Complete EU Law: Text, Cases, and Materials (5th edn)
Elspeth Berry, Barbara Bogusz, Matthew Homewood, and Sophie Strecker

p. 58

3. Sovereignty and sources of law

Elspeth Berry, Reader in Law, Nottingham Trent University, Barbara Bogusz, Lecturer in Law, University of Leicester, Matthew Homewood, Deputy Dean, Nottingham Trent University, and Sophie Strecker, Principal Lecturer in Law, Nottingham Trent University

https://doi.org/10.1093/he/9780192846419.003.0003
Published in print: 04 August 2022
Published online: September 2022

Abstract

Titles in the Complete series combine extracts from a wide range of primary materials with clear explanatory text to provide readers with a complete introductory resource. This chapter examines the principle of sovereignty of EU law and how the judicial application of the sovereignty principle has advanced EU integration. The chapter specifically considers the impact of EU membership on the UK's sovereignty and how the principle has been applied by the UK courts. The chapter also discusses EU competences and the attribution of powers to the EU; the application of the principle of subsidiarity; the sources of EU law; and EU legislative procedures.

Keywords: Brexit, EU membership, UK sovereignty, subsidiarity principle, EU law, competence, legislative procedures

Key Points

By the end of this chapter, you should be able to:

- explain the impact of membership of the European Union (EU) on the UK's sovereignty and the consequences of the UK's withdrawal from the EU;
- identify and describe the various sources of EU law;
- explain the concept of subsidiarity; and
- outline the main legislative processes of the EU.

Introduction

What has been the impact of the UK's accession to the European Union (EU) on national sovereignty? This is a much-debated topic and one that took centre stage during the campaigning for the 2016 UK referendum on membership of the EU. It was argued by opponents of continued UK membership of the EU that the UK has entirely ceded national sovereignty to 'Brussels', which prevents the UK from exercising control over important policies such as immigration or trade. The truth of the matter was not so simple, and the first part of this chapter considers to what extent EU law can be considered as a source of law that ranks above our national laws and the status of EU law within the UK now that the UK has withdrawn from the EU on 31 January 2020. In the second part of this chapter, the exact nature of these sources of law will be considered. The Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) provide the starting point, but since 1957 a vast body of EU law has grown up that pervades virtually every aspect of UK law. It is vital for today's lawyer to be aware of these sources and to understand their potential importance as legal authorities.

3.1 The UK referendum

The decision taken on 23 June 2016 by a majority of UK voters to leave the EU has raised significant constitutional and legal consequences. The withdrawal process, was governed by Article 50 TEU, which provided the only formal and legal route through which the UK was able to leave the EU. However, securing a withdrawal agreement within the two-year period provided for by Article 50 proved challenging for the UK government, with Parliament rejecting the Draft Withdrawal Agreement that it had negotiated with the EU in January 2019. Following three further rejections by Parliament the Withdrawal Agreement was finally approved in December 2020, following the election of the Boris Johnson led Conservative government. With
p. 59 its parliamentary majority of over 80 seats it was finally able to implement the EU–UK ↵ Withdrawal Agreement into UK law through the European Union (Withdrawal Agreement) Act 2020.

The opportunity for a referendum to be held on the UK's continued membership of the EU was a commitment within the 2015 Conservative Party election manifesto. It was proposed that the referendum would be held after the UK had sought to 'renegotiate' its relationship with the EU, in order to bring certain decision-making powers back to the UK. In its renegotiation with the EU, the UK would have sought changes in a number of policy areas, but perhaps the two most important ones were a specific commitment that the UK would be excluded from the process of creating 'an ever-closer union' and that it could reduce the number of EU citizens coming to the UK, as well as limit their access to social welfare benefits.

Following the renegotiation, which was concluded at the February 2016 European Council, the then Prime Minister David Cameron recommended the deal to Parliament and led the campaign in favour of a vote for the UK to remain in the EU. The referendum offered a clear choice for UK voters and asked the following question:

> Should the United Kingdom remain a member of the European Union or leave the European Union?

In response to this question, UK voters decided by a 52 per cent to 48 per cent margin to leave the EU. Notwithstanding this decision, it is not clear what the precise reasons were for UK citizens voting in the way they did, as the question was neutral in its wording. However, one reason commonly cited was the perceived effects of uncontrolled migration from the EU, as was the perception that the UK Parliament could no longer make its own laws (i.e. that Parliament was not sovereign). Although this latter point was addressed, to some extent, in the renegotiation through the UK not taking part in the process of ever-closer union, it was probably felt by UK citizens that this was insufficient to regain the sovereignty lost by Parliament through EU membership. Ultimately, UK voters decided at the 2016 referendum that they did not want to be part of 'an ever closer union'.

Thus, a concern about the loss of UK parliamentary sovereignty and the limits this placed on the UK Parliament's ability to make its own laws may be considered as a general reason for the outcome of the vote. However, the question of sovereignty is one that has been an issue in many Member States and concerns about the effect of EU law on national law have not been exclusive to the UK. For example, since 2018, Poland and the EU have been in disagreement, referred to as 'The Rule of Law dispute' about a Polish law concerning the appointment of national judges. The EU contests that the Polish law undermines the independence of the judiciary in Poland and is in breach of the rule of law provisions in Article 2 TEU. The Polish government responded that the appointment of judges is exclusively a question of national law and sovereignty and does not conflict with the rule of law provisions in Article 2 TEU. However, in its judgment in Case C-204/21 R *Commission v Poland* of 27 October 2021, the Court of Justice fined Poland 1 million EUR per day for failing to comply with previous judgments that its law on judicial appointment is in breach of Article 2 TEU. The Rule of Law dispute between Poland and the EU illustrates that notwithstanding the UK leaving the EU, Member States still express concerns about the scope of EU laws and their impact in the domestic legal order.

p. 60

↵ The next section considers how EU law has, through the principle of supremacy, challenged the sovereignty of the UK Parliament and especially its ability to pass laws that may conflict with the EU Treaties.

3.1.1 UK withdrawal from the EU

Throughout UK membership of the EU, the principle of supremacy of EU law guaranteed that EU law would always take precedence over UK law if there was conflict between the two. This supremacy was enforced by judgments of the Court of Justice, which as seen in the case C-213/89 *R v Secretary of State for Transport, ex p Factortame Ltd* [1990] ECR I-2433, required UK courts to disapply UK law in favour of EU legislation (for further discussion on sovereignty of EU law, see 3.1.2).

A key objective of Brexit is to bring an end to the supremacy of EU law and re-establish an orthodox understanding of parliamentary sovereignty. In practice, this means that now that the UK has left the EU, only the UK Parliament can make laws which are applicable in the UK and only UK courts have the jurisdiction to enforce them.

3.1.1.1 The European Union (Withdrawal) Act 2018

Leaving the EU under Article 50 TEU required not only the negotiation of a withdrawal agreement with the EU, but also an end to the supremacy of EU law within the UK. This has been achieved through the enactment of the European Union (Withdrawal) Act 2018, which, originally, included a specific provision that the UK would leave the EU on 29 March 2019 at 11 pm. This is known within the Act as exit day, but was extended to 31 October 2019 and finally to 31 January 2020 as a result of the UK Parliament's failure to ratify the Withdrawal Agreement that was negotiated with the EU.

The primary objective of the 2018 Act is to repeal the European Communities Act 1972 (ECA 1972). The legal consequence of this is that it has brought an end to the principle of supremacy of EU law within the UK. The Act converted existing EU law in force on exit day into UK domestic law (known as retained EU law) in order to ensure the continuity and completeness of the UK's legal system. It also conferred wide powers on the UK government to amend that retained EU law through the use of statutory instruments in order to remedy or mitigate any deficiencies arising from the UK's withdrawal from the EU.

The 2018 Act therefore does three principal things, as follows.

- Under s 1, it repealed the ECA 1972 on exit day, bringing an end to the overriding role of EU law in the UK's legal system. This is both political and symbolic, as well as having an important legal impact.
- Under ss 2–6, it 'domesticated' EU law into the UK as 'retained EU law' which includes most of the EU law that applies in the UK on the day immediately before exit day. Retained EU law are only those laws which can apply in the UK in a wholly domestic context, and thus the free movement laws and the Charter of Fundamental Rights of the European Union have not been retained.

p. 61

- Under s 8, it provided the UK government with wide powers to amend this retained EU law in order to correct deficiencies in that law arising from the UK's withdrawal from the EU.

Retained EU law is wide-ranging. It covers 'EU-derived domestic legislation', which includes statutory instruments made under s 2(2) of the ECA 1972 to implement EU Directives, but also extends to 'any enactment so far as … relating otherwise to the EU or the EEA' (s 2(2)(d) of the 2018 Act). It therefore includes primary legislation passed to implement EU law, as well as implementing rules made by regulators under

their statutory powers. There was no legal need for the 2018 Act to give continuing effect to primary legislation implementing EU law, but there is a need for the Act to authorize changes to that legislation in order to cope with the consequences of Brexit. For example, where reference was made in primary implementing legislation to the EU institutions then these references needed to be removed.

Retained EU law also includes 'direct EU legislation', which is any EU Regulation, EU Decision or EU tertiary legislation that is both in force and applies on the day immediately before exit day (s 3 of the 2018 Act). Legislation that had not yet completed the EU's legislative process on exit day does not form part of retained EU law. The UK government has powers under the 2018 Act to address any resulting gaps that might appear, in particular where EU legislation applies in stages, with some provisions taking effect before exit day, but some not doing so until afterwards.

The validity, meaning, and effect of retained EU law is to be interpreted in accordance with, amongst other matters, 'retained EU case law'. Retained EU case law means 'principles laid down by, and any decisions of, the European Court [i.e. the Court of Justice of the European Union, or CJEU, which comprises the General Court and the Court of Justice], as they have effect in EU law immediately before exit day' (s 6(3) of the 2018 Act). Only the UK's Supreme Court was excepted from this obligation placed on UK courts to apply pre-Brexit CJEU decisions to retained EU law. The Supreme Court can depart from a decision of the CJEU in the same way as it can depart from its own earlier case law (s 6(4) of the 2018 Act). If exercising the power to depart then, according to s 6 (5) of the 2018 Act, the Supreme Court must apply the same test as it would apply in deciding whether to depart from its own case law. For the Supreme Court this is where it is 'right to do so'. This right to depart from retained EU case law has now been extended to the Court of Appeal by the EU (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020, SI 2020/1525.

UK courts are not bound by decisions of the European Court made after exit day, but 'may have regard' to those decisions 'so far as relevant to any matter before the court' (s 6(1) and (2) of the 2018 Act). However, if the CJEU were to decide that a piece of EU legislation made prior to Brexit is invalid, the equivalent retained EU law would remain valid in the UK (para 1(1) of Sched 1 to the 2018 Act).

Retained EU law does not include the EU's Charter of Fundamental Rights (s 5(3) of the 2018 Act) nor does it include any right to damages in accordance with 'the rule in *Francovich*' (para 4 of Sched 1 to the 2018 Act). The rule decided in C-6 & 9/90 *Francovich v Italy* [1991] ECR I-5357 (see 5.2 and 5.3) allows people to claim damages from a Member State in certain circumstances if that Member State has wrongly implemented or failed to
p. 62 implement an EU ↵ Directive or has otherwise acted in breach of EU law. The UK has faced (and continues to face) numerous actions for enacting tax law in breach of EU law principles, requiring it to refund significant amounts. There will be no right in domestic law on or after exit day to damages in accordance with the rule in *Francovich*.

3.1.1.2 Amending retained EU law

The European Union (Withdrawal) Act 2018 gives the UK government wide powers to change retained EU law. These powers can be used for up to two years after exit day (s 8(8) of the 2018 Act), but the powers are not absolute. The UK government can use the powers in the Act to amend or repeal retained EU law only:

- if it considers that there is a failure of retained EU law to operate effectively or that there is another deficiency in retained EU law; and
- that failure or other deficiency arises from the UK's withdrawal from the EU (s 8(1) of the 2018 Act).

The UK government cannot, for example, change rights included within retained EU law just because it considers that the EU tipped the balance too far in one direction. In order to change retained EU law, it must first point to a deficiency in retained EU law arising from Brexit. Nor is retained EU law deficient merely because it does not include a change made by the EU to that law after Brexit (s 8(4) of the 2018 Act).

Section 8(2) of the 2018 Act sets out what constitutes a 'deficiency' in retained EU law (although the categories are capable of being expanded under s 8(3)(b)). These include anything that is of no practical application or which is otherwise redundant, which confers functions on EU entities, or which contains EU references that are no longer appropriate.

If there is a failure of retained EU law to operate effectively or any other deficiency arising from Brexit, the UK government can make 'such provision as [it] considers appropriate to prevent, remedy or mitigate' that deficiency (s 8(1) of the 2018 Act). This confers considerable latitude on the UK government. The changes required will not only be technical corrections, but also will involve policy choices and other complexities (for example even changing sums expressed in euro to sterling can raise significant issues). The UK government can, for example, provide for the functions of EU entities or public authorities (including making instruments 'of a legislative character') to be exercisable by UK public authorities (s 8(6) of the 2018 Act). The Act cannot, however, be used to create public authorities, to impose or increase taxation, or to make retrospective provision (s 8(7)).

The European Union (Withdrawal Agreement) Act 2020 gives legal effect in UK law to the EU–UK Withdrawal Agreement negotiated under Article 50 TEU. In recognition that the UK has left the EU, and perhaps to leave no doubt as to the legal and constitutional effects of Brexit, s 38(1) of the 2020 Act states that 'Parliament is sovereign'.

3.1.2 Sovereignty

National courts across most, if not all, Member States have, since the early days of EU integration, been
p. 63 concerned with the reach of EU law, and in particular with the principle of ↵ supremacy and how this is to be accommodated within domestic constitutional orders. Each Member State has faced challenges with respect to how to give effect to EU law in the domestic legal order. The Court of Justice clearly stated in its judgment in Case 6/64 *Costa v ENEL* [1964] ECR 585 that all Member States have a legal obligation to ensure that the rights within the Treaty are equally available in all of the Member States and that no national rules can restrict those rights.

Throughout the UK's membership of the EU, its constitutional relationship with the EU and the principle of supremacy of EU law was considered through the lens of parliamentary sovereignty and the extent to which membership of the EU limits the rights of Parliament to legislate. In particular, supporters of the UK's withdrawal from the EU made a 'sovereignty' argument that the principle of supremacy of EU law has prevented the UK Parliament from being able to pass legislation that may conflict with EU law and that, in

circumstances in which it did so, the UK courts reacted by 'overturning' an Act of Parliament. For example, the judgments in *Factortame*—a series of cases starting with Case C-213/89 *R v Secretary of State for Transport, ex p Factortame Ltd* [1990] ECR I-2433—demonstrate how the UK courts sought to reconcile the constitutional principle of parliamentary sovereignty with the obligation laid out in s 2 of the ECA 1972. In *Factortame*, the UK courts recognized the obligation of the UK to give full effect to its Treaty obligations and, if necessary, disapply a UK Act of Parliament.

3.1.3 The political problem

The problem of 'sovereignty' has both a political and a legal dimension. By way of introduction, we will consider briefly the political dimension.

In the political arena, the term 'national sovereignty' is often used to mean the power of the British people, through their national government, to govern their own affairs as they see fit. There is little doubt that membership of the EU has limited the power of the UK government, since decisions in certain policy areas are taken by the EU. While it may have been theoretically open for the UK to repeal the ECA 1972 at any point during its membership and unilaterally declare that it had left the EU, this did not occur. Moreover, judgments such as *Factortame* were considered to provide an interpretation of the supremacy of EU law in the UK that, because of s 2 of the ECA 1972, entrenched EU law in the UK legal order and that meant that withdrawal from the EU would, for this reason, prove to be difficult.

However, the inclusion of Article 50 TEU in the Treaty of Lisbon has addressed procedural questions about EU withdrawal. Thus, once the UK decided to leave the EU, the process for leaving the EU could take effect only if the UK followed the procedure provided for in Article 50 TEU (as explained in 16.2.1).

In the case of *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5, the UK's Supreme Court was asked to rule on how precisely Article 50 TEU should be triggered. Specifically, would an Act of Parliament be required to commence the process of withdrawal from the EU, or could the UK government commence the process without the need for parliamentary approval by using the royal prerogative? The use of the royal prerogative was controversial because it would bypass Parliament and challenge the principle of parliamentary sovereignty, which was a major political question in the referendum.

p. 64 ↵ The Supreme Court identified the outer limits of the royal prerogative and acknowledged that although the UK government has the power to withdraw from the EU Treaties, the government cannot exercise this power without an Act of Parliament in circumstances in which the effect is to change UK law. Thus, whilst the ECA 1972 remains in force, its effect is to constitute EU law as an independent and overriding source of domestic law, and therefore to change the effect of the ECA 1972 requires an Act of Parliament.

On the question of the Act of Parliament being required to trigger Article 50 TEU, the Supreme Court anchored its judgment firmly in the argument that EU withdrawal will lead to UK citizens losing rights and that, because EU law is an independent source within the UK constitution, only an Act of Parliament can remove these rights (see also 16.2.1 and 6.13).

Crucially, the Supreme Court focused on the relationship between Parliament and government, and it held that where rights attached to UK membership of the EU were given by Parliament, they can be taken away only by Parliament. In particular, the Supreme Court considered the purpose and scope of the ECA 1972: when the EU institutions make new laws, these laws become part of UK law. The Supreme Court therefore concluded that EU law is, under s 2 of the ECA 1972, an independent source of UK law that provides rights to citizens. The Supreme Court held that an Act of Parliament is required, rather than merely a parliamentary vote, to authorize the executive to trigger Article 50 TEU.

In response to this judgment, the government presented before Parliament the European Union (Notification of Withdrawal) Act 2017, which was approved by Parliament by a majority of 498 to 114 votes and provided the necessary parliamentary authority for the government to trigger Article 50 TEU.

Thinking Point

> Does UK withdrawal from the EU mean that the UK will have fully regained its sovereignty and that it will no longer be bound by EU law?

Throughout the Article 50 TEU process, the UK remained a Member State of the EU, which required its compliance with EU law in its entirety until the conclusion of the Article 50 EU withdrawal process. After the UK formally left the EU, it entered into an 11 month transition period until the 31 December 2020. This was sometimes referred to as an implementation period, the UK, though outside the EU, continued to apply EU law 'as if it were a Member State' (s 1(2)(f) European Union (Withdrawal Agreement Act 2020). During this transition period s 1 of the 2020 Act 'saved' the application of the ECA 1972 which allowed for the continued supremacy of EU law in the UK, for the duration of the transition period. The UK was obliged to enact new EU laws coming in to force during the transition period and abide by judgments of the CJEU.

The question, which is more a matter of politics than of law, is whether the obvious restrictions on UK parliamentary sovereignty that have accompanied the UK's membership of the EU are a price that has been worth paying for the benefits of EU membership. In 1992, in a ↵ Hamlyn Lecture titled 'Introducing a European Legal Order', Lord Slynn of Hadley contrasted the negative view of membership (that the EU endangers 'national sovereignty, national independence and national identity') with the positive view (that the situation is not one 'of surrendering sovereignty but of pooling sovereignty in certain areas for the good of all'). This analysis by Lord Slynn, which correctly captures the overall neo-functionalist objectives of EU integration, is one that was broadly rejected by the UK's referendum result. Moreover, the argument that the UK has now regained its sovereignty following the referendum was highlighted by Prime Minister Theresa May at the Conservative Party Conference on 2 October 2016 when she spoke about the effects of the then Great Repeal Bill on the ECA 1972: 'Its effect will be clear, our laws will be made not in Brussels but in Westminster. The judges interpreting those laws will sit not in Luxembourg but in courts in this country. The authority of EU law in Britain will end.'

p. 65

3.1.4 The legal problem

The legal dimension to the question of sovereignty is more complex.

3.1.4.1 Parliamentary sovereignty

The UK's withdrawal from the EU undoubtedly alters the UK's political and legal relationship with the EU. Central to this change will be the European Union (Withdrawal) Act 2018, which is intended to restore parliamentary sovereignty to the UK in the way that Prime Minister Theresa May highlighted. However, the extent to which the UK will have a 'clean break' with the EU and thus fully restore its parliamentary sovereignty is a moot point. For example, the EU–UK Withdrawal Agreement, enacted in the UK through the European Union (Withdrawal Agreement) Act 2020 continues to protect EU citizen's rights living in the UK and enables UK courts to make preliminary rulings to the CJEU on the application of this part of the EU–UK Withdrawal Agreement until 2028. Furthermore, under Article 87 of the EU–UK Withdrawal Agreement, the European Commission has four years from the end of the transition period to bring infringement proceedings against the UK for breaches of EU law that took place during the transition period.

Throughout UK membership of the EU, the doctrine of parliamentary sovereignty was clearly in conflict with the full recognition of EU law in the UK. First, if EU law was to be fully effective, UK courts did, from time to time, question the validity of Acts of Parliament that conflicted with, or inadequately transposed, EU law. Second, if UK legislation that was inconsistent with EU law were to have the effect of repealing it, this would have destroyed any possibility of EU law applying uniformly across the EU. Since the UK did not have a formal written constitutional document that could be amended to give effect to EU law, the UK gave effect to EU law in the UK through the ECA 1972 which provided the means by which priority of EU law could be incorporated into national law. The ECA 1972 was repealed by the European Union (Withdrawal) Act 2018 and ceased to have effect in the UK from 31 January 2020, subject to the requirements of the transition period.

Section 2(1) of the ECA 1972 provides as follows.

p. 66

European Communities Act 1972, s 2(1)

> 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; and the expression '[enforceable EU right]' and similar expressions shall be read as referring to one to which this subsection applies.

In relation to UK legislation, EU law was given direct effect. This applied in relation to the Treaties and those regulatory rules that are 'created or arising by or under the Treaties'.

Section 2(4) of the ECA 1972 cements the status of EU law in the UK:

European Communities Act 1972, s 2(4)

> … any such provision (of any such extent) as might be made by Act of Parliament, and any enactment passed or to be passed … shall be construed and have effect subject to the foregoing provisions of this section; …

The status of 'any enactment' made or to be made by Parliament was subject to EU law and this included directly effective EU law, as was provided for under s 2(1) of the ECA 1972. This gave legal effect to the primacy of EU law over UK legislation.

The operation of s 2(1) of the ECA 1972 throughout UK membership of the EU may be considered at odds with the doctrine of parliamentary sovereignty, which does not allow Parliament to bind its successors such that it limits its own powers. However, rather than taking a restrictive approach towards s 2(4), the English courts viewed this provision as an interpretative rule whereby it is presumed that Parliament would legislate in a manner which would have overridden EU law in future legislation. This interpretative approach was considered by Lord Denning MR in the Court of Appeal in *Macarthys Ltd v Smith* [1979] 3 All ER 325, where he explained the relationship between EU and UK legislation:

Macarthys Ltd v Smith [1979] 3 All ER 325, 329, Court of Appeal

> In construing our statute, we are entitled to look to the Treaty as an aid to its construction; but not only as an aid but as an overriding force. If on close investigation it should appear that our legislation is deficient or is inconsistent with Community law by some oversight of our draftsmen then it is our bounden duty to give priority to Community law. Such is the result of s 2(1) and (4) of the European Communities Act 1972.
>
> I pause here, however, to make one observation on a constitutional point. Thus far I have assumed that our Parliament, whenever it passes legislation, intends to fulfil its obligations
p. 67 under ↵ the Treaty. If the time should come when our Parliament deliberately passes an Act with the intention of repudiating the Treaty or any provision in it or intentionally of acting inconsistently with it and says so in express terms then I should have thought that it would be the duty of our courts to follow the statute of our Parliament. I do not however envisage any such situation … Unless there is such an intentional and express repudiation of the Treaty, it is our duty to give priority to the Treaty.

The priority of EU law over UK national legislation was acknowledged through the enactment of the ECA 1972. In Lord Denning's view, Parliament had not ceded sovereignty completely; rather, it is constrained in as far as priority is given to EU law. It was considered that Lord Denning was arguing that if Parliament were to deliberately repeal the ECA 1972, then EU law would no longer be applicable or bind the UK and Parliament would regain full sovereignty. This is the legal effect of the European Union (Withdrawal) Act 2018 which ends the domestic effect of EU law in the UK. However, it is also correct to say that, following the Treaty of Lisbon, in order for the UK to repeal the ECA 1972, it first had to leave the EU lawfully and this meant after concluding its negotiations under Article 50 TEU.

Lord Denning's reasoning did leave scope for some uncertainty for the judiciary, especially on the question of Parliament passing legislation that may be at odds with obligations arising under the Treaties. In particular, what were the obligations of the judiciary when deciding whether to apply a UK Act of Parliament or EU law? In *Duke v GEC Reliance* [1988] AC 618, the House of Lords (now the Supreme Court) considered the compatibility of the Sex Discrimination Act 1975 with the Equal Treatment Directive (Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ 1976 L39/40). Their Lordships stated that because the UK Act was passed before the Directive, it would 'be most unfair to the respondent to distort the construction of the 1975 Sex Discrimination Act in order to accommodate the meaning of the Equal Treatment Directive' (*Duke v GEC Reliance*, at 627). Their Lordships were concerned that, through interpretative techniques, they would adopt the mantle of legislature and provide the Act with a meaning that Parliament had not intended.

The House of Lords subsequently showed greater willingness to apply a more purposive interpretation to equal treatment legislation. In *Webb v EMO Cargo* [1992] All ER 43, on similar facts to those of *Duke v GEC Reliance*, the House of Lords interpreted the Sex Discrimination Act 1975 to conform with the Equal Treatment Directive in a manner that the Court of Appeal had previously rejected as a distortion of the statute. However, their Lordships accepted that there were limits to the extent to which the courts could interpret UK statutes so as to conform with EU law and held that this could not be done if the impact of such purposive interpretation was to alter the meaning of domestic legislation.

Unlike the political debate concerning the UK's relationships with the EU, which undoubtedly became more polarized, fulfilling EU obligations has been more readily accepted by the UK judiciary. In *Thoburn v Sunderland County Council* [2002] 3 WLR 247 (the *Metric Martyrs Case*), the applicant challenged a Directive
p. 68 requiring produce that was not prepacked to be ↵ sold in metric, not imperial, measurements. The High Court of England and Wales dismissed the applicant's defence, which was based on the argument that, as the Weights and Measures Act 1985 had entered into force after UK accession, this later statute impliedly repealed the ECA 1972. In such circumstances, the defendant argued, UK law takes precedence over EU law. The English court dismissed these arguments and held that the 1972 Act—the primary legislation that provides for the UK's accession to the EU—had a 'constitutional quality' that during its operation prevented implied repeal and thereby suggests a degree of entrenchment of EU law within the UK during membership.

3.1.4.2 The role of the Court of Justice of the European Union

There is no mention of supremacy of EU law in the founding Treaty of Rome (1957) or subsequent Treaties; rather, it is a judicial concept that has been developed through teleological (or purposive) reasoning. The Court of Justice, in developing supremacy, has given effect to the intention of those drafting the Treaties as found in Article 10 EC.

Thinking Point

> Compare and contrast the wording of Article 10 EC and post-Lisbon Article 4(3) TEU, as set out in Table 3.1.

It can be observed from Article 10 EC and the post-Lisbon Article 4(3) TEU (see Table 3.1) that neither of them mentions 'supremacy' or 'primacy' in relation to EU law and national legislation, although there is an implied obligation to give effect to the Treaty obligations even if this means disapplying national law. The essence of
p. 69 Article 10 EC has been replicated in ↵ Article 4(3) TEU, although the wording in the latter reflects a tone of solidarity and collaboration compared to the former. The only acknowledgement of supremacy made in the Treaty of Lisbon can be found in Declaration 17 of the Declarations annexed to the Treaty concerning primacy, which states as follows.

Table 3.1 Article 10 EC and Article 4(3) TEU

Article 10 EC	Article 4(3) TEU
Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.	Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.
They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty.	The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
	The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives.

Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, OJ 2012 C326/337

17. Declaration concerning primacy

> The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.
>
> The Conference has also decided to attach as an Annex to this Final Act the Opinion of the Council Legal Service on the primacy of EC law as set out in 11197/07 (JUR 260):
>
> > 'Opinion of the Council Legal Service of 22 June 2007
> >
> > It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (*Costa/ENEL*, 15 July 1964, Case 6/641) there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice. The Court of Justice has, on a number of occasions, taken the view that the supremacy of Community law is implicit in the obligation imposed upon Member States by Article 10 (ex 5) EC [the substance of this provision can now be found in Art 4(3) TFEU].'

Thinking Point

> Does Declaration 17 help to guarantee the supremacy of EU law?

3.1.4.3 Developing the principle of supremacy

The Court of Justice was instrumental in the construction of a robust doctrine on the supremacy of EU law. In Case 26/62 *Van Gend en Loos v Nederlandse Administratie de Belastingen* [1963] ECR 1, the Court, in considering whether a litigant before the national court could rely directly upon a Treaty provision, stated that 'the

Community [now Union] constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields' (*Van Gend en Loos*, at 12).

> *Cross-Reference*
>
> See *Van Gend* at 4.1.1.1.

p. 70 ↵ The Court recognized that the EU Treaties were not simply new additions to international law, but rather 'a new legal order' in which Member States have limited their sovereignty and to which they are subject. The Court in Case 6/64 *Costa v Ente Nazionale per l'Energia Elettrica (ENEL)* [1964] ECR 585 went further, delivering the classic statement on supremacy of EU law.

Costa argued that the nationalization of the Italian electricity industry was contrary to EU law. ENEL and the Italian government argued that this was irrelevant, since the Italian courts were obliged to apply the later Italian law under which nationalization was legal. The case was referred to the Court of Justice under the preliminary reference procedure set out in Article 267 TFEU for an interpretation of EU law.

> *Cross-Reference*
>
> See Chapter 6 for a discussion of Article 267 TFEU.

The Court of Justice ruled that EU law was part of the legal systems of the Member States and had to be applied by national courts. There had been a transfer of sovereignty to the EU and it was integral to this new legal system that EU law took precedence over later, inconsistent, national law.

Case 6/64 *Costa v Ente Nazionale per l'Energia Elettrica (ENEL)* [1964] ECR 585, 593–4

> By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.
>
> By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.
>
> The integration into the laws of each Member State of provisions which derive from the Community [now Union], and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The executive force of Community law [now EU law] cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty set out in Article 5(2) [now Article 4(3) TEU] and giving rise to the discrimination prohibited by Article 7 [now Article 18 TFEU].
>
> The obligations undertaken under the Treaty establishing the Community would not be unconditional, but merely contingent, if they could be called in question by subsequent legislative acts of the signatories. Wherever the Treaty grants the States the right to act unilaterally, it does this by clear and precise provisions … Applications, by Member States for authority to derogate from the Treaty are subject to a special authorization procedure … which would lose their purpose if the Member States could renounce their obligations by means of an ordinary law.
>
> The precedence of Community law is confirmed by Article 189 [now Article 288 TFEU], whereby a Regulation 'shall be binding' and 'directly applicable in all Member States'. This provision, ↵ which is subject to no reservation, would be quite meaningless if a State could unilaterally nullify its effects by means of a legislative measure which could prevail over Community law.
>
> It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.

p. 71

> The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail. …

The Court reinforced its statement from *Van Gend en Loos* declaring that the EEC Treaty provides a 'new legal order' and went on to reaffirm the Member States' commitment to this legal order by their release of limited sovereignty powers to the EU. The Court also emphatically reinforced the principle of supremacy by declaring that 'the law stemming from the Treaty … could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question' (*Costa v ENEL*, at 594).

Crucially, the Court in *Costa v ENEL* adopted a dynamic mode of interpreting EU law, referring to '[t]he integration into the laws of each Member State of provisions which derive from the Community, and *more generally the terms and the spirit of the Treaty*' (*ENEL*, at 593, emphasis added). The Court has expressly reserved for itself the teleological mode of interpretation of EU law, which enables it to take a more dynamic approach so that it is aligned with the integrationist spirit of the Treaties.

Acceptance of the supremacy of EU law over national law has not been without some difficulties. In Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA ('Simmenthal II')* [1978] ECR 629, the Court of Justice had ruled in the earlier Case 35/76 *Simmenthal SpA v Italian Minister of Finance ('Simmenthal I')* [1976] ECR 1871 that a fee charged on Simmenthal's imports of beef into Italy was contrary to EU law on the free movement of goods. The Italian court ordered the fee to be repaid, but the Amministrazione delle Finanze appealed. Under Italian law, the constitutionality of the law imposing the fee had to be referred to the Constitutional Court. The case was referred to the Court of Justice.

Cross-Reference

See also *Simmenthal* at 1.8 and 4.3.3.

Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA ('Simmenthal II')* [1978] ECR 629

p. 72

17. … in accordance with the principle of the precedence of Community law [now EU law], the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but—in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States—also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community [now Union] provisions.

18. Indeed any recognition that national legislative measures which encroach upon the field within which the Community exercises its legislative power or which are otherwise incompatible with the provisions of Community law had any legal effect would amount to a corresponding denial of the effectiveness of obligations undertaken unconditionally and irrevocably by Member States pursuant to the Treaty and would thus imperil the very foundations of the Community.

19. The same conclusion emerges from the structure of Article 177 of the Treaty [now Article 267 TFEU] which provides that any court or tribunal of a Member State is entitled to make a reference to the Court whenever it considers that a preliminary ruling on a question of interpretation or validity relating to Community law is necessary to enable it to give judgment.

20. The effectiveness of that provision would be impaired if the national court were prevented from forthwith applying Community law in accordance with the decision or the case-law of the Court.

21. It follows from the foregoing that every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule.

22. Accordingly any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent Community rules from having full force and effect are incompatible with those requirements which are the very essence of Community law.

> 23. This would be the case in the event of a conflict between a provision of Community law and a subsequent national law if the solution of the conflict were to be reserved for an authority with a discretion of its own, other than the court called upon to apply Community law, even if such an impediment to the full effectiveness of Community law were only temporary.
>
> 24. The first question should therefore be answered to the effect that a national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means.

p. 73 ↵ The Court of Justice referred to the 'principle of the precedence of Community law' and stated expressly that a national court should 'disapply' national legislation that conflicts with EU law without waiting for it to be repealed by legislative or other means (such as a ruling by the Constitutional Court).

A different problem in according supremacy to EU law arose in the *Factortame* litigation, which involved a number of references to the Court of Justice. Case C-213/89 *R v Secretary of State for Transport, ex p Factortame Ltd ('Factortame I')* [1990] ECR I-2433 concerned the possibility of interim relief being granted, in the form of a suspension of the disputed parts of the national legislation, pending a final ruling on their validity from the Court of Justice. It was held by the House of Lords (now the Supreme Court) that the remedy was not available under the law of England and Wales, but, in the light of conflicting Court of Justice case law on an interim measure, a reference would be made to the Court of Justice under Article 267 TFEU concerning the award of interim protection.

Cross-Reference

See also *Factortame I* at 4.3.3 and 6.10.2, and *Factortame II* at 4.2.5, 5.4.1, and 6.10.2.

The Court of Justice stated as follows.

Case C-213/89 *R v Secretary of State for Transport, ex p Factortame Ltd ('Factortame I')* [1990] ECR I-2433

> 21. ... the full effectiveness of Community law [now EU law] would be just as much impaired if a rule of national law could prevent a court seised of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law. It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule.

The Court of Justice ruled that, despite the provisions of national law, the national legislation could and should be suspended pending a conclusive ruling on its validity. Rights under EU law could not be truly effective if those who sought to enforce them were prejudiced by the operation of the allegedly conflicting national legislation while the issue was being resolved. Following *Factortame I*, Case C-221/89 *R v Secretary of State for Transport, ex p Factortame Ltd ('Factortame II')* [1991] ECR I-3905 concerned the validity of certain provisions of the Merchant Shipping Act 1988, which the applicants, a group of Spanish fishermen, claimed were in contravention of directly enforceable EU rights. The Court of Justice held the contested provisions of the 1988 Act to be contrary to EU law.

The UK—and, for that matter, all of the Member States—have surrendered, or pooled, their absolute national sovereignty. In terms of legal sovereignty, not only has the UK Parliament lost its exclusive right to legislate, but also EU law will prevail over national laws. This position is subject to two provisos: first, absolute sovereignty may be regained by withdrawing from the EU; and, second, in those areas in which the EU has no competence, such as defence and tax, sovereignty is, for the time being, intact (although, of course, many of these areas are affected indirectly by EU law).

p. 74

3.2 Attribution of powers to the EU

The issues of sovereignty are concerned with the sharing of power. The fundamental rule is that the EU may act only if the Treaty has given it power to do so and the exercise of such power is subject to the principle of subsidiarity. Article 2 TFEU sets out in general terms the various levels of competence at both the EU and national levels.

Cross-Reference

See 3.3 for a discussion on subsidiarity.

Article 2 TFEU

1. When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.
2. When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.
3. The Member States shall coordinate their economic and employment policies within arrangements as determined by this Treaty, which the Union shall have competence to provide.
4. The Union shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy, including the progressive framing of a common defence policy.
5. In certain areas and under the conditions laid down in the Treaties, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas.
6. Legally binding acts of the Union adopted on the basis of the provisions of the Treaties relating to these areas shall not entail harmonisation of Member States' laws or regulations.

The scope of the competence for certain policy areas is delineated in Articles 3–6 TFEU. These are expressed according to the level of competence granted to the EU, for example where the EU has exclusive powers, where the powers are shared with the Member States, and where the EU has a supportive role and the role of coordinator in specific areas. In addition to these provisions, more guidance is given in relation to particular policy areas in other parts of the Treaty and specific Treaty bases are provided for legislative measures. For example, Articles 151 and 153–155 TFEU provide a broad Treaty base for employment law measures. If the Treaty does not specifically give the EU power to act or where the Treaty has failed to provide the necessary power in another Treaty provision, Article 352 TFEU provides an alternative Treaty base for new measures. However, action under Article 352 TFEU requires unanimity among the Member States.

Cross-Reference

See Chapter 1 for a discussion of the Treaty base.

p. 75

Article 352 TFEU

> 1. If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.
> 2. Using the procedure for monitoring the subsidiarity principle referred to in Article 5(3) of the Treaty on European Union, the Commission shall draw national Parliaments' attention to proposals based on this Article.
> 3. Measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation.
> 4. This Article cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy and any acts adopted pursuant to this Article shall respect the limits set out in Article 40, second paragraph, of the Treaty on European Union.

Constraints on the scope of this provision are provided for in Article 352(2)–(4) TFEU and include, inter alia, drawing to the attention of national parliaments any proposals for new measures, to ensure compliance with the subsidiarity principle. Article 352 is not to be used for measures that are aimed at the harmonization of laws.

Article 352(1) TFEU limits the use of this provision specifically to the attainment of one of the objectives set out in the Treaties'. This reference to the objectives of the Treaties is further elaborated in Declaration 41 annexed to the Lisbon Treaty, which sets out which of the Treaty objectives this provision applies to—namely, Article 3(2), (3), and (5) TEU.

Article 3 TEU

> [...]
>
> 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.
>
> p. 76 ↵ 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.
>
> [...]
>
> 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.

From this extract, it can be noted that the objectives are broad and, so as to limit potential circumvention of the Treaty, Declaration 42 of the Lisbon Treaty places a strict limit on the application of Article 352 TFEU.

Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, OJ 2012 C326/337

42. Declaration on Article 352 of the Treaty on the Functioning of the European Union

> The Conference underlines that, in accordance with the settled case law of the Court of Justice of the European Union, Article 352 of the Treaty on the Functioning of the European Union, being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Union powers beyond the general framework created by the provisions of the Treaties as a whole and, in particular, by those that define the tasks and the activities of the Union. In any event, this Article cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaties without following the procedure which they provide for that purpose.

3.3 The principle of subsidiarity

EU competence arises from the Treaties, which provide a legal foundation for all EU action. As the EU has a multilevel governance structure, this requires that competences are allocated between the various levels. In
p. 77 some instances, the EU has exclusive competence to act, whereas ↵ in others, it shares competence with the Member States. In those circumstances in which the EU shares competence with the Member States, the principle of subsidiarity applies, which is used to determine whether legislative action should be taken at the EU or national level.

Article 5 TEU

1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.
2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.
3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

   The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.
4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

   The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

Under Article 5(3) TEU, the principle of subsidiarity appears to suggest that the EU should take legislative action only if the Member States acting independently could not achieve the result. Although the presumption for action would, under Article 5 TEU, appear to lie with the Member States, it can be argued that the principle of subsidiarity conflicts with the objective of an 'ever-closer union', which presupposes action at the EU level to achieve integration. Protocol 2 of the Treaty of Lisbon, on the application of the subsidiarity principle, contains rules relating to the application of subsidiarity against which the Commission benchmarks legislative proposals.

In essence, subsidiarity is concerned with the complex issue of the allocation of competence between the Member States and the EU institutions. Academic journals in the field of EU law and policy have been filled in recent years with articles raising questions about the meaning of the principle of subsidiarity, its practical operation, its impact on the relationship between the EU and the Member States (including national parliaments), and the extent to which it is possible or appropriate for the Court of Justice to determine disputes that arise.

p. 78 ↵ For example, Cygan has stated as follows.

A Cygan, 'The Parliamentarisation of EU Decision-Making? The Impact of the Treaty of Lisbon on National Parliaments' (2011) 36(4) EL Rev 480, 484

> Under art. 5(3) TEU, in policy areas which do not come within the scope of exclusive EU competence the Union shall act only if, and, 'insofar as the objectives of the proposed action cannot be achieved by the Member States ... but can rather by reason of scale or effects of the proposed action be better achieved at the EU level.'
>
> This, prima facie, suggests a presumption against EU action, but, since the Treaty of Maastricht, the precise meaning of subsidiarity has been the subject of much debate. The Court has favoured a restrictive interpretation, shared by the Commission, in whose view art. 5 TEU raises a presumption that the measure satisfies the dual requirements of necessity and effectiveness for EU action to be justified.

The justification for EU action, and therefore for not applying the principle of subsidiarity, is that EU action is both necessary and efficient. This justification has proved very difficult to rebut, with the Court of Justice being unwilling to challenge the political judgement of the Commission that legislative action at the EU level is most appropriate.

In Case C-58/08 *Vodafone Ltd and others v Secretary of State for Business Enterprise and Regulatory Reform* [2010] ECR I-4999, for example, the Court considered whether legislation capping roaming charges for mobile phone users could be achieved only by means of an EU Regulation (then, Regulation (EC) No 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community ..., OJ 2007 L171/32) and not by means of national legislation introduced by each individual Member State. The Court justified the need for EU legislative action on the basis that there was a genuine internal market in roaming services, which could be regulated only through harmonizing legislation. The Court stated as follows.

Case C-58/08 *Vodafone Ltd and others v Secretary of State for Business Enterprise and Regulatory Reform* [2010] ECR I-4999

72. It is appropriate to recall that the principle of subsidiarity is referred to in the second paragraph of Article 5 EC—and given actual definition by the Protocol on the application of the principles of subsidiarity and proportionality, annexed to the Treaty—, which provides that the Community, in areas which do not fall within its exclusive competence, is to take action only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. That protocol, in paragraph 5, also lays down guidelines for the purposes of determining whether those conditions are met.

p. 79

73. As regards legislative acts, the protocol states, in paragraphs 6 and 7, that the Community is to legislate only to the extent necessary and that Community measures should leave as much scope for national decision as possible, consistent however with securing the aim of the measure and observing the requirements of the Treaty.

74. In addition, it states in its paragraph 3 that the principle of subsidiarity does not call into question the powers conferred on the European Community by the Treaty, as interpreted by the Court of Justice.

75. As regards Article 95 EC, the Court has held that the principle of subsidiarity applies where the Community legislature uses it as a legal basis, inasmuch as that provision does not give it exclusive competence to regulate economic activity on the internal market (*British American Tobacco (Investments) and Imperial Tobacco* [C-491/01 *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* [2002] ECR I-11453], paragraph 179).

76. In this respect, it must be pointed out that the Community legislature, wishing to maintain competition among mobile telephone network operators, has, in adopting Regulation No 717/2007, introduced a common approach, in order in particular to contribute to the smooth functioning of the internal market, allowing those operators to act within a single coherent regulatory framework.

77. As is clear from recital 14 in the preamble to the regulation, the interdependence of retail and wholesale charges for roaming services is considerable, so that any measure seeking to reduce retail charges alone without affecting the level of costs for the wholesale supply of Community-wide roaming services would have been liable to disrupt the smooth functioning of the Community-wide roaming market. For that reason, the Community legislature decided that any action would require a joint approach at the level of both wholesale charges and retail charges, in order to contribute to the smooth functioning of the internal market in those services.

78. That interdependence means that the Community legislature could legitimately take the view that it had to intervene at the level of retail charges as well. Thus, by reason of the effects of the common approach laid down in Regulation No 717/2007, the objective pursued by that regulation could best be achieved at Community level.

79. Therefore, the provisions of Articles 4 and 6(3) of Regulation No 717/2007 are not invalidated by any infringement of the principle of subsidiarity.

Thinking Point

> Are there any circumstances in which the subsidiarity principle could prevent the use of EU legislation when the EU is seeking to regulate the internal market?

In *Vodafone*, the Court made it very clear that when the operation of the internal market is at issue, then only through EU legislative action will its integrity be preserved. Based on this reasoning, it would appear to leave very little opportunity for Member States to legislate.

p. 80

3.4 Sources of EU law

There are a number of sources of EU law and it is important to familiarize yourself with them.

Cross-Reference

See 1.1 for a discussion on the rationale for the EU.

3.4.1 The Treaties

The TEU and the TFEU are of equal legal status and form the primary source of EU law. These are 'self-executing'—that is, they become law in a Member State immediately upon ratification by that State, which therefore need not pass national legislation in order to implement them. The UK, in fact, chose nonetheless to do so because of its approach to the status of non-national law. Unlike its European neighbours, the UK sees international law as separate from, rather than simply a superior part of, national law. In order for international law to become part of the UK's legal system, it must actually be written into national law. This was achieved in relation to EU law by s 2(1) of the ECA 1972. See Table 3.2 for an overview of the Treaties.

Table 3.2 An overview of the Treaties

Year	Title	Entry into force
1951	European Coal and Steel Community (ECSC) Treaty Signed: 18 April 1951	23 July 1952 Expired: 23 July 2002
1957	European Economic Community (EEC) Treaty Signed: 25 March 1957	1 January 1958
1957	European Atomic Energy Community (EURATOM) Treaty Signed: 25 March 1957	January 1958
1965	Merger Treaty Signed: 8 April 1965 (EEC, EURATOM, and ECSC share single Commission and Council)	1 July 1967 Repealed by Treaty of Amsterdam
1986	Single European Act Signed: 17 February 1986	1 July 1987
1992	Treaty on European Union—Treaty of Maastricht Signed: 7 February 1992 (European Community (EC) replaced European Economic Community (EEC))	1 November 1993
1997	Treaty of Amsterdam Signed: 2 October 1997	1 May 1999
2001	Treaty of Nice Signed: 26 February 2001	1 February 2003
2004	Treaty establishing a Constitution for Europe Signed: 29 October 2004	Not ratified
2007	Treaty of Lisbon Signed: 13 December 2007 Renamed and amended the European Community (EC) Treaty as the Treaty on the Functioning of the European Union (TFEU)	1 December 2009

Cross-Reference

The amending Treaties are discussed in Chapter 1.

Cross-Reference

Section 2(1) of the European Communities Act 1972 is discussed at 3.1.4.1. See also direct effect, which is considered at 4.1.

A requirement of accession to the EU is that the Treaties must become part of the generally binding law of the Member State. EU law is also law having a special character, as made clear in Case 26/62 *Van Gend en Loos v Nederlandse Administratie de Belastingen* [1963] ECR 1.

p. 81

Case 26/62 *Van Gend en Loos v Nederlandse Administratie de Belastingen* [1963] ECR 1, 2

> 3. [T]he European Economic Community [now European Union] constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals.
>
> Independently of the legislation of Member States, Community law [now EU law] not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. …

As a result, these Treaties are directly applicable in the Member States, although they are not always directly enforceable in the national courts (i.e. they do not always have direct effect). Both the TEU and TFEU provide necessary frameworks, guidelines, and regulatory tools for the functioning of the EU. In some sense, the Treaties are similar to a constitution because they set out the competences of the EU and the EU institutions, and also, to some extent, the rights of the citizens. However, EU law is not solely dependent on Treaties: much of the detail implementing the objectives and policies of the EU is to be found in secondary legislation.

The TEU sets out the aims and values of the EU. Articles 2 and 3 TEU provide as follows.

Article 2 TEU

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity, and equality between women and men prevail.

Article 3 TEU

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.

p. 82

↵ 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.

The TEU also provides the principles by which the EU is governed, its institutional structure, provisions on enhanced cooperation and external action, including a common foreign and security policy, and new revision procedures for both Treaties.

The TFEU provides the detail on achieving the aims set out in the TEU and it sets out the explicit competences of the EU. External action has been excluded from the TFEU and is governed by the TEU. The TFEU provides the framework within which the EU can make laws and sets out the areas in which there has been an express

transfer of law-making powers from the Member States to the EU.

Article 3 TFEU

> 1. The Union shall have exclusive competence in the following areas:
>
> (a) customs union;
>
> (b) the establishing of the competition rules necessary for the functioning of the internal market;
>
> (c) monetary policy for the Member States whose currency is the euro;
>
> (d) the conservation of marine biological resources under the common fisheries policy;
>
> (e) common commercial policy.
>
> 2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

p. 83

Article 4 TFEU

1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.
2. Shared competence between the Union and the Member States applies in the following principal areas:
   (a) internal market;
   (b) social policy, for the aspects defined in this Treaty;
   (c) economic, social and territorial cohesion;
   (d) agriculture and fisheries, excluding the conservation of marine biological resources;
   (e) environment;
   (f) consumer protection;
   (g) transport;
   (h) trans-European networks;
   (i) energy;
   (j) area of freedom, security and justice;
   (k) common safety concerns in public health matters, for the aspects defined in this Treaty.

   [...]
4. In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.
5. In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

Article 5 TFEU

1. The Member States shall coordinate their economic policies within the Union. To this end, the Council shall adopt measures, in particular broad guidelines for these policies.

   Specific provisions shall apply to those Member States whose currency is the euro.

2. The Union shall take measures to ensure coordination of the employment policies of the Member States, in particular by defining guidelines for these policies.
3. The Union may take initiatives to ensure coordination of Member States' social policies.

p. 84

Article 6 TFEU

The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be:

(a) protection and improvement of human health;

(b) industry;

(c) culture;

(d) tourism;

(e) education, vocational training, youth and sport;

(f) civil protection;

(g) administrative cooperation.

The EU has only those powers that are conferred on it by the Treaties, and any powers not so conferred remain with the Member States. However, not all Treaty provisions lay down clear limits on the powers they confer and so Article 352 TFEU can be used as a reserve power that enables the EU institutions to act where their action is necessary to attain one of objectives set out in the Treaties.

Cross-Reference

See 3.2 for a discussion on Article 352 TFEU.

3.4.2 Secondary legislation

Thinking Point

> In the light of what you learned about the institutions in Chapter 2, can you identify the body/bodies responsible for making secondary legislation? Is it always the responsibility of the same body/bodies?

Article 288 TFEU provides a list of the five different kinds of legal acts of the EU.

Article 288 TFEU

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

p. 85

3.4.2.1 Regulations

Article 288 TFEU provides that Regulations 'shall have general application', such that they apply generally, rather than to specific groups or individuals. Regulations are binding in their entirety and directly applicable in all Member States. Regulations do not normally require implementing legislation (i.e. converting the Regulation into national law) because they will apply automatically. No further action is required by a Member State with regard to a Regulation because the Regulation applies in a uniform manner across the whole EU. If further action were required, it would deprive the measure of its uniform character as a measure of EU law. A Regulation becomes part of the national legislation in the Member State on the date specified within the Regulation or on the 20th day following that of its publication in the *Official Journal of the European Union* (Article 297 TFEU). Where a Regulation requires implementation measures to be adopted by the Member State, any failure to meet the requirements of the Regulation will amount to a breach of EU law.

3.4.2.2 Directives

Directives are binding as to the result to be achieved. Directives are not directly applicable and the Member State must transpose the Directive into national legislation. The Member State has discretion as to the form and method by which the implementation will be made. Directives are binding upon the Member State(s) to whom they are addressed.

All Directives provide a deadline for implementation, which will be specified in the Directive. In the event that a date of implementation has not been included in the Directive, Article 297 TFEU states that the date of implementation will be the 20th day following that of its publication in the *Official Journal of the European Union*. Sometimes, implementation of a Directive will not be necessary because the law in the Member State already conforms to the Directive. In this situation, the Member State must inform the Commission of the existing provision's conformity with the Directive.

3.4.2.3 Decisions

Decisions are binding in their entirety on those to whom they are addressed. Decisions may be addressed to all or some Member States, or to businesses, or to individuals. There is no requirement for implementing legislation. Article 297(2) TFEU provides that where Decisions specify to whom they are addressed, the addressee will be notified of that Decision, and the Decision will take effect only upon such notification. Where a Decision does not specify to whom it is addressed, the Decision will be published in the *Official Journal of the European Union*. In that case, the Decision will enter into force on the date specified in the Decision or, in the absence of a specified date, on the 20th day following that of its publication.

3.4.2.4 Recommendations or Opinions

Neither Recommendations nor Opinions have binding force. These are sometimes known as soft law. They cannot be altogether ignored, however, and it is wise to take note of them because they are often followed by binding measures along the same lines (Case 322/88 *Grimaldi v Fonds des Maladies Professionnelles* [1989] ECR 4407).

Cross-Reference

See also *Grimaldi* at 4.1.1.5 and 4.2.1.2.

p. 86

3.4.3 Decisions of the Court of Justice

Acts that are not listed in Article 288 TFEU may have a legal effect. The rulings of the Court of Justice are authoritative on all aspects of the Treaties and other (secondary) legislation. The Court has also developed certain legal principles, some of which it has implied into the Treaties and others of which are part of the legal traditions of the Member States.

3.4.4 International agreements and Conventions

The EU, as an institution with international legal personality, is able to enter into international agreements with third countries (Article 47 TEU) and it does so quite frequently. The main fields relate to commercial and trade policy, relations with prospective Member States, and development policy.

3.4.5 General principles of EU law

Not all EU law is laid down in writing. Through its role, under Article 19 TEU, in ensuring that 'the law is observed' in the interpretation and application of the Treaties, the Court of Justice has developed principles known as general principles of law, which are the unwritten law of the EU.

The general principles of law have been derived from various principles of law found in the national legal orders of the Member States and are considered to be part of EU law with which the Court of Justice must ensure compliance. In the context of the primary legislation of the TFEU, these principles are used to inform interpretation—although TFEU provisions can override these principles. They are also used to interpret secondary legislation, such as Directives. In addition, secondary legislation must be consistent with these principles and may be challenged before the Court of Justice if it violates such principles.

The areas mainly affected by general principles of law include:

- fundamental rights;
- the development of a general principle of equality and non-discrimination, although this is now mainly addressed by legislative measures; and
- procedural fairness.

Under the category of procedural fairness, take note of the development of the following principles:

- the right to be heard;
- confidentiality and legal privilege;
- legal certainty;
- protection of legitimate expectations; and
- proportionality.

p. 87 ↵ Legal certainty means that it should always be possible to ascertain the law applicable to the circumstances at the time and therefore that laws should neither be ambiguous nor apply retrospectively to the detriment of those who have fairly relied on them. The principle of legal certainty has been invoked, for example, to justify the possibility of placing time limits for bringing proceedings to challenge decisions that contravene EU law. Whilst the principle of effectiveness generally requires that remedies be available to challenge such decisions, the principle of legal certainty makes it permissible to place limits on those challenges.

Proportionality means that legislation should not go beyond that which is necessary to achieve the desired objective or deal with the problem. This requires that a measure must be both:

- *suitable* to promote the objective sought—that is, there must be a reasonable connection between the measure and its objective; and
- *necessary* to achieve that objective—that is, no more onerous than is required to achieve the objective and the least onerous approach by which that objective can be achieved.

These principles can be used by all courts to interpret EU law, and can be used by the Court of Justice to test the legality of EU acts and of implementing measures enacted by the Member States.

3.5 Legislative procedures

The law-making process enables policy objectives to be implemented. Article 17(2) TEU provides that 'Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise'. According to this provision, the Commission has the right of initiative such that legislative measures can be adopted on the basis of a Commission proposal only where the Treaties so provide. The usual procedure is for a measure to be proposed by the Commission and adopted jointly by the European Parliament and by the Council, but there are considerable variations on this procedure, the two most important of which are the ordinary legislative procedure (OLP)—formerly known as co-decision—and the special legislative procedure.

> *Cross-Reference*
>
> See more on co-decision at 1.13, 1.15, and 1.17.

The correct procedure in respect of a proposed piece of legislation is determined by the legal base of the proposed legislation—that is, the Treaty Article that gives the EU competence to act in that area.

It is also necessary to note that, in some cases, a completely different procedure may be used. For example, the Commission has direct legislative powers to make law in only two areas: under Article 106(3) TFEU in ensuring that public undertakings comply with the rules contained in the Treaty; and under Article 45(3)(d) TFEU in determining the conditions under which citizens of the EU may reside in another Member State after having worked there.

Article 289 TFEU provides for two legislative procedures.

p. 88

Article 289 TFEU

1. The ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission. This procedure is defined in Article 294.
2. In the specific cases provided for by the Treaties, the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament, shall constitute a special legislative procedure.
3. Legal acts adopted by legislative procedure shall constitute legislative acts.
4. In the specific cases provided for by the Treaties, legislative acts may be adopted on the initiative of a group of Member States or of the European Parliament, on a recommendation from the European Central Bank or at the request of the Court of Justice or the European Investment Bank.

3.5.1 Ordinary legislative procedure

The OLP applies to the majority of areas of activity that fall within the competence of the EU. It is grounded in the adoption of legislation by both the European Parliament and Council, based on a proposal submitted by the Commission. Article 289 TFEU states that this procedure applies to legislative proposals submitted by the Commission. Article 289(4) TFEU provides that, in specific cases laid down in the Treaty, the legislative procedure will apply based on the initiative of a group of Member States, or the European Parliament, on a recommendation from the European Central Bank (ECB), or at the request of the Court of Justice. In these circumstances, the role and prerogatives of the Commission do not apply (Article 294(15) TFEU).

The OLP is set out in Article 294 TFEU (see Figure 3.1 for a summary):

Article 294 TFEU

1. Where reference is made in the Treaties to the ordinary legislative procedure for the adoption of an act, the following procedure shall apply.
2. The Commission shall submit a proposal to the European Parliament and the Council.

First reading

3. The European Parliament shall adopt its position at first reading and communicate it to the Council.
4. If the Council approves the European Parliament's position, the act concerned shall be adopted in the wording which corresponds to the position of the European Parliament.
5. If the Council does not approve the European Parliament's position, it shall adopt its position at first reading and communicate it to the European Parliament.

p. 89

6. The Council shall inform the European Parliament fully of the reasons which led it to adopt its position at first reading. The Commission shall inform the European Parliament fully of its position.

Second reading

7. If, within three months of such communication, the European Parliament:
   (a) approves the Council's position at first reading or has not taken a decision, the act concerned shall be deemed to have been adopted in the wording which corresponds to the position of the Council;
   (b) rejects, by a majority of its component members, the Council's position at first reading, the proposed act shall be deemed not to have been adopted;
   (c) proposes, by a majority of its component members, amendments to the Council's position at first reading, the text thus amended shall be forwarded to the Council and to the Commission, which shall deliver an opinion on those amendments.
8. If, within three months of receiving the European Parliament's amendments, the Council, acting by a qualified majority:
   (a) approves all those amendments, the act in question shall be deemed to have been adopted;
   (b) does not approve all the amendments, the President of the Council, in agreement with the President of the European Parliament, shall within six weeks convene a meeting of the Conciliation Committee.
9. The Council shall act unanimously on the amendments on which the Commission has delivered a negative opinion.

Conciliation

10. The Conciliation Committee, which shall be composed of the members of the Council or their representatives and an equal number of members representing the European Parliament, shall have the task of reaching agreement on a joint text, by a qualified majority of the members of the Council or their representatives and by a majority of the members representing the European Parliament within six weeks of its being convened, on the basis of the positions of the European Parliament and the Council at second reading.
11. The Commission shall take part in the Conciliation Committee's proceedings and shall take all necessary initiatives with a view to reconciling the positions of the European Parliament and the Council.
12. If, within six weeks of its being convened, the Conciliation Committee does not approve the joint text, the proposed act shall be deemed not to have been adopted.

Third reading

13. If, within that period, the Conciliation Committee approves a joint text, the European Parliament, acting by a majority of the votes cast, and the Council, acting by a qualified majority, shall each have a period of six weeks from that approval in which to adopt the act in question in accordance with the joint text. If they fail to do so, the proposed act shall be deemed not to have been adopted.

p. 90

14. The periods of three months and six weeks referred to in this Article shall be extended by a maximum of one month and two weeks respectively at the initiative of the European Parliament or the Council.

Special provisions

15. Where, in the cases provided for in the Treaties, a legislative act is submitted to the ordinary legislative procedure on the initiative of a group of Member States, on a recommendation by the European Central Bank, or at the request of the Court of Justice, paragraph 2, the second sentence of paragraph 6, and paragraph 9 shall not apply.

    In such cases, the European Parliament and the Council shall communicate the proposed act to the Commission with their positions at first and second readings. The European Parliament or the Council may request the opinion of the Commission throughout the procedure, which the Commission may also deliver on its own initiative. It may also, if it deems it necessary, take part in the Conciliation Committee in accordance with paragraph 11.

3.5.2 Special legislative procedure

Article 289(2) TFEU refers to the special legislative procedure, which is used only in specific cases where the Treaties provide for the adoption of a Regulation, Directive, or Decision:

- by the European Parliament with the participation of the Council; or
- by the Council with the involvement of the European Parliament.

This procedure does not require the European Parliament and Council jointly to decide on the measure.

3.5.3 Enhanced cooperation

The Treaty of Amsterdam authorized 'closer cooperation' in the context of the EC Treaty generally and specifically Title VI TEU (on police and judicial cooperation under the Maastricht Treaty). This was a revolutionary concept, as it recognized the general principle that EU action could be taken by only some Members. Previously, this had been limited to opt-outs by particular Member States in specific areas.

The Treaty of Nice renamed 'closer cooperation' as 'enhanced cooperation' and clarified the conditions under which such enhanced cooperation would operate. For example, it extended enhanced cooperation to the implementation of joint actions and common positions under the Common Foreign and Security Policy (CFSP). Such cooperation may not apply to matters with military or defence implications.

> *Cross-Reference*
>
> See also enhanced cooperation at 1.5, 1.15, 1.17, and 1.18.

New provisions for enhanced cooperation can be found in the TEU and TFEU. Article 20 TEU provides that
p. 91 '[e]nhanced cooperation shall aim to further the objectives of the Union, ↵ protect its interests and reinforce its integration process'. Where Member States wish to engage in this cooperation, they may make use of the EU institutions. Articles 326–334 TFEU provide regulatory rules for the operation of enhanced cooperation, which will apply only to those participating Member States and not to all Member States.

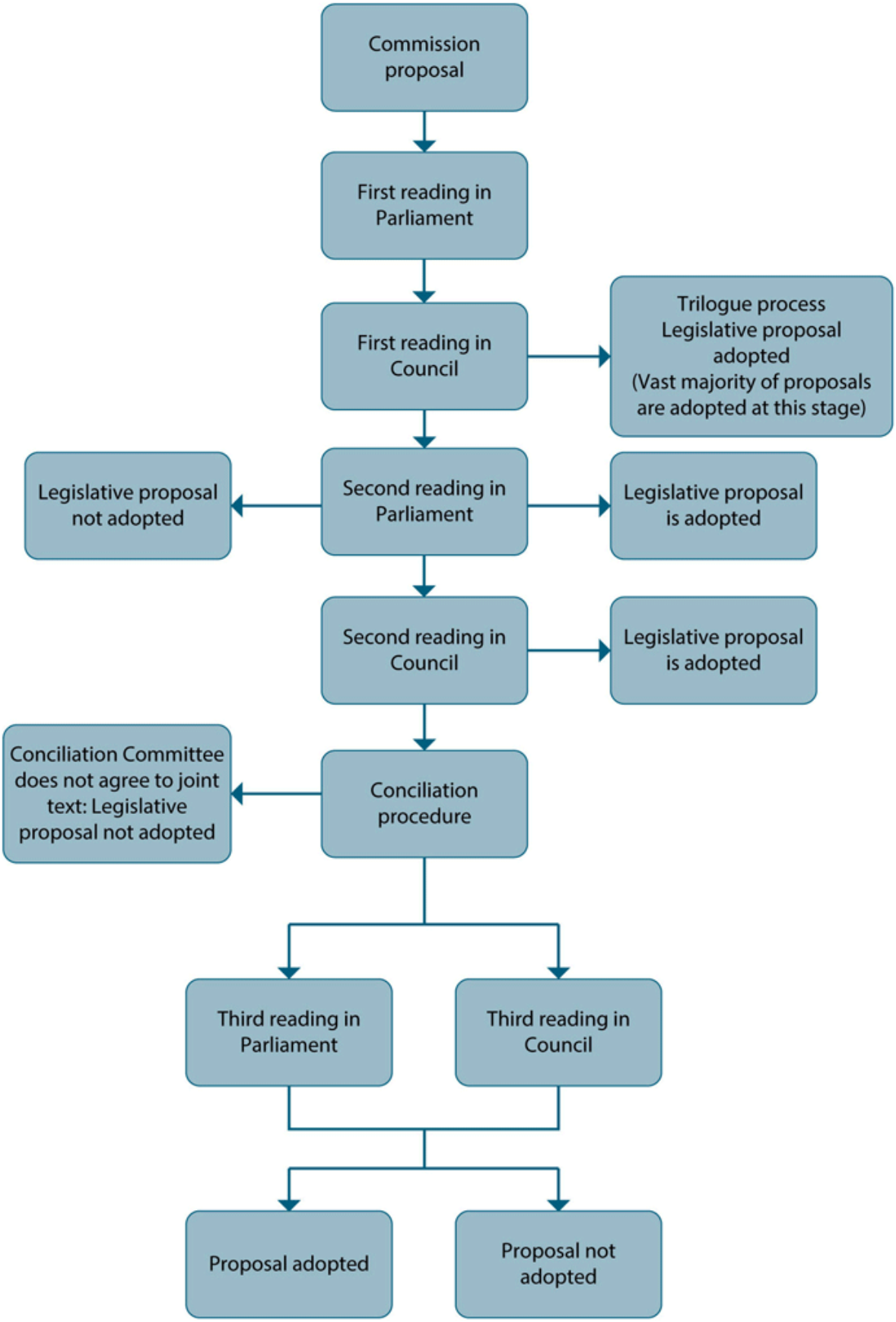

Figure 3.1 A summary of the ordinary legislative procedure

http://www.europarl.europa.eu/external/html/legislativeprocedure/default_en.htm <http://www.europarl.europa.eu/external/html/legislativeprocedure/default_en.htm> © European Union, 2014—Source: European Parliament, 2014. Responsibility for the adaptation lies entirely with the authors and publisher of the adapted figure.

p. 92

3.6 Conclusions

Now that the UK has left the EU, by means of its 2016 referendum, the key principle of the supremacy of EU law ceases to have effect once the withdrawal process is complete. In practice, this will mean that the UK is no longer bound by EU legislation or the jurisdiction of the Court of Justice. Parliament has regained full legislative authority over those competences that were previously exercised at the EU level.

Notwithstanding the UK's withdrawal, EU law will continue to have the same effect within the remaining Member States. In Chapter 4, the impact of Treaty Articles and secondary legislation will be considered in detail and, throughout this textbook, the impact of judgments from the Court of Justice will be apparent.

Summary

- The European Communities Act 1972 provided that future UK legislation takes effect subject to EU law. This represented a significant erosion of parliamentary sovereignty. Now that the UK has withdrawn from the European Union (EU), the supremacy of EU law within the UK has ended.
- The powers of the EU are granted to it by the Member States in the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). These powers are subject to many limitations, including those laid down expressly in the Treaties and principles such as subsidiarity.
- Sources of EU law include the Treaties, secondary legislation, the judgments of the Court of Justice, and general principles laid down by the Court.
- Secondary legislation comprises Regulations, Directives, and Decisions.
  - Regulations are directly applicable, apply in a uniform manner, and have the force of law as soon as they are adopted.
  - Directives set out provisions that Member States must implement into national law.
  - Decisions are addressed to particular entities and are legally binding on them as soon as they are adopted.
- Law-making procedures in the EU include the ordinary legislative procedure (OLP) and the special legislative procedure.
- The OLP applies to the vast majority of activity areas. The decision on a legislative act must be made jointly by the European Parliament and Council.
- Enhanced cooperation allows a smaller group of Member States, as opposed to the entire EU membership, to take action within the framework of the EU.

Brexit

- Following Brexit, the European Union (Withdrawal Act) 2018 provides for the end of the supremacy of EU law in the UK by repealing the European Communities Act 1972.
- The European Union (Withdrawal Act) 2018 has 'domesticated' EU law where possible to create Retained EU law. Post Brexit, Retained EU law is applied only by UK courts.

p. 93

Further Reading

Articles

A Cygan, 'The Parliamentarisation of EU Decision-Making? The Impact of the Treaty of Lisbon on National Parliaments' (2011) 36(4) EL Rev 480

Examines the role of national parliaments in monitoring subsidiarity post-Lisbon.

J Snell, '"European Constitutional Settlement": An Ever Closer Union, and the Treaty of Lisbon—Democracy or Relevance?' (2008) 33 EL Rev 619

Examines whether a democratic deficit still exists within the EU.

Question

Why has the supremacy of EU law proved so important for the process of EU integration?

Visit the online resources for an outline answer to this question *<https://iws.oupsupport.com/ebook/access/content/eulaw-complete5e-student-resource/eulaw-complete5e-chapter-3-guidance-on-answering-assessment-questions?options=showName>***, and additional self-test questions** *<https://iws.oupsupport.com/ebook/access/content/eulaw-complete5e-student-resource/eulaw-complete5e-chapter-3-self-test-questions?options=showName>* **with feedback.**

www.oup.com/he/eulaw-complete5e *<https://www.oup.com/he/eulaw-complete5e>*

Related Links

Visit the online resources for this title <https://learninglink.oup.com/access/eulaw-complete5e>

Test yourself: Multiple choice questions with instant feedback <https://learninglink.oup.com/access/content/smith-concentrate8e-student-resources/smith-concentrate8e-diagnostic-test>

Find This Title

In the OUP print catalogue <https://global.oup.com/academic/product/9780192846419>