a basic understanding of how to:

- ✓ Navigate EU legal sources;
- ✓ Understand relevant laws and regulations governing the internal European Union market;
- ✓ Apply the fundamental principles of EU law within the EU legal framework;
- ✓ Utilize the rules of freedom of movement and their impacts on trade in the EU;
- ✓ Understand EU policies and their influence on foreign trade and investment;
- ✓ Understand how an individual can challenge an inadequate EU legislation.



1. Introduction to EU law

1.1 The History of the EU - A Changing Europe

The different treaties relevant for you, are the TEU - the Treaty on the European Union, and the TFEU - the Treaty on the Functioning of the European Union. The member states agreed on this current version in the city of Lisbon. Thus, this version of the legal provision is also referred to as the Lisbon Treaty.

In the end of a devastating second World War, the focus was on ensuring that a war like this would never happen again in Europe. Influential in this thinking was the European Union of Federalists established in 1946, an organization that one might call today a think tank.

These ideas also led to the creation of several international organizations, like the UN, the IMF, the GATT and also, particularly important for Europe, the Council of Europe, and with it, the European Convention on Human Rights. Following the Coal and Steel Community in 1952, the Treaties of Rome in 1958 established a European Economic Community and a European Atomic Energy Community. The first revision came in 1987 with a Single European Act, while in 1993 and in 1999, revisions were introduced by means of the Treaty of Amsterdam and the Treaty of Maastricht, and in 2003 the Treaty of Nice. The current version, with the TEU and a TFEU, were adopted by means of the Treaty of Lisbon in 2009.



1.2 The Institutions of the EU

The following institutions of the EU are identified in Article 13 TEU: the European Parliament, the European Council, the European Commission, the Council, the Court of Justice of the European Union, the European Central Bank and finally, the Court of Auditors. Article 13 to Article 19 TEU set out a details with regard to these institutions. Beyond these institutions, there are others, such as the European Ombudsman, to which EU citizens and entities can appeal concerning administered malpractices.

1.3 The Court of Justice of the EU

Looking at the institutional setting, article 19 explains that the judicial branch is collectively called the Court of Justice of the European Union or CJEU. It has a task to ensure that in the interpretation and the application of the treaties, the law is observed. The judicial branch is made up of the Court of Justice, the general court and specialized courts. An example of a specialized court could be the Civil Service Tribunal which deals with employment disputes related to employees of the EU. The Court of justice is the highest court of the European Union.



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1.4 Treaties of the European Union

You can also find the main treaties here:

Treaty of the European Union:

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012M/TXT>

Treaty of the Functioning of the European Union:

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012E/TXT>



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2. Sources and Methods

2.1 Introduction to EU Law Sources

Most of the EU publications are available for free online today. The Official Journal of the European Union (OJ) is the official companion of EU legislation and other official documents of the EU institutions, bodies and agencies. It is published every day from Tuesday to Saturday in the official languages of EU and is available in different formats. The L series contains mainly secondary legislation, such as regulations, directives, decisions, and recommendations. The C series contains information from the main institutions like notices, guidelines, announcements, resolutions, opinions, joint declarations, preparatory acts, and summaries of judgments.

All documents are easy to find in the legal database of EUR-Lex. It is a database free online available in all official languages. The database is updated everyday. In EUR-Lex you find official journal. Note that since the first of July 2013, the electronic edition of the Official Journal in EUR-Lex is the authentic one, including consolidated legislation, preparatory acts, and legislative history, EU case law, ECR in pdf.

Another useful database can be found on the webpage of the Court of Justice of the European Union. It is available for free in every official language. It contains the case from the Court of Justice to General court and the Civil service Tribunal, the opinions from the Advocate General, notes from the Academic Writings, and press releases about new cases.



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Finally, there is a huge website of the European Union, where you can find many relevant documents. The European Union has a tradition of publishing nearly everything online and the website is translated into every official language.

2.2 Case Law

We're going to look at European Union case law, show how to search for the cases, explain the numbers of the cases, and how to search within the documents.

Let's look at an example: C-341/05, the Laval case. The letter tells us it's a case from the Court of Justice, the number 341 is the serial number and finally we have the year. The number is given when it comes to the court, so the year is when the case started. If you find a T or an F in front of the number, it is a case from either the General court or the Civil Service Tribunal.

Quite recently a new system to cite and to number the cases has been introduced. ECLI is the new European Case Law Identifier. The ECLI number is a number that will include both European and national courts, and it is supposed to improve search facilities for case law.



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The Laval case has the following number, ECLI EU:C:2007:809. First comes the country code, then code of the court that rendered the judgment, the year of the decision, and finally, the sequential number. The sequential number is in a format that is decided upon each member state. It could consist of up to 25 alphanumeric characters. To search for the case, use the database that you can find on the website for the Court of Justice of European Union.

2.3 Commission Documents

We are going to look at different documents from the commission. The documents are published in different ways. The proposals for new legislation is published in the COM document series, where official documents from the commission are published. Other important documents like notices for example, are only published in the official journal. Some documents are only published at the commission webpage. The COM documents are available in EUR-Lex. You can search for the document on the entrance page where you will fill in the year, number, and type. The Commission also produced documents like implementation reports. They are not always published in the same way. If we like to look for the latest implementation report regarding a service directive for example, I suggest you start by using a search engine such like Google.



2.4 Online Resources

- Official website of the EU: http://europa.eu/european-union/index_en
- EUR-lex - General database for EU-law: <http://eur-lex.europa.eu/homepage.html>
- Curia - the Court of Justice: http://curia.europa.eu/jcms/jcms/j_6/en/
- Charter on Fundamental Rights of the European Union:
http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2016.202.01.0389.01.ENG
- Official Journal: <http://eur-lex.europa.eu/oj/direct-access.html>
- Interinstitutional Style Guide: <http://publications.europa.eu/code/en/en-000100.htm>
- European Commission homepage: https://ec.europa.eu/commission/index_en



3. The Economic Freedoms

3.1 Internal Market

According to Article 26 of the TFEU, "The union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market." It goes on, "The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services, and capital is in short.

The development of the internal market can be divided into the different stages of economic integration. Starting from a free trade area, which later developed into the so-called customs union, it was all about the free movement of goods in the beginning and removing the various barriers to trade. With the establishment of the customs union, the other factors of production, capital, workers, and services also slowly started to move between the member states. As a result, the three remaining freedoms have been included into the treaties, so together, they could form the internal market of the EU. Some of the principles which were initially developed for the free movement of goods have later been adopted in a similar vein for the other freedoms. It is also worth noting that economic integration does not stop with the completion of the internal market. In order to achieve full economic integration, an economic and monetary union is necessary. Which includes things like the introduction of a common currency controlled by a central authority or the harmonization of fiscal policies, such as taxation. In particular, that last step is seen as controversial in some member states, and even the common currency, the euro, has only been adopted by 19 of the currently 28 member states, with countries such as Sweden or Denmark still using their own currencies.



3.2 Free Movement of Goods

Free movement of goods is protected by the rules of Article 26, and Article 28 to 37 of the treaty on the functioning of the European Union TFEU. Article 28 to Article 33 TFEU, established the essence of a Customs union. The EU charges Customs at its outside border that within the EU territory, no custom charges are allowed. This is the effect of Article 28 and 30 TFEU which prohibit, custom duties on imports and exports, and charges having equivalent effect. It also applies to charges having equivalent effect. The same applies to goods for exports, that is to say a charge is prohibited if it only applies to exported good.

3.3 Free Movement of Persons

The legal framework that covers free movement is set by primary law, secondary law, and finally case law. That is to say, the judgments of the European courts. The relevant primary law is the principle of non-discrimination, contained in Article 18 of the Treaty on the Functioning of the European Union, the TFEU, as well as the Articles 20 to 25 TFEU. Articles 20 to 25 set out the rules for EU citizenship. Moreover, Article 45 to 48 TFEU covered the free movement of workers.

On the level of secondary law, the most relevant rules are Regulation 492/2011 on the freedom of movement of workers within the Union. And Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, the so-called citizens or Citizens Right Directive.



This entails a right to accept offers of employment actually made. Move freely within the territory of the Member State for this purpose. Stay in a Member State for the purpose of employment in accordance with the provisions governing employment of nationals of that state. And finally, to remain in the territory of the Member State after having been employed in that state, subject to the conditions which shall be embodied in EU regulations.

3.4 Freedom of Establishment

Article 49 of the Treaty Under Functioning of the European Union, the TFEU sets all that restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, Branches or subsidiaries by nationals of any Member State established in the territory of any Member State. Freedom of establishment shall include the right to take up and pursue activities as a self-employed person and to set up and manage undertakings, in particular companies and firms.

Article 54 and Article 55 TFEU, ensure that the freedom of establishment also applies to companies about the setting up of companies. Similarly, Article 51 and Article 52 of element for the freedom of establishment.

Another important element of the freedom of establishment, relevant both for natural as well as for legal person is the following guarantee. The freedom of establishment also entails the right to purchase, exploit and transfer real or personal property, as well as the right to obtain loans and to have access to forms of credit



3.5 Free Movement of Services

Free movement of services is protected by the rules of Articles 56-62 of the Treaty on the Functioning of the European Union, the TFEU. Moreover, EU secondary legislation ensures the free movement of services within the EU. The basic idea is the following; self-employed people or companies who are legally operate in one member state should also be able to carry out these activities in another member state. The freedom of establishment protects the right of self-employed and companies to set up a business in a member state on a constant and stable basis. The freedom of movement of services, on the other hand, protects the right to offer services in another member state on a temporary basis, while remaining permanently based in their country of origin. Article 51 TFEU excludes services which are specific activities and functions which imply the exercise of public authority and also national measures that restrict the freedom to provide services can be justified.

3.6 Free Movement of Capital

Free movement of capital is part of the most important substantive elements of EU law, the fundamental freedoms. Free movement of capital is protected by the rules of Articles 63 to 66 of the Treaty on the Functioning of the European Union, the TFEU. Free movement of capital is seen as an important foundation of the single market in complimenting the other freedoms. Free movement of capital also contributes to economic growth and promotes the use of the Euro as an international currency. Moreover, it is also indispensable to the introduction of the Euro and for development of the economic and monetary union. With the introduction of the Euro, all remaining restrictions on capital movements between residents in the member states were abolished.



And moreover, the Capital Directive was amended to address measures relating to long term lending for commercial transaction and purchases of securities not dealt on the stock exchange. Examples from the case law on the movements of capital include, direct investments, real estate investments, operations in security and other guarantees, financial loans and credits. But also, inheritance, gifts, and endowments.

3.7 Online Resources

- European Commission sites covering the free movement of persons:
<http://ec.europa.eu/social/main.jsp?catId=457>
<http://ec.europa.eu/social/main.jsp?catId=26&langId=en>
<http://ec.europa.eu/social/main.jsp?catId=465&langId=en>
- Practical application of EU regulations by the Danish Government:
https://www.nyidanmark.dk/enus/coming_to_dk/familyreunification/family_reunification_under_eulaw/family_reunification_danish_nationals_under_eu-law.htm
- Worker Participation- EU (for a summary of the cases):
<http://www.worker-participation.eu/Company-Law-and-CG/ECJ-Case-Law/Daily-Mail>



4. Enforcement of EU Law and Judicial Review

4.1 Enforcement of EU rights at national level

There is a variety of primary and secondary EU legislation which may grant certain rights or impose obligations on individuals and companies alike. This could be, for example, the right to equal pay or the right to fair trial. Depending on the type of law. It might need to be implemented at national level. But what happens if this implementation is done incorrectly or if the national administrations and courts do not apply it correctly and give effect to the relevant EU law provisions. Well, first of all, it is important to note that member states are obliged to do so according to article four sub-section three of the TEU and the principle of sincere cooperation. The European courts have thus created three main mechanisms here to ensure a system of enforcement. Direct effect, indirect effect, and state liability.

- Direct effect is the capacity for legal norms to be invoked and relied upon directly before national courts.
- Indirect effect, is an obligation on the national courts to interpret national law in conformity with EU law. This is an alternative route when there is no direct effect.
- State liability plays a role when individuals or companies have suffered damages due to their member state being in breach of EU law. Such damages might be recoverable under certain conditions by claiming compensation from your own member state.



4.2 Case study

In the famous case of Francovic, Francovic's employer went into liquidation with some of his salary still unpaid. According to an EU directive, however, employees have the right to recover such unpaid salaries from guarantee bodies to be set up at national level. The problem was that Italy had not implemented this directive.

How could Mr. Francovic enforce his EU rights? May be through direct effect. But then the relevant provisions in the directive did not satisfy the conditions for direct effect. How about indirect effect? Unfortunately, no national legislation could be interpreted in the light of the directive in this case, or maybe national law? Well, Italian law did not allow actions for damages to be brought against the legislature.

This was when the court establish the remedy of state liability, which obliges the member state to pay compensation for the harm caused to individuals or companies if the member state is responsible for having breached EU law.

The rationale behind this is the effectiveness of EU law. In other words, if individuals could only rely on direct or indirect effect before their national courts, but not request compensation for the damage is caused. EU law would not be as effective.

Direct effect is only a minimum guarantee but state liability goes further. It operates as a determined or sanction for a member state which has failed to implement or give effect to EU laws, so you are able to rely on state liability independently from direct or indirect effect, and it is available to both public and private employees, unlike, for example, direct effect.



4.3 Challenging an EU act

Why would someone want to challenge directly a piece of legislation at EU level?

Well, maybe it imposes certain obligations on their company which puts them at a competitive disadvantage, or it discriminates against them as an individual.

The most important provision here, is Article 263 of the TFEU, as it will challenge an EU measure entirely or in parts with the aim to declare it invalid, which is the action for an annulment.

It clearly states that any legislative act by any of the EU institutions can be reviewed so any regulation, directive, or a decision which has binding legal effects. The second subparagraph then gives the different grounds of review.

So for which reason can you challenge an EU act? This can be for example, if the EU would have not had the necessary competence to act or has done so on an incorrect legal base.

The most important question, however, is whether you are actually eligible to bring an action.

This is called standing. As an individual or the owner of a company, you would have to turn to subparagraph four, which provides different options. If the measure is directly addressed to you, then you always have standing. However, in most cases, this would not be the case. Then you would have to prove direct and individual concern. Direct concern is a direct link between the challenged measure and a damage for the applicant. Individual concern is more difficult to prove according to the Plaumann criteria.



There is also another possibility, the non-contractual liability, which you can find on the Article 340 of the TFEU.

This is the equivalent of state liability. The action for non-contractual liability, however, takes place at EU level. So again, this is an action to recover damages. Any actions wrongfully imposed by EU institutions or its servants can be challenged under this procedure, if these have caused the damage.

4.4 Online Resources

- Michal Bobek, 'The Effects of EU Law in the National Legal Systems' in C Barnard and S Peers (eds), European Union Law (OUP 2014) 140-173, available at: <http://ssrn.com/abstract=2371396>
- Charter on Fundamental Rights of the European Union:
http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2016.202.01.0389.01.ENG



5. Principles and Institutional Setup

First, we will take a look at the rules in the EU treaties which may be relevant. We will also look at the institutional setup in the EU; in particular the role of different institutions and the EU member states. These are intertwined since the rules govern the institutional set up.

As with most, if not all fields of EU law, there is primary law, the treaties and secondary law, directives and regulations. The law regulates the balance between the two main players in the external dimension. The EU itself on one hand, and its member states on the other. It is this parallel setup that creates the complexity of the system.

5.1 Seven main players

In the external dimension of the European Union, there are seven main players.

1. One is the European External Action Service and the High Representative or the EEAS for short. You'll find the legal basis in article 27 TEU. The purpose is to present a strong coherent voice in fields outside of the common commercial policy. It is not an EU institution which naturally limits its influence and scope of action.
2. The European Council on the other hand sets out the future policy making of the EU and as such may influence non legal, but important foreign policy activity.
3. The council is another agenda setting institution. The Foreign Affairs Council, which consists of the ministers of foreign affairs of the member states, elaborate the union's external action on the basis of strategic guidelines laid down by the European Council, and ensure that the union's action remains consistent.



4. The European Commission is a key player in this field. Although the dedicated directorate general for external relations was removed and became the EEAS, the external dimension of most policy areas mean that the commission has remained a key player in this field. The fields of trade, energy, and humanitarian aid were never transferred to the EEAS and they remain fully in the hands of the commission. The commission also represents the EU abroad with the exception inter alia for the common foreign security policy.
5. The European Parliament has proven to be a very active player in the field of external relations. The European Parliament is regularly consulted. It must give its consent before an international agreement can be concluded by the European Union. This was apparent before the signing of the TTIP with the United States of America.
6. The Court of Justice, of course, plays a pivotal role in the external dimension. One of its main tasks is to decide on the delimitation of external competences between the union and its member states. Its judgments in these matters are therefore very important for the institutional balance in the EU.
7. And then last but not least, there are the member states. Despite their membership in the EU, the member states are still international actors themselves. The principle of conferral means that the EU can act only as long as there is competence to act. If there is no competence for the EU or indeed if there is a shared competence between the EU and the member states, the member states remain free to act on the international arena.



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5.2 Procedure for the conclusion of new international agreements.

The procedure is laid down in Article 218 TFEU. The procedure is in the hands of the council, although the commission is the key actor. The commission initiates the procedure by a recommendation, you find this in paragraph three, but needs the approval of the council, paragraph two.

The council then controls the procedure through directives or consultations, you see this in paragraph four. Then the council issues an authorization to sign, according to paragraph five. According to paragraph six, the European Parliament must be consulted in a number of cases.

There are four categories of agreements. There are mixed agreements, which implies that both the union and its member states become parties to the agreement.

There are association, accession, and withdrawal agreements involving reciprocal rights and obligations, common action, and special procedure.

There is the accession to international organizations. And finally, there are the future agreements concluded by the member states only.



5.3 Legal texts of the EEA Agreement

Article 6 EEA

“Without prejudice to future developments of case law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties, shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this Agreement.”

5.4 Online Resources

- Legal texts of the EEA Agreement, available at: <http://www.efta.int/legal-texts/eea>



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What is next?

- ✓ 5 Case studies
- ✓ Evaluation of the B-LAND Multilingual APP





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Suggested Readings

- How the European Union works: your guide to the EU institutions, Publications Office, Luxembourg, 2013.
- C. Barnard (2016), “The Substantive Law of the EU: The Four Freedoms”, Oxford University Press.
- Fundamental Rights Protection in the EU Post Lisbon Treaty, by Xavier Groussot.
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1628552
- Weak Right, Strong Court - The Freedom to Conduct Business and the EU Charter of Fundamental Rights, by Xavier Groussot.
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2428181
- Paul Craig and Gráinne de Búrca EU Law: Text, cases and materials (newest edition), relevant chapters on enforcement and judicial review.



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