## 5.1.1 The Development of the European Union

Following the accession of Croatia on 1 July 2013, the European Union is made up of 28 Member states and with a total population of 508 million inhabitants.

The initial impetus for European integration, eventually leading to the current structure and the, as yet still to be attained, establishment of an integrated EU, was a response to two factors: the disasters of World War II; and the emergence of the Soviet Bloc in Eastern Europe. The aim was to link the separate European countries, particularly France and Germany, together in such a manner as to prevent the outbreak of future armed hostilities. The first step in this process was the establishment of a European Coal and Steel Community. The next step towards integration was the formation of the European Economic Community (EEC) under the Treaty of Rome in 1957. The UK joined the EEC in 1973. The Treaty of Rome has subsequently been amended in the further pursuit of integration as the original Community has expanded. Thus, the Single European Act (SEA) 1986 established a single economic market within the EC and widened the use of majority voting in the Council of Ministers. The Maastricht Treaty further accelerated the move towards a federal European supranational state, in the extent to which it recognised Europe as a social and political – as well as an economic – community. Previous Conservative governments of the UK resisted the emergence of the EU as anything other than an economic market and objected to, and resiled from, various provisions aimed at social, as opposed to economic, affairs. Thus, the UK was able to opt out of the Social Chapter of the Treaty of Maastricht. The New Labour administration in the UK had no such reservations and, as a consequence, the Treaty of Amsterdam 1997 incorporated the European Social Charter into the EC Treaty.

As the establishment of the single market within the European Community (EC), as the EEC became, progressed, it was suggested that its operation would be greatly facilitated by the adoption of a common currency, or at least a more closely integrated monetary system. Thus, in 1979, the European Monetary System (EMS) was established, under which individual national currencies were valued against a nominal currency called the ECU and allocated a fixed rate within which they were allowed to fluctuate to a limited extent. Britain was a member of the EMS until 1992, when financial speculation against the pound forced its withdrawal. Nonetheless, other members of the EC continued to pursue the policy of monetary union, now entitled European Monetary Union (EMU), and January 1999 saw the installation of the new European currency, the euro, which has now replaced national currencies within what is now known as the Eurozone. The UK did not join the EMU at its inception and there is little chance that membership will appear on the political agenda for the foreseeable future, especially given the financial crisis that is enveloping many of the EMU states, particularly those on the periphery of the EU. It remains to be seen whether the ongoing financial crisis results in the break-up of the EMU, or its strengthening, as the current members may be forced to seek more economic unity to address its consequences.

### Treaty of Nice

In December 2000 the European Council met in Nice in the south of France. The Council consists of the heads of state or government of the member countries of the EU, and is the body charged with the power to make amendments to EU treaties. The purpose of the meeting was to prepare the Union for expansion from its then 15 to 25 members by the year 2004, and so to its current 28 members. New members ranged from the tiny Malta with a population of 370,000 to Poland with its population of almost 39 million people. In order to accommodate this large expansion, it was recognised that significant changes had to be made in the institutions of the current Union, paramount among those being the weighting of the voting power of the Member states. Although parity was to be maintained between Germany, France, Italy and the UK at the new level of 29 votes, Germany and any two of the other largest countries gained a blocking power on further changes, as it was accepted that no changes, even on the basis of a qualified majority vote, could be introduced in the face of opposition from countries constituting 62 per cent of the total population of the Union. The recognition of such veto power was seen as a victory for national as against supranational interests within the Union and a significant defeat for the Commission. However, the number of matters subject to qualified majority voting was increased, although a number of countries, including the UK, refused to give up their veto with regard to the harmonisation of national and corporate tax rates. Nor would the UK, this time supported by Sweden, agree to give up the veto in relation to social security policy. Core immigration was another area in which the UK government retained its ultimate veto (see 5.3.1for current voting power).

At the same time as these changes were introduced, the members of the Council of Europe also signed a new Charter of Fundamental Rights. Among the rights recognised by the charter are included:

• right to life;

• respect for private and family life;

• protection of family data;

• right to education;

• equality between men and women;

• fair and just working conditions;

• right to collective bargaining and industrial action;

• right not to be dismissed unjustifiably.

It is significant that the Charter was not included within the specific Treaty issues at Nice, at the demand of the UK. The UK had also ensured that some of the references, particularly to employment matters, were subject to reference to domestic law.

### Lisbon Treaty

Although the Treaty of Nice was difficult and time-consuming in its formation, it looked for some time as though its terms would be replaced before they had actually come into effect. This possibility came about as a result of the conclusions of the *Convention on the* *Future of Europe*, which was constituted in February 2002 by the then members to consider the establishment of a European Constitution. The Convention, which sat under the presidency of the former President of France, Valéry Giscard d’Estaing, produced a draft constitution, which it was hoped would provide a more simple, streamlined and transparent procedure for internal decision-making within the Union and to enhance its profile on the world stage. Among the proposals for the new constitution were the following:

• the establishment of a new office of President of the European Union;

• the appointment of an EU foreign minister;

• the shift to a two-tier Commission;

• fewer national vetoes;

• increased power for the European Parliament;

• simplified voting power;

• the establishment of an EU defence force by ‘core members’;

• the establishment of a charter of fundamental rights.

In the months of May and June 2005 the move towards the European Constitution came to a juddering halt when first the French and then the Dutch electorates voted against its implementation. Such a signal failure meant that it was not necessary for the UK government to conduct a referendum on the proposed constitution as it had promised. However, as with most EU initiatives, the new constitution did not disappear and re-emerged as the Treaty of Lisbon, signed by all the members in December 2007. Once again the UK government, together with the Polish one, insisted that a protocol, number 7, be appended to the treaty ensuring that the Charter of Fundamental Rights could not create new rights in the UK. The Lisbon Treaty gave rise to much ill-feeling in many states for the reason that it incorporated most of the proposals originally contained in the previously rejected constitutional proposal. In legal form, the Lisbon Treaty merely amended the existing treaties, rather than replacing them as the previous constitution had proposed. In practical terms, however, all the essential changes that would have been delivered by the constitution were contained in the treaty – a fact widely recognised by some EU leaders, although not the UK’s. Thus Angela Merkel, Chancellor of Germany, was quoted in June 2007 in the *Daily Telegraph* as saying, ‘The substance of the Constitution is preserved. That is a fact’, and Valéry Giscard d’Estaing, Chairman of the Convention on the Future of Europe, which drafted the Constitution, was quoted, in a European Parliament press release on 17 July 2007, as saying, ‘In terms of content, the proposals remain largely unchanged, they are simply presented in a different way … This text is, in fact, a rerun of a great part of the substance of the Constitutional Treaty.’

As a matter of interest and political significance, most member countries decided to ratify the new treaty through their legislatures rather than by hazarding it in a referendum, a decision that caused much discontent in many countries. In the UK, the government declined to have a referendum on the basis of the (not totally convincing) suggestion that the treaty was simply an amendment and a tidying-up measure and consequently did not need the confirmation of a referendum in the way necessary and promised for the constitution.



Who’s who in the European context

The necessary alterations to the fundamental treaties governing the EU, brought about by the Lisbon Treaty, were published at the end of March 2010 in the form of an updated *Treaty on European Union* (TEU), a newly named *Treaty on the Functioning of the European Union* (TFEU) (formerly the *Treaty Establishing the European Community*), together with *the Charter of Fundamental Rights of the European Union* (CFREU).

### The Treaty on European Union (TEU)

The text of the treaty is divided into six parts as follows, with reference to some of the most important specific provisions:

1 *Common provisions*

• Art 1 of this treaty makes it clear that ‘The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union (hereinafter referred to as “the Treaties”). Those two Treaties shall have the same legal value. *The Union shall replace and succeed the European Community*’ (emphasis added). This provision means that the previous confusion between when it was more appropriate to refer to EC rather than the EU has been removed and that it is now correct in all circumstances to refer to the EU. Art 47 provides further that the EU has legal personality, which means that the EU, as well as its constituent members, will be able to be a full member of the Council of Europe. As yet, the EU has not joined the Council, although an agreement to do so was established in July 2011.

• Art 2 establishes that the EU is ‘founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities’.

• Art 3 then states the aims of the EU in very general terms as follows:

• the promotion of peace, its values and the well-being of its peoples;

• the assurance of freedom of movement of persons without internal frontiers but with controlled external borders;

• the creation of an internal market … aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment;

• the establishment of an economic and monetary union whose currency is the euro;

• the promotion of its values, while contributing to the eradication of poverty and observing human rights and respecting the Charter of the United Nations;

• the sixth aim requires that the EU pursue its objectives by ‘appropriate means’.

• Art 6 binds the EU to the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights.

2 *Provisions on democratic principles*

• Art 9 establishes the equality of EU citizens and that every national of a Member state shall be a citizen of the Union. It makes clear that citizenship of the Union is *additional to* and does *not replace* national citizenship.

3 *Provisions on the institutions*

• Art 13 establishes the institutions in the following order and under the following names (excepting the ECB, these will be considered in detail):

• the European Parliament;

• the European Council;

• the Council;

• the European Commission;

• the Court of Justice of the European Union;

• the European Central Bank;

• the Court of Auditors.

• Art 15 establishes the President of the European Council.

• Arts 15(2) and 18 establish the High Representative of the Union for Foreign Affairs and Security Policy to conduct the Union’s common foreign and security policy.

4 *Provisions on enhanced co-operation*

• Art 20 allows a number of Member states to co-operate in furthering integration in a particular area where other members are blocking full integration.

5 *General provisions on the Union’s external action and specific provisions on the Common Foreign and Security Policy*

• Arts 21–46 relate to the establishment and operation of a common EU foreign policy including:

• compliance with the UN charter, promoting global trade, humanitarian support and global governance;

• establishment of the European External Action Service, which will function as the EU’s foreign ministry and diplomatic service;

• the furtherance of military co-operation including mutual defence.

6 *Final provisions*

• Art 47 establishes the legal personality of the EU.

• Art 48 deals with the method of treaty amendment; either through the ordinary or the simplified revision procedures.

• Arts 49 and 50 deal with applications to join the EU and withdrawal from it.

### The Treaty on the Functioning of the European Union (TFEU)

This document, going back through several iterations to the original Treaty of Rome, contains the detail of the structure and operation of the European Union.

Art 2 of this treaty provides that:

Box Start

When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member states being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.

Box End

Art 3 specifies that the Union shall have exclusive competence in the following areas:

a customs union;

b the establishing of the competition rules necessary for the functioning of the internal market;

c monetary policy for the Member states whose currency is the euro;

d the conservation of marine biological resources under the Common Fisheries Policy;

e common commercial policy.

Art 3 provides that the Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

### The Charter of Fundamental Rights of the European Union (CFREU)

The Charter contains 54 Articles, divided into seven titles. The first six titles deal with substantive rights relating to:

• *dignity* including the right to life and the prohibition of torture and inhuman or degrading treatment or punishment;

• *freedom* including the right to liberty and security of person, the right to engage in work and the freedom to conduct a business;

• *equality* including equality before the law, and the right not to be discriminated against;

• *solidarity*, which emphasises workers’ rights to fair working conditions, protection against unjustified dismissal, information and consultation within the undertaking, together with the right to engage in collective bargaining and to engage in industrial action;

• *citizens’ rights* including the right to vote and to stand as a candidate at elections; and finally

• *justice*, which includes the rights to a fair trial, the presumption of innocence and the right of defence.

The last title, Arts 51–54, deals with the interpretation and application of the Charter.

Many Member states, including the UK, negotiated opt-outs from some of the provisions of the Charter.

## 5.1.2 Parliamentary Sovereignty, European Union Law and the Courts

The doctrine of parliamentary sovereignty has already been considered with respect to the relationship between Parliament and the courts (see 2.3.2), and similar issues arise with regard to the relationship between EU law and domestic legislation. It has already been seen that the doctrine of parliamentary sovereignty is one of the cornerstones of the UK constitution. One aspect of the doctrine is that, as long as the appropriate procedures are followed, Parliament is free to make such law as it determines. The corollary of that is that no current Parliament can bind the discretion of a later Parliament to make law as it wishes. The role of the court, as also has been seen, is merely to interpret the law made by Parliament. Each of these constitutional principles is revealed as problematic in relation to the UK’s membership of the EU and the relationship of domestic and EU law.

Before the UK joined the EU, EU law was just as foreign as law made under any other jurisdiction. On joining the EU, however, the UK and its citizens accepted, and became subject to, EU law. This subjection to European law remains the case even where the parties to any transaction are themselves both UK subjects. In other words, in areas where it is applicable, European law supersedes any existing UK law to the contrary. The European Communities Act (ECA) 1972 gave legal effect to the UK’s membership of the EEC, and its subjection to all existing and future Community/Union law was expressly stated in s 2(1), which provides:

Box Start

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 UK* shall be recognised and available in law, and be enforced, allowed and followed accordingly (emphasis added).

Box End

Such statutory provision merely reflected the approach already adopted by the Court of Justice of the European Union (formerly the European Court of Justice):

Box Start

By contrast with ordinary international treaties, the EC Treaty has created its own legal system which … became an integral part of the legal systems of the Member states and which their courts are bound to apply (Costa v ENEL (1964)).

Box End

The impact of Community/Union law on, and its superiority to, domestic law was clearly stated by Lord Denning MR thus:

Box Start

If on close investigation it should appear that our legislation is deficient or is inconsistent with Community law by some oversight of our draftsmen then it is our bounden duty to give priority to Community law. Such is the result of s 2(1) and (4) of the European Communities Act 1972 (*Macarthys Ltd v Smith* (1979)).

Box End

*Thoburn v Sunderland CC* (2002) appeared a simple enough case, but it raised some fundamental constitutional issues. It concerned a Sunderland greengrocer who sold fruit only by imperial weight. He was given a conditional discharge after his conviction under an Order in Council implementing a European Directive. He appealed by way of case stated, arguing that the Weights and Measures Act 1985 took precedence over European law or Orders in Council. His appeal failed, but, in deciding the issue, Laws LJ rejected the argument that the overriding force of European law in the UK depends on its own principles as enunciated by the European Court in *Costa v ENEL*. Laws LJ stated that EU law could not entrench itself, because, when Parliament enacted the ECA in 1972, it could not and did not bind subsequent parliaments. The British Parliament, being sovereign, could not abandon its sovereignty, and there are no circumstances in which the jurisprudence of the Court of Justice could elevate Community law to a status within the corpus of English domestic law to which it could not aspire by any route of English law itself.

However, he went on, the traditional doctrine of parliamentary sovereignty has been modified by the common law, which has in recent years created classes of legislation that cannot be repealed by mere implication, that is, without express words to that effect. There now exists a clear hierarchy of Acts of Parliament – ‘ordinary’ statutes, which may be impliedly repealed, and ‘constitutional’ statutes, clearly including the ECA, which may not. The ECA is a constitutional statute and cannot be impliedly repealed, but that truth derives not from EU law but from the common law. In summary, the appropriate analysis of the relationship between EU and domestic law required regard to four propositions:

i Each specific right and obligation provided under EC/EU law was, by virtue of the 1972 Act, incorporated into domestic law and took precedence. Anything within domestic law which was inconsistent with EC/EU law was either abrogated or had to be modified so as to avoid inconsistency.

ii The common law recognised a category of constitutional statutes.

iii The 1972 Act was a constitutional statute which could not be impliedly repealed.

iv The fundamental legal basis of the UK’s relationship with the EU rested with domestic rather than European legal powers.

Thus did Laws LJ maintain balance between the supremacy of EU law in matters of substantive law, and the supremacy of the UK Parliament in establishing the legal framework within which EU law operates. Clause 18 of the European Union Bill 2010/11 provides a statutory confirmation of Laws’s reasoning.

An example of EU law invalidating the operation of UK legislation can be found in the *Factortame* cases. The Common Fisheries Policy established by the EEC had placed limits on the amount of fish that any member country’s fishing fleet was permitted to catch. In order to gain access to British fish stocks and quotas, Spanish fishing boat owners formed British companies and re-registered their boats as British. In order to prevent what it saw as an abuse and an encroachment on the rights of indigenous fishermen, the British government introduced the Merchant Shipping Act 1988, which provided that any fishing company seeking to register as British would have to have its principal place of business in the UK and at least 75 per cent of its shareholders would have to be British nationals. This effectively debarred the Spanish boats from taking up any of the British fishing quota. Some 95 Spanish boat owners applied to the British courts for judicial review of the Merchant Shipping Act 1988 on the basis that it was contrary to Community law.

The High Court decided to refer the question of the legality of the legislation to the ECJ under Art 267 of the Treaty on the Functioning of the European Union (TFEU) (formerly Art 234 and Art 177 of previous versions of the treaty (see 5.3.6)), but in the meantime granted interim relief in the form of an injunction disapplying the operation of the legislation to the fishermen. On appeal, the Court of Appeal removed the injunction, a decision that was confirmed by the House of Lords. However, the House of Lords referred the question of the relationship of Community law and contrary domestic law to the ECJ. Effectively, they were asking whether the domestic courts should follow the domestic law or Community law. The ECJ ruled that the Treaty of Rome required domestic courts to give effect to the directly enforceable provisions of Community law and, in doing so, such courts are required to ignore any national law that runs counter to Community law. The House of Lords then renewed the interim injunction. The ECJ later ruled that, in relation to the original referral from the High Court, the Merchant Shipping Act 1988 was contrary to Community law and therefore the Spanish fishing companies should be able to sue for compensation in the UK courts. The subsequent claims also went all the way to the House of Lords before it was finally settled in October 2000 that the UK was liable to pay compensation, which was estimated at between £50 million and £100 million.

The foregoing has demonstrated the way in which, and the extent to which, the fundamental constitutional principles of the UK are altered by its membership of the EU. Both the sovereign power of Parliament to legislate in any way it wishes and the role of the courts in interpreting and applying such legislation are now circumscribed by EU law. There remains one hypothetical question to consider and that relates to the power of Parliament to disapply legislation from the EU. While CJEU jurisprudence might not recognise such a power, it is certain that the UK Parliament retains such a power in UK law. If EU law receives its superiority as the expression of Parliament’s will in the form of s 2 of the European Communities Act, as suggested by Lord Denning in *Macarthys*, it would remain open to a later Parliament to remove that recognition by passing new legislation. Such a point was actually made by the former Master of the Rolls in his judgment in that very case:

Box Start

If the time should come when our Parliament deliberately passes an Act with the intention of repudiating the Treaty or any provision in it or intentionally of acting inconsistently with it and says so in express terms then I should have thought that it would be the duty of our courts to follow the statute of our Parliament.

Box End

Art 10 (formerly 5) requires:

Box Start

Member states to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community’s tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.

Box End

This Article effectively means that UK courts are now EU law courts and must be bound by, and give effect to, that law where it is operative. The reasons for the national courts acting in this manner were considered by John Temple Lang, Director in the Competition Directorate General, in an article entitled ‘Duties of national courts under Community constitutional law’ [1997] EL Rev 22. As he wrote:

Box Start

National courts are needed to give companies and individuals remedies which are as prompt, as complete and as immediate as the combined legal system of the Community and of Member states can provide. Only national courts can give injunctions against private parties for breach of Community law rules on, for example, equal pay for men and women, or on restrictive practices. Private parties have no standing to claim injunctions in the Court of Justice against a Member state; they can do so only in a national court. In other words, only a national court could give remedies to individuals and companies for breach of Community law which are as effective as the remedies for breach of national law.

Box End

### European Union Act 2011 and European Union (Withdrawal Agreement) Act 2020

In September 2011, Parliament passed the European Union Act 2011. The main purpose of the Act was to make provision for the application of the post-Lisbon treaties. However, the Act also amended the European Communities Act (ECA) 1972 to ensure that any proposed future EU treaty, or amendment to the treaties, which purported to transfer competences or areas of power from the UK to the EU would have to be subject to a domestic referendum. Section 18 of the Act, for the first time, placed the common law principle of parliamentary sovereignty on a statutory footing and stated that all EU law took effect in the UK only by virtue of the will of Parliament, as provided in the ECA 1972. Such measures were taken in an endeavour to provide clear statutory authority for the superiority of domestic law over EU law and to circumscribe any suggestion that EU law constituted a new higher autonomous legal order in its own right. It was suggested at the time that these measures were a sop to the Eurosceptic wing of the Conservative Party within the coalition government. It is perhaps worth considering that the eventual exit of the UK from the EU was not *directly* the result of any exercise of UK sovereignty, rather the European Union (Withdrawal Agreement) Act 2020was eventually passed by Parliament as a way to implement the agreement between the United Kingdom and the EU under Art 50(2) of the Treaty on European Union, which set out the arrangements for the United Kingdom’s withdrawal from the EU. So it is at least arguable that the ‘Brexit Act’ itself recognised the superiority of EU law – it certainly did not challenge it.

# 5.2 Sources of European Union Law

European Union law, depending on its nature and source, may have a direct effect on the domestic laws of its various members; that is, it may be open to individuals to rely on it without the need for their particular state to have enacted the law within its own legal system (see *Factortame*).

There are two types of direct effect. Vertical direct effect means that the individual can rely on EU law in any action in relation to their government, but cannot use it against other individuals. Horizontal direct effect allows the individual to use the EU provision in an action against other individuals. Other EU provisions only take effect when they have been specifically enacted within the various legal systems within the Union.

The sources of EU law are fourfold:

• internal treaties and protocols;

• international agreements;

• secondary legislation;

• decisions of the CJEU.

## 5.2.1 Internal Treaties

Internal treaties govern the Member states of the EU, and anything contained therein supersedes domestic legal provisions. Upon the UK joining the then Community, the Treaty of Rome was incorporated into UK law by the ECA 1972. Since that date the UK has been subject to the various iterations of the ruling treaties. As was considered previously, the ruling treaties are now:

• Treaty on European Union (TEU);

• Treaty on the Functioning of the European Union (TFEU);

• Charter of Fundamental Rights of the European Union.

As long as treaties are of a mandatory nature and are stated with sufficient clarity and precision, then they have both vertical and horizontal effect (*Van Gend en Loos* (1963)).

## 5.2.2 International Treaties

International treaties are negotiated with other nations by the European Commission on behalf of the EU as a whole and are binding on the individual members of the EU.

## 5.2.3 Secondary Legislation

Secondary legislation is provided for under Art 249 (formerly 189) of the Treaty of Rome. It provides for three types of legislation to be introduced by the European Council and Commission:

• *Regulations* apply to, and within, Member states generally, without the need for those states to pass their own legislation. They are binding and enforceable from the time of their creation and individual states do not have to pass any legislation to give effect to regulations. Thus, in *Macarthys Ltd v Smith* (1979), on a referral from the Court of Appeal to the ECJ, it was held that Art 157 (formerly 141) entitled the plaintiff to assert rights that were not available to her under national legislation, the Equal Pay Act 1970, that had been enacted before the UK had joined the EEC. Whereas the national legislation clearly did not include a comparison between former and present employees, Art 157’s reference to ‘equal pay for equal work’ did encompass such a situation. Smith was consequently entitled to receive a similar level of remuneration to that of the former male employee who had done her job previously. The horizontal direct effect of regulations was confirmed by the ECJ in *Munoz y Cia SA v Frumar Ltd* (2002), in which it was held that the claimant was entitled to bring a civil claim against the defendant for failure to comply with EU labelling regulations.
Regulations must be published in the *Official Journal* of the EU. The decision as to whether or not a law should be enacted in the form of a regulation is usually left to the Commission, but there are areas where the Treaty of Rome requires that the regulation form must be used. These areas relate to: the rights of workers to remain in Member states of which they are not nationals; the provision of state aid to particular indigenous undertakings or industries; and the regulation of EU accounts and budgetary procedures.

• *Directives*, on the other hand, state general goals and leave the precise implementation in the appropriate form to the individual Member states. Directives, however, tend to state the means as well as the ends to which they are aimed and the CJEU will give direct effect to directives that are sufficiently clear and complete (see *Van Duyn v Home Office* (1974)). Directives usually provide Member states with a time limit within which they are required to implement the provision within their own national laws. If they fail to do so, or implement the directive incompletely, then individuals may be able to cite and rely on the directive in their dealings with the state in question. Further, *Francovich v Italy* (1991) has established that individuals who have suffered as a consequence of a Member state’s failure to implement EU law may seek damages against that state.

• *Decisions* on the operation of European laws and policies are not intended to have general effect but are aimed at particular states or individuals. They have the force of law under Art 288 (formerly 249).

• Additionally, Art 17(1) TEU (formerly 211 TEC) provides scope for the Commission to issue *recommendations* and *opinions* in relation to the operation of EU law. These have no binding force, although they may be taken into account in trying to clarify any ambiguities in domestic law.

## 5.2.4 Judgments of the Court of Justice of the European Union

The CJEU is the judicial arm of the EU and, in the field of EU law, its judgments overrule those of national courts. Under Art 267 (formerly 234), national courts have the right to apply to the CJEU for a preliminary ruling on a point of EU law before deciding a case.

The mechanism through which EU law becomes immediately and directly effective in the UK is provided by s 2(1) of the ECA 1972. Section 2(2) gives power to designated ministers or departments to introduce Orders in Council to give effect to other non-directly effective EU law.

# 5.3 The Institutions of the European Union

The major institutions of the EU are: the Council of Ministers; the European Parliament; the European Commission; and the CJEU.

## 5.3.1 The European Council and the Council of the European Union

Understanding this section is complicated by the multiple uses of the words council and European. First of all it should be remembered that the European Union and its internal organisation are completely different from the *Council of Europe*, which is a human rights organisation consisting of those 47 countries across wider Europe that have signed up to the European Convention on Human Rights.

Then, as regards the EU a distinction has to be clearly drawn between the *Council of the European Union* and the *European Council*, which will be considered in turn below.

### The European Council

This institution of the European Union is made up of the heads of government of the Member states. It has a designated permanent president, at the moment the former Belgian Prime Minister Charles Michel, who is charged with organising the meeting of the council. The President of the Commission and the High Representative of the Union for Foreign Affairs and Security Policy also take part in its meetings.

Initially an informal body, the council was formalised as a distinct EU institution in 2009 under the Treaty of Lisbon. The European Council has no formal legislative power as such; rather, it is the strategic body that provides the union with general political directions and priorities. Its meetings take place at least twice every six months and are chaired by its president. Decisions are made on a consensus basis, except where the Treaties provide otherwise.



Sources of EU law

### The Council of the European Union (Council of Ministers)

This council is made up of ministerial representatives of each of the 27 Member states of the EU. The actual composition of the Council, in its ten different configurations, varies depending on the nature of the matter to be considered. When considering economic and financial matters (ECOFIN), the various states will be represented by their finance ministers or, if the matter before the Council relates to agriculture, the various agricultural ministers will attend.

The organisation of the various specialist councils falls to the President of the Council and that post is held for six-monthly periods in rotation by the individual Member states of the EU. The Presidency of the Council is significant to the extent that the country holding the position can, to a large extent, control the agenda of the Council and thus can focus EU attention on areas that it considers to be of particular importance. The Foreign Affairs Council, that is, the meeting of national foreign ministers, is chaired by the Union’s High Representative for Foreign Affairs and Security Policy, who is currently the Spanish politician Josep Borrell.

Historically, the Council of Ministers was the supreme decision-making body of the EU and, as such, it had the final say in deciding upon EU legislation. However, the current position is that, for the most part, both the Council and European Parliament pass legislation put before them by the EU Commission, through a process of ‘co-decision’. Although it normally acts on recommendations and proposals made to it by the Commission, the Council does have the power to instruct the Commission to undertake particular investigations and to submit detailed proposals for its consideration. In addition, under the citizens’ right of initiative introduced by the Treaty of Lisbon, a million citizens may sign a petition inviting the Commission to submit a proposal to the Commission.

Council decisions are taken on a mixture of voting procedures. Some measures only require a simple majority; in others, a procedure of qualified majority voting is used; and, in yet others, unanimity is required. Qualified majority voting is the procedure in which the votes of the 27 member countries are weighted in proportion to their population from 29 down to three votes each. The distribution of votes is:

|  |  |
| --- | --- |
| Germany, France, Italy (formerly UK) | 29 votes |
| Spain, Poland | 27 votes |
| Romania | 14 votes |
| Netherlands | 13 votes |
| Belgium, Czech Republic, Greece, Hungary, Portugal | 12 votes |
| Austria, Sweden, Bulgaria | 10 votes |
| Denmark, Croatia, Ireland, Lithuania, Slovakia, Finland | 7 votes |
| Cyprus, Estonia, Latvia, Luxembourg, Slovenia | 4 votes |
| Malta | 3 votes |

From 1 November 2014 a double majority voting system was adopted, meaning that the qualified majority is reached if a draft decision is supported by at least 55 per cent of the Member states (i.e. 15 Member states) representing at least 65 per cent of the EU population.

The use of qualified majority voting has been extended under various treaties, but unanimity is still required in what can be considered as the more politically sensitive areas, such as those relating to the harmonisation of indirect taxation or the free movement of individuals.

In addition to the need for unanimity in such sensitive areas, there is also the ultimate safeguard of what is known as the Luxembourg Compromise. This procedure, instituted at the behest of the French government in 1966, permits individual Member states to exercise a right of veto in relation to any proposals that they consider to be contrary to a ‘very important interest’ of theirs. It has been suggested that David Cameron considered using this procedure to prevent the appointment of Jean-Claude Junker to the presidency of the EU Commission in 2014, but, in the event, that ‘nuclear’ option was not deployed.

As the format of particular councils fluctuates, much of its day-to-day work is delegated to a Committee of Permanent Representatives, which operates under the title of COREPER.

## 5.3.2 The European Parliament

The European Parliament is the directly elected European institution and, to that extent, it can be seen as the body that exercises democratic control over the operation of the EU. As in national parliaments, members are elected to represent constituencies, the elections being held every five years.

The Treaty of Lisbon provides for a maximum number of 751 MEPs with a maximum possible allocation of 96 and a minimum allocation of six MEPs, depending on size of population. At the beginning of the 2019–24 session of the Parliament, there were 751 Members of Parliament divided among the then 28 Member states: Germany had 96 MEPs, France 74 and Italy and the United Kingdom 73 each. The smallest countries, such as Malta and Luxembourg, had six MEPs. On its exit from the EU the UK lost its representation but 27 of its former places were reallocated, to remedy perceived inequity in voting power, leaving the total membership at 705.

The European Parliament’s general secretariat is based in Luxembourg, and, although the Parliament sits in plenary session in Strasbourg for one week in each month, its detailed and preparatory work is carried out through 22 permanent committees, which usually meet in Brussels. These permanent committees consider proposals from the Commission and provide the full Parliament with reports of such proposals for discussion. The President of the Parliament is currently Italian, David Sassoli, who was elected in July 2019.

## 5.3.3 Powers of the European Parliament

Originally the powers of the European Parliament were merely advisory and supervisory but its powers have significantly increased since the early days of the EEC until now; following the Lisbon Treaty, it shares the EU legislative function with the Council through the process of co-decision-making, now referred to as ‘the ordinary legislative procedure’. In this way, the vast majority of European laws are adopted jointly and on an equal footing by the European Parliament and the Council. However, in the case of ‘special legislative procedures’, the Parliament still retains only a consultative role. Thus, in areas such as taxation, it can only provide an advisory opinion to the Council. If such consultation is obligatory the proposal cannot acquire the force of law unless the Parliament has delivered an opinion, but the Council is not required to accept the opinion proffered.

The powers of the European Parliament should not be confused, however, with those of national parliaments in terms of initiating legislation. While the Parliament can reject, amend or at its weakest advise on proposals for legislation, it cannot, itself, make such a proposal, being dependent on the Commission putting proposals before it before anything can become law. However, it does now have a similar power to that of the Council to request the Commission to submit particular proposals to the Council.

The European Parliament is, together with the Council of Ministers, the budgetary authority of the EU. The budget is drawn up by the Commission and is presented to both the Council and the Parliament. As regards what is known as ‘obligatory’ expenditure, the Council has the final say, but, in relation to ‘non-obligatory’ expenditure, the Parliament has the final decision whether to approve the budget or not. Such budgetary control places the Parliament in an extremely powerful position to influence EU policy, but perhaps the most draconian power the Parliament wields is the ability to pass a vote of censure against the Commission, requiring it to resign en masse.

The events of 1998/99 saw a significant shift in the relationship between the Parliament and the Commission. In December 1998, as a result of sustained accusations of mismanagement, fraud and cover-ups levelled against the Commission, the Parliament voted not to discharge the Commission’s accounts for 1996. Such action was, in effect, a declaration that the Community’s budget had not been properly handled and was tantamount to a vote of no confidence in the Commission. In January 1999, the Community’s Court of Auditors delivered what can only be described as a devastating report on fraud, waste, mismanagement and maladministration on the part of the Commission. It was found that the Commission had understated its financial obligations by £3.3 billion, and was so lax in its control that it had not even noticed that its banks were not paying any interest on huge amounts of money they were holding. The report of the Court of Auditors led to a vote of no confidence in the Commission in early January 1999 and, although the Commission survived the vote by a majority of 293 to 232, it had to accept the setting-up of a ‘committee of wise persons’ to investigate and report on its operation. At the time, the appointment of this committee was thought to be a diplomatic fudge, allowing the Commission to carry on under warning as to its future conduct. However, when the committee submitted its report, it was so damning that it was immediately obvious that the Parliament would certainly use its power to remove the Commission. To forestall this event, the Commission resigned en masse.

However, by the first week of July 1999, a new Commission had been proposed and gained the approval of the European Parliament later that month.

## 5.3.4 Economic and Social Committee

If the Parliament represents the directly elected arm of the EU, then the Economic and Social Committee represents a collection of unelected, but nonetheless influential, interest groups throughout the EU. This Committee is a consultative institution and its opinion must be sought prior to the adoption by the Council of any Commission proposal. The Economic and Social Committee represents the underlying ‘corporatist’ nature of the EU, to the extent that it seeks to locate and express a commonality of view and opinion on proposals from such divergent interest groups as employers, trade unions and consumers. It is perhaps symptomatic of the attitude of recent British governments to this underlying corporatist, essentially Christian Democratic, strand within the EU that it dispensed with its own similar internal grouping, the National Economic Development Council, in 1992.

## 5.3.5 The European Commission

The European Commission is the executive of the EU and, in that role, it is responsible for the administration of EU policies. As considered previously, it is also the prime initiator of EU legislation. There are 27 commissioners chosen from the Member states to serve for renewable terms of four years. Commissioners are appointed to head departments with specific responsibility for furthering particular areas of EU policy. Once appointed, commissioners are expected to act in the general interest of the EU as a whole rather than in the partial interest of their own home country. The current President of the Commission is the German politician Ursula von der Leyen.

As a result of the Treaty of Nice, the five largest countries gave up one of their appointees in order that each of the then 25 Member states would be able to nominate a commissioner. However, with further enlargement, it was intended that a system of rotation be implemented for the benefit of the smaller member countries, while preventing an increase in the number of commissioners to match the new membership. However, such a procedure had not yet been implemented when Croatia joined the European Union in 2013, so the Health and Consumer Protection portfolio was split to create a twenty-eighth portfolio.

In pursuit of EU policy, the Commission is responsible for ensuring that Treaty obligations between the Member states are met and that Union laws relating to individuals are enforced. In order to fulfil these functions, the Commission has been provided with extensive powers both in relation to the investigation of potential breaches of EU law and the subsequent punishment of offenders.

The classic area in which these powers can be seen in operation is competition law. Under Arts 101 and 102 (formerly Arts 81 and 82) of the TFEU, the Commission has substantial powers to investigate and control potential monopolies and anticompetitive behaviour, and it has used these powers to levy what, in the case of private individuals, would amount to huge fines where breaches of EU competition law have been discovered. In November 2001, the Commission imposed a record fine of £534 million on a cartel of 13 pharmaceutical companies that had operated a price-fixing scheme within the EU in relation to the market for vitamins. The highest individual fine was against the Swiss company Roche, which had to pay £288 million, while the German company BASF was fined £185 million. The lowest penalty levelled was against Aventis, which was only fined £3 million due to its agreement to provide the Commission with evidence as to the operation of the cartel. Otherwise its fine would have been £70 million. The Commission took two years to investigate the operation of what it classified as a highly organised cartel, holding regular meetings to collude on prices, exchange sales figures and co-ordinate price increases.

In the following month, December 2001, Roche was again fined a further £39 million for engaging in another cartel, this time in the citric acid market. The total fines imposed in this instance amounted to £140 million.

In 2012 the Commission imposed the biggest antitrust penalty in its history, fining six firms including Philips, LG Electronics and Panasonic a total of €1.47 billion (£1.32 billion) for running two cartels for nearly a decade.

The 2006 Fining Guidelines (http://ec.europa.eu/competition/antitrust/legislation/fines.html) give the Commission the power to increase fines by 100 per cent for repeat offending, even if the infringements took place long before the existence of the cartel in question. Saint-Gobain, the car glass manufacturer, had been the subject of previous Commission decisions relating to similar infringements in 1984 and 1988. In this instance, the Commission increased Saint-Gobain’s fine by 60 per cent for the earlier violations, but in March 2014 the General Court (see 5.3.6) announced its decision to reduce it, from €880 million to €715 million.

In 2004 the then EU Competition Commissioner, Mario Monti, levied an individual record fine of €497 million (£340 million) on Microsoft for abusing its dominant position in the PC operating systems market. In addition, the commissioner required Microsoft to disclose ‘complete and accurate’ interface documents to allow rival servers to operate with the Microsoft Windows system, or face penalties of €2 million (£1.4 million) for each day of non-compliance. In January 2006 Microsoft offered to make available part of its source code – the basic instructions for the Windows operating system. In an assertion of its complete compliance with Mario Monti’s decision, Microsoft insisted it had actually gone beyond the Commission’s remedy by opening up part of the source code behind Windows to rivals willing to pay a licence fee.

The offer, however, was dismissed by many as a public relations exercise. As a lawyer for Microsoft’s rivals explained, ‘Microsoft is offering to dump a huge load of source code on companies that have not asked for source code and cannot use it. Without a road map that says how to use the code, a software engineer will not be able to design inter-operable products.’

In February 2006 Microsoft repeated its claim that it had fully complied with the Commission’s requirements. It also announced that it wanted an oral hearing on the allegations before national competition authorities and senior EU officials, a proposal that many saw as merely a delaying tactic postponing the imposition of the threatened penalties until the court of first instance has heard the company’s appeal against the original allegation of abuse of its dominant position and, of course, the related €497 million fine. In July 2006, the Commission fined Microsoft an additional €280.5 million, €1.5 million per day from 16 December 2005 to 20 June 2006. On 17 September 2007, Microsoft lost its appeal and in October 2007, it announced that it would comply with the rulings.

However, in February 2008 Microsoft was fined an additional €899 million for failure to comply with the 2004 antitrust decision. In June 2012 Microsoft’s appeal was rejected by the General Court of the EU, although the total of the fine for non-compliance was reduced to €860. As a result, Microsoft was fined a total of €1.64 billion.

In May 2009 the Commission levied a new record individual fine against the American computer chip manufacturer Intel for abusing its dominance of the micro-chip market. Intel was accused of using discounts to squeeze its nearest rival, Advanced Micro Devices (AMD), out of the market. The amount of the fine was €1.06 billion (£950 million, or $1.45 billion). Intel’s subsequent appeal was rejected by the General Court in June 2014. The Court said that the fine amounted to 4.15 per cent of Intel’s annual revenue, less than half of the maximum 10 per cent fine that the Commission had the power to levy.

The Commission also acts, under instructions from the Council, as the negotiator between the EU and external countries.

In addition to these executive functions, the Commission has a vital part to play in the EU’s legislative process. The Council can only act on proposals put before it by the Commission. The Commission therefore has a duty to propose to the Council measures that will advance the achievement of the EU’s general policies.

## 5.3.6 The Court of Justice of the European Union

The CJEU is the judicial arm of the EU, and in the field of EU law its judgments overrule those of national courts. It consists of 27 judges, one from each Member state, assisted by 11 Advocates General, and sits in Luxembourg. The UK’s last representative, Christopher Vajda, had to resign on the UK’s leaving the EU. The Court may sit as a full court, in a Grand Chamber of 13 judges or in Chambers of three or five judges. The role of the Advocate General is to investigate the matter submitted to the Court and to produce a report, together with a recommendation, for the consideration of the Court. The actual Court is free to accept the report or not, as it sees fit.

The SEA 1986 provided for a new Court of First Instance to be attached to the existing Court of Justice. Under the Treaty of Lisbon it was renamed the General Court. It has jurisdiction in first instance cases, with appeals going to the CJEU on points of law. The former jurisdiction of the Court of First Instance, in relation to internal claims by EU employees, was transferred to a newly created European Union Civil Service Tribunal in 2004. Together the three distinct courts constitute *the Court of Justice of the European Union*. The aim of introducing the two latter courts was to reduce the burden of work on the CJEU, but there is a right of appeal, on points of law only, to the full CJEU.

The Court of Justice performs two key functions:

a It decides whether any measures adopted, or rights denied, by the Commission, Council or any national government are compatible with Treaty obligations. Such actions may be raised by any EU institution, government or individual. In October 2000, the Court of Justice annulled EU Directive 98/43, which required Member states to impose a ban on advertising and sponsorship relating to tobacco products, because it had been adopted on the basis of the wrong provisions of the EC Treaty. The Directive had been adopted on the basis of the provisions of the Treaty relating to the elimination of obstacles to the completion of the internal market, but the Court decided that under the circumstances, it was difficult to see how a ban on tobacco advertising or sponsorship could facilitate the trade in tobacco products.
Although a partial prohibition on particular types of advertising or sponsorship might legitimately come within the internal market provisions of the Treaty, the Directive was clearly aimed at protecting public health and it was therefore improper to base its adoption on the freedom to provide services (*Germany v European Parliament and EU Council* (Case C-376/98)).
A Member state may fail to comply with its Treaty obligations in a number of ways. It might fail or indeed refuse to comply with a provision of the Treaty or a regulation; alternatively, it might refuse to implement a directive within the allotted time provided for. Under such circumstances, the state in question will be brought before the CJEU, either by the Commission or another Member state, or indeed individuals within the state concerned.
In 1996, following the outbreak of ‘mad cow disease’ (BSE) in the UK, the European Commission imposed a ban on the export of UK beef. The ban was partially lifted in 1998 and, subject to conditions relating to the documentation of an animal’s history prior to slaughter, from 1 August 1999, exports satisfying those conditions were authorised for despatch within the Community. When the French Food Standards Agency continued to raise concerns about the safety of British beef, the Commission issued a protocol agreement, which declared that all meat and meat products from the UK would be distinctively marked as such. However, France continued in its refusal to lift the ban.
Subsequently, the Commission applied to the CJEU for a declaration that France was in breach of Community law for failing to lift the prohibition on the sale of correctly labelled British beef in French territory. In December 2001, in *Commission of the European Communities v France*, the CJEU held that the French government had failed to put forward a ground of defence capable of justifying the failure to implement the relevant Decisions and was therefore in breach of Community law.
France was also fined in July 2005 for breaching EU fishing rules. On that occasion the CJEU imposed the first ever ‘combination’ penalty, under which a lump-sum fine was payable, but in addition France is liable to a periodic penalty for every six months until it had shown it was fully complying with EU fisheries laws. The CJEU set the lump-sum fine at €20 million and the periodic penalty at €57.8 million.
The Court held that it was possible and appropriate to impose both types of penalty at the same time, in circumstances where the breach of obligations has both continued for a long period and is inclined to persist.

b It provides authoritative rulings, at the request of national courts, under Art 267 (formerly 234) of the TFEU, on the interpretation of points of EU law. When an application is made under Art 267, the national proceedings are suspended until such time as the determination of the point in question is delivered by the CJEU. While the case is being decided by the CJEU, the national court is expected to provide appropriate interim relief, even if this involves going against a domestic legal provision, as in the *Factortame* case.

This procedure can take the form of a preliminary ruling where the request precedes the actual determination of a case by the national court.

Art 267 provides that:

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The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

a the interpretation of treaties;

b the validity and interpretation of acts of the institutions of the Union and of the European Central Bank;

c the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member state, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member state against whose decision there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

Box End

The question as to the extent of the CJEU’s authority arose in *Arsenal Football Club plc v Reed* (2003), which dealt with the sale of football souvenirs and memorabilia bearing the names of the football club and consequently infringing its registered trademarks. On first hearing, the Chancery Division of the High Court referred the question of the interpretation of the Trade Marks Directive (89/104) in relation to the issue of trademark infringement to the CJEU. After the CJEU had made its decision, the case came before Laddie J for application, who declined to follow that decision. The grounds for so doing were that the ambit of the CJEU’s powers was clearly set out in Art 234. Consequently, where, as in this case, the CJEU makes a finding of fact that reverses the finding of a national court on those facts, it exceeds its jurisdiction and it follows that its decisions are not binding on the national court. The Court of Appeal later reversed Laddie J’s decision on the ground that the CJEU had not disregarded the conclusions of fact made at the original trial and, therefore, he should have followed its ruling and decided the case in Arsenal’s favour. Nonetheless, Laddie J’s general point as to the CJEU’s authority remains valid.

It is clear that it is for the national court and not the individual parties concerned to make the reference. Where the national court or tribunal is not the ‘final’ court or tribunal, the reference to the CJEU is discretionary. Where the national court or tribunal is the ‘final’ court, then reference is obligatory. However, there are circumstances under which a ‘final’ court need not make a reference under Art 267 (formerly 234). These are:

• where the question of EU law is not truly relevant to the decision to be made by the national court;

• where there has been a previous interpretation of the provision in question by the CJEU so that its meaning has been clearly determined;

• where the interpretation of the provision is so obvious as to leave no scope for any reasonable doubt as to its meaning.

This last instance has to be used with caution given the nature of EU law; for example, the fact that it is expressed in several languages using legal terms that might have different connotations within different jurisdictions. However, it is apparent that, where the meaning is clear, no reference need be made.

Mention has already been made to cases that have been referred under the Art 267 procedure. Thus, the first case to be referred to the CJEU from the High Court was *Van Duyn v Home Office* (1974), the first case to be referred from the Court of Appeal was *Macarthys Ltd v Smith* (1979), and the first from the House of Lords was *R v Henn* (1982).

### *MB v Secretary of State for Work and Pensions* [2016] UKSC 53

Since the implementation of the Gender Recognition Act (GRA) 2004, it has been possible for transgender individuals to apply to a Gender Recognition Panel for a Gender Recognition Certificate confirming that for all legal purposes they are to be recognised and treated in line with their acquired gender. However, when the GRA 2004 was passed a legally valid marriage could only subsist in law between a man and a woman (a position altered subsequently by the Marriage (Same Sex Couples) Act 2013)). For that reason, the GRA made specific provision for married applicants, whose change of legally recognised gender would have resulted in their being married to a person of the same gender as themselves. Thus as a result of this purely temporary legal incompatibility, although an unmarried person who satisfied the criteria for gender recognition was entitled to a full gender recognition certificate, a married person, even though they met the same criteria, would only be entitled to an interim gender recognition certificate, which did not give full legal recognition of their acquired gender status. The consequence of this concatenation of circumstances and laws was that transgender people in opposite-sex marriages formed before 2013 could not be awarded a full gender recognition certificate unless they annulled their weddings, a provision specifically facilitated by the GRA. As a result, a number of transgender people who were unwilling to annul their marriages for a variety of reasons, be it friendship, love or religion, were effectively locked into their birth gender with, for them, no acceptable way to obtain official recognition of their acquired gender and the rules that might apply as a consequence of that recognition. So much for English law, however Art 4 of Council Directive 79/7/EEC on the Progressive Implementation of the Principle of Equal Treatment for Men and Women in Matters of Social Security, including state benefits such old age and retirement pensions requires that there shall be ‘no discrimination whatsoever on ground of sex either directly, or indirectly by reference in particular to marital or family status …’

In *MB* a married transgender woman appealed to the Supreme Court against a decision by the social security tribunal that she would only be entitled to her state retirement pension at the age of 65, as if she were a man. Her case was that such a ruling was contrary to the directive and that is should take precedence over the UK law. The Supreme Court was divided on the question, and, in the absence of Court of Justice authority directly in point, it considered itself unable to resolve the appeal without a reference to the Court of Justice. The stark question formulated by the Supreme Court was:

Box Start

whether Council Directive 79/7 EEC precludes the imposition in national law of a requirement that, in addition to satisfying the physical, social and psychological criteria for recognising a change of gender, a person who has changed gender must also be unmarried in order to qualify for a state retirement pension.

Box End

The immediate point of examining *MB* is to demonstrate the way in which under currently prevailing circumstances a decision in favour of *MB* would eventually require the government to change the existing rule preventing the full recognition of the rights of all transgender people. However, it is not really possible to predict what the political circumstances may be in the future, or indeed which aspects of EU law will still be applicable in the UK (or England for that matter), but what can be said is that the current unsatisfactory and unnecessary situation need not have arisen and should have been remedied when the Marriage (Same Sex Couples) Act 2013)) was implemented.

Mention has also been made in Chapter 4of the methods of interpretation used by courts in relation to EU law. It will be recalled that, in undertaking such a task, a purposive and contextual approach is mainly adopted, as against the more restrictive methods of interpretation favoured in relation to UK domestic legislation. The clearest statement of this purposive, contextualist approach adopted by the CJEU is contained in its judgment in the *CILFIT* case:

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Every provision of EU law must be placed in its context and interpreted in the light of the provisions of EU law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.

Box End

It can be appreciated that the reservations considered previously in regard to judicial creativity and intervention in policy matters in the UK courts apply *a fortiori* to the decisions of the CJEU.

Another major difference between the CJEU and the courts within the English legal system is that the former is not bound by the doctrine of precedent in the same way as the latter is. It is always open to the CJEU to depart from its previous decisions where it considers it appropriate to do so. Although it will endeavour to maintain consistency, it has, on occasion, ignored its own previous decisions, as in *European Parliament v Council* (1990), where it recognised the right of the Parliament to institute an action against the Council.

The manner in which EU law operates to control sex discrimination through the Equal Treatment Directive is of significant interest and, in *Marshall v Southampton and West Hampshire Area Health Authority* (1993), a number of points were highlighted. Ms Marshall had originally been required to retire earlier than a man in her situation would have been required to do. She successfully argued before the CJEU that such a practice was discriminatory and contrary to Community Directive 76/207 on the equal treatment of men and women.

The action related to the level of compensation she was entitled to as a consequence of this breach. UK legislation, the Sex Discrimination Act 1975, had set limits on the level of compensation that could be recovered for acts of sex discrimination. Marshall argued that the imposition of such limits was contrary to the Equal Treatment Directive and that, in establishing such limits, the UK had failed to comply with the Directive.

The Court of Appeal referred the case to the ECJ, as it then was, under Art 267 (formerly 234) and the latter determined that the rights set out in relation to compensation under Art 5 of the Directive were directly effective, and that, as the purpose of the Directive was to give effect to the principle of equal treatment, that could only be achieved by either reinstatement or the awarding of adequate compensation. The decision of the ECJ therefore overruled the financial limitations placed on sex discrimination awards and effectively overruled the domestic legislation.

*P v S and Cornwall CC* (1996) extended the ambit of unlawful sex discrimination under the Directive to cover people who have undergone surgical gender reorientation (sex change). However, in *Grant v South West Trains Ltd* (1998), the ECJ declined to extend the Directive to cover discrimination on the grounds of sexual orientation (homosexuality), even though the Advocate General had initially supported the extension of the Directive to same-sex relationships. While *Grant* was in the process of being decided in the ECJ, a second case, *R v Secretary of State for Defence ex p Perkins (No 2*) (1998), had been brought before the English courts arguing a similar point, that discrimination on grounds of sexual orientation was covered by the Equal Treatment Directive. Initially, the High Court had referred the matter, under Art 267 (formerly 234), to the ECJ for decision, but on the decision in *Grant* being declared, the referral was withdrawn. In withdrawing the reference, Lightman J considered the proposition of counsel for Perkins to the effect that:

Box Start

… there have been a number of occasions where the ECJ has overruled its previous decisions; that the law is not static; and, accordingly, in a dynamic and developing field such as discrimination in employment there must be a prospect that a differently constituted ECJ may depart from the decision in *Grant* … But, to justify a reference, the possibility that the ECJ will depart from its previous decision must be more than theoretical: it must be a realistic possibility. The decision in *Grant* was of the full Court; it is only some four months old; there has been no development in case law or otherwise since the decision which can give cause for the ECJ reconsidering that decision … I can see no realistic prospect of any change of mind on the part of the ECJ.

Box End

It could be pointed out that there could be no change in case law if judges such as Lightman J refused to send similar cases to the CJEU, but there may well be sense, if not virtue, in his refusal to refer similar cases to the court within such a short timescale.

## 5.3.7 The Court of Auditors

Given the part that the Court of Auditors played in the 1998/99 struggle between the Parliament and the Commission, the role of this body should not be underestimated.

As its name suggests, it is responsible for providing an external audit of the EU’s finances. It examines the legality, regularity and soundness of the management of all the EU’s revenue and expenditure.