LEGAL SKILLS

FIFTH EDITION

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Legislation

1

INTRODUCTION

This chapter deals with the first primary source of law that you will need to be able to find, understand, and use as part of your legal skills portfolio: legislation. It will begin by looking at the process by which an Act of Parliament comes into existence before turning to consider delegated legislation—that is, law that is made by other bodies under Parliament's authority. It will then move on to consider European Union legislation, which has had an increasingly significant effect ever since the UK joined the European Economic Community in 1973. Although a large part of domestic law remains unaffected, certain high-profile areas are significantly affected; these include employment law, commercial and consumer law, environmental law, and the law relating to the free movement of goods and workers throughout Europe. This chapter will therefore discuss the various institutions of the European Union and their role in the law-making process before looking at the different types of EU legislation in detail and explaining the circumstances in which individuals may use them in domestic courts. Finally, the chapter will discuss the impact of the European Convention on Human Rights and the Human Rights Act 1998.

Understanding legislation as a source of law is a fundamentally important legal skill. Every legal topic that you study will generally involve a mixture of legislation, delegated legislation, case law, and equitable principles. Therefore, a thorough understanding of national legislation is key. Furthermore, you must also understand the operation of EU legislation as a source of law since it impacts many areas of domestic law. Without understanding the effects of the EU sources on our domestic law, you will not be able to see the 'whole picture' of a particular area of legal study—particularly in areas such as employment, commercial, environmental, and discrimination law.

LEARNING OUTCOMES

After studying this chapter, you will be able to:

- Explain the process by which Acts of Parliament come into being
- Describe various types of delegated legislation and their function
- Understand the roles of the various institutions of the European Union
- Describe the process by which European Union legislation comes into being
- Explain the differences between European Union Treaty Articles, Regulations, Directives, Decisions, Recommendations, and Opinions

- Distinguish between the concepts of direct *applicability* and direct *effect*
- Explain the principles underlying the supremacy of European Union law
- Discuss the effect of the European Convention on Human Rights and the Human Rights Act 1998

1.1 Domestic legislation

Legislation is a broad term which covers *statutes* (**Acts of Parliament**) and other types of legislation, such as **delegated** (or **subordinate**) legislation and **European Union** legislation.

1.1.1 Statute law

Parliament passes legislation in the form of statutes, or Acts of Parliament. On average, Parliament enacts around sixty or seventy statutes per session and, although this figure remains largely constant, the length of statutes seems to have expanded in recent years, hence increasing the overall volume of legislation.

An Act of Parliament will begin life as a Public Bill, Private Bill, or Hybrid Bill.

The procedure for enacting Private and Hybrid Bills is different to that for Public Bills. This chapter will concentrate on Public Bills and the resulting Public General Acts, although a brief overview of Private Bills, Hybrid Bills, and Private Members' Bills is included here for completeness.

1.1.1.1 Public Bills

Public Bills are introduced by the Government as part of its programme of legislation. Although many people think that most Public Bills arise from the commitments made by the Government as part of its election manifesto, in fact most Public Bills originate from Government departments, advisory committees or as a political reaction to unforeseen events of public concern (such as the Dangerous Dogs Act 1991 in response to public and media outcry over a number of attacks by pit-bull terriers in which some unfortunate individuals were severely or disfiguringly injured).

If enacted, most Public Bills result in Public General Acts which, as their name suggests, affect the general public as a whole.

1.1.1.2 Private Bills

Private Bills are introduced for the benefit of particular individuals, groups of people, institutions, or a particular locality. They are promoted by organizations outside the House to obtain powers for themselves in excess of, or in conflict with, the general law. They often fail to become law due to insufficient time in a particular Parliamentary session. For example, before divorce became generally available under the public law, it was granted by Private Act of Parliament. Nowadays, personal Private Bills are extremely rare. There are now only a few Private Bills in each session. Private Bills tend to deal with nationalized industries, local authorities, companies, and educational institutions.

If enacted, Private Bills generally result in Private Acts (for example, the George Donald Evans and Deborah Jane Evans (Marriage Enabling) Act 1987), unless (as with Public Bills)

they deal with local authorities, in which case the resulting legislation is known as a Local Act (the most recent example being the St Austell Market Act 2008).

Take care not to confuse Private Bills with Private Members' Bills which are a type of Public Bill and are covered later in section 1.1.1.4.

1.1.1.3 Hybrid Bills

Hybrid Bills are a cross between Public Bills and Private Bills. According to the House of Commons Speaker, Hylton-Foster, they may be described as:

> A Public Bill which affects a particular private interest in a manner different from the private interests of other persons or bodies in the same category or class.

Bills which propose works of national importance that only affect a specific local area are generally Hybrid Bills. The most recent examples all deal with transport: the Channel Tunnel Bill of 1986–87, proposing the Channel Tunnel, the Crossrail Bill of 2005 which proposed the new east-to-west rail link throughout Central London, and the High Speed Rail (London – West Midlands) Bill 2013–14 to 2014–15 (dealing with the so-called HS2 rail link) which is still before Parliament at the time of writing. Each of these projects claim to benefit the country as a whole, although they clearly affect the private interests of those who are closest to the works more than those living a great distance from them.

1.1.1.4 Private Members' Bills

Private Members' Bills are non-Government Bills (Public, Private, or Hybrid) that are introduced by private Members of Parliament (MPs of the political party or members of the House of Lords who are not Government Ministers). They may be introduced in the Commons in a variety of ways: by ballot, under the 'ten minute rule', or by presentation. Private Members' Bills introduced in the House of Lords are treated in the same way as all other Public Bills. Relatively few Private Members' Bills end up as Acts of Parliament. Although they often deal with relatively narrow issues (such as mock auctions and drainage rates), they may also be used to draw attention to issues of concern that are not within the legislative agenda of Government. Significant pieces of legislation that have begun life as Private Members' Bills include the Abortion Act 1967 and the Hunting Act 2004.

Be careful not to confuse Private Members' Bills with Private Bills.

1.1.1.5 Consolidating and codifying statutes

Statutes may also be passed to consolidate or codify the law.

Consolidating statutes

A **consolidating statute** is one which re-enacts particular legal subject matter which was previously contained in several different statutes, which repeals obsolete law, or which gives effect to certain amendments.

According to the *Companion to the Standing Orders and guide to Proceedings of the House of Lords*, the following types of Bill are classified as consolidation Bills:

(a) consolidation Bills, whether public or private, which are limited to re-enacting existing law;

(b) Bills to consolidate any enactments with amendments to give effect to recommendations made by the Law Commissions;

(c) statute law repeals Bills, prepared by the Law Commissions to promote the reform of the statute law by the repeal of enactments which are no longer of practical utility;

(d) statute law revision Bills, which are limited to the repeal of obsolete, spent, unnecessary or superseded enactments;

(e) Bills prepared under the Consolidation of Enactments (Procedure) Act 1949, which include corrections and minor improvements to the existing law.

As Lord Simon stated in *Farrell v Alexander*:[1]

> All consolidation Acts are designed to bring together in a more convenient, lucid and economical form a number of enactments related in subject-matter [which were] previously scattered over the statute book.

Examples of such consolidation Acts include the Children Act 1989, the Limitation Act 1980, and the Companies Act 2006.

Codifying statutes

A **codifying statute** is one which restates legal subject matter previously contained in earlier statutes, the common law, and custom.

The meaning of 'common law' and 'custom' is considered in chapter 4.

Unlike consolidation, codification *may* change the law. An example of a codifying Act is the Theft Act 1968, which attempted to frame the law of theft in 'ordinary language'.

1.1.1.6 The domestic law-making process

White Papers and Green Papers

Before a Bill is introduced into Parliament, it may be preceded by a White Paper or a Green Paper.

White Papers set out Government proposals on topics of current concern. They signify the Government's intention to enact new legislation and may set up a consultative process to consider the finer details of the proposal.

Green Papers are issued less frequently. They are introductory higher-level Government reports on a particular area put forward as tentative proposals for discussion without any guarantee of legislative action or consideration of the legislative detail.

Drafting the Bill

Proposed Government legislation is passed to the Parliamentary draftsmen (officially the 'Parliamentary Counsel to the Treasury') who draft the Bill acting on the instructions of the Government department responsible for the proposal. Oddly, it is conventional practice that the Ministers responsible for the Bill do not usually see the instructions sent from their departments.

Procedure for Public Bills

Once drafted, the Parliamentary procedure for Bills introduced in the House of Commons can be depicted as shown in Figure 1.1.

1. [1977] AC 59 (HL) 82 (Lord Simon of Glaisdale).

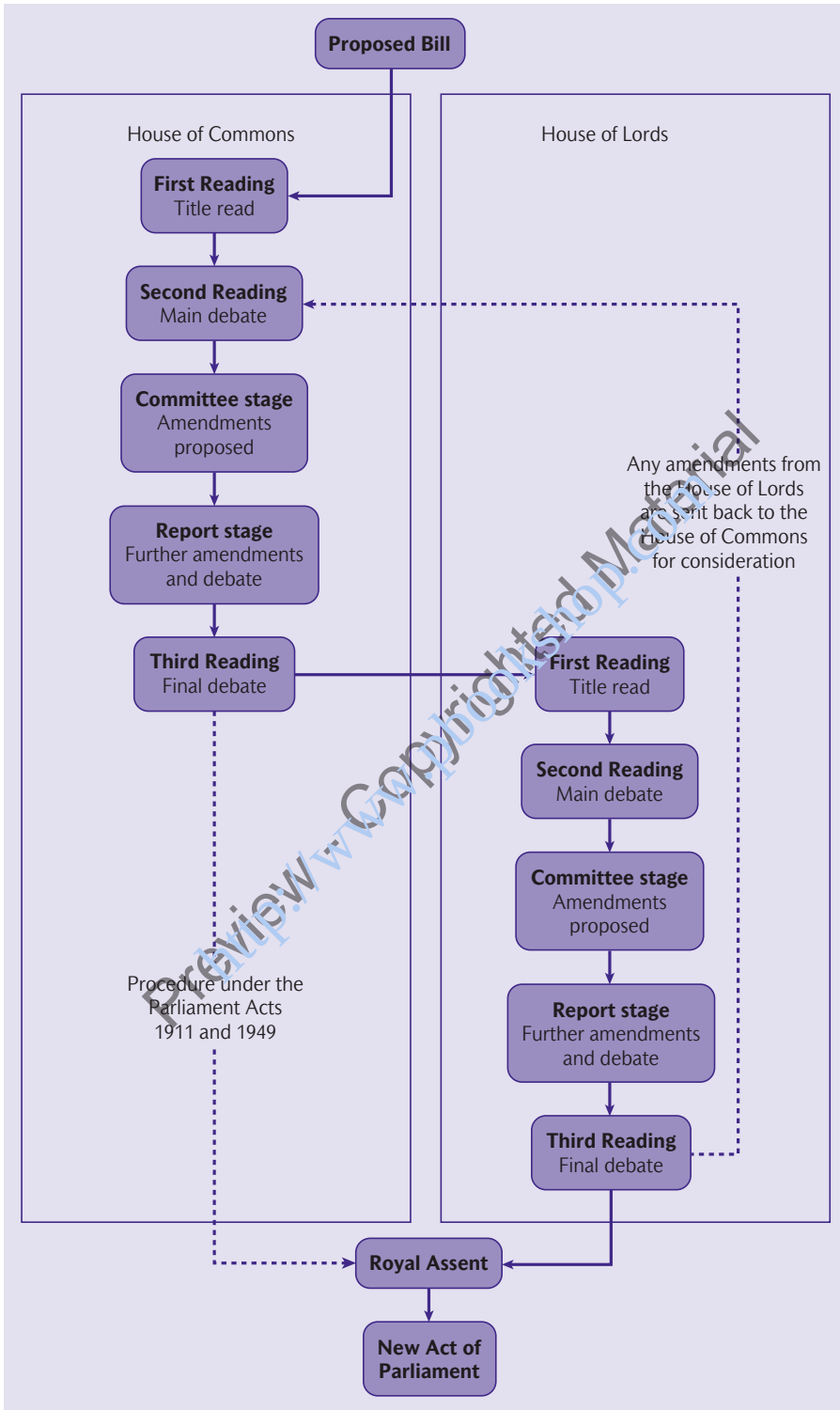

Figure 1.1 The Parliamentary procedure for Bills introduced in the House of Commons

Bills introduced in the House of Lords

A Government Bill can be introduced into either the House of Commons or the House of Lords. Most Bills begin life in the House of Commons; particularly Bills which deal primarily with taxation or public expenditure. The House of Commons has priority in such matters by virtue of its financial privileges (see Parliament Acts 1911 and 1949). Conversely, Bills relating to the judicial system, Law Commission Bills, and consolidation Bills conventionally begin their passage in the House of Lords. An example of a House of Lords Bill can be found in the Local Government Act 1988 which became famous for introducing the controversial s 28 into law which prohibited local authorities from promoting in the specified category of schools 'the teaching of the acceptability of homosexuality as a pretended family relationship'.

House of Commons—First Reading

The First Reading in the House of Commons is a formality. The Title of the Bill is read by the Clerk of the House and a date is fixed for the Second Reading. Conventionally, the Second Reading does not normally take place before two weekends have passed.

House of Commons—Second Reading

The Second Reading in the House of Commons involves the main debate on the principles of the Bill. For Government Bills, the debate is usually opened by the Minister responsible for the Bill and closed by a junior Minister. A vote is generally taken on the Bill as a whole at the end of the Second Reading. The Bill will then move to a Standing Committee (unless it is moved that the Bill be sent to a Committee of the whole House, a Select Committee, or a Special Standing Committee).

House of Commons—Standing Committee

Following the Second Reading in the House of Commons, most Bills are sent to a Standing Committee. The name 'Standing Committee' was coined from the time when Bills were sent to large, permanent committees which considered all Bills they received. The membership of the Standing Committees now varies for each Bill. Standing Committees can have as many as fifty members or as few as sixteen. The members are chosen by the Committee of Selection by virtue of their particular expertise or interest in the subject matter of the Bill and to ensure that the party political composition of the Committee is, so far as possible, representative of the overall party political composition of the House of Commons: in other words that the relative proportions of members of the various political parties are roughly the same in the Committee as in the House of Commons as a whole. The Chair of each Standing Committee is selected by the Speaker of the House of Commons from a panel of chairmen.

The Standing Committee examines the provisions of the Bill in detail and votes on whether each clause, as proposed, 'stands part of the Bill'. Amendments may be moved in Standing Committee. These amendments are also voted upon. The Bill (as amended in Standing Committee) then moves into a Report Stage.

House of Commons—Report Stage

Unless a Bill has been considered by a Committee of the whole House without amendment, the Committee stage is followed by a Report Stage (sometimes referred to as a Consideration Stage). Here, further amendments may be proposed and introduced, often in an attempt to undo the changes made in Committee. Once the Report Stage is complete—which may take two or three days—the Bill finally proceeds to its Third Reading in the Commons.

House of Commons—Third Reading

In the Third Reading of the Bill, its contents are debated for a final time. It is unusual for any further amendments to be made at this stage. Indeed, unless six members table a motion that

'the Question be not put forthwith', the Third Reading does not have to involve any debate at all.

Once the Third Reading is over, the Bill is then tied up with a green ribbon and taken to the House of Lords by the Clerk of the House of Commons with a message kindly requesting the Lords' agreement to its content.

Procedure in the House of Lords

The procedure in the House of Lords mirrors that in the House of Commons. Bills have a formal First Reading, are debated on a Second Reading, proceed to consideration in Committee (although, unlike in the House of Commons, the committee stage is almost invariably taken in the Committee of the whole House), are debated again on Report and then receive a final Third Reading. At the end of the Third Reading there is a formal motion 'that this Bill do now pass'.

Assuming that the Bill survives the motion at the end of the Third Reading in the House of Lords, it is returned to the House of Commons with the Lords' amendments which must be considered in the Commons. If the House of Commons does not agree with the Lords' amendments it can send it back with counter-amendments and its reasons for doing so. Therefore a Bill can go back and forth between the Houses several times until proceedings are terminated or the parliamentary session runs out of time. However, in practice, the House of Lords often accepts the second offering from the House of Commons.

The Parliament Acts 1911 and 1949

These Acts provide a means by which the House of Commons can under certain circumstances bypass the House of Lords to present a Bill for Royal Assent without it having been passed by the House of Lords. The procedure under the Parliament Acts has historically been used infrequently. The 1911 Act was used only three times: for the Welsh Church Act 1914, the Government of Ireland Act 1914, and the Parliament Act 1949, which amended the 1911 Act to reduce the power of the House of Lords further. The 1997 Labour Government used the Parliament Acts to force through three Acts: the European Parliamentary Elections Act 1999, the Sexual Offences (Amendment) Act 2000, and the Hunting Act 2004. Before 1997 the amended form of the 1911 Act had been used only once, in respect of the War Crimes Act 1991. The Parliament Acts do not apply to Bills which prolong the length of a Parliament beyond five years, Private Bills, Bills sent to the Lords less than a month before the end of the Parliamentary session, and Bills which are introduced in the Lords.

Royal Assent

Royal Assent is required before any Bill can become law. The Monarch is not required by the constitution to assent to any Act passed by Parliament. However, assent is conventionally given by the Monarch acting on ministerial advice. It has not been refused since Queen Anne refused to assent to the Scottish Militia Bill of 1707.

Indeed the Royal Assent Act 1967 has marginalized the personal involvement of the monarch to the extent that all that is now required for Royal Assent by Notification is a formal reading of the short title of the Act with a form of words signifying the fact of assent in both Houses of Parliament.

Without express provision to the contrary, an Act of Parliament is deemed to come into force on the day (and for the whole of the day)[2] that it receives Royal Assent. Otherwise it will

2. *Tomlinson v Bullock* (1879) 4 QBD 230 (DC).

come into force on a date specified within the Act itself, or via an 'appointed day' provision which allows the Act to be brought into force via a statutory instrument.

Statutory instruments are described in section 1.1.2.1.

Parts of the Act may be brought into force on different dates (for example, the provisions of the Anti-social Behaviour Act 2003 relating to high hedges did not come into force until June 2005).

For more information on the coming into force of statutes, see chapter 3.

Territorial extent

There is a presumption in the absence of proof to the contrary that Acts of the UK Parliament enacted after 1707 apply to the whole of the UK. If such an Act, or any part of it, does not apply to Scotland, this will usually be expressly stated within the Act itself. In modern practice, an 'extent' provision setting out any limitations on the geographical application of the Act is usually found in one of the final sections of the Act. Acts of the UK Parliament that apply only to Scotland are usually denoted by the inclusion of '(Scotland)' in the short title of the Act, e.g. the Solicitors (Scotland) Act 1980.

Following the passing of the Scotland Act 1998 and the creation of the Scottish Parliament in 1999, statutes can be enacted by the Scottish Parliament provided that the subject matter of the Act is within its legislative competence. These Acts are given Royal Assent under Letters Patent (a published written order issued by the Crown). The UK Parliament retains the power to legislate for Scotland on all matters, including those matters that are now within the legislative competence of the Scottish Parliament. However, a convention has developed (the Sewel Convention)[3] that the UK Government will not normally introduce legislation dealing with matters that have been devolved to the Scottish Parliament, or the other devolved legislatures within the UK, without the agreement of the devolved legislature.

In Wales, Measures of the National Assembly for Wales between 2006 and 2011 were given Royal Assent by means of an Order in Council. Following the extension of the Assembly's legislative powers after the 2011 referendum, Measures become known as Acts of the Assembly and are given Royal Assent via Letters Patent in the same way as Acts of the Scottish Parliament.

1.1.1.7 The impact of the Human Rights Act 1998

Section 19 of the Human Rights Act 1998 provides that the Minister in charge of each new Bill in either House of Parliament must, before the Second Reading of the Bill, either:

- make a statement of compatibility—that is, state that the provisions of the Bill are compatible with the European Convention on Human Rights; or
- make a statement acknowledging that it is not possible to make a statement of compatibility, but, despite this, the Government still wishes the House to proceed with the Bill.

The courts have no power to set aside any Act of Parliament that is incompatible with Convention rights; this is a function that is exercised by Parliament (which has a fast-track procedure under s 10 of the Act that it may use in such cases if it wishes to do so). The court may, however, make a 'statement of incompatibility' under s 4 of the Act if it is satisfied that the provision is incompatible with a Convention right. Such a statement does not affect the validity, continuing operation, or enforcement of the provision in respect of which it is given; and is not binding on the parties to the proceedings in which it is made.

3. House of Commons, 'The "Sewel Convention"' (Library Standard Note) (25 November 2005) SN/PC/2084.

1.1.2 Delegated legislation

Parliament has delegated legislative power to various other persons and bodies.

Delegated legislation is law made by persons or bodies with the delegated authority of Parliament. It is sometimes referred to as 'subordinate legislation'.

1.1.2.1 Statutory instruments

An Act of Parliament may grant the power to make statutory instruments, usually to a Minister of the Crown. The scope of this power can vary greatly, from the technical (for example, varying the dates on which different provisions of an Act will come into force or changing the levels of fines or penalties for offences) to much wider powers such as filling out the broad provisions in Acts. Often, Acts only contain a broad framework and statutory instruments are used to provide the necessary detail that would be considered too complex to include in the body of an Act. Statutory instruments can also be used to amend, update, or enforce existing primary legislation.

'Statutory instruments' is a general term that includes Regulations, Rules, and Orders. A very common form of statutory instrument is a commencement order, which brings all, or part, of an Act into force.

For examples of commencement orders, see chapter 3.

The procedure for introducing a statutory instrument is usually laid down partly in the enabling (parent) Act and partly in the Statutory Instruments Act 1946. The use of statutory instruments is becoming increasingly widespread as a means of introducing some flexibility into the legislative process as well as helping to combat the ever-increasing length and complexity of statutes. For instance Parliament passed thirty-three Acts in 2013; 3,292 statutory instruments were made in the same year.

Procedures for creating statutory instruments

The procedure for creating a statutory instrument is laid down in the parent Act. These procedures can be categorized as:

- negative resolution;
- positive resolution;
- no approval by Parliament.

Approximately two-thirds of all statutory instruments are made under the negative resolution procedure. It is named as such since it does not require Parliament to act unless it disapproves of the statutory instrument. It takes one of two forms depending on the state of the statutory instrument at the time that it is presented to ('laid before') Parliament. In the first form, the statutory instrument is laid before Parliament in draft and cannot be made if Parliament votes its disapproval within forty days. In the second form, the statutory instrument is actually made and laid before Parliament. If Parliament votes its disapproval within forty days, then the statutory instrument cannot remain in force.

A further 10 per cent of statutory instruments require positive resolution—in other words they require positive Parliamentary approval. This procedure takes one of three forms. The first of these requires the draft statutory instrument to be laid before Parliament. It can only come into force if approved by resolution of the House or Houses specified in its parent Act. The second form is similar, except that the statutory instrument is made before being laid before Parliament. However, it cannot come into force until approved by resolution as before. The final situation occurs where the statutory instrument has been made, comes into

immediate effect, and is then laid before Parliament. It cannot continue beyond the period specified in the parent Act without positive resolution.

The final two-fifths of statutory instruments require no approval by Parliament. This either means that they do not need to be laid before Parliament at all, or that they do, but do not require any subsequent form of approval.

1.1.2.2 By-laws

By-laws are laws which are made by a local authority and only apply within a specific geographical area. By-laws are usually only created when there is no general legislation that deals with particular matters of concern to local people, such as waste collection and public park opening hours. By-laws are made under the Local Government Act 1972. However, by-laws can only come into force once they have been affirmed by the relevant Minister. By-laws come into force one month after affirmation unless a specific date is specified within the by-law itself.

1.1.2.3 The Rule Committees

The Rule Committees have delegated power to make procedural rules for the courts. These consist of the Civil Procedure Rule Committee (who are responsible for the Civil Procedure Rules 1998 and their subsequent amendments), the Criminal Procedure Rule Committee, and the Family Procedure Rule Committee.

1.1.2.4 The Privy Council

The role of the Privy Council is described further in chapter 4.

The Privy Council may make Orders in Council, such as emergency regulations. These have the force of law. It may also implement resolutions of the United Nations Security Council.

1.1.2.5 Validity of delegated legislation

Unlike Acts of Parliament, delegated legislation may be challenged in the courts via the doctrine of *ultra vires*.

Ultra vires is a Latin term meaning 'outside (their) powers'.

If a body acts beyond the powers that are delegated to it by the parent Act, then the delegated legislation can be declared void by the court. The body is said to have acted *ultra vires* by exceeding its powers. The delegated legislation may also be referred to as being *ultra vires*.[4]

Delegated legislation is also *ultra vires* if it conflicts with an earlier Act of Parliament or, following s 2(4) of the European Communities Act 1972, European Union legislation.

Decisions which are made by the public bodies granted power by delegated legislation can also be challenged via judicial review. See section 4.3.4.2.

1.1.2.6 Advantages and disadvantages of delegated legislation

Advantages

The main advantage of delegated legislation is that detailed rules and regulations can be introduced relatively quickly without the need for full debate in Parliament that Acts would

4. For examples of the ways in which the courts have approached the issue of *ultra vires*, see *Commissioners of Customs & Excise v Cure & Deeley Ltd* [1962] 1 QB 340 (DC) and *R v Secretary of State for Social Security, ex p Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275 (CA).

require. There is insufficient Parliamentary time available to debate all Bills in full and delegated legislation enables the most effective use of this limited time.

Moreover, Members of Parliament may not have the particular specialist knowledge to debate certain subject areas. It is therefore preferable to delegate authority to individuals or bodies with the requisite degree of specialist, technical, or local knowledge.

Disadvantages

Since delegated legislation is not debated before Parliament in the way that Acts are, the opportunity for public objection is minimized. Nor is delegated legislation publicized before and after implementation in the same way as some new Acts of Parliament. For instance, the Civil Partnership Act 2004 and the Identity Cards Act 2006 both received widespread media coverage, whereas a mass of delegated legislation was also introduced over the same period without any significant attention. While it could be argued that media attention derives from the very nature of primary legislation and its general public impact, it is also true that delegated legislation can have a significant public impact (for example, the majority of the Identity Cards Act 2006 would have been brought into force by delegated legislation).[5]

Finally, the proliferation of delegated legislation means that in researching any area of law, it is important to be sure that your research is up-to-date.

1.2 European legislation

An increasingly influential range of sources of law emanates from Europe. The majority of this arises by virtue of the UK's membership of the European Union.

With regard to human rights issues, individual citizens of the UK had the right to petition the European Court of Human Rights from 1966. Building on this, the Human Rights Act 1998 came into force in October 2000, allowing individuals to rely on (most) of the rights guaranteed by the European Convention on Human Rights directly in national courts as well as enabling courts to overrule earlier incompatible decisions. This section will consider European Union legislation in the form of Treaty Articles, Regulations, and Directives. It will also consider the European Convention on Human Rights as a further European source of law. However, it is important to remember throughout that the European Court of Human Rights is separate from the Court of Justice of the European Union.

1.2.1 European Union law

1.2.1.1 A brief history

The UK became a member of the European Communities on 1 January 1973 when the European Communities Act 1972 came into force.

At this time the 'European Communities' were the European Economic Community (the 'EEC'), established by the Treaty of Rome 1957, together with the European Coal and Steel Community,[6] and the European Atomic Energy Community ('Euratom'), with the EEC being the most significant.

5. Identity Cards Act 2006 s 44(3). The Identity Documents Act 2010 repealed the Identity Cards Act 2006 and requires the destruction of the information held on the National Identity Register.
6. Established by the Treaty of Paris 1951.

The 1992 Treaty on European Union (also known as the Maastricht Treaty or TEU) renamed the EEC as the European Community (EC) and the geographical entity formed by the Member States became the European Union (EU) when it came into force on 1 November 1993. As such, the EU has evolved from a trade body into an economic and political partnership.

The Maastricht Treaty is not the only Treaty that you will encounter. The Single European Act 1986 (which is actually a Treaty rather than an Act of Parliament—despite its name) initiated moves toward the harmonization of laws across the Member States. The 1997 Treaty of Amsterdam made further changes, not least of which was the renumbering of the pre-existing Treaty provisions.

The Maastricht Treaty established the three so-called 'pillars' of the European Union: the European Community, Common Foreign and Security Policy, and Police and Judicial Co-operation in Criminal Matters.

The 2001 Treaty of Nice effected further changes relating to the enlargement of the Community which allowed the addition of ten new Member States on 1 May 2004, and two more on 1 January 2007, increasing the membership from fifteen to twenty-eight by 1 July 2013. The expansion of the EU over time is illustrated in Table 1.1.

As the EU expanded to include more Member States, a new European Constitution was proposed which contained significant reforms to both the institutions of the EU and its operation. This proposed constitution was rejected by France and the Netherlands. Following this rejection, a new Reform Treaty was drawn up and was signed in Lisbon on 13 December 2007.[7] It was originally intended to have been ratified by all Member States by the end of 2008. However, following a referendum on 12 June 2008, the Irish electorate voted against its ratification by 53 to 47 per cent. This decision was reversed in a second referendum in 2009 after the Irish secured concessions on particular policies, including abortion, taxation, and military neutrality.

Table 1.1 The expansion of the European Union

Year	Countries	Membership
1957	Belgium, France, Germany, Italy, Luxembourg, Netherlands	6
1973	United Kingdom, Denmark, Ireland	9
1981	Greece	10
1986	Portugal, Spain	12
1995	Austria, Finland, Sweden	15
2004	Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia	25
2007	Bulgaria, Romania	27
2013	Croatia	28
Candidate countries	Montenegro, Serbia, former Yugoslav Republic of Macedonia, Turkey, Iceland	
Potential candidates	Albania, Bosnia and Herzegovina, Kosovo (in line with UN Security Council Resolution 1244/99 and the ICJ Opinion on the Kosovo declaration of independence)	

7. Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (Treaty of Lisbon) [2007] OJ C306/1.

The Treaty of Lisbon was ratified by the UK on 19 June 2008 by the European Union (Amendment) Act 2008 and came into force on 1 December 2009.

The Treaty of Lisbon amended the Treaty on European Union and the Treaty establishing the European Community (Treaty of Rome)—which was also renamed the Treaty on the Functioning of the European Union). Its most significant changes include:

- the creation of a long-term President of the European Council;
- the elimination of the pillar system;
- the division of European policy areas into three categories: exclusive competence, shared competence (with the Member States), and supporting competence (where the EU supports, coordinates, or supplements the actions of the Member States);
- more qualified majority voting in the Council of Ministers;
- increased involvement of the European Parliament in the legislative process;
- the Charter of Fundamental Rights being given the status of a legally binding instrument.

Therefore, the two key treaties are the *Treaty on European Union* (TEU; Maastricht) and the *Treaty on the Functioning of the European Union* (TFEU; Treaty of Rome). The other treaties amended these as the scope of the EU changed over time.

1.2.1.2 The institutions of the European Union

It is important to be able to distinguish between the different institutions of the European Union and to understand their functions. These are set out in Article 13 TEU as:

- the European Commission;
- the Council of Ministers/European Council;
- the European Parliament;
- the Court of Justice of the European Union;
- the General Court;
- the European Central Bank;
- the Court of Auditors.

We will consider each of these in turn (with the exception of the European Central Bank and Court of Auditors which are less relevant to legal studies).

The European Commission

The **European Commission** represents the interests of the EU as a whole. It proposes new legislation to the European Parliament and the Council of the European Union, and it ensures that EU law is correctly applied by member countries.

The first main role of the European Commission lies in proposing new laws using its 'right of initiative' for the protection of the citizens and interests of the EU. It proposes such laws according to the principles of subsidiarity and proportionality: that is, it will only put forward proposals on issues that cannot be dealt with at national, regional, or local levels and then no more than necessary to achieve the agreed objectives. Legislative proposals are drafted by the Commission and, if approved by a minimum of fourteen of the (currently) twenty-eight Commissioners, are sent to the Council and the Parliament. Each EU Member State has one Commissioner, although the Commissioners are not representatives of their respective countries. Each Commissioner is responsible for one or more specific areas of

policy. The appointments run for a term of five years and are subject to the approval of the European Parliament.

The second role of the Commission is in the enforcement of European law as 'guardian of the Treaties' together with the Court of Justice. It can take action, including the imposition of penalties, against an EU Member State that is allegedly in breach of its obligations under the Treaties (Article 258 TFEU) or for failure to implement a piece of EC legislation (Article 260 TFEU).

The Commission also has roles in managing the EU budget and allocating funding (with the Council and Parliament) and representing the EU on the world stage, negotiating agreements between the EU and other countries.

The Council of the European Union

The **Council of the European Union** represents the governments of the individual EU countries. It is one of the main law-making bodies of the EU, along with the European Parliament.

The Council of the European Union shares responsibility with the European Parliament for passing EU laws that are proposed by the Commission. It also coordinates the broad economic policies of the EU countries and develops the EU's foreign and defence policies. The Council also coordinates cooperation between the courts and police forces of EU countries to ensure equal access to justice for EU citizens throughout the Union and mutual recognition of court judgments. It is further concerned with policing the EU's borders and combating terrorism and organized crime. The EU budget is approved jointly between the Parliament and the Council. Finally, the Council can enter into international agreements on behalf of the EU on a range of diverse matters including: environment, trade, textiles, fisheries, science, technology, and transport.

The Council's members are politicians who are Ministers in their respective national Governments. Each Minister has the authority to commit its Government to a particular policy or decision. There are no fixed members: its membership fluctuates according to the subject matter under debate. For instance, if the debate concerns environmental issues, the UK would be represented by the Secretary of State for Environment, Food, and Rural Affairs. The presidency of the Council is held for six months by each EU Member State on a rotational basis.

The general voting method for the Council is qualified majority voting, except where the treaties require a different procedure (e.g. a unanimous vote). This means that the bigger the population of the EU Member State, the more votes it has (for example, Germany, France, Italy, and the UK have twenty-nine votes, while Malta has three). A qualified majority is reached when a majority of the EU countries are in favour and at least 260 of the possible 352 votes are cast.

In 2014, double majority voting will be introduced. Proposals will then require a majority not only of the EU countries (minimum of fifteen) but also of the total EU population (65 per cent). This has not been introduced at the time of writing, but should do so during the lifetime of this edition.

Take care not to confuse the Council of the European Union with the European Council or the Council of Europe. The Council of Europe is a separate body and has responsibility for the European Court of Human Rights.

The European Parliament

The **European Parliament** represents the people of the EU. It is one of the main EU law-making institutions, along with the Council of the European Union.

Members of the European Parliament (MEPs) are directly elected representatives of the people, with elections being held every five years. The first main role of the Parliament is debating and

passing EU laws, together with the Council. The process by which this is done is known as the 'ordinary legislative procedure', set out by the Lisbon Treaty. In many areas (such as economic governance, immigration, energy, transport, consumer protection, and the environment) equal weight is given to the Parliament and the Council and most EU laws are adopted jointly between these two institutions. The steps in the ordinary legislative procedure are as follows:

- The Commission sends its proposal to Parliament and the Council.
- They consider it and discuss it on two successive occasions.
- After two readings, if they cannot agree, the proposal is brought before a Conciliation Committee made up of an equal number of representatives of the Council and Parliament.
- Representatives of the Commission also attend the meetings of the Conciliation Committee and contribute to the discussions.
- When the Committee has reached agreement, the agreed text is sent to Parliament and the Council for a third reading, so that they can finally adopt it as law. The final agreement of the two institutions is essential if the text is to be adopted as a law.
- Even if a joint text is agreed by the Conciliation Committee, Parliament can still reject the proposed law by a majority of the votes cast.

The number of MEPs for each EU Member State is broadly in proportion to its population, although, following the Lisbon Treaty, none may have fewer than six or more than ninety-six MEPs. The maximum number of members is set at 751.

The European Parliament also debates and adopts the EU budget with the Council. It also exercises democratic supervision of the other EU institutions: for instance, Parliament approves the nomination of the President of the Commission and the Commissioners (as a body)[8] and can censure the Commission, forcing its members to resign. It may also consider petitions from citizens and set up inquiry committees.

The Court of Justice of the European Union

The **Court of Justice of the European Union** (still often referred to by its former name as the **European Court of Justice or ECJ**) upholds the rule of EU law by ensuring consistency of application between EU countries, settling disputes between EU governments and institutions and hearing cases that are brought before it.

It is vitally important not to confuse the Court of Justice of the European Union (CJEU) (which sits in Luxembourg) with the European Court of Human Rights (which sits in Strasbourg). They are separate courts with separate jurisdictions.

The CJEU sits in Luxembourg and comprises one judge from each EU Member State. The judges sit in chambers of three or five as well as in plenary session (where all judges sit to hear a case). They are assisted by eight 'advocates-general' whose role is to submit reasoned, public, and impartial opinions to the Court on the cases brought before it. Each judge and advocate-general is appointed for a six-year term. The Court delivers a single judgment: separate concurring or dissenting judgments are not permitted.

The cases brought before the CJEU fall into certain types. The most common are:

- **Preliminary rulings.** National courts may make interim references directly to the Court if they need clarification on how a particular piece of European legislation should be

8. Art 17(7) TEU.

interpreted. The need for such references will arise during the course of a national (domestic) action. In England and Wales this will typically occur in the Supreme Court (although it has been done directly from a magistrates' court).[9] In other words, if a national court cannot make a ruling because it is unsure how to interpret a piece of EU legislation, then it can effectively suspend the proceedings before it to ask the Court for its opinion. These references are made under Article 267 TFEU. The case will then proceed in the national court with the assistance of the European Court's ruling. It is the role of the national courts to give effect to and enforce the rulings of the CJEU.

- **Failure to fulfil an EU obligation.** The Court also hears actions for failure of an EU national government to fulfil its obligations under EU law. Proceedings before the CJEU are preceded by an investigation conducted by the Commission, which gives the defendant EU Member State the opportunity to reply to the complaints made against it. If that procedure does not result in remedy of the failure by the defendant EU Member State, an action for breach of EU law may be brought before the CJEU. That action may be brought by the Commission[10]—as is practically always the case—or by another EU Member State.[11] If the CJEU finds that an obligation has not been fulfilled, the EU Member State concerned must remedy the breach without delay. If the Court later finds that the breach has not been remedied, it may, upon request of the Commission, impose a financial penalty.[12]
- **Actions for annulment.** The CJEU may also hear applications seeking the annulment of a Regulation, Directive, or Decision. Such actions may be brought by a Member State, by the European Parliament, the Council of the European Union or the European Commission, or by individuals to whom a measure is addressed or which is of direct and individual concern to them.
- **Actions for failure to act.** The CJEU may also review the legality of a failure to act on the part of a EU institution. Where the failure to act is held to be unlawful, it is for the institution concerned to put an end to the failure by appropriate measures.
- **Direct actions**. Any legal person can bring an action directly before the CJEU if they have suffered loss or damage as a result of the acts or omissions of the EU's institutions or its staff.
- **Appeals from the General Court**. Appeals on points of law only may be brought before the CJEU against judgments given by the General Court. If the appeal is admissible and well founded, the CJEU may set aside the judgment of the General Court. The CJEU may decide this itself or may refer the case back to the General Court, which is bound by the decision of the CJEU given on appeal.

The General Court

The **General Court** has jurisdiction at first instance over all direct actions brought by individuals and EU countries, with the exception of those to be assigned to a 'judicial panel' and those reserved for the CJEU. It was formerly known (until 1 December 2010) as the **Court of First Instance**.

The Court of First Instance was established by the Single European Act of 1986 to ease some of the burden of cases on the Court of Justice. It was renamed as the General Court by the

9. Case C-145/88 *Torfaen Borough Council v B&Q plc* [1990] 2 QB 19 (CJEU) on application from Cwmbran Magistrates' Court regarding Sunday trading regulations.
10. Art 258 TFEU.
11. Art 259 TFEU.
12. Art 260 TFEU.

Treaty of Lisbon. It comprises at least one judge from each of the EU countries, but, unlike the CJEU, does not have permanent advocates general. Judges sit in chambers of three or five judges or, exceptionally, as a single judge. For complex or important cases it may sit as a Grand Chamber of thirteen or as a full court. However, around 80 per cent of cases are heard by a chamber of three. It deals with:

- direct actions against the institutions, bodies, offices or agencies of the European Union;
- actions brought by the Member States against the Commission;
- actions brought by the Member States against the Council relating to acts adopted in the field of State aid, 'dumping' and acts by which it exercises implementing powers;
- actions seeking compensation for damage caused by the institutions of the European Union or their staff;
- actions based on contracts made by the European Union that expressly give jurisdiction to the General Court;
- actions relating to Community trade marks;
- appeals, limited to points of law, against the decisions of the European Union Civil Service Tribunal;
- actions brought against decisions of the Community Plant Variety Office or of the European Chemicals Agency.

There is a route of appeal to the CJEU within two months on points of law only.

As previously stated, it is vitally important not to confuse the Court of Justice of the European Union (CJEU) (which sits in Luxembourg) with the European Court of Human Rights (which sits in Strasbourg). They are separate courts with separate jurisdictions.

The European Council

The **European Council** is composed of the Heads of State or Government of the EU countries together with its President and the President of the Commission. It defines general political directions and priorities of the Union. It does not have any law-making function.

The European Council was introduced in 1974 in an attempt to deal with policy matters at the highest level, comprising the individual Heads of State or Governments of each of the Member States. It acquired a formal status in the Maastricht Treaty and became a formal institution of the Union following the Treaty of Lisbon.

The European Council defines the general political direction and priorities of the European Union, but does not exercise any legislative function. It meets twice every six months, convened by its President, but may convene specially if a specific situation requires it to do so. Decisions of the European Council are taken by consensus unless the Treaties require unanimity or qualified majority voting. The European Council elects its President by qualified majority. The President's term of office is two and a half years, renewable once.

Take care not to confuse the European Council with the Council of the European Union or the Council of Europe.

1.2.1.3 Sources of EU law

There are three sources of EU law:

- **Primary sources.** A number of primary sources of European law have already been mentioned. These are the founding Treaties: the Treaty on European Union and the Treaty on

the Functioning of the EU. These Treaties provide the framework of competencies between the EU as a body and its member countries. They also set out the powers of the EU institutions. Therefore, they set out a broad legal framework within which the institutions implement EU policy. Other primary sources include the amending EU Treaties, the annexed protocols, and the accession Treaties for new EU countries.

- **Secondary sources.** Secondary sources supplement the primary sources by providing a more detailed treatment of the law in a given area and establishing how the principles and objectives identified in the primary sources are to be achieved. The secondary sources of European law comprise **unilateral acts** (regulations and directives, decisions, opinions, and recommendations) and **conventions and agreements** (international agreements between the EU and an external country or body and agreements between EU countries and between EU institutions).
- **Supplementary law.** This covers the case law of the CJEU, relevant international law, custom and usage, and general unwritten principles of law and justice.

The sources of EU law can be summarized as shown in Table 1.2.

The interrelationship between EU law and domestic law

The body of EU law became part of domestic law by virtue of the European Communities Act 1972. Section 2(1) of the Act provides that:

> All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression 'enforceable Community right' and similar expressions shall be read as referring to one to which this subsection applies.

This meant that all directly applicable EU law, regardless of whether it has already been made or is to be made in the future, became part of national law.

Before proceeding much further, we must cover some important terminology.

Direct *applicability* and direct *effect*

It is important that you understand the distinction between provisions of EU law which are directly applicable and provisions that are directly effective.

Table 1.2 Sources of EU Law

Primary sources of EU law	Secondary sources of EU law	Supplementary law
Treaty of Rome 1957	Regulations	Case law of the CJEU
Single European Act 1985	Directives	Principles of international law
Treaty on European Union (Maastricht Treaty) 1992	Decisions issued by the Commission	Unwritten principles of law and justice
Treaty of Amsterdam 1996	Opinions	
Treaty of Nice 2001	Recommendations	
Treaty of Lisbon 2009	Conventions and agreements	

A provision of EU law is **directly applicable** if it automatically becomes part of the law of an EU Member State without the need for that EU Member State to enact any further legislation.

A provision of EU law is **directly effective** if (and only if) it creates rights upon which individuals may rely in their national courts and which are enforceable by those courts.

Thus, direct *applicability* is concerned with the incorporation of EU law into the legal system of an EU Member State, whereas direct *effect* is concerned with its enforceability.

Before considering which of the different types of EU law have direct effect (that is, can be relied upon by individuals in national courts and are enforceable by those courts) it is necessary to understand the distinction between vertical direct effect and horizontal direct effect as illustrated in Figure 1.2.

A provision of EU law has **vertical direct effect** if it can be enforced against an EU Member State in its own courts.

A provision of EU law has **horizontal direct effect** if it can be enforced against another individual in the courts of an EU Member State.

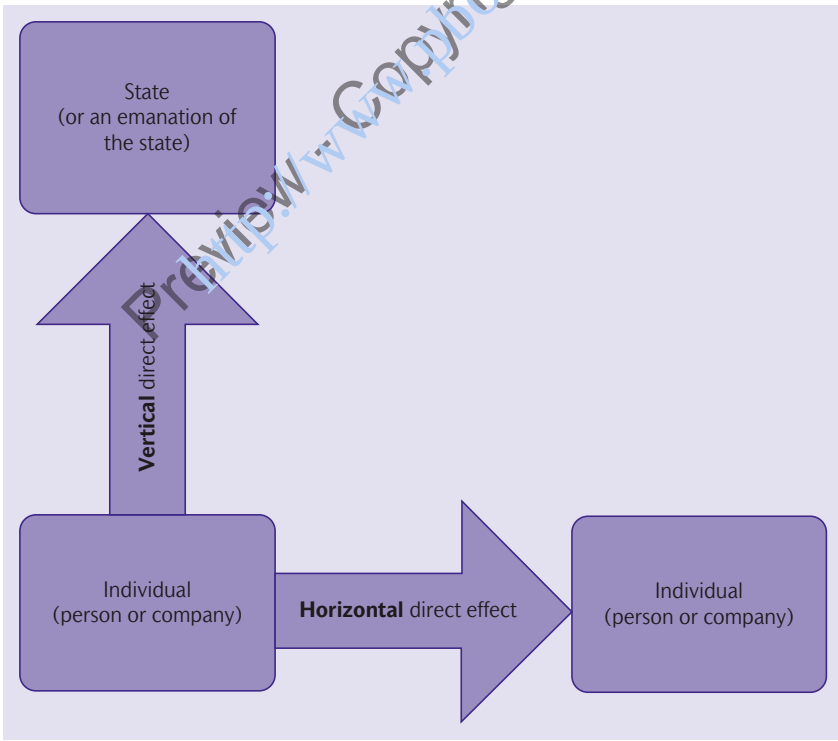

Figure 1.2 Horizontal and vertical direct effect

Therefore, provisions of EU law with vertical direct effect can be enforced against the UK (or indeed, any other EU Member State) itself. Vertically directly effective provisions may also be enforced against emanations of the state, such as local authorities and health authorities[13] and nationalized industries.[14]

You should take care when reading cases which consider the distinction between direct applicability and direct effect since the CJEU does not always distinguish between its use of the two terms.

We have looked at the different sources of EU law and the rules of direct applicability and direct effect which determine how those provisions operate within domestic law. To complete the puzzle, we finally have to establish the applicability and effect of each type of provision.

Treaty Articles

Although it is for the CJEU to determine, Treaty Articles are normally held to be directly applicable. Therefore, following s 2(1) of the European Communities Act 1972, they require no further legislative action by the UK to take effect as law.

A Treaty Article will have vertical direct effect (it will create individual enforceable rights against the state) if its terms are 'clear, precise and unconditional' and its implementation required no further legislation in EU member countries (i.e. it was directly applicable).[15] These are often referred to as the *Van Gend* criteria from the case in which the matter was first considered. In other words, an Article has vertical direct effect if the EU countries had no discretion in the means of its implementation.

Treaty Articles may also have horizontal direct effect.[16] Therefore, provided that the *Van Gend* criteria are satisfied, Treaty Articles can be enforced directly in UK courts, regardless of any other domestic legislation.

Regulations

Article 288 TFEU states that a Regulation 'shall have general application' and 'shall be binding in its entirety and directly applicable in all Member States'. Since Regulations are immediately directly applicable, then, as with Treaty Articles, s 2(1) of the European Communities Act 1972 means that they do not require any further legislative work for their implementation. They take effect on the day specified within them, or if the Regulation is silent as to its effective date, on the twentieth day following their publication in the *Official Journal*.[17]

You can find more information regarding the Official Journal *in section 2.2.1 which demonstrates how to find EC legislation.*

Therefore, subject to satisfying the *Van Gend* criteria, Regulations, like Treaty Articles, have both vertical[18] and horizontal[19] direct effect.

Directives

Article 288 TFEU shows quite clearly that Directives are fundamentally different from Regulations. It states that:

> 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 authority the choice of form and methods.

13. Case C-271/91 *Marshall v Southampton and South West Hampshire Area Health Authority (No 2)* [1993] ECR I-4367 (CJEU).
14. Case C-188/89 *Foster v British Gas plc* [1990] ECR I-3133 (CJEU).
15. Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1 (CJEU).
16. Case 43/75 *Defrenne v Sabena (No 2)* [1976] ECR 455 (CJEU).
17. Case 39/72 *Commission v Italy* [1973] ECR 101 (CJEU).
18. Case 93/71 *Leonesio v Italian Ministry of Agriculture* [1972] ECR 287 (CJEU).
19. Case C-253/00 *Antonio Munoz Cia SA v Frumar Ltd* [2002] ECR I-7289 (CJEU).

In other words, Directives tell the Member States of the EU what needs to be done, but leave each of the States to decide what provisions of domestic law to enact in order to implement that Directive. There is always a specified period of time for the EU Member States to implement any given Directive.

Directives often provide the fine detail on a given area; here, the EU recognizes that individual EU Member States may need to implement them in slightly different ways, to reflect their own national cultures or customs. Therefore, as long as the objective of the Directive is met, the EU gives each EU Member State a measure of discretion as to its precise method of implementation in its domestic law. Many pieces of important and influential UK legislation have arisen from the implementation of EU Directives, such as the Equal Pay Act 1970 and the Sex Discrimination Act 1975.

Since Directives require domestic legislation for their implementation, they are not directly applicable forms of EU law. Moreover, if the Directive has been properly implemented, an individual who wishes to bring an action based on that Directive will use the national law rather than relying on the Directive itself; therefore, in general, Directives do not have horizontal direct effect.[20]

However, a Directive will have vertical direct effect if it satisfies the *Van Gend* criteria and the time for implementation specified in the Directive has passed.[21]

Directives may also be said to have indirect effect, since the CJEU also requires national law to be interpreted in accordance with Directives.[22]

Finally, an EU Member State that has failed to implement a Directive may be liable to compensate individuals who have suffered as a result.[23] In other words, if an individual has lost out because of defective implementation of a Directive by an EU Member State, they may be able to sue that state for their losses provided that the breach was sufficiently serious (which will be so if the Member State 'manifestly and gravely disregard[ed]' its obligations).[24]

Decisions

The final secondary sources of European law are decisions. Article 288 TFEU provides that a decision 'shall be binding in its entirety upon those to whom it is addressed'. The addressees may be individuals, companies, or EU Member States. Thus, they are not directly applicable, but may be capable of having direct effect.

1.2.1.4 'Soft law'—Recommendations and opinions

Recommendations

Recommendations are not legally binding. However, courts of EU Member States are required to interpret their own law in the light of recommendations.[25]

Opinions

In common with recommendations, opinions also have no legal authority. However, the opinion of the Commission may be a precursor to legal proceedings. If the Commission

20. However, see Case C-1994/94 *CIA Security International SA v Signalson SA and Securitel SPRL* [1996] ECR I-2201 (CJEU) and Case C-443/98 *Unilever Italia v Central Food* [2000] ECR I-7535 (CJEU) where it appears that, in some instances, Directives may be pleaded against an individual or non-state body.
21. Case 148/78 *Pubblico Ministero v Ratti* [1979] ECR 1629 (CJEU).
22. Case 14/83 *Von Colson and Kamann v Land Nordheim-Westfalen* [1984] ECR 1891 (CJEU); Case C-106/89 *Marleasing SA v La Commercial Internacionale de Alimentacion SA* [1990] ECR I-4135 (CJEU).
23. Cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italian Republic* [1991] ECR I-5357 (CJEU).
24. Cases C-178/94, etc. *Dillenkofer and Others v Germany* [1996] ECR I-4845 (CJEU).
25. Case 322/88 *Grimaldi v Fonds des Maladies Professionelles* [1989] ECR 4407 (CJEU).

states an opinion that a Member State is in breach of an obligation, then it would be foolhardy for a Member State to ignore it.

Despite their evidently persuasive nature, Article 288 TFEU states that 'Recommendations and opinions shall have no binding force'.

1.2.1.5 The supremacy of EU law

From the point of view of the EU, where there is a conflict between EU law and the law of EU Member States, EU law prevails. This has been clear since *Van Gend en Loos* in 1963 where the European Court of Justice (as it then was) clearly stated that 'the Community constitutes a new legal order . . . for whose benefit the states have limited their sovereign rights'.[26]

In *Costa v ENEL*[27] the following year, the European Court of Justice made two important observations regarding the relationship between Community law (as it then was) and national law; first, that the Member States have definitively transferred sovereign rights to a Community created by them. They cannot reverse this process by means of subsequent unilateral measures which are inconsistent with the concept of the Community. In other words, the autonomy of the Member States to act as they wish has been limited by virtue of their membership of the Community.

Moreover, it is a principle of the founding Treaties that no Member State may call into question the status of Community law as a system uniformly and generally applicable throughout the Community. Therefore, it follows that Community law, which was enacted in accordance with the Treaties, has priority over any conflicting law of the Member States. Therefore, in *Costa v ENEL* the European Court of Justice emphatically established the primacy of Community law over national law. In *Simmenthal*, the Court further held that the principle of supremacy does not invalidate conflicting national law, rather that the national law was of no effect to the extent of the conflict. Moreover, the national court should apply European law in the case of a conflict without waiting for the setting aside of the offending national provision.[28]

This implies that the enactment of the European Communities Act 1972 prevents Parliament from introducing new statutes which conflict with European law. This impacts upon the constitutional principle of Parliamentary sovereignty which, in essence, requires that Parliament has unlimited legislative competence (that is, it may enact any law that it wishes) and that there is no competing legislative body (that is, no body may challenge the validity of a properly-enacted Act of Parliament). Initially, the courts viewed that national law remained supreme. In *Felixstowe Dock & Railway Co v British Transport Docks Board*[29] Lord Denning stated *obiter* that:

> It seems to me that once the Bill is passed by Parliament and becomes a statute that will dispose of all discussion about the Treaty. These courts will have to abide by the Statute without regard to the Treaty.

However, in *Macarthys v Smith*[30] the courts considered that national law *was* subservient to Europe, although Lord Denning again considered that if Parliament deliberately and

26. Case 26/62 *Van Gend en Loos* v *Nederlandse Administratie der Belastingen* [1963] ECR 1 (CJEU).
27. Case 6/64 *Costa v ENEL* [1964] ECR 585 (CJEU).
28. Case 106/77 *Amministrazione delle Finanze Dello Stato v Simmenthal* [1978] ECR 629 (CJEU).
29. [1976] 2 CMLR 655 (CA) 664 (Denning MR).
30. [1979] ICR 785 (CA) 789 (Denning MR).

consistently breached European law, 'it would be the duty of our courts to follow the statute of our Parliament'.[31]

This situation was not tested in the domestic courts for some years. It was eventually considered in the *Factortame* cases.[32] Here, a conflict arose between certain provisions of the EC Treaty (as it was then) which prevented discrimination on the grounds of nationality and Part II of the Merchant Shipping Act 1988 which provided that fishing boats registered in the UK which were fishing for the quotas allocated to the UK by the EC must be owned and managed by UK citizens.

The House of Lords upheld the opinion of the European Court of Justice that it could grant an interim injunction against the Crown to prevent it enforcing an Act which contravened European law. The act of binding the Crown was previously constitutionally impossible. The House of Lords later held that parts of the Merchant Shipping Act 1988 were incompatible with the relevant provisions of the EC Treaty. This conundrum was cleverly and carefully reconciled by Lord Bridge who firstly considered s 2(4) of the European Communities Act 1972 which provided that:

> Any enactment passed or to be passed . . . shall be construed and have effect subject to the foregoing provisions of this section.

In other words, any legislation passed or to be passed in the UK must be interpreted with applicable European law in mind.

Lord Bridge argued that, since s 2(4) of the European Communities Act 1972 states that any enactment must have regard to Community obligations, this effectively meant that Parliament's intention was that *all* future legislation would be EC-compliant and would contain a fictional 'invisible clause' to this effect, unless the incompatibility was so important, in which case it could be explicitly excluded in the new legislation. Lord Bridge stated that:

> Whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 it was entirely voluntary . . . when decisions of the Court of Justice have exposed areas of United Kingdom law which failed to implement Council Directives, Parliament has always loyally accepted the obligation to make appropriate and prompt amendments. Thus there is nothing in any way novel in according supremacy to rules of Community law.

Therefore the relevant provisions of the Merchant Shipping Act 1988 took effect subject to directly enforceable Community rights. In doing so, the House of Lords affirmed that, for all future cases, where a statute is silent on a matter covered by European law, it is presumed that it is intended to comply with European law.

The *Conservative – Liberal Democrat Coalition Agreement* published following the 2010 general election contained a promise to 'ensure that there is no further transfer of sovereignty or powers [to the EU] over the course of the next Parliament'; to 'amend the 1972 European Communities Act so that any proposed future treaty that transferred areas of power, or competences, would be subject to a referendum on that treaty'; and to 'examine the case for a United Kingdom Sovereignty Bill to make it clear that ultimate authority remains with Parliament'. The ensuing European Union Act 2011 contains a sovereignty clause in s 18 as follows:

> Directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European

31. [1979] ICR 785 (CA) 789 (Denning MR).
32. *R v Secretary of State for Transport, ex p Factortame Ltd (No 2)* [1990] 2 AC 85 (HL).

> Communities Act 1972) falls to be recognised and available in law in the United Kingdom only by virtue of that Act or where it is required to be recognised and available in law by virtue of any other Act.

Thus, s 18 demonstrates the clear intention of Parliament that if UK law clearly, deliberately, and explicitly states that EU law is not to be followed then the courts should apply the domestic UK law. The associated Explanatory Note states that s 18 is 'declaratory' of the current position:

> This declaratory provision was included in the Act in order to address concerns that the doctrine of parliamentary sovereignty may in the future be eroded by decisions of the courts. By providing in statute that directly effective and directly applicable EU law only takes effect in the UK legal order through the will of Parliament and by virtue of the European Communities Act 1972 or where it is required to be recognised and available in law by virtue of any other Act, this will provide clear authority which can be relied upon to counter arguments that EU law constitutes a new higher autonomous legal order derived from the EU treaties or international law and principles which has become an integral part of the UK's legal system independent of statute.

1.2.2 The European Convention on Human Rights

1.2.2.1 A brief history

The European Convention on Human Rights and Freedoms is a creation of the Council of Europe although it is, at least in part, based upon the 1948 United Nations Declaration of Human Rights. The Council of Europe was formed in 1949, shortly after the end of the Second World War, with the aim of international cooperation and the prevention of the kinds of widespread atrocious violations of human rights which had occurred during the war. The European Convention on Human Rights was signed in Rome in 1950, ratified by the UK a year later and came into force in 1953.

1.2.2.2 Convention rights

The European Convention on Human Rights establishes a number of fundamental rights and freedoms (see Table 1.3).

1.2.2.3 The European Court of Human Rights

The European Court of Human Rights was established in 1959 as a final avenue of complaint for claimants who had exhausted the remedies available to them in their domestic courts for alleged breaches of Convention rights. At the same time, the European Commission of Human Rights was also established. The Commission's role was to decrease the caseload of the European Court of Human Rights by filtering out some cases and attempting to resolve others by conciliation. The individual's right to petition the European Court of Human Rights became available to UK citizens in 1966.

The European Court of Human Rights and the European Commission of Human Rights were abolished on 31 October 1998 and replaced by a single Court of Human Rights. Questions of admissibility (formerly dealt with by the Commission) are now dealt with by its judges sitting in committee.

It is worth repeating the point that it is vitally important not to confuse the European Court of Human Rights (which sits in Strasbourg) with the Court of Justice of the European Union (which sits in Luxembourg). They are separate courts with separate jurisdictions.

Table 1.3 Convention rights by Article number

Article	Convention right
1	Obligation to respect human rights
2	Right to life
3	Prohibition of torture
4	Prohibition of slavery and forced labour
5	Right to liberty and security
6	Right to a fair trial
7	No punishment without law
8	Right to respect for private and family life
9	Freedom of thought, conscience, and religion
10	Freedom of expression
11	Freedom of assembly and association
12	Right to marry and found a family
13	Right to an effective remedy
14	Prohibition of discrimination

CHAPTER SUMMARY

Statute law

- Public Bills are introduced by the Government as part of its programme of legislation
- Private Bills are introduced for the benefit of particular individuals, groups of people, institutions, or a particular locality
- Hybrid Bills are a cross between Public and Private Bills
- Private Members' Bills are non-Government Bills that are introduced by private Members of Parliament
- Consolidating statutes re-enact a topic contained in several earlier statutes
- Codifying statutes restate a topic previously contained in statute, common law, and custom
- Government Bills can be introduced in the House of Commons or House of Lords
- The Parliament Acts 1911 and 1949 provide a means by which the House of Commons can (under certain circumstances) bypass the House of Lords to present a Bill for Royal Assent without it having been passed by the House of Lords
- Royal Assent is required before any Bill can become law; it is customarily given

- The Human Rights Act 1998 requires that new Bills must be accompanied by a statement of compatibility (or a declaration that a statement of compatibility is not possible)
- The courts may make a declaration of incompatibility for Acts of Parliament which are incompatible with the European Convention on Human Rights; this does not affect the validity of the Act
- Delegated legislation is made under powers delegated by Parliament
- Delegated legislation includes statutory instruments (Rules, Regulations, and Orders) and by-laws

European institutions

- The European Commission represents the interests of the Union as a whole
- The Council of the European Union represents the governments of the individual member countries
- The European Parliament is directly elected by the citizens of the EU which it represents
- The Court of Justice of the European Union (CJEU) interprets EU law to ensure uniform application and settles disputes
- The CJEU and the European Court of Human Rights are different
- The General Court deals with most European cases at first instance
- The European Council is composed of the Heads of State or Government of the EU Member States

Interrelationship between EU law and domestic law

- A provision of EU law is directly applicable if it becomes part of the law of a Member State without need for further legislation
- A provision of EU law is directly effective if it creates rights upon which individuals may rely in their national courts and which are enforceable by those courts)
- A provision of EU law has vertical direct effect if it can be enforced against a Member State in its own courts
- A provision of EU law has horizontal direct effect if it can be enforced against another individual in the courts of a Member State
- Treaty Articles and Regulations have both vertical and horizontal direct effect if they satisfy the *Van Gend* criteria: that its terms are 'clear, precise and unconditional' and its implementation required no further legislation in Member States
- Directives do not have horizontal direct effect
- Directives may have vertical direct effect if they satisfy the *Van Gend* criteria and the time limit for their implementation has expired
- Where a statute is silent on a matter covered by EU law, it is presumed that it is intended to comply with European law—the UK's position is declared in s 18 of the European Union Act 2011.

European Convention on Human Rights

- The European Convention on Human Rights establishes a number of fundamental rights and freedoms
- The European Court of Human Rights is a final avenue of complaint for individuals who have exhausted national remedies available for alleged breaches of Convention Rights
- The European Court of Human Rights is not the same as the Court of Justice of the European Union

FURTHER READING

- The law-making process is explained very clearly and with a good level of detail on the UK parliament website at www.parliament.uk/about/how/laws/. In particular the site covers the reasons why new laws are needed and how they are developed, the use of draft Bills, the different types of Bill, the passage of Bills through Parliament, the nature of Acts of Parliament, the role of secondary legislation, and the use of the Parliament Acts.
- This chapter gives a very brief overview of the EU institutions and the sources of law which come from Europe. It does not attempt to cover the substantive EU law. EU law is a huge subject area in its own right. For further detail, see S Weatherill, *Cases and Materials on EU Law* (11th edn, OUP 2014); N Foster, *Blackstone's EU Treaties and Legislation 2014–15* (25th edn, OUP 2013); and P Craig and G de Burca, *EU Law: Text, Cases and Materials* (6th edn, OUP 2015).