

# Module 05 – European Union Law MQF Level 5, 4 ECTS

## Lecture 3 - The Sources of EU Law and the General Principles of EU Law

Lecturer: Dr. Veronica-Anne Spiteri, LL.D

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Diploma in Law (Malta)



CAMILLERI PREZIOSI  
ADVOCATES

# WHAT IS THE AIM OF ARTICLES 216 AND 288 OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION AND ARTICLE 6 OF THE TREATY ON EUROPEAN UNION?

- Article 216 of the Treaty on the Functioning of the European Union (TFEU) states the conditions under which the European Union (EU) may conclude agreements with non-EU countries and international organisations.
- Article 288 TFEU defines the different types of legal acts that the EU may adopt.
- Article 6(3) of the Treaty on European Union (TEU) states that fundamental rights constitute general principles of EU law.



# Sources of EU Law

- primary law,
- general principles of EU law and
- secondary law



# Primary Law

- The main sources of primary law are the treaties establishing the EU: the TEU, the TFEU and the Treaty on the European Atomic Energy Community (Euratom). These treaties set out the distribution of competences (powers) between the EU and the EU Member States, describing the powers of the EU institutions. They therefore set out the legal framework in which the EU institutions are working to implement policies.
- Primary law also includes:
  - the amending EU treaties;
  - the protocols annexed to the founding treaties and to the amending treaties;
  - the treaties on the accession of new Member States to the EU;
  - the Charter of Fundamental Rights (since the Treaty of Lisbon – December 2009).



# What is Primary Law?

- It is the supreme source of law in the European Union (EU). It comes mainly from the founding treaties, notably the Treaty of Rome (which evolved into the Treaty of the Functioning of the European Union) and the Treaty of Maastricht (also called the Treaty on European Union).
- Primary law sets out the distribution of competences between the EU and the EU Member States. It provides the legal context within which EU institutions formulate and implement policies.



# Primary Law Cont.

- Primary law, also known as primary sources, is derived from the EU's:
  - 1.founding treaties;
  - 2.amending treaties;
  - 3.accession treaties;
  - 4.protocols annexed to those treaties;
  - 5.supplementary agreements amending specific sections of the founding treaties;
  - 6.the Charter of Fundamental Rights (since the Treaty of Lisbon).



# Primary Law Cont.

- **The founding treaties are:**
  - the Treaty of Paris establishing the European Coal and Steel Community (1951);
  - the Treaty of Rome establishing the European Economic Community (1957);
  - the Euratom Treaty (1957);
  - the Treaty of Maastricht (1992).
- **The amending treaties are:**
  - the Single European Act (1986);
  - the Amsterdam Treaty (1997);
  - the Treaty of Nice (2001);
  - the Treaty of Lisbon (2007).



# Primary Law Cont.

- The **accession treaties** concern the following Member States:
  - Denmark, Ireland and the United Kingdom (1) (1972);
  - Greece (1979);
  - Spain, Portugal (1985);
  - Austria, Finland, Sweden (1994);
  - Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia (2003);
  - Romania, Bulgaria (2005);
  - Croatia (2012).
- The **supplementary agreements** are:
  - the Treaty of Brussels (Merger Treaty) (1965);
  - the Treaty amending certain budgetary provisions of the Community treaties (1970);
  - the Treaty amending certain financial provisions of the Treaties establishing the European Economic Communities and of the Treaty establishing a single Council and a single Commission of the European Communities (1975);
  - the Act on election of members of the European Parliament by direct universal suffrage (1976).



# General Principles of EU Law

- These can be unwritten sources of law developed by the case-law of the Court of Justice of the European Union (CJEU).
- General principles of EU law can also be a result of the constitutional traditions common to the Member States. The treaties explicitly name fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, as general principles of EU law.



# Secondary Law

- Secondary law comprises legal acts, which can be divided into two categories:
  - those listed in Article 288 TFEU: regulations, directives, decisions, opinions and recommendations;
  - those not listed in Article 288 TFEU: atypical acts, such as the rules of procedure of the institutions and interinstitutional agreements.
- International agreements with non-EU countries or with international organisations are also an integral part of EU law. They are separate from primary law and secondary law.
- According to the CJEU ruling in the *Meryem Demirel v Stadt Schwäbisch Gmünd* case (Case 12/86), they can have direct effect and their legal force is superior to secondary legislation, which must therefore comply with them. Their rules have direct effect if they contain a clear and precise obligation that is not subject to the adoption of any subsequent measure.

# Other Sources of EU Law

- CJEU case-law.
- international law – often a source of inspiration for the CJEU when developing its case-law. The CJEU cites written and customary law.



# WHAT IS THE AIM OF ARTICLES 288, 289, 290 AND 291 OF THE TFEU?

- There are five types of legal acts at the EU institutions' disposal.
- Article 288 describes the five types of legal acts the EU institutions can adopt.
- Article 289 distinguishes between legislative and non-legislative legal acts, and distinguishes between the ordinary legislative procedure and the special legislative procedure.
- Article 290 enables the European Commission to adopt a new category of acts: delegated acts.
- Article 291 gives the Commission and, in specific cases, the Council of the European Union the power to adopt implementing acts.

# EU Instruments

- Article 288 TFEU:

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

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.

Recommendations and opinions shall have no binding force.

# EU Instruments - Introduction

1. There is no formal hierarchy between these provisions. Regulations are not superior to directives, or vice-versa.
2. Regulations, Directives and decisions may take the form of legislative, delegated or implementing acts.
3. The treaties may specify the type of instrument to be used, but will often not do so.
4. Article 296 TFEU imposes an obligation to give reasons for legal acts, and this includes reference to any proposals, initiatives, recommendations, requests or opinions required by Treaties.
5. Article 297 TFEU specifies rules for the making of the legal acts in article 288.



# Regulations

- Regulations are binding in their entirety and directly applicable in all MS.
- They are measures of general application and applicable to all MS.
- Regulations can be legislative, delegated or implementing acts.
- **Directly Applicable** =
  1. Connotes that Individuals have rights, which they can enforce through national courts.
  2. Relates to the way in which international norms enter national legal systems.
- Directly applicable signifies that regulations are part of national legal systems, without the need for transformation or adoption by national legal measures.



# Directives

- Directives are different from Regulations.
- Directives do not have to be addressed to all MS, and they are binding as to the end to be achieved while leaving some choice as to the form and method to the MS.
- Directives are particularly useful when the aim is to harmonize the laws within a certain area, or to introduce complex legislative change.
- The content of the directive and the ends specified therein, will commonly be very detailed, and the MS do not have discretion in this respect, except insofar as a particular directive confers it.





# Decisions

- A decision is binding in its entirety, and a decision that specified those to whom it is addressed is binding only on them.

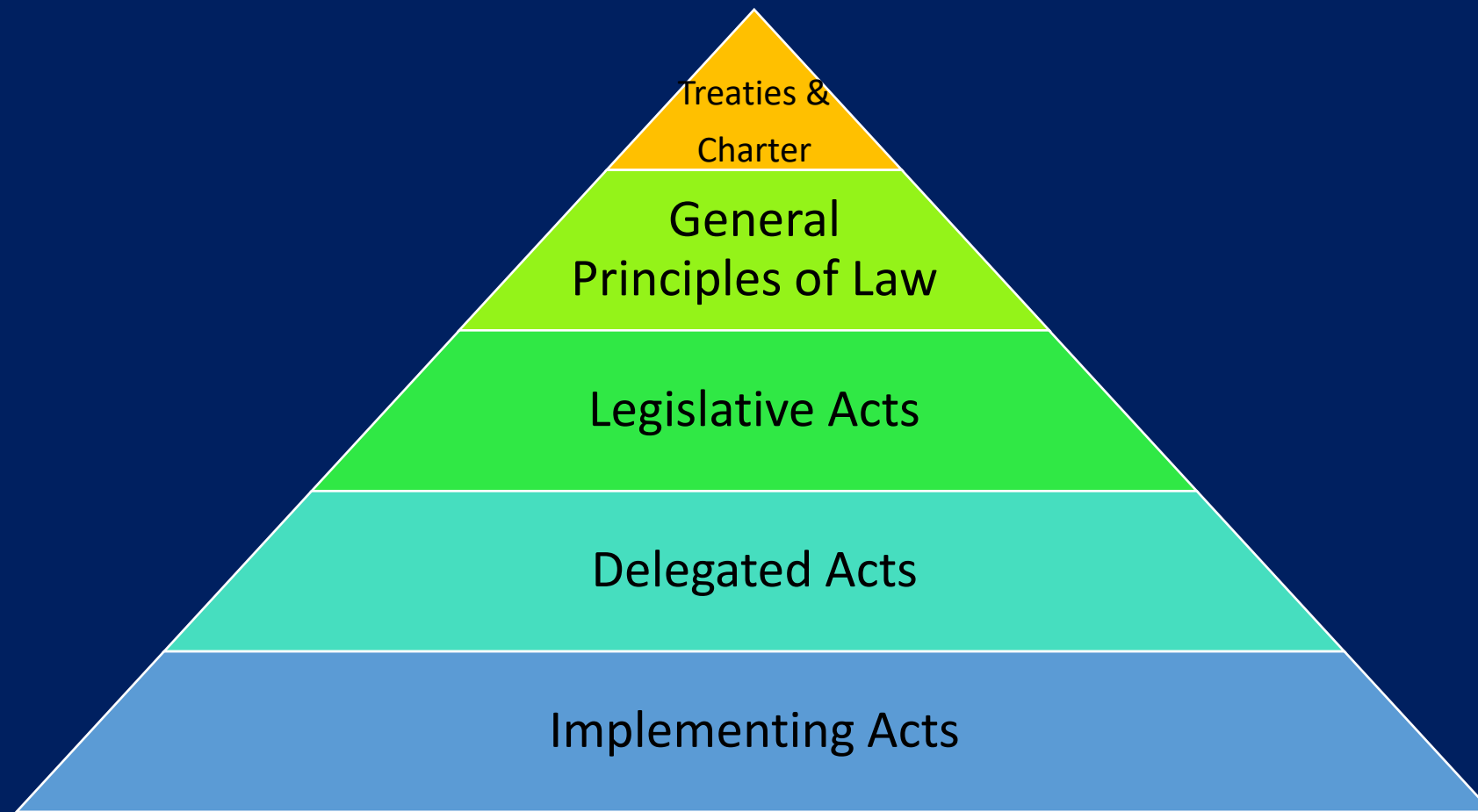


# Recommendations, Opinions and Soft Law

- Recommendations & Opinions have no binding force.
- This precludes such measures from having direct effect, but it does not immunize them from the judicial process.
- A national court can refer a case to the ECJ concerning the interpretation or validity of such a measure.
- Recommendations & Opinions are forms of soft law. There also Policy guidelines.



# Hierarchy of Norms



# Hierarchy of Norms Cont.

- The hierarchy of norms refers to the idea that, in a legal system, there is a vertical order of legal acts, with those in the lower levels of the hierarchy being subject to those at a higher level.
- The Lisbon Treaty retained the hierarchy of legal acts which was proposed by the unratified Constitutional Treaty.
- At the top of the hierarchy of EU norms is primary law, which consists of:
  - the EU's constituent treaties (the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU)) and its protocols;
  - the Charter of Fundamental Rights (Article 6 of the Treaty on European Union); and
  - the general principles established by the Court of Justice of the European Union.



# Hierarchy of Norms Cont.

- Next in the hierarchy are international agreements with non-EU countries or with international organisations. These agreements are separate from primary and secondary law and form a unique category.
- Below this is secondary law, which comprises all legislative and non-legislative acts adopted by the EU institutions, which enable the EU to exercise its powers.
- Legislative acts are regulations, directives and decisions adopted by an ordinary or special legislative procedure (Article 289 TFEU).
- They are at a higher level than non-legislative acts which include, in particular, delegated and implementing acts.
- While delegated acts (Article 290 TFEU) enable the European Commission to supplement or amend non-essential parts of EU legislative acts, implementing acts (Article 291 TFEU) lay down detailed rules allowing for their uniform implementation.



# Rationale

- The hierarchy of norms was said to be the consequence of a better separation of powers.
- Post-Lisbon there was to be a clearer delineation between matters that fell to the legislative arm of government, and those that were for the executive.



# Treaties & Charter

- It is the Treaties, mainly the TEU and the TFEU, which sit at the top of the hierarchy of norms in the EU.
- The Charter of Rights has the same status. Why?
- Article 6(1) TEU states that the Charter has the same legal value as the Treaties.
- Any legislative act must be made pursuant to some Treaty Article, and the Union Courts will determine the scope and interpretation of such Treaty and Charter provisions.

# General Principles

- General Principles of EU Law may be used when interpreting Treaty Articles.
- General Principles can be used not only to interpret legislative, delegated or implementing acts, but also to invalidate a legislative, delegated or implementing act if it contravenes these principles.
- GP have been largely fashioned by the Union Courts.
- They have read principles such as proportionality, fundamental rights, legal certainty, legitimate expectations, equality, the precautionary principle, and procedure justice into the Treaty.
- The whole system itself embodies a principle of judicial review.





# Legislative Acts

## Article 289

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

# Legislative Acts

- Article 289 TFEU – Legislative Acts are legal acts adopted by a legislative procedure. The legal acts that can be legislative are regulations, directives, or decisions: if they are adopted by a legislative procedure they will be legislative acts for the purpose of the Lisbon Treaty. This is the ORDINARY LEGISLATIVE PROCEDURE.
- Article 289(3) TFEU - Any legal act, whether in the form of a regulation, directive or decision, which is enacted in accordance with ordinary or special legislative procedure, is a legislative act for the purposes of the Lisbon Treaty.



# Delegated Acts

## Article 290

1. A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act. The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power.

2. Legislative acts shall explicitly lay down the conditions to which the delegation is subject; these conditions may be as follows:

- (a) the European Parliament or the Council may decide to revoke the delegation;
- (b) the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act.

For the purposes of (a) and (b), the European Parliament shall act by a majority of its component members, and the Council by a qualified majority.

3. The adjective 'delegated' shall be inserted in the title of delegated acts.

# Delegated Acts

- Secondary measures that are legislative in nature = Delegated Acts.
- Secondary measures that are more executive in nature = Implementing Acts.
- They are described as non-legislative acts of general application. They are non-legislative in the formal sense that they are not legislative acts, because they have not been made by the ordinary or special legislative procedure.
- They are said to be of general application and can supplement or amend certain non-essential elements of legislative acts.
- A delegated act will often be what would be regarded as secondary or delegated legislation.
- The essential objectives of an area must be reserved to the legislative acts and cannot be delegated.



# Delegated Acts Cont.

- The delegated act can amend or supplement non-essential elements of the legislative act.
- Amend = denotes a delegated act that formally changes some non-essential element of the legislative act.
- Supplement = connotes the addition of non-essential elements.
- Delegated acts are subject to the controls specified in A.290: the EP and the Council is empowered to revoke the delegation and can veto the particular delegated act.

# Implementing Acts

## Article 291

1. Member States shall adopt all measures of national law necessary to implement legally binding Union acts.
2. Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council.
3. For the purposes of paragraph 2, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall lay down in advance the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.
4. The word 'implementing' shall be inserted in the title of implementing acts.

# Implementing Acts

- Implementing Acts will be of general application, but they execute the legislative act without amendment or supplementation.
- These acts aim to create uniform conditions for the implementation of the legislative act in question, if and when this is necessary.
- They are often of an administrative or technical nature and may take various forms, such as individual financing decisions, authorisation decisions to place certain products on the market, or models for certificates required under EU law.
- Procedurally, implementing acts are adopted by the Commission after it consults committees comprising technical experts from the EU Member States, following the rules and procedures laid down in Regulation (EU) No 182/2011.
- The European Parliament and the Council are kept informed during the preparation of implementing acts and have a right of scrutiny, but cannot block the adoption of implementing acts.





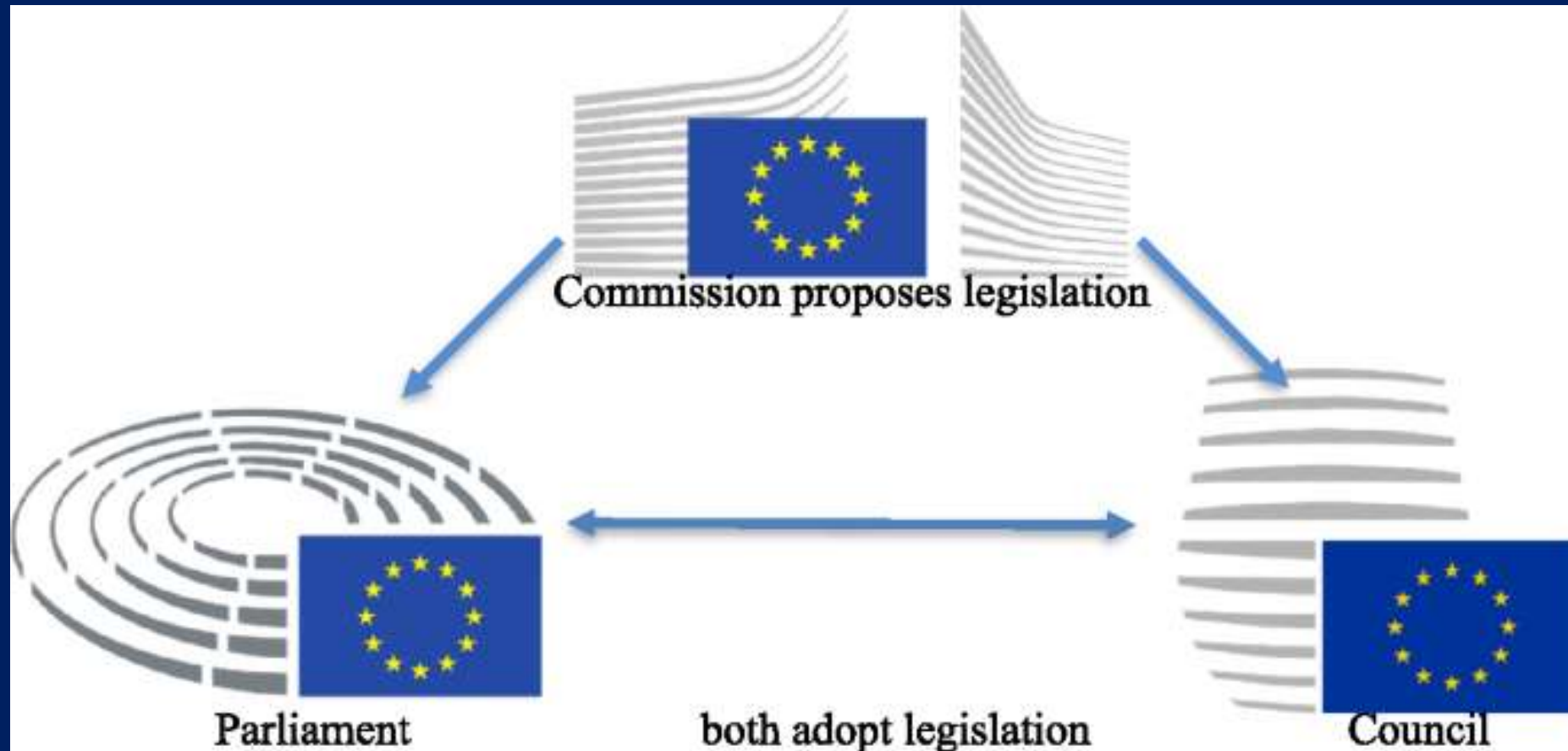
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# Legislation & Decision Making



# Legislative Initiative: Who initiates legislation?

- The Commission has the right of legislative initiative.
- Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise.
- Article 225 TFEU – EP can request the Commission to submit any appropriate proposal on matters on which it considers that a Union act is required to implement the Treaties. If Commission does not submit a proposal, it must inform the EP of the reasons.
- **Citizen's Initiative** – Article 11(4) TEU – No fewer than one million citizens who are nationals of a significant number of MS may take the initiative of inviting the European Commission, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.



# Legislative Acts: The Ordinary Legislative Procedure - Pre-Lisbon

- Prior to the Lisbon Treaty, there were various legislative procedures.
- Throughout the years, the increase of participation by the EP in the legislative process increased.
- The most significant increase in the power of the EP was through the co-decision procedure introduced by the Maastricht Treaty, which prevented a measure being adopted without the approval of the Council and the EP.



# Ordinary Legislative Procedure

- The co-decision procedure is now deemed to be the ordinary legislative procedure, and this procedure consists in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission.
- A legal act can be classified as an EU legislative act only if it has been adopted on the basis of a Treaty provision that expressly refers either to the ordinary legislative procedure, or to the special legislative procedure.
- Hence, it is the Treaty which will determine which procedure should be used in the area which the EU is legislating.



# Ordinary Legislative Procedure: Stages in the Process

## A) First Reading

- It is the Commission that submits the proposal to the EP and the Council.
- The EP has 2 readings, first one which occurs when the EP adopts its position and communicates this to Council. Amendments proposed by EP Committee are then approved by EP plenary session.
- IF Council approves the EPs position, the legislative act is adopted in the wording that corresponds to the position of the EP.
- Until the Council approves, the Commission may alter its proposal at any time.

# Ordinary Legislative Procedure: Stages in the Process

## B) Second Reading

- The council's position is communicated to the relevant EP Committee, which will make recommendations for a second reading as to whether to accept, reject, or amend the Council's position.
- The EP has the following options which it can use within 3 months:
  1. It can approve the position taken by the Council, in which case the act is adopted in the format that corresponds to the wording of the Council's position. *(this also occurs if the EP takes no action at second reading)*
  2. The EP may reject the Council's first reading position by a majority of its component members, in which case the act is deemed not to have been adopted.
  3. To propose by a majority of its members second-reading amendments to the Council's position.



# Ordinary Legislative Procedure: Stages in the Process

## B) Second Reading Cont.

- EP 2<sup>nd</sup> Reading amendments are only admissible if they:
  1. seek to restore wholly or in part the EPs 1<sup>st</sup> reading position; or
  2. To reach a compromise between the EP and the Council; or
  3. To amend part of the Council's position that was not included in the initial proposal; or
  4. To take account of a new fact situation.
- The ball is then back in the Council's court. It may within 3 months approve the EPs amendments, or not approve the 2<sup>nd</sup> reading amendments in which case the Conciliation Committee comes into operation.

# Ordinary Legislative Procedure: Stages in the Process

## C) Conciliation

- Conciliation Committee is composed of equal numbers from the EP and Council, and the Commission is fully involved.
- Object is to secure agreement on a joint text, but if this cannot be achieved within six weeks, the act is deemed not to have been adopted.
- If the Conciliation Committee is successful the agreed text must be approved within 6 weeks by the EP and the Council, failing which the act is deemed not to have been adopted.





# Legislative Acts: Special Legislative Procedure

- The special legislative procedure takes the form of a regulation, directive or decision adopted by the EP with the participation of the Council, or by the Council with the participation of the EP.
- Legal acts adopted by the special legislative procedure constitute legislative acts.
- Where the TFEU requires the special legislative procedure, the European Council may adopt a unanimous decision with the consent of the EP allowing for the adoption of such acts in accordance with the ordinary legislative procedure, which takes effect if there is no opposition from a national parliament.

# Legislative Acts: Special Legislative Procedure Cont.

- The SLP, in most instances, signifies that the legal act is adopted by the Council unanimously, combined with a requirement of consent by or more commonly consultation with, the EP.
- It is clear that the Council must wait for Parliament's opinion, if it does not, the measure may be annulled.
- Council is NOT bound to adopt the Parliament's opinion.
- The SLP may also stipulate that a measure should be adopted by the Council acting unanimously with the consent of the EP, as opposed to consultation.



# Delegated Acts: Enactment & Control

- Neither Council nor the EP has any formal right to amend a delegated act, but only the power to veto.
- Exercise of the veto power is dependent on understanding the proposed measure.
- The EP and the Council have to raise any such objections within a short period specified by the legislative act, which will normally be somewhere between two or three months.
- The very nature of the divide between delegated and implementing acts that lies at the heart of the Lisbon schema is very problematic, and this it can be fortuitous whether a measure is characterised as delegated subject to the controls of A.290 or implementing, subject to the controls of A.291.



# Implementing Acts

- There are two procedures:
  - The Advisory Procedure – Default Procedure – it is to be used except when the examination procedure is mandated.
  - The Examination Procedure – applies in relating to implementing acts of general scope.
- The implementing act will be passed if the committee delivers a positive opinion, voting in accordance with the rules for qualified majority.
- If it gives a negative opinion, the Commission cannot adopt the act.
- There is a provision enabling Commission to adopt a draft act in case of urgency.

- Lisbon reforms relating to the hierarchy of norms were intended to simplify, but may have actually increased legal and institutional complexity...why?
  1. The divide between delegated and implementing acts is inherently problematic.
  2. It will not be clear whether a particular act falls into one category or another until it is made.
  3. The distinction between delegated and implementing acts is crucial under Lisbon since very different procedures and controls are necessary.
  4. The Lisbon Regime will lead to greater institutional complexity.



# Enhanced Cooperation

- Thus far we spoke about legislative making when all EU MS participate.
- Enhanced cooperation is a last resort
- To be used where the council has established that the EU as a whole cannot attain the objectives of such cooperation within a reasonable period.
- One needs at least 9 MS for Enhanced cooperation to be used.
- Acts adopted by enhanced cooperation bind only participating MSs.





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# Decision Making & New Forms of Governance

- The shift towards new modes of governance is characterised by a move away from hierarchical governing towards more flexible forms of governance.
- Which means that institutions would now share the space of policy making with stake holders within the field.
- Hence, a less rigid perspective





# New Governance: The New approach to Harmonisation

- The new approach to harmonisation reveals some shift away from the three dimensions of hierarchical governance. Several elements can be noted in this new approach to harmonisation:
  1. Although directives continue to be used to set the basic requirements, they are limited to the setting of 'essential requirements' that are necessary to ensure public safety and other general interests, thereby reducing the degree of detail and prescriptiveness in the legislation.
  2. The task of setting technical standards for the products that have to meet these essential requirements is to be carried out not by the EU legislative institutions themselves, but by European standardisation bodies. Hence, we see the devolution of aspects of policy-making to bodies other than that of formal EU Law making institutions.



# New Governance: The New approach to Harmonisation Cont.

3. Standards set by these bodies are not compulsory, but remain voluntary. Manufacturers have an incentive to abide by the standards, because if their products are certified as being in conformity with them, they benefit from the presumption that they meet the essential requirements of the directive and are entitled to enjoy free movement across the EU market.



# New Governance: the Open Method of Coordination

- Key features of the OMC:
  1. Fixing Guidelines
  2. Establishing indicators and benchmarks against what these should be measured.
  3. Translating the European guidelines into local policies
  4. Peer-reviewed monitoring and evaluation.
- OMC-type processes have been proposed for a range of reasons:
  - a) To overcome a political blockage where agreement on more conventional measures cannot be found
  - b) Where formal, legal competence is lacking
  - c) Sometimes, because it is considered to be the most suitable instrument for achieving the policy goals in question.



# New Governance: the Open Method of Coordination Cont.

- OMCs were originally used in economic policy coordination and the European employment strategy. This has been broadened to the fields of social exclusion, pensions, and healthcare etc.
- The OMC was supposed to involve a fully decentralised approach in line with the principle of subsidiarity in which the Union, the MS, the regional and local levels, as well as the social partners and civil society, will be actively involved, using variable forms of partnership.
- The OMC architecture is premised on the setting of general guidelines or goals, which are translated into national plans by state and regional actors.



# New Governance: General EU Governance reform initiatives.

## Subsidiarity and Proportionality

- The very essence of the subsidiarity and proportionality principles is that of restraint as regards the need for regulation, and restraint as to both the form and the content of regulation.
- The form of action should be as simple as possible, where legislation is chosen directives are to be preferred to regulations and framework directives are to be referred to detailed measures.
- The degree of prescriptiveness of legislation should be reduced. While directives are binding as to their aim, they leave greater room for discretion in their implementation than other measures.
- The provision for extensive Commission consultation before proposing legislation demonstrates a concern for the involvement of other actors in law-making, even if the formal initiatives still rests with the Commission.





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