



## SOURCES AND SCOPE OF EUROPEAN UNION LAW

The European Union has legal personality and as such its own legal order 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.

### SOURCES AND HIERARCHY OF UNION LAW

- Treaty on European Union (TEU), Treaty on the Functioning of the European Union (TFEU), and their protocols (there are 37 protocols, 2 annexes and 65 declarations, which are attached to the treaties to fill in details, without being incorporated into the full legal text) [1.1.5](#);
- Charter of Fundamental Rights of the European Union [4.1.2](#);
- The Treaty Establishing the European Atomic Energy Community (Euratom) is still in force as a separate treaty;
- International agreements [5.2.1](#);
- General principles of Union law;
- Secondary legislation.

The European Union is a Union based on the rule of law that has established a complete system of legal remedies and procedures designed to enable the Court of Justice of the European Union (CJEU) to review the legality of the EU institutions' acts (Article 263 TFEU). The Treaties and the general principles are at the top of the hierarchy, and are known as primary legislation. Following the entry into force of the Lisbon Treaty on 1 December 2009, the same value was also given to the Charter of Fundamental Rights. International agreements concluded by the European Union are subordinate to primary legislation. Secondary legislation is the next level down in the hierarchy and is valid only if it is consistent with the acts and agreements which have precedence over it. The doctrine of primacy of EU law is a fundamental pillar of the EU legal order and aims to ensure the unity and consistency of EU law. The CJEU formally insists that EU law has absolute primacy over the domestic laws of the Member States, and that this must be taken into account by domestic courts in their decisions. It has always claimed ultimate authority in determining the relationship between EU and domestic law. In the landmark cases [van Gend en Loos v Nederlandse Administratie der Belastingen](#) and [Costa v ENEL](#), the CJEU developed the fundamental doctrines of direct effect and



primacy of EU law. The CJEU upheld these doctrines in subsequent cases. Notably, it argued in [Internationale Handelsgesellschaft](#) that EU law enjoys primacy even with respect to fundamental rights guaranteed in national constitutions.

## OBJECTIVES

Creation of a legal order for the Union to achieve the objectives stipulated in the Treaties.

## EU SOURCES OF LAW

**A.** Primary legislation of the European Union [1.1.1](#), [1.1.2](#), [1.1.3](#), [1.1.4](#), [1.1.5](#), [4.1.2](#)

**B.** Secondary legislation of the European Union

### 1. General points

The legal acts of the Union are listed in Article 288 TFEU. They are regulations, directives, decisions, recommendations and opinions. EU institutions may adopt legal acts of these kinds only if they are empowered to do so by the Treaties. The limits of Union competences are governed by the principle of conferral, which is enshrined in Article 5(1) TEU. The TFEU defines the scope of Union competences, dividing them into three categories: exclusive competences (Article 3), shared competences (Article 4) and supporting competences (Article 6), whereby the EU adopts measures to support or complement Member States' policies. Articles 3, 4 and 6 TFEU list the areas that come under each category of Union competence. In the absence of the necessary powers to attain one of the objectives set out in the Treaties, the institutions may apply the provisions of Article 352 TFEU, and thus adopt the 'appropriate measures'.

The institutions adopt only those legal instruments listed in Article 288 TFEU. The only exceptions are the common foreign, security and defence policies, to which the intergovernmental method still applies. In this area, common strategies, common actions and common positions have been replaced by 'general guidelines' and 'decisions defining' actions to be undertaken and positions to be adopted by the Union, and the arrangements for the implementation of those decisions (Article 25 TEU).

There are, in addition, various forms of action, such as recommendations, communications and acts on the organisation and running of the institutions (including interinstitutional agreements), the designation, structure and legal effects of which stem from various provisions in the Treaties or the rules adopted pursuant to the Treaties.

### 2. Hierarchy of EU secondary legislation

A hierarchy of secondary legislation is established by Articles 289, 290 and 291 TFEU between legislative acts, delegated acts and implementing acts. Legislative acts are legal acts which are adopted through the ordinary or a special legislative procedure. Delegated acts for their part are non-legislative acts of general application that supplement or amend certain non-essential elements of a legislative act. The power to adopt these acts may be delegated to the Commission by the legislator (Parliament and the Council). The objectives, content, scope and duration of the delegation of power are defined in the legislative act, as are any urgent procedures, where applicable. In addition, the legislator lays down the conditions to which the



delegation is subject, which may be the authority to revoke the delegation or the right to express an objection.

Implementing acts are generally adopted by the Commission, which is competent to do so in cases where uniform conditions for implementing legally binding acts are needed. Implementing acts are a matter for the Council only in specific cases which are duly justified and in areas of common foreign and security policy. Where a basic act is adopted under the ordinary legislative procedure, the European Parliament or the Council may at any time indicate to the Commission that, in its view, a draft implementing act goes beyond the implementing powers provided for in the basic act. In this case, the Commission must revise the draft act in question.

### **3. The various types of EU secondary legislation**

#### **a. Regulations**

Regulations are of general application, binding in their entirety and directly applicable. They must be complied with fully by those to whom they apply (private individuals, Member States, EU institutions). Regulations are directly applicable in all the Member States as soon as they enter into force (on the date stipulated or, failing that, on the twentieth day following their publication in the Official Journal of the European Union) and do not need to be transposed into national law.

They are designed to ensure the uniform application of Union law in all the Member States. Regulations supersede national laws incompatible with their substantive provisions.

#### **b. Directives**

Directives are binding, as to the result to be achieved, upon any or all of the Member States to whom they are addressed, but leave to the national authorities the choice of form and methods. National legislators must adopt a transposing act or 'national implementing measure' to transpose directives and bring national law into line with their objectives. Individual citizens are given rights and bound by the legal act only once the transposing act has been adopted. Member States are given some discretion, in transposing directives, to take account of specific national circumstances. Transposition must be effected within the period laid down in the directive. In transposing directives, Member States guarantee the effectiveness of EU law, in accordance with the principle of sincere cooperation established in Article 4(3) TEU.

In principle, directives are not directly applicable. The CJEU, however, has ruled that certain provisions of a directive may, exceptionally, have direct effects in a Member State even if the latter has not yet adopted a transposing act in cases where: (a) the directive has not been transposed into national law or has been transposed incorrectly; (b) the provisions of the directive are imperative and sufficiently clear and precise; and (c) the provisions of the directive confer rights on individuals.

If these conditions have been met, individuals may invoke the provision in question in their dealings with the public authorities. Even when the provision does not confer any rights on the individual, and only the first and second conditions have been met, Member State authorities are required to take account of the untransposed directive.



This ruling is based chiefly on the principles of effectiveness, the prevention of Treaty violations and legal protection. On the other hand, an individual may not rely on the direct effect of an untransposed directive in dealings with other individuals (the 'horizontal effect'; [Faccini Dori v Recreb Srl, Case C-91/92, point 25](#)).

According to the case law of the CJEU ([Francovich, joined cases C-6/90 and C-9/90](#)), an individual citizen is entitled to seek compensation from a Member State that is not complying with Union law. This is possible, in the case of a directive which has not been transposed or which has been transposed inadequately, where: (a) the directive is intended to confer rights on individuals; (b) the content of the rights can be identified on the basis of the provisions of the directive; and (c) there is a causal link between the breach of the obligation to transpose the directive and the loss and damage suffered by the injured parties. Fault on the part of the Member State does not then have to be demonstrated in order to establish liability.

### c. Decisions, recommendations and opinions

Decisions are binding in their entirety. Where those to whom they are addressed are stipulated (Member States, natural or legal persons), they are binding only on them, and address situations specific to those Member States or persons. An individual may invoke the rights conferred by a decision addressed to a Member State only if that Member State has adopted a transposing act. Decisions may be directly applicable on the same basis as directives.

Recommendations and opinions do not confer any rights or obligations on those to whom they are addressed, but may provide guidance as to the interpretation and content of Union law.

As actions brought against Member States under Article 263 TFEU must concern acts that have been adopted by EU institutions, bodies, offices or agencies, the CJEU has no jurisdiction over the decisions of the representatives of the Member States, e.g. as regards establishing the seats of the EU agencies. Acts adopted by representatives of the Member States acting, not in their capacity as members of the Council, but as representatives of their governments, and thus collectively exercising the powers of the Member States, are not subject to judicial review by EU courts, according to a judgment of the Court of 14 July 2022 in the case of relocation of the European Medicines Agency (EMA)<sup>[1]</sup>. The Court held that Article 341 TFEU does not apply to the designation of the location of the seat of a body, office or agency of the Union, only to institutions. The competence to determine the location of the seat of Union agencies lies with the EU legislature, which must act to that end in accordance with the procedures laid down by the substantively relevant provisions of the Treaties. The decision in question was a non-binding measure of political cooperation, which is not capable of limiting the discretion of the EU legislature. In that sense, the decision is not capable of limiting the discretion of the EU legislature or the European Parliament.

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[1] See [Joined Cases C-59/18 Italy v Council and C-182/18 Comune di Milano v Council](#), [Joined Cases C-106/19 Italy v Council and Parliament](#) and [C-232/19 Comune di Milano v Parliament and Council](#), and [Case C-743/19 Parliament v Council](#).



#### 4. Provisions on competences, procedures, implementation and enforcement of legal acts

##### a. Legislative competence, right of initiative and legislative procedures: [1.3.2](#), [1.3.6](#), [1.3.8](#) and [1.2.3](#)

Parliament, the Council and the Commission take part in the adoption of the Union's legislation to varying degrees, depending on the individual legal basis. Parliament can ask the Commission to present legislative proposals to itself and to the Council.

##### b. Implementation of Union legislation

Under primary law, the EU has only limited powers of enforcement, as EU law is usually enforced by the Member States. Furthermore, Article 291(1) TFEU adds that 'Member States shall adopt all measures of national law necessary to implement legally binding Union acts'. Where uniform conditions for implementing legally binding Union acts are needed, the Commission exercises its implementing powers (Article 291(2) TFEU).

##### c. Choice of type of legal act

In many cases, the Treaties lay down the type of legal act to be adopted. In many other cases, however, no type of legal act is specified. In these cases, Article 296(1) TFEU states that the institutions must select it on a case-by-case basis, 'in compliance with the applicable procedures and with the principle of proportionality'.

##### C. General principles of Union law and fundamental rights

The Treaties make very few references to the general principles of Union law. These principles have mainly been developed in the case law of the CJEU (legal certainty, institutional balance, legitimate expectation, etc.), which is also the basis for the recognition of fundamental rights as general principles of Union law. These principles are now enshrined in Article 6(3) TEU, which refers to the fundamental rights as guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States and the Charter of Fundamental Rights of the European Union ([4.1.2](#)).

##### D. International agreements concluded by the EU under Articles 216 and 217 TFEU

The Union may, within its sphere of competence, conclude international agreements with third countries or international organisations (Article 216(1) TFEU). These agreements are binding on the Union and the Member States, and are an integral part of Union law (Article 216(2) TFEU). According to Article 217 TFEU, the EU may also conclude agreements establishing an association involving reciprocal rights and obligations, common action and special procedure. The [Trade and Cooperation Agreement](#) between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, [was concluded](#) in accordance with this provision. On 28 April 2021, Parliament [gave its consent](#) under Article 218, paragraph 6a, TFEU.

According to the [case law of the CJEU](#), international law takes precedence over (secondary) EU law: 'It should also be pointed out that, by virtue of Article 216(2) TFEU, where international agreements are concluded by the European Union they are binding upon its institutions and, consequently, they prevail over acts of the European Union'.



## E. Independent expertise and better law-making

In 2004, Parliament created five [policy departments](#) providing [high-level independent expertise, analysis and policy advice](#) at the request of committees and other parliamentary bodies. This [independent research](#) – connecting MEPs, academia and citizens – should accompany every legislative initiative, from its planning until the evaluation of its implementation. It should contribute to the high quality of legislation and its interpretation, as an indispensable part of preparatory work<sup>[2]</sup>.

[Optimal EU legislation](#) can lead to [potential gains of over EUR 2 200 billion](#) annually. [Research prepared for the European Parliament](#) by the policy departments indicates that annual gains of EUR 386 billion can be achieved for the free movement of goods, EUR 189 billion for the customs union, EUR 289 billion for the free movement of services and EUR 177 billion for the digital single market.

The [Interinstitutional Agreement on Better Law-Making](#) covers annual and multiannual programming and all aspects of the policy cycle. It also sets out the institutions' various commitments to deliver high-quality EU legislation that is efficient, effective, simple and clear, and that avoids overregulation and unnecessary burdens for individuals, public authorities and businesses, especially small and medium-sized enterprises.

However, recent research commissioned by the European Parliament indicates that the involvement of independent research needs to be: (1) improved at the stage of formulating and planning EU strategies<sup>[3]</sup>, including by shortening delays to introducing legislative reforms, (2) equally applied to all legislative initiatives (e.g. exceptions for urgent files lower the quality of EU legislation in important areas), and (3) equally applied to evaluations of the effects of EU law, which currently lack crucial assessments of quantified effects due to a lack of data collection<sup>[4]</sup>.

## ROLE OF THE EUROPEAN PARLIAMENT

Under Article 14(1) TEU: 'The European Parliament shall, jointly with the Council, exercise legislative (via the 'ordinary legislative procedure') and budgetary (via a special legislative procedure under Article 314 TFEU) functions'. Parliament is seeking to simplify the legislative process, improve the drafting quality of legal texts and ensure that more effective penalties are imposed on Member States that fail to comply with Union law. The Commission's Annual Working and Legislative Programme presents the major political priorities of the Commission and identifies concrete actions, either legislative or non-legislative, that translate these priorities into operational terms. Parliament plays a genuine role in creating new laws, since it examines the Commission's Annual Programme of Work and says which laws it would like to see introduced.

Having gained legal personality, the Union can conclude international agreements (Article 216-217 TFEU). Any agreement concluded in the field of the common

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[2]Maciejewski M., [Role of the European Parliament in promoting the use of independent expertise in the legislative process](#), Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, December 2018.

[3]Jones S. et al., [Better regulation in the EU: Improving quality and reducing delays](#), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, June 2022.

[4]Sartor G. et al., [The way forward for better regulation in the EU – better focus, synergies, data and technology](#), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, August 2022.



commercial policy and in all fields whose policies fall under the ordinary legislative procedure require the consent of the European Parliament (Article 218(6)(a) TFEU). For example, [Parliament gave its consent](#) on 28 April 2021 to the [EU-UK Trade and Cooperation Agreement](#). On other occasions, Parliament had already shown that it will not hesitate to use its veto if it has serious concerns. For example, it rejected the [Anti-Counterfeiting Trade Agreement](#) (ACTA) in 2012.

In July 2022, Parliament adopted an [own-initiative report](#) in response to the communication from the [Commission entitled 'Better Regulation: Joining forces to make better laws'](#).

Research commissioned by the European Parliament's policy departments indicates a need for reform to promote better law making and regulation in the EU<sup>[5]</sup>. The research also shows that EU legislation can benefit from a reform of its drafting and its structure so as to indicate its benefits more clearly and facilitate the digital use of legislation by EU citizens<sup>[6]</sup>. A recent [study on Law and ICT](#) recommends the progressive digitalisation of the EU legal system, including its sources.<sup>[7]</sup>

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[5] Jones, S. et al., [Better regulation in the EU](#), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, October 2023.

[6] Xanthaki H., [The 'one in, one out' principle. A real better lawmaking tool?](#), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, October 2023.

[7] Maciejewski M., [Law and ICT](#), Policy Department for Citizens' Rights and Constitutional Affairs, European Parliament, April 2024.

