

SOURCES OF LAW IN THE EUROPEAN UNION



1. PRIMARY LEGISLATION - TREATIES ESTABLISHING THE EU

When Member States join the European Union (the “EU”) they become signatories to a set of Treaties.¹ These are the basic constitutional texts of the EU and are referred to as primary legislation because they set out the EU’s broad aims and establish the various institutions to achieve those aims. By signing the Treaties, Member States agree to transfer their powers on a number of key policy areas to the relevant EU institution.

The primacy principle provides that in the areas where binding EU legislation exists, it takes precedence over all forms of national law. This means that when addressing areas such as employment, environment, competition, economic and financial affairs, education and culture, energy and transport, and taxation and customs, Member States must comply with any legislation enacted by the EU on the subject.

The rights and obligations arising out of the Treaties can be enforced in the Court of First Instance of the European Communities and Court of Justice (the “EU Courts”). It is also possible for national courts to determine matters arising out of EC law, as long the relevant article is clear and unconditional enough to be capable of having direct effect.² Apart from Member States, private parties such as undertakings and individuals, are also able to invoke the rights conferred by the Treaties.³

¹ The main Treaties (in reverse chronological order) are: Treaty of Lisbon signed in 2007, Treaty of Nice signed in 2001, Treaty of Amsterdam signed in 1997, Treaty on European Union signed in 1992 (Maastricht), Single European Act signed in 1986 (Luxembourg and the Hague), Merger Treaty signed in 1965 (Brussels), Treaty of Rome and the Euratom Treaty both signed in 1957, Treaty establishing the European Coal and Steel Community signed in 1951 (Paris). They comprise the ‘Founding Treaties’ (Treaty on European Union, Treaties of Rome and Treaty of Paris (now expired)) and the ‘Amending Treaties’. There are also a number of Accession Treaties by which new members join the EU (these are not discussed further).

² Case 43/75 *Defrenne v Sabena* [1976] ECR 455.

³ Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] 1891; Case 43/75 *Defrenne v Sabena* [1976] ECR 455 and Joined Cases C-6; and 9/90 *Francovich and Bonifaci v Italy* ECR I-5357.

2. SECONDARY LEGISLATION

Secondary legislation represents the rest of the legal instruments adopted by EU institutions, which include legally binding⁴ and non-binding⁵ instruments. In addition, there are other forms of 'soft law' that also have an important impact on the EU legal order.⁶

Below is a brief overview of the content and application of three types of binding EU legal instruments: Regulations, Directives and Decisions.



2.1 Regulations

Regulations⁷ are used whenever there is a need for consistency and uniformity of application between Member States. They have general application which means that they are applicable to everybody and are not specifically addressed to a set of parties, particular circumstances, etc.

They are also directly applicable meaning that they take immediate effect (become law) across all Member States, without the need for national governments to adopt them into national legislation.⁸ Direct effect also means that regulations are capable of being enforced by private parties.⁹

In rare cases, Regulations may require State authorities to adopt measures so that they can be appropriately implemented.

2.2 Directives

Much of EU law takes the form of Directives¹⁰ which are addressed to Member States, requiring them to align their national legislation with the general rules and objectives set out in the Directive. Although they are capable of having direct effect,¹¹ parties have generally tended to enforce them only once Member States have passed national legislation implementing the Directive.¹²

⁴ These include Regulations, Directives and Decisions as well as international agreements and conventions ratified by the Community.

⁵ These include Resolutions and Opinions.

⁶ These include Notices, Guidelines, Recommendations, Commitments about the conduct of institutions and Action Plans.

⁷ An example is Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (OJ L 364, 9.12.2004, p1).

⁸ Immediate effect does not mean that Regulations enter into force immediately. They enter into force either 21 days after they have been published in the Official Journal or on a particular date specified in the Regulation (Art 254 EC).

⁹ Article 249 EC; Case 93/71 *Leonesio v Italian Ministry of Agriculture* [1092] ECR 293; and Case 39/72 *Commission v Italy* [1973] ECR 101.

¹⁰ An example is Directive 2005/56/EC of the European Parliament and of the Council on cross-border mergers of limited liability companies (OJ L 310, 25.11.2005, p1).

¹¹ Case C-91/92 *Faccini Dori v Recreb* [1994] ECR I-3325.

¹² Although individuals may avail themselves of the right to have unimplemented directives transposed into national legislation by Member States and State entities.

This process may take time - national administrations are usually given 18 or 24 months to transpose the prescribed obligations within the framework of their internal legal order.¹³ The resulting national laws are likely to vary because Member States are provided with a choice as to form and method they adopt to realise these objectives. Therefore, Directives are not meant to unify but to harmonise the legislation of Member States.¹⁴

2.2.1 Maximum and minimum harmonisation standards in EU Directives



The difference between a maximum and a minimum standard of harmonisation refers to the extent to which Member States are required to harmonise their legislation with the relevant EU Directive.

A “maximum harmonisation” Directive,¹⁵ requires Member States to apply a specific set of standards, but does not allow them to exceed the terms of the Directive, i.e. they are unable to apply higher standards.

A “minimum harmonisation” Directive¹⁶ has the opposite effect, requiring Member States to legislate to at least the minimum standard laid down by the Directive, but allowing them to set higher national standards, if they prefer to.

“Maximum harmonisation” Directives tend to create a higher degree of uniformity across Member States.

2.2.2 Vertical and horizontal EU Directives

“Horizontal” Directives deal with a particular type of activity, irrespective of the business sector concerned. “Vertical” Directives deal with a particular sector of the economy in a more detailed manner.

For example, the EU has provided for the regulation of working hours through a horizontal Directive which lays down the general rules regarding working hours.¹⁷ That Directive was then followed by a number of sectoral vertical directives addressing particular industries, following negotiation with various interested parties such as unions and industry associations.¹⁸

¹³ Although Directives come into force 20 days after publication in the Official Journal or on a date specified in the Directive, they allow a period of time during which Member States adopt the Directive into their national legislation (Art 252 EC).

¹⁴ If a Directive is not transposed into national legislation, if there has been delay, or if it has been improperly or only partially transposed, citizens of Member States can sometimes directly invoke the application of the Directive before the national courts.

¹⁵ An example is the Unfair Commercial Practices Directive (OJ L 149/22, 11.6.2005, p1) which came into force in May 2005 and is due to be implemented in the UK through the Consumer Protections from Unfair Trading Regulation 2008 and Business Protection from Misleading Marketing Regulation 2008.

¹⁶ An example is Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending (OJ L 390/38, 31.12.2004, p1). The Transparency Directive was implemented in the UK through provisions in the Companies Bill and Financial Services Authorities rules.

¹⁷ Council Directive 93/104/EC concerning certain aspects of the organisation of working time to cover sectors and activities excluded from that Directive (OJ L 307, 13/12/1993, p18), as amended by Directive 2000/34/EC of the European Parliament and of the Council of 22 June 2000 (OJ L 195, 1.8.2000, p41).

¹⁸ Directive 1999/95/EC of the European Parliament and of the Council concerning the enforcement of provisions in respect of seafarers' hours of work on board ships calling at Community ports (OJ L 14, 20.1.2000, p29).

2.3 Decisions

Decisions¹⁹ are the instrument by which the Community institutions give a ruling on a particular matter. They are individual measures through which require specific Member States, undertakings or citizens to take or refrain from taking a particular action. They can also confer rights or impose obligations on these specific entities. Decisions are capable of having direct effect.²⁰

Decisions can have a broader effect on the conduct of persons who are not mentioned in the Decision because they encapsulate the Council or Commission's views on a specific issue. This is because although the relevant institution is not strictly bound to do so, it is likely that it will follow previous Decisions in which it has dealt with similar issues, albeit in a different context.



3. CASE LAW

Another source of law in the EU is the case-law developed by the EU Courts. Proceedings before the EU Courts can arise between Member States, EU institutions, undertakings or private individuals.

The EU Courts aim to ensure that EU law is interpreted and applied consistently in all Member States e.g. by ensuring that national courts do not give different rulings on a comparable set of facts. Case-law of the EU Courts addresses matters that are the subject of the Treaties or EU secondary legislation. Unless there is an EU dimension, they do not address matters that are within the exclusive jurisdiction of the national courts, such as the law of contract between private individuals. Although there have been some projects aimed at developing general codes in relation to the operation of such areas (e.g. Principles of European Contract Law), it is unlikely that we will witness a real convergence in this area in the near future.

March 2008

This article contains a summary of complicated issues and should not be relied upon in relation to specific matters. You are advised to take legal advice on specific matters. For more information on how Martineau can assist in this regard, please contact:



James Dilley

Partner, Competition & Procurement Team
T: 44(0)870 763 1208
Email: james.dilley@martineau-uk.com

¹⁹ Examples include Commission Decisions allowing or rejecting a merger that affects trade between Member States.

²⁰ Case 9/70 *Grad v Finanzamt Traustein* [1097] ECR 838.