FOUNDATIONS SERIES

FAIRHURST, MORANO-FOADI AND NELLER'S LAW OF THE EUROPEAN UNION

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- it is limited to certain policy areas, although the policy areas have been substantially extended by amendments made by the ToA and ToN and then further extended by the ToL, such that it is now referred to as the ordinary legislative procedure.

Special legislative procedure

As stated above, although the 'ordinary legislative procedure' applies in the vast majority of cases, **Article 289 TFEU** provides that a legislative act can also be adopted by a 'special legislative procedure'.

The special legislative procedure refers to specific cases where the Treaties provide for the adoption of a regulation, directive or decision:

(i) by **consent procedure** (formerly called the assent procedure), which gives the Parliament the power to accept or reject an act drafted by the Council; or

(ii) by **consultation procedure**, which requires the Council to consult with Parliament.

In both instances, the Council will normally be acting on a proposal from the Commission. The legal base will detail the exact role of each institution, together with the voting procedure (in the case of the Council, the voting procedure is qualified majority unless otherwise stated (Art 16(3) TEU)). The difference between the two is that the former enables the Parliament to reject a draft outright, whereas the latter only requires the Council to consult with the Parliament. In practice, the Parliament will be consulted throughout a **consent procedure** so as to maximise the likelihood that consent will be achieved and a draft will be successful. An example of a legal base where the special legislative procedure provides for the adoption of a legislative act by the **consent procedure** is Article 86(1) TFEU, which provides that:

> In order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust. The Council shall act unanimously after obtaining the **consent** of the European Parliament.

An example of a legal base where the special legislative procedure provides for the adoption of a legislative act by the **consultation procedure** is Article 64(3) TFEU, which provides that:

> … only the Council, acting in accordance with a special legislative procedure, may unanimously, and after **consulting** the European Parliament, adopt measures …

Although the Council is not required to follow the opinion of Parliament in the consultation procedure, the consultation must be genuine. Parliament must have a proper opportunity to respond to the proposal. This was recognised as an essential procedural requirement by the Court of Justice in the case of ***Roquette Frères* v *Council*** (Case 138/79):

> The consultation provided for in … the Treaty is the means which allows the Parliament to play an actual part in the legislative process of the Community [i.e. Union]. Such power represents

> **an essential factor in the institutional balance** intended by the Treaty. Although limited, it reflects at Community [i.e. Union] level the fundamental principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly. Due consultation of the Parliament in the cases provided for by the Treaty therefore constitutes **an essential formality** disregard of which means that the measure concerned is void. [p. 3360]

This principle was further developed to require re-consultation when a measure on which Parliament had already given an opinion was subsequently changed. In ***European Parliament* v *Council*** (Case C-65/90) the Court of Justice said that further consultation was required unless the amendments essentially corresponded to the wishes already expressed by the Parliament. Although the Council should not come to a final decision without giving the Parliament an opportunity to respond, it does not have to suspend all discussion until it receives that opinion (***European Parliament* v *Council*** (Case C-417/93)).

Other procedures

As stated above, in a few cases the Treaties provide for legal acts to be adopted using a procedure other than the ordinary or special legislative procedure. Because the procedure used is neither the ordinary nor the special legislative procedure, the resultant act is a 'legal act' but not a 'legislative act' pursuant to Article 289(3) TFEU (see above).

Commission acting alone

The Commission is, in very limited policy areas, empowered by the Treaties to enact legislation. One example is Article 106(3) TFEU, which provides that:

> The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.

This Article is concerned with the role of the state in relation to public bodies or other bodies, to which the state has granted special or exclusive rights (e.g. privatised utility companies, such as water, gas, electricity, etc.).

Additionally, the Commission can, where provided for, adopt **delegated acts** or **implementing acts**. Under **Article 290 TFEU**, legislative acts adopted since the entry into force of the ToL on 1 December 2009 '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'. Delegated acts may therefore make minor additions or adjustments to the substance of the original legislation. **Article 291 TFEU** then grants the power to the Commission to adopt implementing acts 'where uniform conditions for implementing legally binding Union acts are needed'. Implementing acts are therefore concerned with procedural aspects of implementing legislation. Examples of such acts include the awarding of funds, market authorisations, implementing the Common Agricultural Policy and implementing Annual Action Programmes for third countries. Delegated and implementing acts represent a simplified means of adopting minor but necessary acts of Union law. Thus, the **Interinstitutional Agreement on Better Law-Making** describes these acts as 'an integral tool for Better Law-Making, contributing to simple, up-to-date legislation and its efficient, swift implementation'. Delegated and implementing acts are adopted through a process of

comitology, which is discussed in section 2.3.3. However, it is not always clear which procedure should be used to adopt a given measure.

Council and Commission acting alone

The EU Treaties empower the Council to adopt a Commission proposal, without the involvement of the Parliament, in a very limited number of policy areas. For example, Article 31 TFEU provides as follows:

> Common Customs Tariff duties shall be fixed by the Council on a proposal from the Commission.

3.4.5 Legal validity and grounds for annulment of legal acts

Secondary legislation must meet certain conditions in order to be considered valid. Under Article 263 TFEU, the Court of Justice of the European Union has the power to review the legal validity of legal acts. Such acts can be annulled by the Court on one of the following grounds:

- lack of competence;
- infringement of an essential procedural requirement;
- infringement of the Treaties or of any rule of law relating to their application; or
- misuse of powers.

These grounds for the annulment of legal acts of the Union are discussed in detail in Chapter 6.

Additionally, **Article 297(1) TFEU** provides that all legislative acts must be published in the **Official Journal**. The Official Journal is a Union publication which consists of two related series and a supplement:

- **The L series (legislation)** contains all the legislative acts that the Treaties require to be published, as well as other acts.
- **The C series (information and notices)** covers the complete range of information other than legislation, including recommendations and opinions.
- **The S series** is a supplement containing invitations to tender for public works and supply contracts.

The L and C series are published daily (except Sunday) and the supplement is published every day from Tuesday to Saturday. Legislative acts and non-legislative acts (i.e. regulations, directives and decisions) will be published in the L series. The act will be cited alongside a reference, such as OJ 1990 L 257/13. In full, this reference can be decoded as: Official Journal, published in 1990, L series, issue number 257, page 13. In accordance with **Article 288(1) TFEU**, secondary legislation enters into force on the date specified in the act, or – if there is no such date specified – on the twentieth day following its publication in the Official Journal.

Issues of the ***Official Journal*** which have been published since 1998 can be accessed from the Eur-lex website:

https://eur-lex.europa.eu/homepage.html

Reflection: EU secondary legislation in the UK after Brexit

As EU directives have been incorporated into UK law through national legislative acts, these national acts automatically remain in force after Brexit. However, as the UK is no longer bound to implement EU law, it is likely that, sooner or later, these national acts will be reviewed and may be subject to amendments or repeal where they are deemed not to be in the best interests of the UK.

EU regulations, on the other hand, are directly applicable within the Member States, so there are no national legislative acts through which EU regulations will continue to be enforceable in the currently UK after Brexit. In response to this predicament, the European Union (Withdrawal) Act 2018 provides for the transposition of regulations and other relevant EU law into domestic legislation. This creates a new category of domestic legislation: 'retained EU law'. Retained EU law includes all 'direct EU legislation' – i.e. any EU legislation that is directly applicable to the UK immediately prior to Brexit – as well as EU and domestic case law that pertains to such legislation. The European Union (Withdrawal) Act 2018 sets out the procedures that can be used to amend, repeal or revoke retained EU law.

The process of disentangling EU law from UK law is highly complex. For one thing, EU law permeates many different areas of UK law and is not always easy to distinguish. Additionally, simply stating that EU regulations and national measures implementing EU directives continue to be binding in UK law does not work in the many instances where these acts refer to EU institutions or bodies. Furthermore, agreeing which EU laws should be amended and how is likely to prove extremely challenging and, at times, controversial. Indeed, the provisions in the European Union (Withdrawal) Act 2018 for the modification of retained EU law have provoked concern over the scope of the powers that they grant, with some commentators referring to them critically as 'Henry VIII' provisions.

3.5 Decisions of the Court of Justice of the European Union

Objective 5

Article 19(1) TEU, as amended by the ToL, provides that 'the Court of Justice, the General Court and specialised courts' shall be collectively referred to as the Court of Justice of the European Union. The General Court is now the name given to the former Court of First Instance.

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

The role of the Court of Justice of the European Union in developing Union law is noted above in relation to the general principles of EU law and is discussed further throughout the following chapters.

3.6 Soft law

Objective 6

Instruments which are not legally enforceable but which may aid the interpretation and/or application of Union law are referred to as 'soft laws'. Such instruments may be referred to by the Court of Justice of the European Union when interpreting Union law and should be

taken into consideration by the Member States where they supplement or otherwise shed light on binding provisions. In addition, soft law can provide a means of establishing a position in instances when it is not possible or practical to enact 'hard' law (Snyder, 1993). Two particular forms of 'soft law' are considered further here: recommendations and opinions.

3.6.1 Recommendations and opinions

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

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

3.7 International sources of law

Objective 7

In addition to its own internally developed law, the activities of the Union are regulated by the international treaties to which it is a party. Furthermore, the Union may refer to treaties outside of the structure of the Union to which its Member States are parties. The status of these external sources of law within EU law is examined below.

3.7.1 International treaties negotiated by the Union

Article 47 TEU provides that the Union shall have legal personality, enabling it to enter into international treaties and agreements on behalf of the Member States in areas where it has exclusive competence (see Chapter 4). The procedure for negotiating and concluding treaties with third (i.e. non-EU) countries or international organisations is set out in **Article 218 TFEU**. Paragraph 2 states that:

> The Council shall authorise the opening of negotiations, adopt negotiating directives, authorise the signing of agreements and conclude them.

Article 218(3) TFEU then provides for the involvement of the Commission or the High Representative of the Union for Foreign Affairs and Security Policy if the international agreement in question relates exclusively or principally to the common foreign and security policy.

The category of international treaties includes not only **multilateral treaties** to which the Union is a party but also **accession treaties** and **association agreements** concluded by the Union with individual states. Additionally, with the initiation of the Article 50 TEU exit process by the UK in March 2017, **withdrawal treaties** are also relevant to this category.

Multilateral treaties

One example of a multilateral treaty to which the Union is a party is the General Agreement on Tariffs and Trade (GATT). The GATT agreement was held in the case of ***International Fruit*** (Case 21–24/72) to be binding on the Union. The Court of Justice has also held that undertakings which complain to the Commission of illicit commercial practices in breach of the Union's commercial policy instrument may rely upon the GATT as forming part of the rules of international law to which the instrument applies (***Fediol*** (Case 70/87)).

Accession treaties

A Treaty of Accession is necessary when the Union is enlarged through the addition of new Member States. The most recent Accession Treaty was concluded in 2011 to pave the way for Croatia's membership on 1 July 2013. Like the original Treaties themselves, the Treaties of Accession have been held to confer directly enforceable rights on individuals (***Rush Portuguesa* v *Office National d'Immigration*** (Case C-113/89)).

➤ Accession criteria and procedures are outlined in section 1.1.3

Withdrawal agreements

Article 50(2) TEU authorises the Union to negotiate a withdrawal agreement with a Member State that is seeking to exit the Union. Although a withdrawal agreement is not necessary when a Member State leaves the Union, such an agreement helps to smooth the exit process as it establishes arrangements for the withdrawal and lay the foundations for the state's future relationship with the Union. Key features of the UK withdrawal agreement include:

➤ See section 1.1.3 for the full text of Article 50 TEU

- a transition period until the end of December 2020, during which the UK will remain a member of the customs union and the single market and EU law will continue to apply to the UK;
- the payment of a 'divorce' settlement;
- special arrangements for Northern Ireland to remain aligned with EU trade regulations, so as to prevent a 'hard' border with the Republic of Ireland;
- executive powers to deal with issues arising from withdrawal, including in relation to the border between Northern Ireland and Ireland;

The UK withdrawal agreement, which has been approved by the UK parliament and the EU, leaves many other details – especially relating to trade – to be determined during the transition period. The agreement has been criticised for failing to provide guarantees in relation to workers rights, the protection of refugees and parliamentary oversight of trade negotiations.

The process for negotiating a withdrawal agreement, and the corresponding details applying to Brexit at the time of writing, are set out in Figure 3.5 below.

If a withdrawal agreement is not reached and extensions are not agreed, the exiting state nevertheless ceases to be a member of the Union two years after they notified the European