

European Union Law

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The sources of EU law: (iii) secondary law

Lesson No 11

The legal acts of the EU's institutions

'Secondary' 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 ⇔ the Treaties 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
- 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
- ✓ 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