

## 7. Sources of EU Law

### 7.1 International Law

International law is the highest source of law in the European Union.<sup>188</sup> This derives from the recognition that the EU is a creation of and based on international law. The EU (then the European Economic Community) was created by an international agreement between sovereign states. Adherence to that agreement is an issue of international law.<sup>189</sup> International law therefore prevails when in conflict with EU law. This applies both to customary international law<sup>190</sup> as well as international conventions.<sup>191</sup>

### 7.2 Primary Law

In the hierarchy of legal norms within the EU legal system, primary law follows international law. The term “primary law” refers to the treaties which serve as the foundation for the EU and its legal system. This includes the EU Treaty and the TFEU as well as the Charter of Fundamental Rights of the European Union (Article 6(1) EU Treaty).

### 7.3 Secondary Law

Secondary law refers to the collection of legislative acts taken by the EU institutions based on the authority granted by a provision of primary law. Secondary law follows primary law in the EU legal system. There are three forms of binding secondary law: regulations, directives, and decisions (Art. 288 TFEU).

#### (a) Regulations

Regulations are binding in their entirety, self-executing, and directly applicable throughout the EU. Regulations have immediate effect and operate to confer rights on individuals which the national courts have a duty to protect.<sup>192</sup> They are not dependent upon transposition by the member states. The European Merger Control Regulation,<sup>193</sup> for example, is a form of law which does not require transposition into national law. Companies involved in mergers and acquisitions

- 188. Case C-366/10, Air Transport Association of America v. Secretary of State for Energy and Climate Change, 2011 E.C.R. I-13833, 13871 ¶50. This includes customary international law. *Id.* at 13886 ¶101.
- 189. Case 6/64, Costa v. ENEL, 1964 E.C.R. 585, 594. Whether the EU can enter into a treaty, however, is an issue subject to EU judicial review. Opinion 1/09 of the Court 8 March 2011, 2011 E.C.R. I-1137 ¶60.
- 190. Case C-366/10, Air Transport Association of America v. Secretary of State for Energy and Climate Change, 2011 E.C.R. I-13755, 13886 ¶101.
- 191. Case C-76/00 P, Petrotub and Republica v. Council, 2003 E.C.R. I-79, 141 ¶53.
- 192. Joined Cases C-4/10 and C-27/10, Bureau national interprofessionel du Cognac v. Gust. Ranin Oy, 2011 E.C.R. I-6131.
- 193. Council Regulation No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, 2004 O.J. (L 24) 1.

exceeding certain monetary thresholds set forth in the Merger Control Regulation are required to notify the transaction to the European Commission regardless of the application of national law. The obvious benefit of regulations is that they establish a uniform set of laws throughout the EU. As is discussed below, other forms of secondary legislation create the possibility for differences among the member states and consequently cause some legal uncertainty.

#### (b) Directives

Another type of secondary law is directives. Directives are only binding in terms of their results to be achieved, and addressed to the member states, which are free to choose the best forms and methods of implementation.<sup>194</sup> Directives are commonly used to harmonize the law of the member states as they apply to certain conduct. For example, Directive 98/44 on the legal protection of biotechnological inventions requires the member states to adjust their laws to make sure that biotechnological inventions are protected under national patent law.<sup>195</sup> Although there are still 28 different sets of laws applicable to the biotechnological inventions, there is a degree of uniformity among these laws because of the Directive. A regulation, on the other hand, would establish a separate law which applies by itself—without the need for transposition by the member states. As discussed in greater detail below, the TFEU determines when the EU institutions can adopt a regulation and when they can adopt a directive.

The effectiveness of directives is dependent on the willingness of the member states to transpose them into national law, and to do so correctly. The Commission is entrusted with the responsibility of making sure the member states comply with their responsibility to transpose the directives into national law. The TFEU (Article 258) grants the Commission the authority to bring an action against a member state before the ECJ for failure to transpose a directive. Before doing so, however, the Commission must notify the member state of its alleged infringement, allow the member state to respond, and then deliver a reasoned opinion to that member state. If the member state fails to conform to the reasoned opinion of the Commission, the case may be brought to the Court of Justice.

For practical purposes, it is important to recognize that directives do not necessarily completely harmonize the laws of the member states. First, the member states are not required to transpose a directive literally.<sup>196</sup> The only requirement is that the national legislation achieves the results envisaged by the directive. Consequently, the laws of the member states transposing a particular directive differ in their wording. These differences often lead to different judicial and administrative interpretations. Of course, if the affected parties contend

- 194. The fact that directives are directed at the member states means that they cannot be relied on by individuals in private litigation against other individuals. Case C-12/08, Mono Car Styling SA v. Dervis Odemis, 2009 E.C.R. I-6653, 6674 ¶59.
- 195. Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions, 1998 O.J. (L 213) 13.
- 196. Case C-321/05, Kofoed v. Skatteministeriet, 2007 E.C.R. I-5795, 5809 ¶44.

that the interpretation of the national law does not conform to the directive, they can challenge the validity of the national law.

Second, noncomprehensive directives allow the member states to adopt legislation offering greater protection than that required by the applicable directive. Generally, there are two types of directives: those that do not leave the member states any latitude in their transposition into national law (comprehensive directives)<sup>197</sup> and those that allow the member states to adopt stricter measures than those set forth in the directive (noncomprehensive directives).<sup>198</sup> For example, the ECJ has held that the biotechnology directive<sup>199</sup> is comprehensive and, consequently, member states are not able to grant greater protection to biotechnology patent holders than is set forth in the directive.<sup>200</sup> The Directive on Transparency Requirements for Issuers of Public Securities expressly provides that the member state where the issuer is located may impose more stringent requirements on the issuer than those set forth in the Directive.<sup>201</sup> Similarly, the Data Privacy Directive and consumer protection legislation set only the minimum standards for protecting personal data and consumers; the member states are not precluded from granting greater protection.<sup>202</sup> The consequences of noncomprehensive directives for businesses are obvious.

Directives that do not fully harmonize an area of law increase legal uncertainty because they lead to divergent outcomes among the member states. Consequently, doing business in Europe may require compliance with a panoply of different laws even where the EU has adopted a directive. Determining when a transaction triggers employee rights provides a good example. The Transfer Directive insures that the rights of an employee transfer along with a transfer of an undertaking, business, or part of a business.<sup>203</sup> According to the ECJ, however, the member states can grant the employees greater protections and in

197. See, e.g., Case C-421/12, Comm'n v. Belgium, 2014 E.C.R. I-\_\_\_\_\_, at ¶63; Joined cases C-261/07 & 299/07, VTB-VAB NV v. Total Belgium NV, 2009 E.C.R. I-2949, 2968 ¶52.

198. See, e.g., Case C-328/13, Österreichischer Gewerkschaftsbund v. Wirtschaftskammer Österreich, 2014 E.C.R. I-\_\_\_\_\_, at ¶22; Case C-205/07, Gysbrechts v. Santurel Inter BVBA, 2008 E.C.R. I-9947, 9961 ¶34.

199. Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions, 1998 O.J. (L 213) 13.

200. Case C-428/08, Monsanto Technology LLC v. Cefetra BV, 2010 E.C.R. I-6765, 6810 ¶62.

201. Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, 2004 O.J. (L 390) 38 at art. 3(1).

202. According to Article 169(4) of the TFEU, the member states, as a general rule, may adopt legislation that imposes greater protection for consumers than the requirements set forth in EU consumer protection legislation.

203. Council Directive 2001/23 of 12 March 2001 on the approximation of the laws of the member states relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings, or businesses, 2001 O.J. (L82) 16. The Transfer Directive is discussed in detail in Chapter IX.

a broader range of circumstances than are set forth in the Transfer Directive.<sup>204</sup> Consequently, the legal situation regarding employees in the context of business transactions differs among the member states. For local transactions involving a small number of employees all in one member state, this panoply of rules does not present a significant challenge. In multi-jurisdictional transactions, however, the parties to the transaction need to address all potentially applicable laws (and their judicial interpretation), most of which differ and some of which contradict each other.

### (c) Decisions

The third form of binding secondary law is decisions. This type of legislation is binding in its entirety upon those to whom it is addressed. Article 105(2) of the TFEU, for example, allows the Commission to adopt decisions regarding infringements of the competition rules. As discussed in Chapter III, when the Commission finds that a firm has infringed the competition rules, the Commission will adopt a formal decision addressed specifically to the firms involved. The TFEU (Article 296) requires the EU institution to provide its reasoning for adopting a decision. The standard is whether the statement of reasons "disclose[s] in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in order to enable the persons concerned to ascertain the reasons for the measure."<sup>205</sup> Failure to adequately state its reasoning can lead to the annulment of the decision by the EU courts.<sup>206</sup>

### (d) Recommendations

Recommendations are of less importance than regulations, directives, and decisions because they are not binding.<sup>207</sup> The Council and the Commission may unilaterally adopt recommendations as authorized in the treaties.<sup>208</sup> As the Commission can unilaterally adopt recommendations, this form of quasi-legislation is often employed when the necessary political consensus cannot be achieved to adopt a regulation or directive. Even though recommendations lack binding character, they are important in two respects. First, a recommendation may be a necessary precondition to the EU institutions taking a binding action. For example, for the Council to sanction a member state for excessive deficits under the EMU, the Council must first receive a recommendation from the Commission.<sup>209</sup> Second, recommendations (even though not binding) can be influential in prompting the member states to observe them. For example, in response to perceived excesses in the remuneration of directors of large EU companies, the Commission adopted a recommendation suggesting that the member states should create greater transparency in this respect so that

204. Case C-458/12, Amatori v. Telecom Italia SrL, 2014 E.C.R. I-\_\_\_\_\_, at ¶40.

205. Case T-144/99, Institute of Professional Representatives before the EPO v. Comm'n, 2001 E.C.R. II-1087, 1102 ¶41.

206. See, e.g., Case T-206/99, Métropole Télévision SA v. Comm'n, 2001 E.C.R. II-1061.

207. TFEU at art. 288.

208. *Id.* at art. 292.

209. *Id.* at art. 104(5). Case C-27/04, Comm'n v. Council, 2004 E.C.R. I-6649.

the shareholders of these companies could more effectively monitor the remuneration of the directors.<sup>210</sup> Within a very short period of time, most of the member states had adopted legislation along the lines recommended by the Commission in its recommendation.

### (e) Notices and Guidelines

Mention should also be made of several additional quasi-legislative measures which may be adopted by the EU institutions.<sup>211</sup> Of particular importance for lawyers and businesses are the notices and guidelines which the Commission has adopted to clarify its position in enforcing primary and secondary EU law. Although these notices and guidelines do not qualify as rules which the EU administration or member states are bound to observe,<sup>212</sup> they are nonetheless considered indirectly binding. The indirectly binding nature of notices and guidelines arises from the application of the general principles of legal certainty and equal treatment. Once an EU institution adopts such notices, that institution is required by the recognized principles of legal certainty and equal application to consistently apply them.<sup>213</sup> For example, failure by the Commission to adhere to its Guidelines on the Method of Setting Fines for Violations of the Competition Laws<sup>214</sup> caused the General Court to partially annul the Commission decision imposing fines on a company for serious competition law violations.<sup>215</sup> If the Commission intends to depart from the notice or guidelines, it must provide reasons why this departure conforms to the principle of equal treatment.<sup>216</sup>

The binding effect of notices and guidelines on the courts of the member states is a different issue, and one whose resolution is uncertain. As discussed above, the member states may have the authority (and in some cases the obligation) to apply EU law. For example, the courts of the member states

- 210. Comm'n Recommendation of 30 April 2009 as regards the regime for the remuneration of directors of listed companies, 2009 O.J. (L 120) 28.
- 211. In addition to the measures discussed here, it is possible for the Council to adopt resolutions. Similar to recommendations of the Commission, resolutions of the Council are not binding on the member states. They are often adopted to address political issues which call for a quick response. For example, in order to prompt the member states into adopting a uniform solution to the problem of football hooliganism, the Council adopted a resolution that “invited” the member states “to examine the possibility of introducing provisions establishing a means of banning individuals guilty of violent conduct at football matches from stadiums at which football matches are to be held.” Council Resolution of 17 November 2003 on the use by member states of bans on access to venues of football matches with an international dimension, 2003 O.J. (C 281) 1.
- 212. Case C-226/11, Expedia Inc. v. Autorité de la concurrence, 2012 E.C.R. I-\_\_\_\_\_, at ¶29; Case C-360/09, Pfleiderer AG v. Bundeskartellamt, 2011 E.C.R. I-5161, 5198 ¶21.
- 213. Case T-461/07, Visa Europe Ltd v. Comm'n, 2011 E.C.R. II-1729, 1807 ¶246; Case C-3/06 P, Groupe Danone v. Comm'n, 2007 E.C.R. I-1331, 1343 ¶23.
- 214. 1998 O.J. (C 9) 1.
- 215. Joined cases T-67/00, T-68/00, T-71/00 and T-78/00, JFE Engineering Corp v. Comm'n, 2004 E.C.R. II-2501, 2694 ¶537.
- 216. Case C-167/04 P, JCB Service v. Comm'n, 2006 E.C.R. I-8935, 9029 ¶207; Joined cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, Dansk Rørindustri A/S v. Comm'n, 2005 E.C.R. I-5425, 5483 ¶209.

have the authority to apply Article 101 of the TFEU to agreements which restrain competition and there is an effect on trade between member states. The Commission has adopted several guidelines and notices designed to assist in the application of the prohibition codified in Article 101. In particular, the Commission has adopted Guidelines on the Effect on Trade Concept contained in Articles 101 and 102 of the TFEU.<sup>217</sup> In *Filigranbetondecken*, one of the issues before the German court was whether the cooperation between two cement products manufacturers in northern Germany had an effect on trade between member states.<sup>218</sup> The German Cartel Office had previously held that the cooperation violated Article 101 of the TFEU. The defendants claimed that Article 101 of the TFEU was not applicable because there was no effect on trade between member states as required by Article 101 of the TFEU. The Düsseldorf Appeals Court held that although the Interstate Trade Guidelines adopted by the Commission suggested that there was an effect on trade between member states, guidelines adopted by the Commission are not necessarily binding on the national courts. The court concluded that in view of the type of product involved in the case—cement products—and the limited geographic scope of the cooperation, there was no effect on trade between member states as required by Article 101 of the TFEU. This issue of the binding effect of Commission guidelines and notices on national courts has not been decided by the ECJ or General Court.

### (f) Legislative Procedures

There are two basic processes by which legislative acts are adopted (both of which necessarily involve other EU institutions).<sup>219</sup> The ordinary legislative procedure refers to the joint adoption by the Parliament and Council on a proposal from the Commission.<sup>220</sup> The ordinary legislative procedure codified in Article 294 of the TFEU starts with the Commission submitting a proposal to the Parliament and Council. The Parliament communicates its position on the proposal to the Council. The Council may then adopt the wording of the legislative act as communicated by the Parliament. If the Council does not approve the Parliament's position, it communicates this lack of approval to the Parliament. It is then up to the Parliament to either approve, reject, or propose amendments to the Council's position. In the instances where the Parliament

- 217. Commission Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty, 2004 O.J. (C 101) 81, 83 ¶21.
- 218. Decision of the OLG Düsseldorf of June 10, 2005, VI – 2 Kart 12/04, reported in Wirtschaft und Wettbewerb 62 (2006).
- 219. The term “legislative act” only refers to laws adopted by one of these two procedures. TFEU at art. 289(3). A legislative act may authorize the Commission to adopt delegated nonlegislative acts or implementing nonlegislative acts. TFEU at art. 290. The procedures for adopting these nonlegislative acts are discussed in Communication from the Commission to the European Parliament and the Council—Implementation of Article 290 of the Treaty on the Functioning of the European Union, COM/2009/0673 final; and Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, 1999 O.J. (L 184) 23.
- 220. TFEU at art. 289.

proposes amendments, it must communicate the amendments not only to the Council but also to the Commission. It is then up to the Council to approve or reject the amendments (but unanimity is required for amendments for which the Commission has given a negative opinion). If the Council does not approve the amendments proposed by the Parliament, the proposed legislation enters the conciliation process.

The Council and Parliament are required to establish a Conciliation Committee comprised of an equal number of representatives of the Council and the Parliament.<sup>221</sup> If the Conciliation Committee does not approve the proposed legislation within six weeks of being convened, the proposed act is deemed not adopted. If the Conciliation Committee does approve a joint text, the Council and the Parliament have six weeks to approve the joint text. Otherwise, it is deemed not to have been adopted.

The other basic process by which legislation is adopted is the special legislative procedure. This refers to the adoption of legislative acts by the Parliament with the participation of the Council or by the Council with the participation of the Parliament.<sup>222</sup> The instances in which the Parliament can adopt legislative acts with the (mere) participation of the Council are limited to:

- The adoption of a statute for the members of the Parliament (Articles 223(2) TFEU);
- The establishment of a committee to inquire into alleged contraventions in the implementation of EU law (Article 226 TFEU); and
- The adoption of the statute of the EU ombudsman (Article 228(4) TFEU).

The more common type of special legislative procedure is where the Council has the right to adopt the legislative act after seeking the participation of the Parliament. Notable examples include Article 115 TFEU authorizing the Council to adopt directives directly affecting the internal market; Article 262 TFEU authorizing the Council to define the jurisdiction of the EU courts; and Article 64 TFEU giving the Council the exclusive right to adopt legislative acts which constitute a step backwards in the liberalization of the movement of capital to or from third countries.

The growth of the EU from the initial six member states to 28 member states meant that consensus on legislation was increasingly difficult to reach. This challenge often led to the inability of the EU to adopt legislation which at least some member states opposed. For example, the introduction of a financial transaction tax on transactions between financial institutions was blocked by the opposition of the UK and Sweden to the tax. The recognition that the difficulty of achieving consensus would hamper the growth of the EU led to the introduction of the enhanced cooperation procedure. This procedure, codified in Article 20 of the EU Treaty and Articles 326 to 334 of the TFEU, allows a minimum of nine member states to adopt legislation applicable only to them through a special

221. *Id.* at art. 294(10).

222. *Id.* at art. 289(2).

procedure. This avoids the situation where a minority of member states can prevent others from moving ahead with EU legislation. The basic requirement for employing the enhanced cooperation procedure is that it be used “as a last resort, when it has been established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole.”<sup>223</sup> This typically means that the EU has been unable to adopt legislation after attempting to reach a consensus using the traditional legislative procedures.

The creation of the unitary patent and the EU patent court is a good example of the use of the enhanced procedure to overcome political deadlock. For many years, the EU struggled with the creation of a unitary patent and a corresponding EU patent court due to the lack of consensus over the official languages. Although, as discussed in Chapter 10, inventors could take advantage of the European Patent Convention, this procedure was outside the parameters of the European Union. Moreover, the European Patent Convention offers only a bundle of rights and not a unitary patent. Most of the EU member states recognized the need for a unitary patent. However, in order to make the EU unitary patent successful, the EU legislators knew that they would have to limit the official languages in which the applications must be filed and the working language of the EU patent court. Spain and Italy blocked the adoption of the necessary legislation because the official languages were to be English, French, and German. The enhanced cooperation procedure allowed the EU to avoid this deadlock and adopt the necessary legislation without the inclusion of Spain and Italy.<sup>224</sup>

## 7.4 General Principles of Law

Not all sources of EU law are codified in primary or secondary legislation. General principles of law form an integral part of the EU legal system. These are noncodified legal principles common to most or all of the member states, which have been recognized as a general principle by the EU courts. They would include, for example, proportionality, equal treatment, legal certainty, legitimate expectations, and fundamental rights. As discussed throughout the following Chapters, these principles play an important role in EU business law. For example, the European Commission is required to respect the fundamental rights of individuals when conducting competition law investigations.<sup>225</sup>

## 7.5 Importance of the Hierarchy of Norms

A proper understanding of the hierarchy of legal norms in the EU is essential for a proper understanding of EU business law. In *Institute of Professional Representatives before the EPO v. Commission*, for example, one of the issues

223. EU Treaty at art. 20(2).

224. Council Decision 2011/167/EU of 10 March 2011 authorizing enhanced cooperation in the area of the creation of unitary patent protection, 2011 O.J. (L 76) 53. The use of the enhanced cooperation procedure in this instance was challenged but approved by the ECJ. Joined cases C-274/11 and 295/11, Spain v. Council, 2013 E.C.R. I-

225. Case C-411/04, Salzgitter Mannesmann GmbH v. Comm'n, 2007 E.C.R. I-959, 972 ¶41.