Aims and objectives

At the end of this chapter you should understand the nature and scope of the following sources of EU law:

- The EU Treaties, in particular the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).
- Secondary legislation made under the EU Treaties.
- ‘Soft law’ comprising non-legally enforceable instruments, which may aid the interpretation and/or application of EU law.
- Related Treaties made between the Member States.
- International Treaties negotiated by the Union under powers conferred on it by the EU Treaties.
- Decisions of the Court of Justice of the European Union (which includes the General Court).
- General principles of law and fundamental rights upon which the constitutional laws of the Member States are based.

The sources of EU law

There are seven principal sources of EU law, each of which will be considered further within this Chapter:

- The EU Treaties, in particular the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).
- Secondary legislation made under the EU Treaties.
- ‘Soft law’ (i.e. non-legally enforceable instruments which may aid the interpretation and/or application of EU law).
- Related Treaties made between the Member States.
- International Treaties negotiated by the Union under powers conferred on it by the EU Treaties.
- Decisions of the Court of Justice of the European Union.
- General principles of law and fundamental rights upon which the constitutional laws of the Member States are based.
The EU Treaties

The principal EU Treaties are:

- the Treaty on European Union (TEU); and
- the Treaty on the Functioning of the European Union (TFEU).

The TFEU was previously called the EC Treaty, having been renamed by the Treaty of Lisbon (ToFL) when it came into force on 1 December 2009. The ToFL amended the TEU and the TFEU. Article 1 TEU (as amended by the ToFL) now provides that the TEU and the TFEU constitute the Treaties on which the Union is founded.

Prior to the ToFL it was common to refer to the European Community in addition to the European Union. However, the ToFL amended the TEU to provide that the Union replaces and succeeds the Community (Art 1, TEU). Throughout the TFEU, the word ‘Community’ has been replaced with the word ‘Union’. The following terms are therefore no longer used: European Community; European Communities; or Community law. Reference is made solely to the European Union (or Union) and European Union law (or Union law).

The articles within both the TEU and TFEU have been renumbered by the ToFL as part of a simplification exercise. The Treaty of Amsterdam (ToA) renumbered the provisions of the TEU and the EC Treaty when it came into force on 1 May 1999. The renumbering of the TEU and the TFEU by the ToFL is therefore the second time this has occurred. Two tables of equivalence are published at the beginning of this book. The first table relates to the renumbering made by the ToA, and the second relates to the renumbering made by the ToFL. Care must be taken when referring to EU case law, legislation and documents, to ensure that the old numbering (i.e. pre-ToA, and pre-ToFL) is distinguished from the numbering used post-ToA and post-ToFL. The ToFL renumbering came into effect on 1 December 2009. For some time it will be necessary to be aware of both the old and new numbering. Subsequent chapters of this book are based on the new (post-ToFL) Treaty numbers but, where appropriate, there are cross-references to old Treaty numbers (pre-ToFL).

The TEU and the TFEU form the ‘constitution’ of the European Union and are therefore an important source of Union law. Although they do not purport to create the constitution of a federal state, in some respects they do have that effect. The TFEU has been interpreted in that way by the Court of Justice:

Opinion 1/91 on the Draft Agreement between the EEC [renamed EC by the TEU] and EFTA [the European Free Trade Association] [1991] ECR 6079

The Court of Justice stated that:

The EEC Treaty [renamed the EC Treaty by the TEU, and the TFEU by the ToFL], albeit concluded in the form of an international agreement, nonetheless constitutes the constitutional charter of a Community [i.e. Union] based on the rule of law. As the Court of Justice has consistently held, the Community [i.e. Union] Treaties established a new legal order for the benefit of which the States had limited their sovereign rights, in ever wider fields, and the subjects of which comprised not only the Member States but also their nationals.

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

- the right not to be discriminated against on grounds of nationality (Art 18 TFEU, previously Art 12 EC Treaty);
- the right to equal pay for work of equal value, regardless of gender (Art 157 TFEU, previously Art 141 EC Treaty);
- the right to seek work and remain as a worker in another Member State (Art 45 TFEU, previously Art 39 EC Treaty);
- the right to receive and provide services (Art 56 TFEU, previously Art 49 EC Treaty);
- the right not to be subjected to import taxes (Art 30 TFEU, previously Art 25 EC Treaty); and
- the right to take action against another undertaking for breach of the competition rules (Art 102 TFEU, previously Art 82 EC Treaty; see Garden Cottage Foods v Milk Marketing Board [1984] AC 130).

This principle of direct enforcement/direct effect is considered in detail in Chapter 9.

The TEU and the TFEU

The TEU and the TFEU require further consideration. As the Court of Justice stated in Opinion 1/91 (see above): ‘... the Community [i.e. Union] Treaties established a new legal order for the benefit of which the States had limited their sovereign rights, in ever wider fields’.

The Union’s competences and the principle of conferral

The reference to ‘ever wider fields’ in Opinion 1/91 refers, in part, to the limited nature of the Union’s competences, in that the Union can act only in those policy areas where the Member States have given it the power to act through the TEU and the TFEU. It also recognises the fact that each time the EU Treaties have been amended the result has been that the powers of the Union have been enhanced, through, for example, the inclusion of more policy areas.

Article 5(1) TEU provides that ‘the limits of Union competences are governed by the principle of conferral’. This means 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’ (Art 5(2) TEU). The corollary is that ‘Competences not conferred upon the Union in the Treaties remain with the Member States’ (Art 5(2) TEU). The exercise of Union competences is also stated to be governed by ‘the principles of subsidiarity and
proportionality’ (Art 5(1) TEU). This provision is complemented by a Protocol on the application of these two principles (Protocol No. 2 which is annexed to the TEU and TFEU), which incorporates an ‘early-warning system’ involving national parliaments in the monitoring of how subsidiarity is applied. National parliaments are informed of all new legislative initiatives and if at least one-third of them are of the view that a proposal infringes the principle of subsidiarity, the Commission will have to reconsider the proposal.

In order to understand the extent of the Union’s legal competences it is essential to be familiar with the contents of the TEU and the TFEU. A useful starting point is to consider the index to both Treaties.

**Index to the TEU**

The index to the TEU, as amended, is as follows:

- **Preamble**
- **Title I** Common Provisions
- **Title II** Provisions on Democratic Principles
- **Title III** Provisions on the Institutions
- **Title IV** Provisions on Enhanced Cooperation
- **Title V** General Provisions on the Union’s External Action and Specific Provisions on the Common Foreign and Security Policy
  - **Chapter 1** General provisions on the Union’s external action
  - **Chapter 2** Specific provisions on the common foreign and security policy
- **Section 1** Common provisions
- **Section 2** Provisions on the common security and defence policy
- **Title VI** Final Provisions

The full text of the TEU, as amended, is available at:


**Index to the TFEU**

The index to the TFEU, as amended, is as follows:

- **Preamble**
- **Part One** Principles
  - **Title I** Categories and areas of Union competence
  - **Title II** Provisions having general application
- **Part Two** Non-discrimination and Citizenship of the Union
- **Part Three** Union Policies and Internal Actions
  - **Title I** The internal market
  - **Title II** Free movement of goods
    - Chapter 1 The customs union
    - Chapter 2 Customs cooperation
    - Chapter 3 Prohibition of quantitative restrictions between Member States
  - **Title III** Agriculture and fisheries
  - **Title IV** Free movement of persons, services and capital
    - Chapter 1 Workers
    - Chapter 2 Right of establishment
    - Chapter 3 Services
    - Chapter 4 Capital and payments
  - **Title V** Area of freedom, security and justice
    - Chapter 1 General provisions
    - Chapter 2 Policies on border checks, asylum and immigration
Part 1 Constitutional and administrative law of the European Union

Chapter 3 Judicial cooperation in civil matters
Chapter 4 Judicial cooperation in criminal matters
Chapter 5 Police cooperation

Title VI Transport

Title VII Common rules on competition, taxation and approximation of laws

Chapter 1 Rules on competition
Chapter 2 Tax provisions
Chapter 3 Approximation of laws

Title VIII Economic and monetary policy

Chapter 1 Economic policy
Chapter 2 Monetary policy
Chapter 3 Institutional provisions
Chapter 4 Provisions specific to Member States whose currency is the euro
Chapter 5 Transitional provisions

Title IX Employment

Title X Social policy

Title XI The European social fund

Title XII Education, vocational training, youth and sport

Title XIII Culture

Title XIV Public health

Title XV Consumer protection

Title XVI Trans-European Networks

Title XVII Industry

Title XVIII Economic, social and territorial cohesion

Title XIX Research and technological development and space

Title XX Environment

Title XXI Energy

Title XXII Tourism

Title XXIII Civil protection

Title XXIV Administrative cooperation

Part Four Association of overseas countries and territories

Part Five External action by the Union

Title I General provisions on the Union’s external action

Title II Common commercial policy

Title III Cooperation with third countries and humanitarian aid

Chapter 1 Development cooperation
Chapter 2 Economic, financial and technical cooperation with third countries
Chapter 3 Humanitarian aid

Title IV Restrictive measures

Title V International agreements

Title VI The Union’s relations with international organisations and third countries and Union delegations

Title VII Solidarity clause

Part Six Institutional and financial provisions

Title I Institutional provisions

Chapter 1 The Institutions
Chapter 2 Legal acts of the Union, adoption procedures and other provisions

Chapter 3 The Union’s advisory bodies
Chapter 4 The European Investment Bank
Chapter 2 Sources of EU law

**Title II Financial provisions**

- Chapter 1 The Union’s own resources
- Chapter 2 The multiannual financial framework
- Chapter 3 The Union’s annual budget
- Chapter 4 Implementation of the budget and discharge
- Chapter 5 Common provisions
- Chapter 6 Combating fraud

**Title III Enhanced cooperation**

Part Seven General and Final Provisions

The full text of the TFEU, as amended, is available at:


**Protocols, annexes and declarations**

Both the TEU and TFEU are followed by a number of protocols, annexes and declarations. Protocols and annexes are given legal effect within the Union legal system by Art 51 TEU (previously Art 311 EC Treaty), which provides that:

The Protocols and Annexes to the Treaties [i.e. the TEU and TFEU] shall form an integral part thereof.

Declarations may be legally effective within the Union legal system, if they are adopted by the Council (as most are). The agreement taken at the Edinburgh Summit, for example, following Denmark’s rejection of the TEU in a referendum, is an example of a non-legally enforceable agreement. At this summit a decision and declaration on Denmark was taken, not by the Council, but by the heads of state and governments meeting within the European Council. This is more akin to an international agreement and does not form part of the Union legal system.

**The Union’s objectives**

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

1. The Union’s aim is to promote peace, its values and the well-being of its peoples.
2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.
3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.
   It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.
Part 1 Constitution and administrative law of the European Union

It shall promote economic, social and territorial cohesion, and solidarity among Member States.
It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe’s cultural heritage is safeguarded and enhanced.

4. The Union shall establish an economic and monetary union whose currency is the euro.

5. In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

6. The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties.

Article 3 TEU sets out the broad objectives of the Union; objectives which include not only economic policies but also social and political policies. But how does the Union operate and function – is it run by the Member States?

The Union’s institutional framework

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

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

Articles 13–19 TEU clarify the role of the Union institutions. Part Six, Title I TFEU contains the detailed provisions governing the institutions. Together, these provisions constitute the Union’s institutional framework. Article 13(1) TEU provides that, through the Union’s institutional framework, the EU institutions shall aim to:

promote its [i.e. the Union’s] values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions.

Each of these EU institutions must act within the powers granted to them under the EU Treaties. If any institution exceeds its powers as defined within the Treaties, any resultant act can be struck down as being *ultra vires*, i.e. in excess of its powers.

In the next three chapters it will be noted that in addition to these seven institutions, the Treaty provides for other named bodies to be established, and defines their role. Two such bodies are specifically referred to in Art 13(4) TEU: the Economic and Social Committee, and the Committee of the Regions, both of which shall assist the European Parliament, the Council and the Commission.
Union policies

Part Three of the TFEU amplifies the broad Art 3 TEU objectives of the Union by setting out, in more detail, the substantive Union policies.

For example, Art 3(3) TEU provides that the Union shall establish an ‘internal market’. Article 26(2) TFEU elaborates on this broad policy objective by stating that the internal market shall comprise ‘an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties’. The more detailed provisions of the internal market are set out within Part Three of the TFEU. Part Three, Title IV TFEU governs the free movement of persons, services and capital. With regard to the free movement of persons, Part Three, Title IV, Chapter 1 TFEU contains four articles (Arts 45–48 TFEU, previously Arts 39–42 EC Treaty) which are specifically concerned with the free movement of workers.

Article 45 TFEU (previously Art 39 EC Treaty) defines the policy area of the free movement of workers in more detail, but it is still stated in quite broad terms. The first thing to note about Art 45 is that it is limited to the free movement of workers, not persons generally. Article 45 TFEU provides that:

1. Freedom of movement for workers shall be secured within the Union.
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
   (a) to accept offers of employment actually made;
   (b) to move freely within the territory of Member States for this purpose;
   (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
   (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.
4. The provisions of this Article shall not apply to employment in the public service.

Article 46 TFEU (previously Art 40 EC Treaty) provides that the European Parliament and the Council shall issue directives or make regulations setting out the measures required to bring about the free movement of workers as defined in Art 45 TFEU. Article 46 TFEU provides that:

The European Parliament and the Council shall . . . issue directives or make regulations setting out the measures required to bring about freedom of movement for workers, as defined in Article 45 . . .

In many instances, the TFEU provides a framework of broad policies, which are to be supplemented by further measures to be adopted by certain Union institutions. In the case of Art 45, these further measures are in the form of directives and regulations, and the institutions which will adopt the directive or regulation are the European Parliament and the Council. The institutions and the legislative process will be considered further in the next three chapters. The measures which may be adopted are the next source of Union law.
Secondary legislation made under the EU Treaties

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

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

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

- **A regulation** shall have general application. It shall be binding in its entirety and directly applicable in all Member States (Art 288, para 2 TFEU).
- **A directive** shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods (Art 288, para 3 TFEU).
- **A decision** shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only upon them (Art 288, para 4 TFEU).
- **Recommendations and opinions** shall have no binding force (Art 288, para 5 TFEU).

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

Regulations

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

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

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

Issues of the *Official Journal* which have been published since 1998 can be accessed at:

Chapter 2 Sources of EU law

Directly applicable

As stated above, Art 288 TFEU provides that a regulation shall be 
*directly applicable*. Normally if a state enters into an agreement with another state, although that agreement may be binding in international law, it will only be effective in the legal system of that state if it is implemented in accordance with the state’s constitutional requirements.

For example, if the UK entered into an agreement with France, in order for the agreement to be enforceable in UK courts an Act of Parliament would normally have to be enacted. The Act may incorporate (e.g. copy) the agreement into the relevant Act, or it may simply refer to the agreement and provide for it to be effective in the UK.

An EU regulation is an agreement, made by an international body, the European Union. For the regulation to be incorporated into the national legal system, implementing legislation would have to be enacted by the national legislature. This would be very burdensome, because the Union adopts a vast number of regulations each year. The whole Union system would very quickly grind to a halt if a regulation had to be incorporated into the national law of each of the 27 Member States before it was effective. Regulations, especially in the agricultural policy area, quite often require speedy implementation in order to have the desired effect. Such regulations would lose their effect if the Union had to await incorporation by each Member State into their respective national legal systems.

It is for this reason that Art 288 TFEU provides that a regulation shall be *directly applicable*. This means that EU regulations shall be taken to have been incorporated into the national legal system of each of the Member States automatically, and come into force in accordance with Art 297 TFEU (see above). They are binding on anyone coming within their scope throughout the whole of the European Union. They require no further action by Member States, and can be applied by the courts of the Member States as soon as they become operative.

In the UK, the European Communities Act 1972 (as amended) provides for the direct applicability of EU regulations.

**Directives**

A directive differs from a regulation in that it applies only to those Member States to whom it is addressed, although normally a directive will be addressed to all 27 Member States. A directive sets out the result to be achieved, but leaves some choice to each Member State as to the form and method of achieving the end result. A directive will quite often provide a Member State with a range of options it can choose from when implementing the measure.

A directive is not directly applicable. It requires each Member State to incorporate the directive in order for it to be given effect in the national legal system. In the UK, this requires the enactment of an Act of Parliament or delegated legislation.

As stated above, Art 297(1) TFEU provides that all legislative acts (which include directives) must be published in the *Official Journal*. Directives will come into force on the date specified in the directive or, if no date is specified, 20 days after publication in the *Official Journal* (Art 297(1) TFEU).

**Regulation or directive?**

Enabling the Union to legislate by means of either a regulation or a directive provides some flexibility. Very few Treaty articles provide that a specific instrument must be used.
This flexibility is necessary given the difference between the instruments. As discussed above, regulations are directly applicable in that they become part of the Member States’ national legal systems just as they are. It is therefore necessary for a regulation to be precise and clear. Compare this to a directive, which is a much more flexible instrument. A directive sets out the result to be achieved, while leaving some degree of discretion to the Member State as to the choice of form and method for achieving that end result. However, despite this apparent flexibility, a directive may nevertheless contain very specific provisions, leaving very little discretion to the Member State.

Usually the EU institution which is empowered to propose an instrument is provided with some degree of flexibility as to the mode of instrument chosen, be it a regulation, a directive or some other instrument. However, some Treaty articles actually specify the mode of instrument. For example, Art 109 TFEU (previously Art 89 EC Treaty) provides that:

The Council, on a proposal from the Commission and after consulting the European Parliament, may make any appropriate regulations for the application of Articles 107 and 108 . . . [emphasis added]

Also, Art 115 TFEU (previously Art 94 EC Treaty) provides that:

. . . the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market. [emphasis added]

### Decisions

Article 288 TFEU provides that a decision is binding in its entirety. Article 297(2) TFEU (previously Art 254(3) EC Treaty) provides that if a decision specifies those to whom it is addressed, such persons must be notified of the decision, and the decision will only take effect upon such notification. However, if a decision does not specify those to whom it is addressed, the decision must be published in the Official Journal, and it will take effect either on the date specified in the decision or, if there is no such date specified, on the twentieth day following its publication in the Official Journal (Art 297(2) TFEU).

The same can be said of decisions as can be said of regulations and directives, in that the Treaty articles are generally left open to allow the relevant institution to determine the actual mode of the instrument. However, some articles actually specify that the mode of the instrument shall be a decision. For example, Art 105(2) TFEU (previously Art 85(2) EC Treaty) provides that:

If the infringement is not brought to an end, the Commission shall record such infringement of the principles in a reasoned decision . . . [emphasis added]

Article 105(2) TFEU concerns infringement of Union competition rules.

### Legal base

The relevant institution, so empowered by the Treaty, may choose the relevant mode for an instrument, unless the Treaty specifies that a particular mode must be used.
Articles 45 and 46 TFEU relating to the free movement of workers were discussed above. Article 46 provides that:

The European Parliament and the Council shall . . . issue directives or make regulations setting out the measures required to bring about freedom of movement for workers, as defined in Article 45 . . . [emphasis added]

The Council has adopted a number of directives and regulations pursuant to Art 46 TFEU. For example:


Article 46 TFEU is said to be the legal base which empowers the Union institutions to adopt secondary legislation in relation to the policy of free movement of workers. Whenever the institutions seek to adopt secondary legislation, the institution which makes the proposal (more often than not the Commission) must find a relevant legal base within the Treaty. Without a legal base the institutions are prevented from acting.

**Soft law**

Non-legally enforceable instruments which may aid the interpretation and/or application of Union law are referred to as ‘soft law’ (Snyder, 1993). Such instruments may be referred to by the Court of Justice of the European Union when interpreting and/or applying Union law. One particular form of ‘soft law’ will be considered further: recommendations and opinions.

**Recommendations and opinions**

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

Although recommendations and opinions have no immediate legal force, they may achieve some legal effect as persuasive authority if they are subsequently referred to, and taken notice of, in a decision of the Court of Justice. National courts are bound to take them into account when interpreting Union measures, where they throw light on the purpose of the legislation: *Grimaldi v Fonds des Maladies Professionnelles* (Case C-322/88).
Related treaties made between the Member States

Treaties which are related to the original EU Treaties and which either amend or enlarge them are themselves a source of EU law. Within this category, as a source of law, are the Merger Treaties, the Single European Act, the Treaty on European Union, the Treaty of Amsterdam, the Treaty of Nice, the Treaty of Lisbon and the Treaties of Accession. A Treaty of Accession is necessary when the Union is enlarged (thus there were separate Accession Treaties for enlargement in 1973, 1981, 1986, 1995, 2004 and 2007).

Like the original Treaties themselves, the Treaties of Accession have been held to confer directly enforceable rights on individuals (Rush Portuguesa v Office National d’Immigration (Case C-113/89)).

International treaties negotiated by the Union under powers conferred by the EU Treaties

Article 47 TEU provides that the Union shall have legal personality, enabling it to enter into international treaties and agreements on behalf of the Member States.

This category includes not only multilateral treaties to which the Union is a party, such as the General Agreement on Tariffs and Trade (GATT), but Association Agreements concluded by the Union with individual states. The GATT agreement was held in International Fruit (Case 21–24/72) to be binding on the Union, and the Court of Justice has also held that undertakings which complain to the Commission of illicit commercial practices which breach the Union’s commercial policy instrument may rely upon the GATT as forming part of the rules of international law to which the instrument applies (Fediol (Case 70/87)).

In Kupferberg (Case 104/81), the Court of Justice held that Art 21 of the EEC–Portugal Association Agreement was directly enforceable in the national courts. The principle of direct enforcement of such agreements has enabled the nationals of states which are parties to such agreements to enforce their provisions against Member States of the Union (the principle of direct enforcement is considered further in Chapter 9). In Kziber (Case C-18/90), the Court of Justice held that parts of the EEC–Morocco Cooperation Agreement are directly enforceable (see also, Yousfi v Belgium (Case C-58/93)).

Decisions of the Court of Justice of the European Union

Article 19(1) TEU, as amended by the ToL, provides that ‘the Court of Justice, the General Court and specialised courts’ shall be collectively referred to as the Court of Justice of the European Union. The former Court of First Instance has been renamed the General Court.

The jurisprudence (i.e. case law) of the Court of Justice of the European Union is a major source of law. It comprises not only all the formal decisions of the Court, but also the principles enunciated in its judgments and opinions. The Treaties and the implementing legislation do not, between them, contain an exhaustive statement of the relevant law, and much of the work of the Court of Justice of the European Union has been to put flesh on the legislative bones. The creative jurisprudence of the Court in particular, and its willingness to interpret measures in such a way as to make them effective, to achieve
the *effet utile*, has done much to assist in the attainment of the general objectives of the EU Treaties.

The role of the Court of Justice of the European Union in developing Union law is discussed below and in Chapter 5.

**Fundamental rights and general principles of law**

Article 2 TEU states, unequivocally, that ‘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 men and women prevail’. The importance of these principles is emphasised by the powers conferred on the Council by Art 7(3) TEU to suspend, *inter alia*, the voting rights of any Member State found to be in breach.

Article 6(1) TEU, as amended by the ToL, provides that the Union shall recognise the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union, which shall have the same legal value as the EU Treaties. Article 6(3) TEU, as amended by the ToL, further provides that fundamental rights ‘as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law’. The Charter will be considered next, followed by the Convention.

**Charter of Fundamental Rights of the European Union**

The Charter of Fundamental Rights of the European Union was signed by the then 15 Member States during December 2000 at the meeting of the European Council held in Nice, France. The Charter combines in a single text the civil, political, economic, social and societal rights which had previously been laid down in a variety of international, European and national sources. It includes the following:

- rights of dignity (e.g. the right to life, and respect for private and family life);
- freedoms (e.g. freedom of assembly and of association);
- equality (e.g. respect for cultural, religious and linguistic diversity);
- solidarity (e.g. right of collective bargaining and action);
- citizens’ rights (e.g. freedom of movement and residence); and
- justice (e.g. presumption of innocence and right of defence).

Originally, the Charter was not legally binding. A Declaration annexed to the ToN provided that an Intergovernmental Conference would be held in 2004 to consider, *inter alia*, the status of the Charter. This resulted in the adoption of the proposed Constitutional Treaty and subsequently the adoption of the ToL.

The Charter, which was amended on 12 December 2007, is given legal recognition by the ToL. Article 6(1) TEU, as amended by the ToL, provides that the Union shall ‘recognise the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union’. The Charter is therefore an integral part of Union law, setting out the fundamental rights which every Union citizen can benefit from. However, it does not create fundamental rights which are of general application in national law.
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It only applies within the scope of Union law. A Declaration on the Charter (which was annexed to the Final Act of the Intergovernmental Conference which adopted the ToL) states that:

The Charter of Fundamental Rights of the European Union, which has legally binding force, confirms the fundamental rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms as they result from the constitutional traditions common to the Member States.

The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined by the Treaties.

The latter paragraph explicitly provides that the Charter does not introduce any new EU powers or tasks. The UK and Poland sought reassurance that the Charter would not be indirectly incorporated into their national law. Article 1, Protocol No. 30 (which is annexed to the TEU and TFEU) provides that:

1. The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it [i.e. the Charter] reaffirms.

2. In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.

As discussed in Chapter 1, in order to secure the Czech Republic President’s signature to the ToL, it was agreed that at the time of the conclusion of the next Accession Treaty a new Protocol will be added to both the TEU and TFEU to provide that Protocol No 30 (which currently only applies to the UK and Poland) will also apply to the Czech Republic.

The European Convention on Human Rights and Fundamental Freedoms

The European Convention on Human Rights and Fundamental Freedoms is discussed further at the end of Chapter 1. Article 6(2) TEU provides that the Union will accede to the Convention, although it states that ‘such accession shall not affect the Union’s competences as defined in the Treaties’. This means that accession to the Convention will not extend the Union’s powers and tasks; application of the Convention will be limited to those areas which come within the competence of the Union. Article 6(3) TEU further provides that the ‘fundamental rights guaranteed by the European Convention of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law’ [emphasis added]. This simply restates the pre-ToL position. However, once the Union accedes to the Convention, EU law will have to be interpreted and applied in accordance with the Convention, not simply as a ‘general principle of the Union’s law’, but because (i) the Convention is directly applicable to the Union; and (ii) the Union is required (in international law) to adhere to the Convention’s provisions.

Following accession to the Convention, it will be possible for a decision of the Court of Justice to be contested by taking the case to the European Court of Human Rights in
Strasbourg, claiming the Court of Justice has failed to correctly apply (or failed to apply) a provision of the Convention.

### General principles of law

In interpreting primary and secondary Union legislation, the Court of Justice of the European Union has developed a number of general principles of law, some based on the fundamental laws of the constitutions of the Member States, some based on principles of international law and some derived directly from the European Convention on Human Rights (ECHR). These general principles of law are also based on the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union. The status of the Charter has been enhanced now that the Charter has been afforded legal recognition by the ToL through the amended Art 6(1) TEU.

Although the jurisdiction of the Court of Justice of the European Union is limited by Art 19(1) TEU (previously Art 220 EC Treaty) to the interpretation of the Treaties, this is to be done in such a way as to ensure that ‘the law is observed’. This has been widely interpreted to mean not only the law established by the Treaties but ‘any rule of law relating to the Treaty’s application’ (Pescatore, 1970).

The development and application of these general principles of Union law are considered further below. This is divided into two principle sections: (i) human rights; and (ii) other general principles of law.

### Human rights

Article 6 TEU (as amended by the ToL) declares that:

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union . . . which shall have the same legal value as the Treaties.

   . . .

2. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.

   The effect of Art 6 is to give formal recognition in the Treaty to what has been part of the jurisprudence of the Court of Justice of the European Union since Stauder (Case 29/69). In this case the Court of Justice declared that ‘fundamental human rights are enshrined in the general principles of Community [i.e. Union] law and protected by the Court’.

   In A v Commission (Case T-10/93) the Court of First Instance (now the General Court) noted the commitment in Art F.2 TEU (now Art 6) to respect the fundamental rights guaranteed by the ECHR and said, repeating the words of the Court of Justice in ERT (Case C-260/89), ‘the Court draws inspiration from the constitutional traditions common to Member States and from the guidelines supplied by international treaties for the protection of human rights on which Member States have collaborated or of which they are signatories’ (see, in particular, the judgment in Nold v Commission (Case 4/73)). The ECHR has special significance in that respect (see, in particular, Johnston v Chief Constable of the Royal Ulster Constabulary (Case 222/84)). It follows that, as the Court of Justice held in its judgment in Wachauf v Germany (Case 5/88), the Union cannot accept measures which are incompatible with observance of the human rights thus recognised and guaranteed.
What this means is that when there is a conflict between a national law which is, for example, intended to implement Union law, but does so in such a way as to breach the Convention, the Court will rule that the national measure is contrary to Union law. In the Johnston case, national measures intended to prohibit sexual discrimination in Northern Ireland and to provide a remedy for those alleging discriminatory behaviour, were held contrary to Union law because the Court of Justice held that they did not give complainants an effective remedy as required by Art 13 ECHR. It must, however, be emphasised that the Court of Justice can only rule on compatibility between the ECHR and Union law in those areas of national law affected by Union law. It could not, for example, rule on the compatibility of a criminal trial in a Member State with the ECHR’s provisions on fair process, if the trial was unrelated to any rules of Union law, even though the individual involved was an EU citizen (Kremzow v Austria (Case C-299/95)).

The Court of Justice defined the limits of its powers in the following case:

Demirel v Stadt Schwäbisch Gmünd (Case 12/86)

The Court of Justice held that it has:

...no power to examine the compatibility with the European Convention on Human Rights of national legislation lying outside the scope of Community [i.e. Union] law.

The application of the ECHR and the development of the jurisprudence of fundamental rights has been a somewhat erratic process, depending very much on the kind of cases which have come before the Court. Some provisions of the ECHR, particularly those relating to due process under Art 6 ECHR, have been discussed frequently by the Court, while others, such as that relating to the right to life, hardly at all. Fundamental rights have been drawn both from the ECHR and from the constitutions of the Member States; rights and freedoms recognised by national constitutions as being ‘fundamental’ both in the sense that they protect and promote the most essential human values, such as the dignity, the personality, the intellectual and physical integrity, or the economic and social well-being of the individual, and in the sense that they are inseparably attached to the person. The Court of Justice has emphasised its commitment to human rights in general on several occasions, over a period of 40 years, starting with Stauder (Case 29/69). However, until the Treaty on European Union came into force in 1993, there were no specific provisions for the protection of human rights as such in the Treaties. It is arguable that the Court has been reluctant to take on the protection of fundamental rights, and did so largely to protect the supremacy of its jurisdiction:

Reading an unwritten bill of rights into Community [i.e. Union] law is indeed the most striking contribution the Court made to the development of a new constitution for Europe. This statement should be qualified in two respects. First...that contribution was forced on the court from outside, by the German and, later, the Italian Constitutional Courts. Second, the court’s effort to safeguard the fundamental rights of the Community [i.e. Union] citizens stopped at the threshold of national legislations.

(Mancini, 1989)

Even where a right is recognised by the Court as a ‘fundamental’ Union right, that recognition is not conclusive. The designation by the Court of a right as fundamental does not always mean that all other rules must give way before it. In some circumstances, one fundamental right may have to give way to another which the Court regards as even
more important. Much will depend on the context in which the fundamental right is called upon, and the nature of the right itself.

Some of the specific ‘human’ rights are now considered.

The right to property and the freedom to choose a trade or profession (Article 1 First Protocol ECHR; Articles 15 and 17 Charter of Fundamental Freedoms)

This right is contained in Art 1 of the First Protocol ECHR (and see Nold v Commission (Case 4/73)). The Court of Justice has declared ‘The right to property is guaranteed in the Community [i.e. Union] legal order’ (Hauer v Land Rheinland-Pfalz (Case 44/79)). In the following case, the Court of Justice applied the principle of the right to property:

Wachauf (Case 5/88)

A German tenant farmer was deprived of his right to compensation under Regulation 857/84 for loss of a milk quota when his lease expired, as a result of the way in which the German government had interpreted the regulation. He argued that this amounted to expropriation without compensation. The case was referred to the Court of Justice, which held:

It must be observed that Community [i.e. Union] rules which, upon the expiry of the lease, had the effect of depriving the lessee, without compensation, of the fruits of his labour and of his investments in the tenanted holding would be incompatible with the requirements of the protection of fundamental rights in the Community [i.e. Union] legal order. Since those requirements are also binding on Member States when they implement Community [i.e. Union] rules, the Member States must, as far as possible, apply those rules in accordance with those requirements.

However, the Court of Justice held in R v Ministry of Agriculture, ex parte Bostock (Case C-2/92), that where a landlord ‘inherited’ the benefit of a milk quota, neither the milk quota scheme itself nor the Union principles of fundamental rights required a Member State to introduce a scheme for compensation for the outgoing tenant, nor did they confer directly on the tenant a right to such compensation.

In the following case, the Court affirmed that both the right to property and the freedom to pursue a trade or business formed part of the general principles of Union law:

Commission v Germany (Case C-280/93)

The Court of Justice stated that the two principles (i.e. the right to property and the freedom to pursue a trade or business) were not absolute, and:

... had to be viewed in relation to their social function. Consequently, the exercise of the right to property and the freedom to pursue a trade or profession could be restricted, particularly in the context of a common organisation of a market, provided that those restrictions in fact corresponded to objectives of general interest pursued by the Community [i.e. Union] and did not constitute a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed.

In relation to access to a trade or profession, the principle of equality should ensure equal access to available employment and the professions between EU citizens and nationals of the host state (see Thieffry (Case 71/76)). In UNECTEF v Heylens (Case 222/86), the Court of Justice stated that ‘free access to employment is a fundamental right which the Treaty confers individually on each worker of the Community [i.e. Union]’. 
The right to carry on an economic activity (Articles 15 and 16 Charter of Fundamental Freedoms)

The right to carry on an economic activity is closely connected with the right to property. The Court has held that the right to property is guaranteed in the Union legal order. However, it has also decided that a Union-imposed restriction on the planting of vines constitutes a legitimate exception to the principle, which is recognised in the constitutions of Member States (see Hauer (Case 44/79), Eridania (Case 230/78) and S M Winsersett v Land Rheinland-Pfalz (Case C-306/93)).

Freedom of trade

Procureur de la République v ADBHU (Case 240/83)

The Court of Justice stated that:

> It should be borne in mind that the principles of free movement of goods and freedom of competition, together with freedom of trade as a fundamental right, are general principles of Community law of which the Court ensures observance.

The Court has held on several occasions that the right of goods to be allowed access to markets in other Member States under Art 34 TFEU (previously Art 28 EC Treaty) is, subject to the exceptions in Art 36 TFEU (previously Art 30 EC Treaty), a directly enforceable right. This decision elevates that right to a fundamental principle, in the face of which inconsistent Union and national legislation must generally give way (see Chapter 9). But the freedom to trade is not absolute, and may have to give way to the imperatives of the internal market (see Commission v Germany (above)).

The right to an effective judicial remedy before national courts (Articles 6 and 13 ECHR; Article 47 Charter of Fundamental Freedoms)

The right to an effective judicial remedy before national courts has become one of the most developed fundamental principles in the jurisprudence of the Court of Justice, as illustrated in the following case:

Johnston v Chief Constable of the RUC (Case 222/84)

The RUC maintained a general policy of refraining from issuing firearms to female members of the force. The policy was defended on the ground, inter alia, that Art 53, Sex Discrimination (Northern Ireland) Order 1976 (SI 1976/1042 (NI 15)) permitted sex discrimination for the purpose of ‘safeguarding national security or of protecting public safety or public order’. A certificate issued by the Secretary of State was to be ‘conclusive evidence’ that the action was necessary on security grounds. The complainant argued that the rule effectively barred her promotion, and that Directive 76/207 (which prohibited discrimination on grounds of sex in relation to conditions of employment) should take priority over national law. Article 6 of the Directive provided that complainants should be able to ‘pursue their claims by judicial process’. On a reference to the Court of Justice, the Court held that the national tribunal had to be given enough information to determine whether or not the policy of the Chief Constable was objectively justified. This was necessary in the interests of effective judicial control:

> The requirements of judicial control stipulated by that Article [Art 6 Dir 76/207] reflect a general principle of law which underlines the constitutional traditions common to the Member States. That principle is also laid down in Articles 6 and 13 of the European Convention on Human Rights and
Fundamental Freedoms... As the European Parliament, Council and Commission recognised in their joint declaration of 5 April 1977 (OJ 1977 C 103 p. 1) and as the Court has recognised in its own decisions, the principles on which the Convention is based must be taken into consideration in Community [i.e. Union] law.

The Court of Justice’s approach in the above case was endorsed by the European Court of Human Rights in the following case:

**Tinnelly & Sons Ltd and McElduff v UK (1999) 27 EHRR 249**

With regard to similar Northern Ireland legislation permitting discrimination on religious grounds, the European Court of Human Rights declared that:

> The right of a court guaranteed by Article 6.1... cannot be replaced by the *ipse dixit* of the executive even if national security considerations constitute a highly material aspect of the case.

The principles of effective judicial control and effective remedies underlie several decisions relating to difficulties encountered by individuals in seeking to establish themselves in businesses and professions in other Member States. These principles require that sufficient reasons must be given for official decisions, to enable them to be challenged in court, should the need arise, as illustrated in the following case:

**UNECTEF v Heylens (Case 222/86)**

The Court of Justice stated that:

> Effective judicial review, which must be able to cover the legality of the reasons for the contested decision, presupposes in general that the court to which the matter is referred may require the competent authority to notify its reasons. But where, as in this case, it is more particularly a question of securing the effective protection of a fundamental right conferred by the Treaty on Community [i.e. Union] workers, the latter must also be able to defend that right under the best possible conditions and have the possibility of deciding, with a full knowledge of the relevant facts, whether there is any point in their applying to the courts. Consequently, in such circumstances the competent national authority is under a duty to inform them of the reasons on which its refusal is based, either in the decision itself or in a subsequent communication made at their request.

The right to due judicial process also involves a fair investigative process in accordance with the ECHR when the European Commission is investigating alleged breaches of competition law. In interpreting its investigative powers under Regulation 17/62 (which has now been replaced by Regulation 1/2003 (OJ 2003 L 1/1); see Chapter 22), the Commission has to have regard to the ECHR and, particularly, the rights of the defence to be informed of the matters under investigation (see *Hoechst v Commission* (Case 46/87)). This principle has come to be known as ‘equality of arms’ (*Solvay SA v Commission* (Case T-30/91)). The same principle entitles protection to be given to certain communications between the person under investigation and his lawyer (see *Australia Mining & Smelting Ltd v Commission* (Case 155/79)).

**The protection of family life, home and family correspondence (Article 8 ECHR; Article 7 Charter of Fundamental Freedoms)**

In *National Panasonic* (Case 136/79), the Court of Justice held that the principles of Art 8 ECHR were applicable to an investigation by the Commission of an alleged anti-competitive practice, but held that the exception in Art 8(2) ECHR justified the action
taken by the Commission under Regulation 17/62 (which, as stated above, has now been replaced by Regulation 1/2003).

In the following case, the applicant had applied for an appointment as a temporary member of the Commission’s staff. He had agreed to undergo the normal medical examination but refused to be subjected to a test which might disclose whether or not he carried the AIDS virus:

**X v Commission** (Case C-404/92)

The Court of Justice held that he was entitled to refuse the test:

The right to respect for private life, embodied in Art 8 ECHR and deriving from the common constitutional traditions of the Member States, is one of the fundamental rights protected by the legal order of the Community [i.e. Union]. It includes in particular a person’s right to keep his state of health secret.

The right of EU citizens in other Member States to have only those restrictions imposed on them as are necessary in the interests of national security or public safety in a democratic society (Article 2 Fourth Protocol ECHR)

This right has a wide application. The position of EU citizens in other Member States, in relation to their human rights, has been described in the most comprehensive terms by Advocate-General Jacobs in the following case:

**Christos Konstantinidis v Stadt Altensteig-Standesamt** (Case C-168/91)

Advocate-General Jacobs stated that:

In my opinion, a Community [i.e. Union] national who goes to another Member State as a worker or a self-employed person under Articles 48, 52 or 59 of the [EC] Treaty [renumbered Articles 39, 43 or 49 EC Treaty by the ToA, and now Articles 45, 49 or 56 TFEU] is entitled ... to assume that, wherever he goes to earn his living in the European Community [i.e. Union], he will be treated in accordance with a common code of fundamental values, in particular those laid down in the European Convention on Human Rights. In other words, he is entitled to say ‘civis Europeus sum’ and to invoke that status in order to oppose any violation of his fundamental rights.

This principle applies, *a fortiori*, following the creation of EU citizenship by Art 20 TFEU (previously Art 17 EC Treaty), because such citizenship carries with it, under Art 21 TFEU (previously Art 18 EC Treaty), a general right of residence anywhere in the Union, subject only to the limitations contained in the Treaty and in the implementing legislation (see Chapters 11–15).

**Prohibition of discrimination on the grounds of sex in relation to pay and working conditions (Article 14 ECHR; Articles 21 and 23 Charter of Fundamental Freedoms)**

The combating of discrimination and the promotion of equality between men and women is one of the principal objectives of the Union (Art 3(3) TEU and Art 8 TFEU). Article 157(1) TFEU (previously Art 141(1) EC Treaty) more specifically provides that ‘Each Member State shall ensure that the principle of equal pay for male and female workers for work of equal value is applied’. Article 23 of the Charter of Fundamental
Rights of the European Union provides that ‘Equality between men and women must be ensured in all areas, including employment, work and pay’.

In *P/S and Cornwall County Council* (C-13/94), a case involving the dismissal of a transsexual, the Court of Justice held that the right not to be discriminated against on grounds of sex is ‘simply the expression, in the relevant field, of the principle of equality, which is one of the fundamental principles of Community [i.e. Union] law’. However, since the Court was not prepared to regard cohabiters of the same sex as being in an ‘equal’ situation, the principle of equality did not apply to them (*Grant v South-Western Trains* (Case C-249/96)). Despite this decision, the creation by the ToA of a power for the Council in the former Art 13 EC Treaty (now Art 19 TFEU) to ‘combat’ discrimination on grounds of sexual orientation, could well persuade the Court of Justice that the situation of same-sex couples is now an ‘equal’ situation. This argument is further strengthened now that the Charter of Fundamental Freedoms has, since 1 December 2009, been legally incorporated into Union law by Art 6(1) TEU. Article 21(1) of the Charter provides that ‘Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited’.

Pursuant to the former Art 13 EC Treaty (now Art 19 TFEU), the Council adopted Directive 2000/78 (OJ 2000 L 303/16) which establishes a general framework for equal treatment in employment and occupation. The directive, which had to be implemented by 3 December 2003, prohibits direct and indirect discrimination as regards access to employment and occupation on grounds of religion or belief, disability, age or sexual orientation. It applies to both the public and private sectors. Although the directive applies to EU and non-EU citizens, the prohibition does not cover national provisions relating to the entry into and residence of third-country (i.e. non-EU) nationals (Art 3(2)). The directive does not, therefore, extend the free movement provisions, *per se*, to non-EU citizens (see Chapter 11).

**Freedom of expression (Article 10 ECHR; Article 11 Charter of Fundamental Freedoms)**

The right to freedom of expression has been considered on several occasions by the Court in the context of freedom to provide and receive services, and in relation to the establishment of businesses in other Member States. In the following case, the Court of Justice had to consider a challenge by an independent broadcasting company to the monopoly of the state broadcasting company:

*Elleneki Radiophonia Tileorasi (ERT)* (Case C-260/89)

Greek law forbade any party other than the state television company from broadcasting television programmes within Greek territory. The defendant company defied the ban and, when prosecuted, pleaded in their defence that the television monopoly was contrary both to Union law (in relation to, *inter alia*, the free movement of goods and services) and to Art 10 ECHR. The Greek government defended the television monopoly as a public policy derogation from the free movement of goods and services under the former Arts 46 and 55 EC Treaty (now Arts 52 and 62 TFEU). The Court of Justice accepted that these derogations were subject to the ECHR and said:

> When a Member State invokes Articles 56 and 66 of the [EC] Treaty [renumbered Articles 46 and 55 EC Treaty by the ToA, and now Arts 52 and 62 TFEU] in order to justify rules which hinder the
Access to information is an important corollary to the effective exercise both of freedom of expression (Art 10 ECHR and Art 11 Charter of Fundamental Freedoms) and of the right to know the basis of a decision under the general rules requiring a fair decision-making process. Article 296 TFEU (previously Art 253 EC Treaty) requires reasons to be given for all decisions by Union institutions. Article 169 TFEU (previously Art 152 EC Treaty) confers a right of information on consumers. Article 15(3) TFEU (previously Art 255(3) EC Treaty) confers a right of access for all EU citizens and those resident in the Union to documents produced by the Union institutions. This right of access is, however, subject to the rules made by each body. Article 42 of the Charter of Fundamental Freedoms explicitly states that any EU citizen has the right ‘of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium’. This right extends to any natural or legal person residing or having its registered office in a Member State. The Court of First Instance ((CFI), now renamed the General Court) has recognised that the policy decision of the Commission to make its documents available could be subject to its power to withhold documents on grounds of public security, international relations, monetary stability, court proceedings and investigations, but these limitations must be specifically justified in the case of each document, and interpreted strictly (Van der Wal v Commission (Case T-83/96)). Article 15(3) TFEU (previously Art 255 EC Treaty) provides for access to European Parliament, Council and Commission documents. Pursuant to the former Art 255 EC Treaty, Regulation 1049/2001 was adopted by the Council. This Regulation replaced Decision 94/90 with effect from 3 December 2001. Refusal to grant access must be based on one of the exceptions provided for in the Regulation and must be justified on the grounds that disclosure of the document would be harmful (see Chapter 3).

Freedom of religion (Article 9 ECHR; Article 10 Charter of Fundamental Freedoms)

The question of religious discrimination came before the Court of Justice in the following case:

Prais v The Council (Case 130/75)

A woman of Jewish faith applied for a post as a Union official. She did not mention her faith in her application form, but when she was informed that she would have to sit a competitive examination on a particular day, she explained that she could not do so because it was an important Jewish festival. She asked to be able to take the examination on another day. She was refused, because the Council decided that it was essential for all candidates to sit the examination on the same day. The Court upheld the decision of the Council, because it had not been told, in advance, about the difficulty. The Court of Justice accepted, as did the Council, that freedom of religion was a general principle of Union law, but decided that it had not been breached in this case (see also Directive 2000/78 above).
Freedom of trade union activity including the right to join and form staff associations (Article 12 Charter of Fundamental Freedoms)

Union Syndicale v Council (Case 175/73) recognised the right to trade union membership. It is debatable if this extended to a right to engage in industrial action, although Art 28 of the Charter of Fundamental Freedoms provides that:

Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action. [emphasis added]

Individuals benefiting from the protection of Union law are entitled to participate equally in trade unions and staff associations, and should not be penalised for taking part in legitimate trade union activity (see Rutilli (Case 36/75) and Association de Soutien aux Travailleurs Immigrés (Case C-213/90)). This includes the right to vote and stand for office in such bodies (Commission v Luxembourg (Case C-118/92)). The European Court of Human Rights, in Schmidt and Dahlstrom, held that the ECHR safeguards the freedom to protect the occupational interests of trade union members by trade union action, but leaves each state a free choice of the means to be used to this end. Article 8, Regulation 1612/68, which gives migrant workers equal rights with national workers as far as membership of trade unions and the election to office in them is concerned, refers only to ‘the rights attaching’ to such membership, without further elaboration. Article 12 of the Charter of Fundamental Freedoms further provides that:

1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.
2. Political parties at Union level contribute to expressing the political will of the citizens of the Union.

The Human Rights Act 1998

Applying the rule of supremacy of Union law (see Chapter 9), the principles referred to in this chapter must be recognised and implemented by the courts of the UK as part of its national law. In addition, since the incorporation of the ECHR into the law of England, Wales, Scotland and Northern Ireland by the Human Rights Act 1998, all public bodies, including courts and tribunals, and even private bodies implementing public law, will have to abide by the principles of the ECHR. Therefore, ECHR rights may be applied either as a matter of Union law, where they concern a measure within the competence of the Union, or under national law, following the procedures set out in the Act, where Union law is not involved.

Other general principles of law

Having considered some of the specific ‘human rights’ provisions, this section considers other general principles which have been embraced by the Court of Justice of the European Union when interpreting and applying Union law.

Proportionality

Proportionality is a general principle imported from German law, and is often invoked to determine whether a piece of subordinate legislation or an action purported to be taken
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under the Treaties goes beyond what is necessary to achieve the declared, lawful objects. It holds that ‘the individual should not have his freedom of action limited beyond the degree necessary for the public interest’ (Internationale Handelsgesellschaft (Case 11/70)). The principle applies in relation to action by the Union in the sphere of legislation, to determine whether a regulation has, for example, gone beyond what is necessary to achieve the aim contained in the enabling Treaty provision, or whether a Union institution has exceeded the necessary action to be taken in relation to an infraction (i.e. breach) of Union law. It may thus be invoked to challenge fines imposed by undertakings found by the Commission to have breached the competition rules in Arts 101 and 102 TFEU (previously Arts 81 and 82 EC Treaty); see Chapter 22.

Article 5(1) TEU specifically provides that the use of EU competences is governed by the principle of proportionality. Article 5(4) TEU further provides that ‘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’. Protocol No. 2, which is annexed to the TEU and the TFEU, concerns the application of the principles of subsidiarity and proportionality. Article 5(4) TEU specifically provides that the EU institutions shall apply the principle of proportionality as laid down in the Protocol.

The principle of proportionality is also applicable to action by Member States in relation to permitted derogations from Union law. While, for example, restrictions on imports from other Member States, and also other measures having an equivalent effect, are prohibited by Art 34 TFEU (previously Art 28 EC Treaty), an exception is permitted under Art 36 TFEU (previously Art 30 EC Treaty) in relation to action taken on the grounds of, inter alia, public health (see Chapter 18). A total ban on a product will in almost every case be disproportionate, while some sampling and testing, in proportion to the degree of the perceived risk, may be legitimate. Excessive action may constitute a disguised restriction on trade (Commission v Germany (Re Crayfish Imports) (Case C-131/93)).

The principle of equality

Article 2 TEU provides that 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 right 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.

The Union’s objectives are set out in Art 3 TEU. Article 3(3) TEU provides that the Union:

. . . 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.

Articles 9 to 12 TEU set out a number of democratic principles which regulate how the Union functions and operates. Article 9 TEU sets out the principle of equality:

In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies . . .

Article 8 TFEU provides that ‘In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women’. Article 10 TFEU further provides that ‘In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation’.

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The TFEU includes three specific types of prohibition against discrimination:

- prohibition against discrimination on grounds of nationality under Art 19(1) TFEU (previously Art 12 EC Treaty);
- prohibition of discrimination between producers and consumers in relation to the operation of the Common Agricultural Policy under Art 40(2) TFEU (previously Art 34(2) EC Treaty); and
- entitlement to equal pay for work of equal value for both men and women under Art 157 TFEU (previously Art 141 EC Treaty).

Article 19(1) TFEU (which, as stated above, replaces the non-discrimination provision in the former Art 12 EC Treaty) specifically provides that:

Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

The former Art 12 EC Treaty has been applied extensively by the Court of Justice of the European Union, particularly with regard to the Treaty provisions relating to Union citizenship and the free movement of persons (see Chapters 11–15). Article 19(1) TFEU will undoubtedly be similarly applied by the Court.

The former Art 13 EC Treaty (now Art 19 TFEU) created a new power for the Council: 'within the limits of the powers conferred upon it by the Community [i.e. Union] . . . [to] take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation’. Two directives have been adopted pursuant to the former Art 13 EC Treaty:

- Directive 2000/43 (OJ 2000 L 180/22) implements the principle of equal treatment between persons irrespective of racial or ethnic origin. The directive had to be implemented by 19 July 2003. The principle of equal treatment prohibits direct or indirect discrimination based on racial or ethnic origin (Art 1). It applies to EU and non-EU citizens and covers both public and private sectors in relation to employment, self-employment, education, social protection including social security and healthcare, social advantages, and access to and supply of goods and services (Art 3(1)). The prohibition of racial or ethnic discrimination does not, however, cover national provisions relating to the entry into and residence of third-country (i.e. non-EU) nationals (Art 13(2)). The directive does not, therefore, extend the free movement provisions per se to non-EU citizens (see Chapter 11).

- Directive 2000/78 (OJ 2000 L 303/16) establishes a general framework for equal treatment in employment and occupation, prohibiting direct and indirect discrimination as regards access to employment and occupation on grounds of religion or belief, disability, age or sexual orientation (see above).

The principle of equality has been recognised by the Court of Justice as one of general application and requires that comparable situations should not be treated differently, and different situations should not be treated in the same way, unless such differentiation is objectively justified (Graf v Hauptzollamt Köln-Rheinau (Case C-351/92)). Besides the specific Treaty provisions, the Court of Justice has held that the fixing and collection of financial charges which make up the Union's own resources are governed by the general principle of equality (Grosoli (Case 131/73)), as is the allocation of Union tariff quotas by the Member States (Krohn (Case 165/84)).
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The principle is also evident in the Court’s requirement of equality of arms under which undertakings which are subject to investigation by the Commission for breach of competition law should have full knowledge of the allegations and evidence in the Commission’s file (Solvay SA v Commission (Case T-30/91)).

Legal certainty and non-retroactivity
Legal certainty and non-retroactivity is a general principle of law familiar to all the legal systems of the Member States. In its broadest sense, it means that ‘Community [i.e. Union] legislation must be unequivocal and its application must be predictable for those who are subject to it’ (Kloppenburg (Case 70/81)). It means, for example, that the principle of the indirect effect of directives does not apply in relation to national provisions with criminal sanctions, because the need for legal certainty requires that the effect of national criminal law should be absolutely clear to those subject to it. In Kolpinghuis Nijmegen (Case 80/86), the Court of Justice stated that the national court’s obligation to interpret domestic law to comply with Union law was ‘limited by the general principles of law which form part of Community [i.e. Union] law, and in particular, the principles of legal certainty and non-retroactivity’ (see Chapter 9).

The following case concerns the issue of national courts imposing penalties for breach of Union law. This case concerned an EU Regulation, whereas previous cases had been concerned with EU Directives:

\(X\) (Case C-60/02)

During November 2000, Rolex, a company which holds various trade marks for watches, applied in Austria for a judicial investigation to be opened against ‘persons unknown’, following the discovery of a consignment of counterfeit watches which persons unknown had attempted to transport from Italy to Poland, thus infringing its trade mark rights. Rolex asked for the goods to be seized and destroyed following that investigation. In July 2001 Tommy Hilfiger, Gucci and Gap likewise requested the opening of judicial investigations concerning imitation goods from China intended to be transported to Slovakia.

The Austrian court was faced with the following problem: the opening of a judicial investigation under the Austrian Code of Criminal Procedure requires that the conduct complained of is a criminal offence. However, the court said, under the national law on the protection of trademarks only the import and export of counterfeit goods constituted a criminal offence. The mere transit across the national territory did not constitute a criminal offence. This interpretation of national law was disputed. The Austrian government, for example, was of the opinion that mere transit was a criminal offence under Austrian law.

The Austrian court referred a question to the Court of Justice on the compatibility of the Austrian law with Regulation 3295/94, which in the national court’s view covers mere transit.

The Court of Justice first confirmed that view: the regulation applies also to goods in transit from one non-member country to another, where the goods are temporarily detained in a Member State by the customs authorities of that state.

The Court further stated that the interpretation of the scope of the regulation does not depend on the type of national proceedings (civil, criminal or administrative) in which that interpretation is relied on.

The Court then noted that there was no unanimity as to the interpretation to be given to the Austrian law on trademarks. The Austrian government and the claimant companies contested the view taken by the national court. In their opinion, mere transit was a criminal offence under
Austrian law. That, said the Court, concerned the interpretation of national law, which was a matter for the national court, not the Court of Justice.

The Court of Justice stated that if the national court decided that the relevant provisions of national law did not in fact penalise mere transit contrary to the regulation, it would have to interpret its national law within the limits set by Union law, in order to achieve the result intended by the Union rule (see Chapter 9: principles of direct effect and indirect effect). In relation to the transit of counterfeit goods across the national territory, the Austrian court would have to apply the civil law remedies applicable under national law to the other offences, provided that they were effective and proportionate and constituted an effective deterrent.

The Court noted, however, that a particular problem arose where the principle of compatible interpretation was applied to criminal matters. Since Regulation 3295/94 empowers Member States to adopt penalties for the conduct it prohibits (i.e. requiring the Member States to make an election as to the penalties it will impose), the Court’s case law on directives must be extended to it, according to which directives cannot, of themselves and independently of a national law adopted by a Member State for their implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of their provisions.

The Court reached the conclusion that, if the national court considered that Austrian law did not prohibit the mere transit of counterfeit goods, the principle of non-retroactivity of penalties, which is a general principle of Union law, would prohibit the imposition of criminal penalties for such conduct, despite the fact that national law was contrary to Union law.

**Legitimate expectation**

Legitimate expectation is based on the concept that ‘trust in the Community’s [i.e. Union’s] legal order must be respected’ (Deuka (Case 5/75) per Advocate-General Trabucchi). Under this principle, ‘assurances relied on in good faith should be honoured’ (Compagnie Continentale v Council (Case 169/73) per Advocate-General Trabucchi).

It is closely linked to the principle of legal certainty. The relationship between the two principles is illustrated in the following case:

**Mulder (Case 120/86)**

In order to stabilise milk production, Union rules required dairy farmers to enter into a five-year non-marketing agreement, in exchange for which they would receive a premium. In 1984, the Union introduced a system of milk quotas, under which milk producers would have to pay a levy on milk produced in excess of their quota in any one year. Those who had entered into the non-marketing agreement for 1983 were not allowed any quota, because there was no provision in the regulations for them to do so. Having suspended production for the non-marketing period, they were effectively excluded from subsequent milk production. A farmer excluded in this way challenged the validity of the regulations. The Court of Justice held that:

... where such a producer, as in the present case, has been encouraged by a Community [i.e. Union] measure to suspend marketing for a limited period in the general interest and against payment of a premium, he may legitimately expect not to be subject, upon the expiry of his undertaking, to restrictions which specifically affect him because he has availed himself of the possibilities offered by the Community [i.e. Union] provisions.

The principle of legitimate expectation seeks to ensure a fair process, although it cannot fetter the Union’s freedom of action. The balance is not always easily struck, but the
issues involved in doing so were applied in an English court by Sedley J in the following case:

**R v Ministry of Agriculture and Fisheries, ex parte Hamble Fisheries [1995]**

2 All ER 714

Sedley J stated that:

> The principle of legal certainty and the protection of legitimate expectation are fundamental to European Community [i.e. Union] law. Yet these principles are merely general maxims derived from the notion that the Community [i.e. Union] is based on the rule of law and can be applied to individual cases only if expressed in enforceable rules. Moreover, in most instances there are other principles which run counter to legal certainty and the protection of legitimate expectations; here the right balance will need to be struck. For instance, in the field of Community [i.e. Union] legislation the need for changes in the law can conflict with the expectation of those affected by such a change that the previous legal situation will remain in force...

In the above case, the court decided that the legitimate expectation of the holders of fishing licences had not been infringed when the Ministry introduced a more restrictive fishing licensing policy to protect the remaining fish stocks allocated to the UK under the Union’s quota system. The CFI (renamed the General Court by the ToL) has held that operators in the Union’s agricultural markets cannot have a legitimate expectation that an existing situation will prevail since the Union’s intervention in these markets involves constant adjustments to meet changes in the economic situation (O’Dwyer and Others v Council (Cases T-466, 469, 473 and 477/93)).

**Natural justice**

Natural justice is a concept derived from English administrative law, but closely linked to the United States’ ‘due process’. It is sometimes used by the Court of Justice to mean no more than ‘fairness’, and is not always distinguishable from ‘equity’. In the English administrative law sense, it implies, however, two basic principles: (i) the right to an unbiased hearing; and (ii) the right to be heard before the making of a potentially adverse decision affecting the person concerned (see, for example, Ridge v Baldwin [1964] AC 40). In the following case, the Court of Justice referred to a general principle of good administration:

**Kuhner (Case 33/79)**

The Court of Justice stated the principle as:

> ...a general principle of good administration to the effect that an administration which has to take decisions, even legally, which cause serious detriment to the person concerned, must allow the latter to make known their point of view, unless there is a serious reason for not doing so.

The principle is explicit in relation to decisions affecting an individual’s free movement rights on the grounds of public policy, public security and public health (Arts 27–32, Directive 2004/38), and implicit in other decisions affecting the exercise of those rights. It involves the right to be given full reasons for the decision in order that they may be challenged. The right to natural justice is thus closely linked to the right to an effective remedy, as stated by the Court of Justice in the following case:
**UNCTEF v Heylens and Others (Case 222/86)**

The Court of Justice stated that:

15. Where, as in this case, it is more particularly a question of securing the effective protection of a fundamental right conferred by the Treaty on Community [i.e. Union] workers, the latter must . . . be able to defend that right under the best possible conditions and have the possibility of deciding, with a full knowledge of the relevant facts, whether there is any point in their applying to the courts.

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**Summary**

Now you have read this chapter you should be able to:

- Explain the nature and scope of the different sources of EU law, including:
  - EU Treaties (in particular the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU)); and
  - secondary legislation.
- Understand the nature of the following different forms of secondary EU legislation which may be adopted pursuant to Article 288 TFEU (previously Article 249 EC Treaty):
  - Regulations;
  - Directives; and
  - Decisions.
- Explain how soft law may be used as an aid to the interpretation and application of EU law.
- Understand the role which the Court of Justice of the European Union plays in the creation and development of EU law.
- Evaluate how the decisions of the Court of Justice of the European Union have been influenced by fundamental rights and general principles of law.

**References**


**Further reading**

**Textbooks**


Part 1 Constitutional and administrative law of the European Union

Journal articles

Visit www.mylawchamber.co.uk/fairhurst to access exam-style questions with answer guidance, multiple choice quizzes, live weblinks, an online glossary, and regular updates to the law.

Use Case Navigator to read in full the key case referenced in this chapter:
11/70 Internationale Handelsgesellschaft v EVGF [1970] ECR 1125