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Chapter 2

Sources of EU law

2.1. Primary law

In the EU law terminology, it is commonplace to distinguish ‘primary’ and ‘secondary’ EU law. Primary EU law originates directly from the Member States as the ‘constituent authority’ of the EU’s legal order.\textsuperscript{16} Thus, this term covers the founding Treaties of the European Union,\textsuperscript{17} namely the Treaty on the European Union (‘TEU’)\textsuperscript{18} and the Treaty on the Functioning of the European Union (‘TFEU’ or ‘Treaty’)\textsuperscript{19} (hereinafter jointly also referred to


\textsuperscript{17} Before the entry into force of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon on 13 December 2007, which entered into force on 1 December 2009 (‘Lisbon Treaty’), the term ‘European Union’ was used to designate the three pillar structure consisting of the European Community, the Common Foreign and Security Policy and the Justice and Home Affairs (after the amendments introduced by the Treaty of Amsterdam the latter was called Police and Judicial Cooperation on Criminal Matters). The legal instruments adopted by the institutions under the various pillars were different. The term ‘Community law’ designated only the sources of law which were employed in the first pillar and which had primacy over the national laws of the Member States and was capable of having direct effect. By means of the Lisbon Treaty, the European Union and the European Community were merged into a single organization, the European Union, which replaced and succeeded the European Community. The former third pillar, i.e. matters connected to police and judicial cooperation in criminal matters, became subject to the procedures and instruments of a supranational nature. With regard to the former second pillar, i.e. Common Foreign and Security Policy, there are derogating provisions in the TEU and these matters remain to be governed through intergovernmental procedures. Besides the European Union, the European Community for Atomic Energy – one of the three original communities that constituted the first pillar besides the European (Economic) Community and the European Coal and Steel Community (the latter was dissolved on 23 July 2002 due to the expiry of its founding Treaty) – continues to exist. See on this D. Chalmers, G. Davis and G. Monti, \textit{European Union Law}, Second Edition (Cambridge University Press, 2010), pp. 23-26, 38-50; P. Craig and P. De Bûrca, \textit{EU Law, Text, Cases and Materials}, Fourth Edition (Oxford University Press 2008), pp. 14-18; Kapteyn and VerLoren van Themaat, \textit{The Law of the European Union and the European Communities}, Fourth Revised Edition (Kluwer Law International, 2008), pp. 30-34, 42-44.

\textsuperscript{18} The original founding Treaty was the Treaty on European Union signed at Maastricht on 10 December 1991 entered into force on 1 November 1993 (‘Maastricht Treaty’). This has been amended several times last by the Lisbon Treaty. For a consolidated version, see Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (OJ C83, 30.03.2010).

\textsuperscript{19} The Lisbon Treaty renamed this Treaty. The original founding Treaty was the Treaty establishing the European Economic Community, signed at Rome on 25 March
as the ‘Treaties’ or the ‘founding Treaties’). These two Treaties are the most important sources of EU primary law and they have the same legal value.\(^{20}\)

The Charter of Fundamental Rights of the European Union\(^ {21}\) (hereinafter also referred to as ‘Charter’) albeit not incorporated in the text of the Treaties has the same legal value as the Treaties as expressly confirmed by Article 6(1) first subparagraph TEU.\(^ {22}\) Consequently, the Charter also forms part of primary EU Law. The Treaty establishing the European Atomic Energy Community\(^ {23}\) is the founding treaty of one of the three original Communities, which, not having been repealed by the Lisbon Treaty, is still in force and constitutes primary EU law. Furthermore, the treaties amending and supplementing the founding Treaties also qualify as primary EU law.\(^ {24}\)

Primary law also extends to the provisions agreed upon by the Member States and the states acceding to the European Union, i.e. the Accession Treaties and the Acts of Accession.\(^ {25}\)

The concept of primary law, as described above, is also used by the Court of Justice (hereinafter: the ‘CJ’ or the ‘Court’) and the General Court (hereinafter: the ‘GC’ or the ‘General Court’).\(^ {26}\) The General Court defined the notion of primary law in Dubois (with regard to the Treaty texts which were in force at the time of the case):

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20. Article 1 third subparagraph TEU.


22. Declaration No. 1. annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon reiterates that the Charter of Fundamental Rights of the European Union has legally binding force.


primary Community law consists of the Treaties establishing the European Coal and Steel Community, the European Community and the European Atomic Energy Community, and the agreements which supplemented or amended those Treaties, such as the Convention on certain institutions common to the European Communities, the treaties concerning the accession of new Member States, the Single Act and the Treaty on European Union. Those treaties [...] are agreements concluded between the Member States in order to establish or modify the European Communities.”

In addition, “protocols annexed to [the Treaties] by common accord of the Member States”, which form “an integral part thereof” also belong to the category of primary law. Finally, primary law also includes the general principles of EU law, which are referred to in Article 6(3) TEU. Inasmuch as they are derived from the constitutional traditions common to the Member States or international agreements to which the Member States are signatories they originate, essentially, from the Member States similar to other forms of primary EU law. The Court declared as early as at the beginning of the seventies that it protects the general principles of law, of which fundamental rights form part, as an integral part of EU law. Thus, fundamental rights may qualify as primary law either on account of being stipulated in the Charter of Fundamental Rights or being general principles of EU law.
2.2. Secondary law

2.2.1. Acts of the institutions

In contrast to primary law, acts adopted by the EU institutions are normally called ‘secondary’ (or ‘derived’) EU law, as the power to adopt these acts is derived from and based on primary EU law, in particular, the legal basis provisions included in the founding Treaties.

The basic typology of secondary EU law is set out in Article 288 TFEU. According to the first subparagraph of this provision "[t]o exercise the Union’s competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions." Strictly speaking, recommendations and opinions are not legal acts resulting in enforceable obligations on third parties, as they do not have binding force. Therefore, they rather fall under the umbrella of ‘soft law’. The list of legal instruments included in Article 288 TFEU is far from being complete, as there are many other forms of acts that the EU institutions and bodies use to carry out their tasks and competences.\(^\text{33}\)

2.2.2. International agreements

Amongst the instruments not listed in Article 288 TFEU, are norms that can be classified as secondary EU law because they are binding and they have a legal basis in the Treaties although in a provision other than Article 288. For example, international agreements concluded by the EU are provided for in Article 216 TFEU. Pursuant to Article 216(2) TFEU they are binding upon the institutions of the Union and the Member States. Formally, due to the fact that they are concluded by the Union or, by the Union too, and they find their legal basis in primary law, they can be regarded as secondary law.\(^\text{34}\) However, as will be discussed below, in a substantive sense, international agreements prevail over other (internal) acts of the Union institutions. At the same time, they are superseded by primary Union law. Therefore, in effect, they are an intermediate category between primary and secondary law. The Court held that for the purposes of what is now Article 267 TFEU,


\(^{34}\text{Chalmers, Davies and Monti, supra note 17, p. 98.}\)
international agreements concluded by the EU – either by itself or with the Member States – qualify as acts of the institutions of the Union thus, the Court has jurisdiction to give interpretation to them under the preliminary ruling procedure.  

2.2.3. Inter-institutional agreements

Furthermore, inter-institutional agreements are normally also considered as a form of secondary law. The Lisbon Treaty has introduced an express legal basis in Article 295 TFEU for the European Parliament, the Council and the Commission to conclude such agreements. These three institutions may make use of such agreements “to make arrangements for their cooperation”. For instance, they may clarify or detail the implementation of procedures laid down in the Treaties without actually amending the Treaties or changing the institutional balance envisaged in the Treaties. This condition is expressed by the requirement in Article 295 TFEU that the agreements be “in compliance with the Treaties”. It is noteworthy that before the codification by the TFEU of a general legal basis for the conclusion of inter-institutional agreements it was rather common practice to enter into such agreements also by institutions and bodies other than the Parliament,


36. This provision is not in the same Section as Article 288. The latter is in Chapter 2, Section 1 of the TFEU entitled “Legal acts of the Union” while Article 295 is placed in Section 2 of the same chapter entitled “Procedures for the adoption of acts and other provisions”. This indicates that inter-institutional agreements are not real legal acts that can produce legal effects in relations extraneous to the institutions that are party to the agreement. Therefore, they are described as “ancillary legal mechanism to be used in the specific context of the inter-institutional decision-making procedures”, see De Witte, supra note 33, p. 102.

37. Lenaerts and Van Nuffel point to a Declaration No.3 annexed to the Treaty of Nice (Lenaerts and Van Nuffel, supra note 16, p. 791, note 666) which goes further than this stating that “[inter-institutional] agreements may not amend or supplement the provisions of the Treaty”. While amending Treaty provisions is definitely not “in compliance” with the Treaties, supplementing them may be considered so especially when the inter-institutional agreement is intended to lay down detailed rules which are necessary for the efficient operation of inter-institutional procedures. This raises the question whether the new provision of the TFEU allows a larger scope for the institutions to supplement the Treaty provisions or the requirement of being “in compliance” excludes it as was the case under Declaration No. 3 to the Treaty of Nice. In the light of this Declaration, a further question is whether or not Article 295 TFEU maintains the requirement that was expressly provided for in the Declaration, i.e. inter-institutional agreements “may be concluded only with the agreement of these three institutions”. The expression “by common agreement” in Article 295 suggests that the participation of all three institutions is a continued condition for entering into inter-institutional agreements.
the Council and the Commission. In addition, agreements were concluded for purposes other than managing cooperation between the institutions. In view of Article 295 TFEU, the question arises whether inter-institutional agreements between other bodies and on different matters than those included in Article 295 are now outlawed by the latter provision.

As to the effects of inter-institutional agreements, Article 295 TFEU merely states that they may be of a binding nature. Accordingly, the legal force of an inter-institutional agreement may depend on whether the institutions intended it to be binding, an indicator of which is the title chosen for the agreement e.g. declaration, code of conduct or agreement (agreement indicating a higher degree of binding force). When it can be inferred that the institutions only intended to coordinate their positions in an agreement before the adoption of a binding act, the agreement will not have binding force. As long as they do not have binding force they fall within the heterogeneous category of “soft law”.

2.2.4. Legal instruments for the former second pillar

With the reform brought about by the Lisbon Treaty the separate legal instruments that existed for the EU’s second and third pillar have disappeared. In this sense, a certain degree of simplification of the legal acts occurred. The matters that had previously fallen within the third pillar, i.e. Police and Judicial Cooperation in Criminal Matters, are now fully subject to the uniform instruments listed in Article 288 TFEU. As far as the former second pillar, the Common Foreign and Security Policy (CFSP), is concerned, specific provisions govern it under the TEU. Article 24(1) second subparagraph TEU excludes the adoption of legislative acts in the field of CFSP. Legislative acts, as will be explained below, are those adopted through the

38. For examples of agreements between other agencies and bodies, such as the ECB and Europol, see Lenaerts and Van Nuffel, supra note 16, p. 791, FN 664.
39. Several types and forms of these agreements are mentioned by Lenaerts and Van Nuffel, such as Joint Declarations and Agreements between the institutions regarding various legislative procedures, the budgetary procedure, financing, joint declarations on fundamental rights and democratic principles, agreements on various aspects of Community legislation, see Lenaerts and Van Nuffel, supra note 16, p. 790, FN 661, 662.
40. Ibid. p. 791.
41. Ibid.
42. For the second pillar they were ‘joint actions’, ‘common positions’ and ‘decisions’, whereas for the third pillar they were ‘framework decisions’, ‘decisions’, ‘common positions’ and ‘conventions’.
43. Title V, Chapter 2 of the TEU.
ordinary or special legislative procedures defined under the TFEU. This means that for the adoption of legal acts concerning the CFSP, the normal legislative procedures do not apply. Instead, specific rules determine the institutions which have competence regarding the CFSP and the procedures and instruments through which they exercise their competence. As regards the instruments, Article 25(b) TEU lays down that the competent institutions, i.e. the European Council and the Council, “adopt decisions defining (i) actions to be undertaken by the Union; (ii) positions to be taken by the Union; (iii) arrangements for the implementation of the decisions referred to in points (i) and (ii)” within the ambit of the CFSP. De Witte points out that it is not clear from the text and structure of the Treaties whether or not this ‘decision’ is the same as the standard ‘decision’ which is defined in Article 288 TFEU. He adds that if the CFSP decision corresponds to the Article 288 decision it would entail that a legal instrument which is capable of producing direct effect has been brought to the field of CFSP, which could hardly have been the intention of the drafters of the Lisbon Treaty.\(^44\)

In addition to the acts mentioned above, the complete catalogue of EU legal instruments includes a large number of atypical instruments (actes atypique) which are not formally defined in the Treaties and are often adopted without an authorization set forth in the Treaties. When considering the legality of these instruments, regard has to be had to the wording of the first subparagraph of Article 288 TFEU, “[t]o exercise the Union’s competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions”. This formulation suggests that the list of secondary law instruments set out in this provision is exhaustive. However, this is contradicted by the third subparagraph of Article 296 TFEU which provides that “[w]hen considering draft legislative acts, the European Parliament and the Council shall refrain from adopting acts not provided for by the relevant legislative procedure in the area in question.” Although the meaning of this provision is far from clear, commentators interpret it as a limited prohibition for the adoption of atypical acts.\(^45\) Specifically, it excludes the adoption of non-standard instruments only if they would qualify as legislative acts, that is, if they are to be adopted by a formalised legislative procedure. Therefore, the Council and the Commission can still adopt atypical acts when exercising implementing powers, or the Commission when exercising delegated

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\(^44\) De Witte, supra note 33, p. 90.
powers subject to the conditions of delegation. Furthermore, nothing under the Treaties seems to exclude the adoption of non-standard, non-binding soft law instruments by any of the institutions or other bodies or agencies. In the light of this, the category of atypical instruments includes soft law measures as well as binding acts, such as the ‘sui generis’ decision.\(^\text{46}\)

### 2.2.5. ‘Sui generis’ decisions

As to the ‘sui generis’ decision, commentators point out that before the changes introduced by the Lisbon Treaty, these were instruments that were distinguishable from the standard decisions included in the nomenclature of legal acts under the then Article 249 EC Treaty (now Article 288 TFEU).\(^\text{47}\)

While under the former system standard decisions were understood to be individual administrative acts, ‘sui generis’ decisions were employed as general legislative or executive measures. In particular, certain decisions of an organic nature took the form of ‘sui generis’ decisions, such as the Comitology Decisions\(^\text{48}\) and the Decision establishing the General Court\(^\text{49}\) (then called the Court of First Instance). They were also used to approve international agreements and to lay down institutional arrangements for internal organizational matters e.g. rules of procedure or rules setting up a body or committee.\(^\text{50}\) ‘Sui generis’ decisions seem to have been codified by the Lisbon Treaty and as a result, no longer qualify as atypical acts. The new type of decision mentioned in Article 288 TFEU encompasses both the previous standard decision (act of individual application) and ‘sui generis’ decision (act of general application).\(^\text{51}\)

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\(^{46}\) De Witte, supra note 33, p. 81.

\(^{47}\) Whereas in English, no separate terms exist to distinguish the two types of decisions, in German and Dutch the terms used for ‘sui generis’ decisions were ‘Beschluss’ and ‘besluit’ respectively in contrast to the standard decision under ex Article 249 EC Treaty which were called ‘Entscheidung’ and ‘beschikking’, see Lenaerts and Van Nuffel, supra note 16, p. 784; De Witte, supra note 33, p. 95.


\(^{50}\) Lenaerts and Van Nuffel, supra note 16, p. 784.

\(^{51}\) De Witte, supra note 33, p. 95.
binding only on them.”

This implies that a decision which does not specify any addressee is of a general nature. Consequently, a ‘decision’ is no longer a homogeneous act of individual nature but may also be a form for general legislative or executive acts.

2.3. Soft law

Other atypical acts adopted by the institutions, such as resolutions, conclusions, communications, action plans, notices, guidelines and codes of conduct, do not have binding force. They belong to the multitude of ‘soft law’ instruments that forms part of the European legal order. The classic definition describes soft law as “[r]ules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects”. Gribnau mentions three core elements of this definition, namely (i) rules of conduct or commitment, (ii) no legally binding force, and (iii) practical impact on behaviour. The two latter elements indicate a tension between the aim and the effect of these instruments. Although they do not intend to produce formal, legally enforceable obligations they do have an effect inasmuch as they influence the behaviour of the subjects to a certain direction.

The growing importance of soft law instruments in the EU’s legal system is connected to the strive to shift to new forms of governance, in which horizontal relationships, networks and involvement of stakeholders replace hierarchy, strict normative order and centralised top-down lawmaking and administration. The proliferation of non-binding rules in the EU can also be explained by the fact that in technologically complex policy areas, norms enacted by expert committees, special bodies and entities possessing highly technical knowledge necessary for efficient regulation increasingly replace

52. The wording of Article 249 EC Treaty was different: “A decision shall be binding in its entirety upon those to whom it is addressed.”
54. Gribnau, supra note 53, p. 75.
formal EU regulatory instruments. Depending on the policy area in which they are applied and the context (i.e. sufficient support by hard law instruments), soft law instruments may be an effective tool of achieving various objectives of EU policies; therefore, they are rightly designated as a distinct source of EU law.

As to their effects, apart from voluntary compliance certain forms of soft law under certain circumstances do entail legal consequences enforceable before the courts. With regard to recommendations, a type of soft law instrument that is formally recognized under Article 288 TFEU, the CJ held in *Grimaldi* that “the [Recommendation] in question cannot [...] be regarded as having no legal effect. The national courts are bound to take recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions”. Although the breach of soft law provisions by the institution enacting it or by a Member State may not result in damages claims, as the violated provision does not have binding effect on anyone, in certain circumstances soft law instruments may create legitimate expectations in individuals as to a certain conduct or response by the EU institution and drive them to undertake certain actions. If those legitimate expectations are disappointed, individuals and undertakings may claim damages on the basis of breach of the legitimate expectations which is a general principle of EU law. Legitimate expectations may also be relied on in the relationship between the Member States and the EU institutions.

The fact that soft law instruments do have indirect legal effect explains that the review of their legality by the CJ is not excluded merely on account of their non-binding nature. Another reason is that a measure which is adopted in the form of soft law may nevertheless impose, in substance, legal obligations on its subjects. The Court therefore looks at the intended effect and the content of a measure instead of its form or nature when it determines whether an action for annulment is available against the measure.

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58. ECJ, 13 December 1989, Case C-322/88 *Salvatore Grimaldi v Fonds des maladies professionnelles*, para. 18., ECJ, 11 September 2003, Case C-207/01 *Altair Chimica SpA v ENEL Distribuzione SpA*, para. 41.
59. Sarmiento, supra note 57, p. 61; Lenaerts and Van Nuffel, supra note 16, p. 783 cases referred to in FN 625.
60. Lenaerts and Van Nuffel, supra note 16, p. 783, cases referred to in FN 626.
Various authors categorise EU soft law instruments in different ways. According to their purpose, Chalmers distinguishes ‘commitments about the conduct of institutions’ (e.g. detailed rules of the legislative procedures), ‘commitments to respect certain values’ (e.g. on fundamental rights), ‘programming legislation’ (e.g. Action Plans), ‘regulatory communications’ (e.g. in competition and nuclear energy), ‘model law-making’ (e.g. areas where harmonization is excluded or hard to achieve). Gribnau following a similar classification on the basis of the function and objective of the measures brings examples from the taxation field for ‘preparatory and informative instruments’ (e.g. the Ruding Report), ‘interpretative and decisional instruments’ (e.g. Commission’s Notice on the application of the State aid rules to measures relating to direct business taxation) and ‘steering instruments’ (e.g. Code of Conduct for Business Taxation). On the basis of the scope of the effects entailed by a provision Sarmiento differentiates between internal soft law (internal organizational rules) and external soft law (rules with effect on third parties). Only the latter may create legitimate expectations the infringement of which may lead to liability to damages on the side of the institutions. Another categorization is unilateral, bilateral and multilateral soft law.

Frequently mentioned amongst the advantages of soft law instruments is that they are flexible, they can easily be adapted to changing circumstances without the formalities of amending legislation, they may enhance public consultation and civil involvement in the decision-making process, thus they may result in better legitimisation than hard rules, they are capable of accommodating diversities among the Member States without enforcing a uniform treatment. On the other hand, they may lack clarity and precision, they can result in rule-making without accountability and rules escaping

62. Chalmers, Davies and Monti, supra note 17, p. 102.
66. Gribnau, supra note 53, pp. 80-86.
67. Sarmiento, supra note 57, p. 56-57.
68. Ibid.
69. Sarmiento, supra note 57, pp. 54-55.
70. Gribnau, supra note 53, pp. 86-94.
judicial control, they may lead to the hidden expansion of Union competences, they may set lower standards of conduct than desirable, or they may simply be ineffective.\textsuperscript{71}

\subsection*{2.4. Case law}

Finally, the case law of the Court of Justice and of the General Court should be mentioned amongst the sources of EU law.\textsuperscript{72} In legal doctrine it is a commonly held view that the Union Courts do not follow the doctrine of precedent and thus, their judgments do not have the value of precedent in the formal sense of the term as used in common law jurisdictions. The doctrine of precedent has a meaning going beyond the basic principle that the courts need to be consistent, as it includes the notion of binding nature of judicial decisions.\textsuperscript{73} The Union Courts are, in principle, not bound by their former decisions; therefore, it is difficult to qualify the case law as a formal source of Union law. Nevertheless, the Courts do endeavour to closely follow their previous decisions or, at least, create the impression that they do so,\textsuperscript{74} and – apart from formal legislation – they rely only on their previous judgments when deciding a case. In this sense, the case law plays a major justificatory role.\textsuperscript{75} This not only confers very high authoritative value on the Courts’ judgments but it also brings them close to being binding on the Courts themselves. In addition, beyond the fact that the interpretation that the Courts give to primary and secondary EU law determines the scope and meaning of the provisions of those laws and thereby, crucially influences the way as EU law is applied and implemented, the Court through its dominantly teleological and frequently creative interpretation method undeniably engages in real rulemaking. Therefore, in practice, the Courts’ task cannot be described as being limited to merely interpreting and applying the other sources of law. This entails that the case law of the Court should, in fact, be

\textsuperscript{71} Chalmers, Davies and Monti, supra note 17, p. 103. For an extensive analysis of soft law see L. Seden, \textit{Soft Law in European Community Law} (Hart Publishing 2004).


\textsuperscript{74} Arnall describes various tendencies in the Courts’ practice, such as obscuring the status of previous decisions, relying on previous decisions to support different conclusions from those they had seemed to suggest, rarely distinguishing previous cases and almost never expressly overruling its own decisions, see Arnall, supra note 73.

considered as a source of EU law. Whether the case law qualifies as primary law or secondary law depends on the classification of the underlying norm that is interpreted by the case law concerned.76