

## **SOURCES OF EUROPEAN UNION LAW**

**Venelin Terziev<sup>1</sup>, Marin Petkov<sup>2</sup>, Dragomir Krastev<sup>3</sup>**

<sup>1</sup>Corresponding Member of the Russian Academy of Natural History, Moscow, Russia, Prof., D.Sc.(Ec.), D.Sc. (National Security), D.Sc. (Social Activities), Ph.D., National Military University, Veliko Tarnovo, Bulgaria; University of Rousse, Rousse, Bulgaria, terziev@skmat.com

<sup>2</sup>Assoc. Professor, Ph.D., National Military University, Veliko Tarnovo, Bulgaria, marin\_5kov@abv.bg

<sup>3</sup>Assoc. Professor, Ph.D., National Military University, Veliko Tarnovo, Bulgaria, drago.krastev@gmail.com

### **Abstract**

EU law is a separate legal framework, different from international law, and integrated into the legal systems of the Member States. The Union's legal framework is based on autonomous legal sources. Different nature of these sources requires the introduction of a hierarchy among them. At the top are the primary law enshrined in the Treaties and the general principles of law followed by international treaties concluded by the Union and by secondary law based on the Treaties.

**Keywords:** Treaties of EU, general principles of law, primary and secondary law of EU.

### **1. INTRODUCTION**

The European Union has its origins in Communities set up after World War II that aimed to create lasting peace. Over the years, the EU has grown to include 27 member states. Member States remain independent sovereign nations, although they pool this sovereignty together in order to gain strength in certain areas and world influence. The Member States delegate some decision-making powers to shared institutions EU law has supremacy over UK law – where EU law and national law conflict, EU law will take primacy. EU law may also have direct effect if it satisfies relevant criteria. This means it gives rights and obligations to individuals as well as state authorities which may be enforced before national courts.

- The EU Treaties, in particular the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).
- Secondary legislation made under the EU Treaties.
- 'Soft law' comprising non-legally enforceable instruments, which may aid the interpretation and/or application of EU law.
- Related Treaties made between the Member States.
- International Treaties negotiated by the Union under powers conferred on it by the EU Treaties.

- Decisions of the Court of Justice of the European Union (which includes the General Court).
- General principles of law and fundamental rights upon which the constitutional laws of the Member States are based.

## **2. SOURCES OF EUROPEAN UNION LAW**

### Primary Legislation: Treaties

The EU has been developed through the adoption and ratification of Treaties. They provide the basic principles on which European law is founded, Treaties set out a broad framework and establish fundamental legal concepts. Treaties create, give authority to and impose restrictions on the power of the institutions. All treaties are generally held to be directly applicable - it automatically becomes part of UK law without the need to enact further legislation.

The principal EU Treaties are: the Treaty on European Union (TEU); and

The Treaty on the Functioning of the European Union (TFEU). The TFEU was previously called the EC Treaty, having been renamed by the Treaty of Lisbon (ToL) when it came into force on 1 December 2009. The ToL amended the TEU and the TFEU. Article 1 TEU (as amended by the ToL) now provides that the TEU and the TFEU constitute the Treaties on which the Union is founded. Prior to the ToL it was common to refer to the European Community in addition to the European Union. However, the ToL amended the TEU to provide that the Union replaces and succeeds the Community (Art 1, TEU). Throughout the TFEU, the word 'Community' has been replaced with the word 'Union'. The following terms are therefore no longer used: European Community; European Communities; or Community law. Reference is made solely to the European Union (or Union) and European Union law (or Union law). The articles within both the TEU and TFEU have been renumbered by the ToL as part of a simplification exercise. The Treaty of Amsterdam (ToA) renumbered the provisions of the TEU and the EC Treaty when it came into force on 1 May 1999. The renumbering of the TEU and the TFEU by the ToL is therefore the second time this has occurred. Two tables of equivalence are published at the beginning of this book. The first table relates to the renumbering made by the ToA, and the second relates to the renumbering made by the ToL. Care must be taken when referring to EU case law, legislation and documents, to ensure that the old numbering (i.e. pre-ToA, and pre-ToL) is distinguished from the numbering used post-ToA and post-ToL. The ToL renumbering came into effect on 1 December 2009. For some time it will be necessary to be aware of both the old and new numbering. Subsequent chapters of this book are based on the new (post-ToL) Treaty numbers but, where appropriate, there are cross-references to old Treaty numbers (pre-ToL). The TEU and the TFEU form the 'constitution' of the European Union and are therefore an important source of Union law. Although they do not purport to create the constitution of a federal state, in some respects they do have that effect. The TFEU has been interpreted in that way by the Court of Justice.

Although fulfilling many of the functions of a constitution for the Union, the EU Treaties still fall far short of creating a federal state. Even though EU law prevails in Member States, the Union depends on national courts and enforcement agencies to implement it. The EU Treaties most nearly resemble a constitution in the way in which they define the competence of the Union itself, and each of its constituent parts and, to a lesser extent, the rights of its citizens. Although the Treaties do not contain a complete catalogue of citizens' rights, they do confer a number of rights which can be enforced directly in the national courts. Ultimately, the Court of Justice acts as guarantor of those rights and has, in fact, quite consciously used the doctrine of 'direct enforcement' (also referred to as 'direct effect') to empower citizens in their own courts and, if need be, against their own governments. A whole range of TFEU provisions have been held to create directly enforceable rights, among them:

- The right not to be discriminated against on grounds of nationality (Art 18 TFEU, previously Art 12 EC Treaty);
- The right to equal pay for work of equal value, regardless of gender (Art 157 TFEU, previously Art 141 EC Treaty);
- The right to seek work and remain as a worker in another Member State (Art 45 TFEU, previously Art 39 EC Treaty);
- The right to receive and provide services (Art 56 TFEU, previously Art 49 EC Treaty);
- The right not to be subjected to import taxes (Art 30 TFEU, previously Art 25 EC Treaty); and

- The right to take action against another undertaking for breach of the competition rules (Art 102 TFEU, previously Art 82 EC Treaty);

#### The Union's objectives

As discussed in Chapter 1, the Union's objectives, set out in Art 3 TEU, are much more succinct than the combined objectives in the former Art 3 EC Treaty (in respect of the former European Community) and the former Art 2 TEU (in respect of the European Union). Article 3 TEU, which replaced both of these provisions when the ToL came into force on 1 December 2009, provides that:

1. The Union's aim is to promote peace, its values and the well-being of its peoples.
2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.
3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States. It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.
4. The Union shall establish an economic and monetary union whose currency is the euro.
5. In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.
6. The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties. Article 3 TEU sets out the broad objectives of the Union; objectives which include not only economic policies but also social and political policies. But how does the Union operate and function – is it run by the Member States?

#### The Union's institutional framework

The following seven Union institutions are established by Art 13(1) TEU:

- The European Parliament;
- The European Council;
- The Council;
- The European Commission (to be referred to as the 'Commission');
- The Court of Justice of the European Union;
- The European Central Bank; and
- The Court of Auditors.

Each of these EU institutions must act within the powers granted to them under the EU Treaties. If any institution exceeds its powers as defined within the Treaties, any resultant act can be struck down as being *ultra vires*, i.e. in excess of its powers. In the next three chapters it will be noted that in addition to these seven institutions, the Treaty provides for other named bodies to be established, and defines their role. Two such bodies are specifically referred to in Art 13(4) TEU: the Economic and Social Committee, and the Committee of the Regions, both of which shall assist the European Parliament, the Council and the Commission.

#### Secondary legislation made under the EU Treaties

Article 288, para 1 TFEU (previously Art 249, para 1 EC Treaty) sets out the different types of Union legal acts:

To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.

The consequences of the Union legal act depend upon its specific nature:

- A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States (Art 288, para 2 TFEU).
- 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 (Art 288, para 3 TFEU).
- A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only upon them (Art 288, para 4 TFEU).
- Recommendations and opinions shall have no binding force (Art 288, para 5 TFEU).

Article 288 TFEU provides that regulations, directives and decisions are 'binding' and are therefore legally enforceable. In contrast, Art 288 provides that recommendations and opinions have 'no binding force' and are therefore not legally enforceable. The former three legally enforceable measures will be considered below, whereas the latter two will be considered in the section entitled 'Soft law'.

#### Regulations

Article 288 TFEU provides that a regulation shall be binding upon all Member States and is directly applicable within all such states. Article 297(1) TFEU (previously Art 254 EC Treaty) provides that all legislative acts (which include regulations) must be published in the Official Journal. The Official Journal is an official Union publication. It consists of two related series and a supplement:

- The L series (legislation) contains all the legislative acts whose publication is obligatory under the Treaties, as well as other acts.
- The C series (information and notices) covers the complete range of information other than legislation.
- The S series is a supplement containing invitations to tender for public works and supply contracts.

The L and C series are published daily (except Sunday) and the supplement is published every day from Tuesday to Saturday. Being a legislative act, a regulation will be published in the L series. The regulation will be cited alongside a reference such as OJ 1990 L 257/13 (this is a reference for an EU Regulation on the control of concentrations between businesses). The reference is decoded as: the L series of the Official Journal, Year 1990, issue number 257, page 13. The regulation enters into force on the date specified in the regulation, or if there is no such date specified, on the twentieth day following its publication in the Official Journal (Art 288(1) TFEU (previously Art 191 EC Treaty)).

#### Directly applicable

As stated above, Art 288 TFEU provides that a regulation shall be directly applicable. Normally if a state enters into an agreement with another state, although that agreement may be binding in international law, it will only be effective in the legal system of that state if it is implemented in accordance with the state's constitutional requirements. For example, if the UK entered into an agreement with France, in order for the agreement to be enforceable in UK courts an Act of Parliament would normally have to be enacted. The Act may incorporate (e.g. copy) the agreement into the relevant Act, or it may simply refer to the agreement and provide for it to be effective in the UK. An EU regulation is an agreement, made by an international body, the European Union. For the regulation to be incorporated into the national legal system, implementing legislation would have to be enacted by the national legislature. This would be very burdensome, because the Union adopts a vast number of regulations each year. The whole Union system would very quickly grind to a halt if a regulation had to be incorporated into the national law of each of the 27 Member States before it was effective. Regulations, especially in the agricultural policy area, quite often require speedy implementation in order to have the desired effect. Such regulations would lose their effect if the Union had to await incorporation by each Member State into their respective national legal systems. It is for this reason that Art 288 TFEU provides that a regulation shall be directly applicable. This means that EU regulations shall be taken to have been incorporated into the national legal system of each of the Member States automatically, and come into force in accordance with Art 297 TFEU (see above). They are binding on anyone coming within their scope throughout the whole of the European Union. They require no further action by Member States, and can be applied by the courts of the Member States as soon as they become operative. In the UK, the European Communities Act 1972 (as amended) provides for the direct applicability of EU regulations.

## Directives

A directive differs from a regulation in that it applies only to those Member States to whom it is addressed, although normally a directive will be addressed to all 27 Member States. A directive sets out the result to be achieved, but leaves some choice to each Member State as to the form and method of achieving the end result. A directive will quite often provide a Member State with a range of options it can choose from when implementing the measure. A directive is not directly applicable. It requires each Member State to incorporate the directive in order for it to be given effect in the national legal system. In the UK, this requires the enactment of an Act of Parliament or delegated legislation. As stated above, Art 297(1) TFEU provides that all legislative acts (which include directives) must be published in the Official Journal. Directives will come into force on the date specified in the directive or, if no date is specified, 20 days after publication in the Official Journal (Art 297(1) TFEU).

## Decisions

Article 288 TFEU provides that a decision is binding in its entirety. Article 297(2) TFEU (previously Art 254(3) EC Treaty) provides that if a decision specifies those to whom it is addressed, such persons must be notified of the decision, and the decision will only take effect upon such notification. However, if a decision does not specify those to whom it is addressed, the decision must be published in the Official Journal, and it will take effect either on the date specified in the decision or, if there is no such date specified, on the twentieth day following its publication in the Official Journal (Art 297(2) TFEU). The same can be said of decisions as can be said of regulations and directives, in that the Treaty articles are generally left open to allow the relevant institution to determine the actual mode of the instrument. However, some articles actually specify that the mode of the instrument shall be a decision. For example, Art 105(2) TFEU (previously Art 85(2) EC Treaty) provides that: If the infringement is not brought to an end, the Commission shall record such infringement of the principles in a reasoned decision [emphasis added] Article 105(2) TFEU concerns infringement of Union competition rules.

## Soft law

Non-legally enforceable instruments which may aid the interpretation and/or application of Union law are referred to as 'soft law'. Such instruments may be referred to by the Court of Justice of the European Union when interpreting and/or applying Union law. One particular form of 'soft law' will be considered further: recommendations and opinions.

## Recommendations and opinions

Article 288 TFEU explicitly states that recommendations and opinions shall not have any binding force. However, the use of these two instruments may help to clarify matters in a formal way. The former Art 211 EC Treaty empowered the Commission to formulate recommendations or deliver opinions on matters dealt with in the Treaty, not only where expressly provided for, but also whenever it considers it necessary. This has not been replicated in the TEU and the TFEU, as amended by the ToL. However, Art 17(1) TEU states that the Commission shall 'promote the general interest of the Union and take appropriate initiatives to that end . . .'. This provision arguably empowers the Commission to formulate recommendations or deliver opinions as appropriate, provided they 'promote the general interest of the Union'.

## 3. CONCLUSION

The European Union has legal personality and as such its own legal order which is separate from international law. Furthermore, EU law has direct or indirect effect on the laws of its Member States and becomes part of the legal system of each Member State. The European Union is in itself a source of law. The legal order is usually divided into primary legislation (the Treaties and general legal principles), secondary legislation (based on the Treaties) and supplementary law (Besselink, 1998; Bobek, 2009a; Coppel, O'Neill, 1992; Goldsmith, 2001a; Harpaz, 2009b; Harpaz, 2009b, Jacobs, 2001b; Jowell, 1996a; Kral, 2008a; Lenaerts, 1991; Lenaerts, De Smijter, 2001c; Liisberg, 2001d; Mancini, 1989; Pescatore, 1970; Schilling, 1996b; Schutze, 2008b; Sharpston, 1990; Snyder, 1993; Toth, 1997; Van Vooren, 2009c; Weiler, Lockhart, 1995).

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