

European Union Law

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A.Y. 2018-2019

The sources of EU law: (iii) secondary law

Lesson No 11

The legal acts of the EU's institutions

'**Secondary**' or '**Derived**' law, as opposed to 'primary' law

- ⇒ it finds its legitimacy in the primary law
- ⇒ EU institutions may only act within the limits of the powers conferred upon them by (and in conformity with) the Treaties: Article 13(2) TEU

⇒ it is for the Treaties to determine:

- What acts may be adopted ⇒ the **legal acts**: Art 288 TFEU
- Which acts are binding, to what extent and upon whom
- **How** they have to be enacted (and **by whom**) ⇒ the **procedures**: Art 293 et seq TFEU
- What is the **hierarchy**, if any
- When, to what extent and for what purposes the EU institutions may act ⇒ the '**legal basis**' ⇔ principle of conferral of competences: Art 5(2) TEU

Hierarchy of norms

EU secondary law is subordinated to EU primary law
⇒ the former finds its legitimacy in the latter ⇒
judicial review on the validity of the EU legal acts ⇒



- i) **Rule of law** ⇒ the legislative and executive powers must comply with the primary law as the constitutional Charter of the EU
- ii) **No competence-competence** ⇒ the EU legislature has not the power to determine the extent of its own powers ⇐ it is the Member States that confer the competences upon the Union: Art 5(2) TEU

THE LEGAL ACTS OF THE UNION

Art 288 TFEU

“To exercise the Union’s competences [⇔ principle of conferral – Art 5(2) TEU: ‘*the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein*’], the institutions shall adopt

- regulations
- directives
- decisions
- recommendations and opinions”

Distinctions to be drawn

A) *Legally binding* acts ⇔ regulations, directives and decisions

B) *Non-binding* acts ⇔ recommendations and opinions

A) *Legislative* acts ⇔ any act adopted by legislative procedure: Art 289(3) TFEU

B) *Non-legislative* acts ⇔ any act other than legislative acts

(this latter distinction has been introduced by the Lisbon Treaty)

Legislative acts

Legislative procedure ⇔ legislative powers conferred on European Parliament and Council only ⇔ these acts are adopted either

- a) Jointly by EP and Council ⇔ **Ordinary legislative procedure**: Arts 289(1) and 294 TFEU
- b) By the EP with the participation of the Council or vice versa ⇔ **Special legislative procedure**: Art 289(2) TFEU

As a consequence ...

- ✓ Acts adopted either by the **European Council** or by the **Commission** cannot be legislative acts
- ✓ Hierarchy ⇔ derived normative acts are subordinated to legislative acts
- ✓ Legislative acts cannot be adopted in the field of common foreign and security policy: Arts 24(1) and 31(1) TEU

Derived normative measures

Non-legislative acts explicitly mentioned in the Treaties (post-Lisbon)

- i) **'Delegated'** acts: Art 290 TFEU ⇔ non-legislative acts of general application adopted by the Commission *"to supplement or amend certain non-essential elements of the legislative act"*
- ii) **'Implementing'** acts: Art 291 TFEU ⇔ non-legislative acts adopted by the Commission, or exceptionally by the Council, *"where uniform conditions for implementing legally binding Union acts are needed"* ⇔ it works as an exception: see Art 291(1) TFEU

LEGALLY BINDING UNION ACTS

Regulation

- It “*shall have general application*” ⇔ it is the equivalent of a statute or law in the national legal order
- It “*shall be binding in its entirety*” ⇔ though MSs may be required to adopt implementing provisions ⇔ Art 291(1) TFEU: “*MSs shall adopt all measures of national law necessary to implement legally binding Union acts*”
- It is “*directly applicable in all MSs*” ⇔ MSs are prevented from adopting national measures to give effect to a regulation, as this would disguise the EU character of the act

Directive

- It “*shall be binding ... upon each MS to which it is addressed*” ⇔ it is binding on the MSs only, not within the MSs ⇔ no obligations upon private parties
- It “*shall be binding as to the **result** to be achieved*” (only), “*but shall leave to the national authorities the choice of **form** and **methods***” ⇔ a form of indirect legislation ⇔ MSs are however bound to choose the form and methods capable of ensuring the effective achievement of the result

Decision

- It *“shall be binding in its entirety”*
- It may be:
 - a) either of general application
 - b) or it may *“specifies those to whom it is addressed”* (including private parties) ⇔ in such a case, it *“shall be binding only on them”* ⇔ if it imposes a pecuniary obligation on persons other than States, it shall be enforceable within the MSs; enforcement shall be governed by the rules of civil procedure of the MS in the territory of which it is carried out: Art 299 TFEU

Hierarchy of norms

- i) No hierarchy between different legally binding acts ⇔ there is no difference between the various acts, as to their legal value:
ex. a regulation does not prevail over a directive, or vice versa
- ii) Hierarchy between legislative and non-legislative acts ⇔ the latter are subordinated to the former

The preamble to an EU-law act

- It has no binding legal force and
- Cannot be relied on
 - either as a ground for derogating from the actual provisions of the act in question
 - or for interpreting those provisions in a manner that is clearly contrary to their wording

Case C-345/13, *Karen Millen Fashions*, para. 31

Case C-287/17, *Česká pojišťovna*, para. 33

Regulation on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC

**REGULATION (EU) 2016/679 OF 27 APRIL 2016
(GENERAL DATA PROTECTION REGULATION)**

Art 5 (Principles relating to processing of personal data)

1. Personal data shall be:
 - (a) processed lawfully, fairly and in a transparent manner in relation to the data subject ('lawfulness, fairness and transparency');
 - (b) ... ('purpose limitation');
 - (c) ... ('data minimisation');
 - (d) ... ('accuracy');
 - (e) ... ('storage limitation');
 - (f) ... ('integrity and confidentiality').
2. The controller shall be responsible for, and be able to demonstrate compliance with, paragraph 1 ('accountability').

Art 6 (Lawfulness of processing)

1. Processing shall be lawful only if and to the extent that at least one of the following applies:
 - (a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes; **(Art 7)**
 - (b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;
 - (c) processing is necessary for compliance with a legal obligation to which the controller is subject;
 - (d) ...;
 - (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;
 - (f) ...

Art 6 (Lawfulness of processing)

2. Member States may maintain or introduce more specific provisions to adapt the application of the rules of this Regulation with regard to processing for compliance with points (c) and (e) of paragraph 1 by determining more precisely specific requirements for the processing and other measures to ensure lawful and fair processing including for other specific processing situations as provided for in Chapter IX.
3. The basis for the processing referred to in point (c) and (e) of paragraph 1 shall be laid down by:
 - (a) Union law; or
 - (b) Member State law to which the controller is subject...

CHAPTER III (Rights of the data subject)

Art 12 (Transparent information, communication and modalities for the exercise of the rights of the data subject)

Art 13 (Information to be provided where personal data are collected from the data subject)

Art 15 (Right of access by the data subject)

Art 16 (Right to rectification)

Art 17 (Right to erasure ('right to be forgotten'))

CHAPTER VI (Independent supervisory authorities)

Art 51 (Supervisory authority)

1. Each Member State shall provide for **one or more** independent public authorities to be responsible for monitoring the application of this Regulation, in order to protect the fundamental rights and freedoms of natural persons in relation to processing and to facilitate the free flow of personal data within the Union ('supervisory authority').
2. Each supervisory authority shall contribute to the consistent application of this Regulation throughout the Union. For that purpose, the supervisory authorities shall cooperate with each other and the Commission in accordance with Chapter VII.
3. ...
4. Each Member State shall notify to the Commission the provisions of its law which it adopts pursuant to this Chapter, by 25 May 2018 and, without delay, any subsequent amendment affecting them.

CHAPTER VI (Remedies, liability and penalties)

Art 79 (Right to an effective judicial remedy against a controller or processor)

1. Without prejudice to any available administrative or non-judicial remedy, including the right to lodge a complaint with a supervisory authority pursuant to Article 77, each data subject shall have the right to an effective judicial remedy where he or she considers that his or her rights under this Regulation have been infringed as a result of the processing of his or her personal data in non-compliance with this Regulation.
2. Proceedings against a controller or a processor shall be brought before the courts of the Member State where the controller or processor has an establishment. Alternatively, such proceedings may be brought before the courts of the Member State where the data subject has his or her habitual residence, unless the controller or processor is a public authority of a Member State acting in the exercise of its public powers.

Art 78 (Representation of data subjects)

1. The data subject shall have the right to mandate a not-for-profit body, organisation or association which has been properly constituted in accordance with the law of a Member State, has statutory objectives which are in the public interest, and is active in the field of the protection of data subjects' rights and freedoms with regard to the protection of their personal data (i) to lodge the complaint on his or her behalf, (ii) to exercise the rights referred to in Articles 77, 78 and 79 on his or her behalf, and (iii) to exercise the right to receive compensation referred to in Article 82 on his or her behalf where provided for by Member State law.

Art 78 (Representation of data subjects)

2. Member States **may** provide that any body, organisation or association referred to in paragraph 1 of this Article, independently of a data subject's mandate, has the right to lodge, in that Member State, a complaint with the supervisory authority which is competent pursuant to Article 77 and to exercise the rights referred to in Articles 78 and 79 if it considers that the rights of a data subject under this Regulation have been infringed as a result of the processing.