

European Union Law

Topic 2 (of 4): Institutions and secondary sources of EU law.

Lecture 2 (of 3):

An Outline of the Sources of EU Law

Aim:

To outline the sources of EU law; to discuss the characteristics of the secondary sources of EU law; and to note the sources of law developed by the ECJ.

Objectives:

After carefully reading the following notes and other prescribed readings for this lecture, you should be able to:

1. Explain why EU sources of law are classified as primary or secondary sources and how they are distinguished;
2. Explain: (a) what is meant by a regulation being directly applicable; (b) how a Directive may become part of English law; and (c) the meaning of a Directive being directly effective; and
3. Discuss the reforms of secondary legislation that would have been introduced if the ***Treaty establishing a Constitution for Europe*** had been ratified and compare this with the corresponding provisions of the ***Treaty on the Functioning of the EU***.

Introduction

In common with English domestic law, EU sources of law may be categorised as enacted (or legislative) and non-enacted (or judicial) sources; and both categories may be subdivided. The principal sub-divisions of enacted law are Treaties and acts of the EU Institutions. The principal non-enacted law relates to the development by the ECJ of a wide-range of general principles of law.

By contrast, the principal acts of Member States (particularly the United Kingdom) consist of the *implementation* of the Treaty of Rome and the subsequent amending Treaties; and the implementation of legislation giving the force of law to acts of the Institutions made under the authority of the Treaties, i.e., the implementation of secondary legislation. Accordingly, such acts focus on the incorporation of EU law: they aren't sources of EU law, *per se*. {In this respect, see, in particular, ***Regulations***, pp4-5, *infra*}.

That the **TEU and TFEU** act as *primary sources* of law means that they contain provisions for making *secondary* sources of law. The principal secondary sources of EU legislation are those provided for in **Art.288 TFEU** [ex.Arts.249EC / 189EEC].

Primary and Secondary Sources of Enacted EU Law

The EU is founded on treaties of equal value, the **TEU** and **TFEU**. However, as English law regards national or domestic law (also known as municipal law) and international law as two fundamentally different systems (i.e., English law adopts a dualist approach to international law), then an international treaty is not recognised as having the force of law in England and Wales until it is incorporated into English law via a legislative enactment. Accordingly, the two Treaties of equal value had the force of law in the U.K. only after the amending Treaty, the **Treaty of Lisbon**, was incorporated by enacting the **European Union (Amendment) Act 2008**. Indeed, from the time the UK acceded to the **EEC** via the incorporation of the Treaty of Rome in the **European Communities Act 1972**, subsequent amendments to the Treaty of Rome by the Single European Act, the Treaty on European Union ('Maastricht'), the Treaty of Amsterdam and the Treaty of Nice became part of English law only on enactment of the **European Communities (Amendment) Acts 1986, 1993, 1998, and 2002**, respectively. Moreover, the **European Union (Accessions) Act 2003** was enacted to make provisions for the 10 new Member States that signed the Accession Treaty on 16th April 2003 and became full members of the EU as from 1st May 2004. **The European Union (Accessions) Act 2006** provided for the accession of **Bulgaria** and **Romania** to the European Union as from 1st January 2007.

As noted, the most recent amendment was the ratification of the **Treaty of Lisbon** via the **European Union (Amendment) Act 2008**, which received the Royal Assent in June 2008. The Treaty of Lisbon amended the **TEU**, as introduced in Maastricht and the EC Treaty, which was renamed the **Treaty on the Functioning of the European Union**.

A country (or state) that requires a legislative enactment to incorporate an international treaty into its corpus of law is said to have a *dualist* approach to international law. Within the EC, states other than the U.K. adopting a dualist approach include **Belgium, Germany and Italy**. By contrast, states whose constitution permits automatic reception of international law into its national law are said to exhibit a *monist* approach to international law. Within the EC, **France** and **The Netherlands** are monist states.

Irrespective of the method of incorporation, the legal significance of the Treaty of Rome (as amended) is, in essence, that it forms the written constitution of the EU (*Opinion 1/91*). Accordingly, the EC Treaty (as amended and renamed the **TFEU**) is one of the ultimate or *primary sources* of legal authority within the EU. Moreover, the Treaties function as *primary* sources of law in two ways, viz;

(i) they contain provisions enabling Union Institutions to make binding *secondary* legislation: see **Art.288 TFEU**. It is essential that the institutions act within the powers conferred on them: to do otherwise, would be to act *ultra vires* and to render a putative measure null and void: *Commission v. Council (Re Generalised Tariff Preferences)* (1987).

(ii) they contain provisions, which have been developed by case law, and on which fundamental, or general, principles of Community law have been based. These are principles that have *direct effect*. This means that individuals may rely upon them when pursuing their actions before their own national courts and tribunals. The general principles, which are based on a combination of, *inter alia*, **Arts.263** [ex. Art.230EC] and **340(2) TFEU** [ex. Art.288(2)EC]; and **Art.19TEU** [ex. Art.220EC], have been developed by the ECJ's interpretation of these provisions. (See Topic 3, Lecture 3).

(I) Primary Sources of EC Law

1. Constitutive Treaties (as they are generally described)

Lasok and Bridge¹ note that not only can we distinguish between primary and secondary sources of EC law but that:

The distinction is important for theoretical and practical reasons because primary sources, being hierarchically superior, generate derivative (secondary) law and provide the criteria by which the validity of the latter is tested.

The primary sources of **EC** law (i.e., *pre-Treaty of Lisbon*) had included:

- the founding treaty, the Treaty of Rome (as amended), together with its annexes and protocols;
- the Convention on Certain Institutions Common to the European Communities (1957) (i.e. the Convention which provided a single Assembly/Parliament and a single Court of Justice of the European Communities);
- the Merger Treaty (1965) (which provided for a single Council and a single Commission for the European Communities);
- the Treaties of Accession and their annexes (the U.K. became a Member State of the then EEC after signing and ratifying the first Treaty of Accession while the 2003 Accession Treaty provided for the single largest expansion in the history of the EC);
- the Act of the Council concerning direct elections to the European Parliament (1976);
- the Single European Act (1986) in force July 1987;
- the Treaty of European Union (1993) together with its Protocols and Declarations; and
- The Treaty of Amsterdam (1997) - in force since May, 1999; and
- The Treaty of Nice (2001), in force since February 2003
- The Treaty of Lisbon – which has now amended EC law and replaced ‘Community’ with ‘Union’.

¹**Lasok, D.** *Lasok & Bridge: Law & Institutions of the European Union.* London: Butterworths, 6/e 1994.

2. EU Treaties with Third States

In addition to the **TFEU** functioning as a primary source of law, a second primary source of law emerges from international agreements concluded by the EU with third states². Clearly, the nature and contents of the treaties must come within the scope and competence of the EU. That the EU has competence over fisheries and transport policies has meant that twice the UK has failed in its claims that prior agreements it had with third countries could take precedence over Community law: cases C-144/89 (fisheries policy) and C-466/98, where an attempted renewal of an “Open Sky” agreement with the USA failed because, in essence, it was a *new* agreement and, thus, outside **Art.351(1) TFEU**.

Art.47 TEU gives the EU legal personality, so enabling **Art.217 TFEU** to provide that : ‘The Union may conclude with one or more States or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure.’

(II) Secondary Sources of EC Law

(ii) Legislation made by the Institutions under Art.288TFEU³

A Community Institution acting within the powers attributed to it by the EC Treaty may enact secondary legislation. ‘Secondary legislation’ is a term which encompasses all the ‘legislative acts’ made by: the European Parliament acting in conjunction with the Council, the Council acting alone, or the Commission, primarily by way of exercising delegated powers, can adopt under the provisions of the EC Treaty and which create enforceable rights and obligations for Community subjects. The types of legislation provided for are contained in **Art.288TFEU** which states that:

In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver 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 which it is 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.

² See **Arts.218** and **351 TFEU**

³ See **Arts.288-292TFEU** – now that the *Treaty of Lisbon* has been ratified.

Given that all secondary legislation is derived from, limited by and hierarchically subordinate to the primary sources, then no manifestation of it can amend, repeal or alter the scope of any primary source of law. Moreover, as a minimum condition, the institutions have to act in accordance with the provisions of the treaties and within the limits of their respective powers as conferred upon them by the treaties if the making of the secondary legislation is to be deemed valid. (The issue of legal base is discussed in the next lecture).

(a) Regulations

Regulations have three general characteristics:

(i) They are of **general application**, i.e. they are not limited to individual cases or situations, or to a limited number of defined or identifiable persons. Thus, in the 'Fruit & Vegetables' case (1962)⁴ the Court stated that:

a regulation, being essentially of a legislative nature, is applicable not to a limited number of persons, defined or identifiable, but to categories of persons viewed abstractly and in their entirety.

(ii) They are **binding in their entirety** (cf. directives which are binding only as to the result to be achieved).

(iii) As a general rule, they are **directly applicable** which means that they are incorporated automatically into the law of each Member State without the need of intervention on the part of national legislative bodies. In Case 34/73⁵, Variola v. Italian Finance Administration, it was stated that:

the direct application of a Regulation means that its entry into force, and its application in favour of or against those subject to it are independent of any measure of reception into national law ... Member States are under a duty not to obstruct the direct applicability inherent in Regulations. Strict compliance with this obligation is an indispensable condition of the simultaneous and uniform application of Community Regulations throughout the Community.

Indeed, nearly 10 years earlier, **Advocate General Lagrange** had said in Case 6/64, Costa v. ENEL [1964] ECR 585 @ 603:

Where the executive organs of the Community have the power to issue regulations, and make use of it, the incorporation in the domestic system takes place *ipso jure* the moment the regulations are published.

⁴ Cases 16, 17/62, Producteurs de Fruits v. Council [elements of this quote were repeated in Joined Cases 789-790/79, Calpak v. Commission].

⁵[1973] ECR 981

One of the few exceptions to the general rule was the ***Tachograph Regulation 1463/70*** which provided that: “Member States shall, in good time and after consulting the Commission, adopt such laws, regulations and administrative provisions as may be necessary for the implementation of this Regulation.”

That a provision of the EC Treaty can be directly applicable is provided for in **s.2(1)** of the ***European Communities Act 1972*** which states that:

All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; ...

However, the meaning of ‘direct applicability’ is not entirely clear. It may refer solely to the way an international norm (i.e. a treaty provision) is incorporated into a national legal system and/or it may ‘connote the idea that individuals have rights which they can enforce in their own name through national courts.’⁶ Suffice it to say that the meanings are related and that the latter is a rule to which there are many exceptions.

(b) Directives

That ‘Directives shall be binding, as to the result to be achieved,’ means that they are binding only as to obligations of result, not obligations of conduct. This means that whereas Directives are aimed at securing objectives, the method by which a particular Member State achieves it is left open for that Member State to decide. So, for example, *Directive 85/337 on the Assessment of the Effects of Certain Private and Public Projects on the Environment* was implemented via the ***Town and Country Planning (Assessment of Environmental Effects) Regulations 1988***. By contrast, a statute, the ***Consumer Protection Act 1987***, was enacted to incorporate ***Directive 85/374*** on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products. Another statute, the ***Data Protection Act 1998***, was enacted to give the force of law to ***Directive 95/46***.

Irrespective of the method of implementation, the obligation on each Member State remains the same: the ‘result’ has to be achieved – i.e., it must be binding and the implementing measure must meet the requirements of legal certainty⁷ - and it has to be achieved within the time limit specified in the Directive (usually two years). Failure to comply may enable an individual to enforce, *in his national court*, any right accorded to

⁶*Craig, P and De Burca, G. EC Law Text Cases & Materials*, 1/e. Oxford: Clarendon Press 1995, p98. The meanings are discussed in the next lecture.

⁷*Case 239/85, Commission v. Belgium* [1986] ERC 364

him via the principle of direct effect: *Case 148/78, Ratti* [1979] ECR 1629. That is, a Directive may have direct effect. The direct effect of Directives is a provision of EU law that has been developed by the ECJ over more than 40 years. [Direct Effect is discussed in detail in Topic 3, Lecture 1].

(c) Decisions

Decisions may be addressed to natural persons or undertakings (usually corporations) or to Member States. They are **binding in their entirety upon those to whom they are addressed**. Decisions are most frequently encountered in cases where the Commission has concluded that undertakings are in breach of competition policy under **Articles 101 or 102 TFEU**. Accordingly, it follows, as a general rule, that Decisions are not normally normative in the sense of creating generally applicable Community law.

(d) Recommendations and Opinions

Whereas recommendations and opinions have no binding effect, the Commission may utilise such methods for clarifying Treaty matters, either where expressly provided for in the Treaty or where the Commission believes it necessary to do so. *Snyder* (1993) termed this '*soft law*' – statements that have no binding effect but which may be considered as some form of persuasive argument. Indeed, they are more than merely persuasive given that a national court would be obliged to take such a recommendation or opinion into consideration when attempting to interpret a Community measure: see *Grimaldi's case, Case C-322/88*.

Qualifications on Art.288 TFEU acts.

Predecessors of the Article 288 TFEU list of acts were subject to three qualifications.

(i) The *title of an act is not necessarily conclusive as to its legal classification*. The classification of an act depends upon its nature rather than its title: *Joined Cases 41-44/70, International Fruit v. Commission*.

(ii) The *acts are not as distinct from each other as might be thought* from the wording of the Article 288 TFEU predecessors. The blurring of the distinctive features of different acts is especially evident with regard to *direct effect*. Article 288 TFEU provides that regulations are *directly applicable*. The ECJ has not, however, drawn a clear distinction between *direct applicability*, which means that, as a general rule, the provision of Community law becomes part of the corpus of national law without the need for any enacting measure on the part of a Member State, and which applies only to *Regulations*, and *direct effect*, which means that the provision may be invoked by an individual in national courts. Despite any implications to the contrary which might be drawn from

Article 288 TFEU, the ECJ has held that some Regulations and Treaty articles, in addition to directives and decisions, may be directly effective.

(iii) The Article 288 list is not necessarily exhaustive. The ECJ has recognised other types of legally binding acts: see Case 22/70, Commission v. Council [1971] ECR 263.

Publication and Notification of Secondary Legislation.

Article 296 TFEU provides that Regulations, Directives and Decisions must state the reasons on which they are based; and **Art.297(2) TFEU** provides that Regulations and Directives must be published in the *Official Journal of the European Union* and will enter into force on the specified date or, in the absence thereof, on the twentieth day following that of their publication.

Summary

Characteristics of binding secondary legislation made under Art.288 TFEU			
	Regulations	Directives	Decisions
To whom the 2 ^o legislation applies	Regulations are of general application	Bind the MSs to whom they are addressed: Art.4(3) TEU + Art.288(3) TFEU	Bind only those to whom they are addressed
Extent to which they have binding force	Binding in their entirety	Binding as to the result	Binding in their entirety
How it achieves the force of law	Directly applicable	Via implementing legislation	No implementing legislation required

(iii) Non-Enacted Law: Decisions of the ECJ

Some of the most remarkable developments in EC Law have come via the development of the law by the ECJ. The developments include those of the doctrine of direct effect; the principle of the supremacy of EC Law; and the development of the general principles of EC Law, all of which will be analysed in later lectures [See Topic 3, Lectures 1 – 3, respectively].

(iv) No Reform of Secondary Legislation

If the *Treaty establishing a Constitution for Europe* had been ratified, recommendations and opinions - the non-binding secondary legislation made under **Art.249EC** [now Art.288

TFEU] – would, in essence, have remained unchanged. However, there would have been a substantial re-classification of the binding secondary legislation, viz;

Art.I-33(1) of the *Treaty establishing a Constitution for Europe* provided for a division into legislative and non-legislative acts. Legislative acts would have encompassed **European laws** and **European framework laws**; and the non-legislative acts would have consisted of *European regulations* and *European decisions*.

In essence, the **European laws** and **European framework laws** would have been similar to, and reflected the differences in, the current **Regulations** and **Directives**, respectively.

Suffice it to say that the non-legislative acts - European regulations and European decisions – were to be used to implement, supplement or amend legislative acts and specific provisions of the Constitution.

The general rule was to be that European laws and framework laws would have been adopted jointly by the European Parliament and the Council under the ‘ordinary legislative procedure’: **Art.I-34**.

Proposals for such reform were omitted from the Treaty of Lisbon / TFEU. Accordingly, there is no change from the previous EC secondary legislation.

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Summary of the principal sources of EU Law

Focus on:

- The primary sources in the constitutive Treaties;
- Primary sources from Treaties between the EU and third countries;
- Binding secondary legislation made under **Art.288 TFEU** and, in particular, the definition of a Regulation and the scope and impact of Directives;
- Soft law via recommendations and opinions;
- General Principles of EU Law – i.e., the principles developed from Treaty provisions and / or the principles common to the legal systems of the Member States.

References

- Fairhurst, J.** *Law of the European Union*, 8th edn., 2010. Harlow: Pearson Longman, Ch.2;
Foster, N. *EU law Directions*, 2nd edn., 2010. Oxford: OUP, Ch.4;
Hartley, T.C. *The Foundations of European Union Law*, 7th edn., 2010. Oxford: OUP, Ch.s 3-6;
Kaczorowska, A. *European Union Law*, 2nd edn., 2010. Abingdon: Routledge, Ch.8, esp. pp213-233;

Short-answer questions

1. Discuss the characteristics of the acts in **Art.288 TFEU** that have binding effect. Explain the meaning of *direct effect* and outline the principal cases where some Treaty Articles and some Directives that have been held to be directly effective.
2. Identify some of the principal primary sources of EU law and discuss their provisions.
3. Explain the purposes of the significant provisions contained in **Arts.296** and **297 TFEU**.
4. Identify and discuss the impact on English law of what you consider to be some of the most important of Directives to be transposed prior to the coming into force of the Treaty of Lisbon.