

Introduction to the legislative processes for European Union directives and regulations on financial services matters

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Preface

European Union (EU) legislation is of paramount importance to the financial services industries of the Member States of the EU and to others who participate in EU financial markets. Indeed, it is no exaggeration to state that the majority of all policy making regarding the regulation of banks, insurance companies, investment services firms and a wide range of other financial institutions, financial market activities and financial market infrastructure in the EU is now made at EU level.

It is therefore essential for those advising financial institutions to have a good working knowledge of the processes by which EU legislation is made that affects those institutions, activities and market infrastructure.

We have prepared this introductory guide to assist those who wish to gain this knowledge, and as a reference source to those who wish to be reminded of the processes concerned.

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A. Introduction

1. THE GOVERNING TREATIES

- 1.1 The various treaties that have been negotiated and ratified by the Member States of the European Union constitute the EU's primary legislation. The treaties therefore define the procedures for making and implementing EU law as well as the powers and responsibilities of the various institutions involved in the process.
- 1.2 Certain treaty provisions have direct effect, that is, they confer rights and impose obligations which Member States and their courts are bound to recognise and enforce¹.
- 1.3 Following the Treaty of Lisbon, which entered into force on 1 December 2009, the two main treaties (collectively, the "**Treaties**") governing the EU legislative process are:
 - (A) the Treaty on the Functioning of the European Union ("**TFEU**"); and
 - (B) the Treaty on the European Union ("**TEU**").
- 1.4 The TFEU replaces the founding treaty of the European Economic Community which established a Commission, a Council of Ministers, a European Parliament and a European Court of Justice.
- 1.5 The TEU introduced a new model for the European Community based around three 'pillars', covering economic relations, a common foreign and security policy, and justice and home affairs.
- 1.6 The TEU also gave the European Parliament greater influence in decision-making through the "co-decision procedure" (what is now the "ordinary legislative procedure").

2. THE KEY INSTITUTIONS

- 2.1 The three most important EU institutions involved in the EU legislative process are:
 - (A) the European Commission (the "**Commission**");
 - (B) the Council of the European Union (the "**Council**"); and
 - (C) the European Parliament.
- 2.2 **Annex 3** contains a short summary of the principal EU institutions.

The Commission

- 2.3 The **Commission** represents the interests of the EU as a whole and is composed of one Commissioner from each Member State². Each Commissioner is assigned responsibility for specific policy areas by the President. The Commission's President is nominated by the European Council and the Council also appoints the other Commissioners in agreement with the nominated President³.
- 2.4 The appointment of all Commissioners, including the President, is subject to the approval of the European Parliament⁴. Decisions are taken by the Commission by a majority of the total number of members⁵. Therefore, 15 of the 28 members must vote in favour of a proposal for it to be adopted.
- 2.5 The Commission has the right of legislative initiative, meaning that all legislative decisions taken by the Council and Parliament are based on a proposal from the Commission.
- 2.6 The Commission is the 'guardian of the Treaties', responsible for monitoring the application of Treaty provisions and legislation such as Directives. The Commission is also the body responsible for enacting technical standards proposed to it in draft by the European Supervisory Authorities (for more on this point, see section E, *infra*).

The Council

- 2.7 The **Council** represents the governments of Member States. The Presidency of the Council is shared by Member States on a rotating basis, with each Member State's Presidency lasting 6 months. There are no fixed members of the Council.
- 2.8 At each Council meeting, each Member State is represented by their minister for the policy field being discussed.
- 2.9 More on the Council's role can be found in Box 1 below.

BOX 1

More on the role of the Council in considering legislative proposals from the Commission

- **COREPER:** Each legislative proposal from the Commission is considered by a working group of national representatives, which will seek to reach agreement on the text. When it has reached agreement on as many issues as it is able, the proposal is referred to the Committee of Permanent Representatives of the Member States ("**COREPER**"). COREPER seeks to eliminate remaining differences. Formal agreement must be by the Council, and may be without discussion where the proposal has been agreed in advance by COREPER. COREPER has two main parts:
 - (A) COREPER I comprises deputy ambassadors from the Member States' permanent staff in Brussels. COREPER is concerned with, amongst other matters, the internal market, including financial services.
 - (B) COREPER II comprises the Member States' ambassadors from their permanent staff in Brussels.
- **ECOFIN:** One of the configurations of the Council is the Economic and Financial Affairs Council ("**ECOFIN**"), comprised of the economics and finance ministers of Member States.
- **Presidency texts:** In practice, successive drafts of a proposal may be advanced in the course of working group discussions at official level under the authority of the Council Presidency (referred to as "Presidency texts").
- **Parallel work:** The Council may only formally adopt a position after the European Parliament has acted, but in practice, much of the preparatory work runs in parallel, and the institutions are encouraged to exchange information.
- **Trialogues:** "Trialogues" are informal tripartite meetings attended by representatives of the European Parliament (the rapporteur and, where appropriate, the shadow rapporteur – see Box 2 below), the Council (the chair of the working party and/or COREPER) and the Commission (the department responsible for the proposal and the Secretariat-General). The aim is to ensure that the amendments to be adopted by the European Parliament are acceptable to the Council.
- **Procedures and voting:** Under the ordinary legislative procedure, the Council usually acts by qualified majority, but unanimity remains the requirement in certain circumstances (for example, if the Commission has not incorporated European Parliament amendments into an amended proposal) or for certain sensitive areas (such as taxation). See **Annex 1** for a summary of the ordinary legislative procedure and **Annex 2** for an explanation of qualified majority voting and unanimity.

The European Parliament

2.10 The **European Parliament** represents EU citizens and its members ("**MEPs**") are directly elected by them every five years. The number of MEPs for each Member State is very roughly proportional to its population⁶.

2.11 More on the European Parliament's role can be found in Box 2 below.

BOX 2

More on the role of the European Parliament in considering legislative proposals from the Commission

- **ECON:** A new Commission proposal is assigned to a lead committee of the European Parliament. The European Parliament's Committee on Economic and Monetary Affairs ("**ECON**") is the most important committee in the area of financial services. A list of its members is [here](#).
- **Rapporteur and shadow rapporteur:** The lead committee appoints one of its members (the rapporteur) to write a first draft opinion on the measure. Political groups other than that of the rapporteur may appoint a shadow rapporteur.
- **Opinion:** This opinion, which can be amended, includes proposed amendments and is discussed with any other Parliamentary Committee that has a role in the legislation, and put to the vote on a simple majority of members of ECON. It is then put on the agenda of the plenary session of the European Parliament. Additional amendments can be proposed at this stage. In the plenary debate, the Commission's position is announced and explained. Amendments, the Commission's proposal as amended and the legislative resolution require a simple majority. If the legislative resolution accompanying the report has been adopted by 90% of the votes, it may be adopted in plenary without further amendment or debate.
- **Timing:** The Treaties do not set any time limit for the European Parliament to give its opinion. In practice, this phase lasts on average for 15 months if a first reading agreement is reached, but it can be longer.
- **Following the European Parliament's activities:** Legislative initiatives can be followed on the recently updated [European Parliament's Legislative Observatory](#) (use the search tab). This shows the key players (for example, the relevant committees and the rapporteur), key events (the legislative history), technical information about the proposal (for example, the relevant legal base), the expected timetable, a documentation gateway as well as links to the Commission website and, when approved, the final text of the relevant legislation and a summary of it.

The European Council

2.12 The Lisbon Treaty also formally recognised a new body as an institution of the European Union. The **European Council** comprises the heads of governments of Member States, its President and the President of the Commission. It is a *distinct and separate body* from the Council of the European Union. Primarily, it is responsible for constitutional and organisational matters, such as revision of the Treaties and determining the composition of the European Parliament and the Commission. It also has informal agenda-setting powers, although the TEU specifically provides that it shall not exercise legislative functions⁷. All references in this document to the “**Council**” alone are to the Council of the European Union and not to the European Council described in this paragraph.

The Court of Justice of the European Union

2.13 The Court of Justice of the European Union, which has its seat in Luxembourg, consists of three courts: the Court of Justice (“**ECJ**”), the General Court and the European Union Civil Service Tribunal.

2.14 The ECJ does not play a direct role in the legislative process for making new Directives or Regulations, but it can rule against Member States that fail to transpose Directives properly or at all before the relevant transposition deadline. We do not consider the ECJ, the General Court or the European Union Civil Service Tribunal further in this document.

3. SECONDARY LEGISLATION: REGULATIONS, DIRECTIVES AND DECISIONS

3.1 Secondary EU legislation⁸ includes Regulations, Directives and Decisions.

Regulations

3.2 **Regulations** are directly applicable, that is, they are binding on Member States without needing to be transposed into national law⁹. National legislation may sometimes be needed to supplement EU Regulations (e.g., by providing sanctions for non-compliance).

Directives and their transposition

3.3 **Directives** are binding on Member States as to the result to be achieved but give Member States some discretion over how they incorporate Directives into their domestic law¹⁰. The incorporation by a Member State of a Directive into its domestic law is referred to as “transposition”.

3.4 A Directive is required to be implemented in the national law of Member States before the end of the transposition period specified in the Directive. A Directive does not have direct effect in relation to individuals or companies in a Member State without domestic legislation being put in place to transpose the Directive into domestic law.

3.5 Transposition may require amendments to existing domestic legislation as well as the enactment of new legislation. Transposition must take place in the law of a Member State with “unquestionable binding force”¹¹.

3.6 Where a Member State fails to transpose a Directive (or transpose it incorrectly):

- (A) an individual or company adversely affected by the failure to transpose the Directive may have a direct claim against the Member State for damages¹²;
- (B) where the claim is against the state or an “emanation of the state” for failure to do an act which the Member State or the “emanation of the state” would have been required to do had the Directive been correctly transposed, then the state or the “emanation of the state” cannot plead its own failure to transpose (or properly transpose) the Directive as a defence¹³; and
- (C) an “emanation of the state” is “a body whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals”¹⁴. Therefore, the legal form of the “emanation of the state” is irrelevant, as long as it is responsible for providing a public service under the control of the relevant Member State and has, for that purpose, special powers. This could therefore include private sector entities responsible for providing a public service (e.g., a company providing a utility service such as gas, water or electricity).

3.7 **Subsidiarity** is an important principle that is enshrined in the Treaties. It is the principle that:

“in areas which do not fall within its exclusive competence, the Union [EU] shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union [EU] level.” (article 5 TEU).

3.8 The Treaty of Lisbon introduced a process under which national parliaments of Member States may express their views on whether proposed EU legislation complies with the principle of subsidiarity. Depending on the proportion of national parliaments that consider that a piece of proposed legislation violates that principle, the Commission could be required to reconsider the proposed legislation and the Council and the European Parliament could also be required to vote on the matter. This is explained further in Box 3 below.

BOX 3

Domestic scrutiny of EU legislative proposals in a UK context

- **Methods of transposition in the UK:** The UK generally transposes Directives concerning financial services matters by means of one, or a combination, of the following:
 - (A) primary legislation (an Act of Parliament), although this is now rare;
 - (B) secondary legislation in the form of a statutory instrument made under an existing power in primary legislation (most often the European Communities Act 1972 (as amended)); and
 - (C) rules and guidance made by the Financial Conduct Authority and the Prudential Regulation Authority in exercise of their rule-making powers under the Financial Services and Markets Act 2000 (as amended).
- **Channels of influence:** National governments of Member States have indirect influence on the EU legislative process through their representation on the Council. Meetings of the Council itself are attended by the relevant minister from each Member State depending on the subject to be discussed. In addition, Member States are represented on COREPER and working groups. The staff of the United Kingdom Permanent Representation to the European Union (UKRep) represent the UK in day-to-day negotiations in the Council. The UK's current Permanent Representative to the EU is Ivan Rogers. Shan Morgan is the UK's Deputy Permanent Representative.
- **Subsidiarity:** As mentioned above, as well as submitting its proposals to the Council and the European Parliament, the Commission also transmits its proposals for consideration by national parliaments, who can raise concerns about the application of the subsidiarity principle to the proposals. In the case of proposals falling under the ordinary legislative procedure, if a draft legislative proposal's compliance with the subsidiarity principle is contested by a simple majority of the votes allocated to national parliaments, it gets an 'orange card', and the Commission has to re-examine the proposal. If the European Commission wishes to maintain its draft, it has to justify its position by a reasoned opinion, and the reasoned opinions of both sides are considered in the legislative process. The proposal is abandoned if a majority of the votes cast in the European Parliament, or 55% of the members of the Council, are of the opinion that the proposal is not compatible with the principle of subsidiarity.
- **Opt outs:** In certain circumstances, such as the recent proposal for a Directive to impose criminal sanctions in the area of market abuse, certain Member States may have the option whether to opt in (see, for example, Protocol No. 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the TFEU).

- **House of Lords European Union Committee:** In the House of Lords, the European Union Committee scrutinises Commission proposals prior to the UK Government taking a position on them in the Council, as well as playing a role in considering subsidiarity and opt-ins. The Committee has the power to initiate a debate and vote on EU proposals subject to UK opt-in. Its Sub-Committee A considers measures on economic and financial affairs, and international trade. The members of Sub-Committee A are [here](#). The House of Lords European Union Committee reports on fewer documents than the equivalent House of Commons European Scrutiny Committee (see below), but reports in greater detail with longer enquiries. Sub-Committee A recently launched an inquiry into the proposed EU financial transaction tax. It will consider the potential risks, benefits and shortcomings of such a tax and its significance for the City of London. It will also assess whether a financial transaction tax could plausibly be implemented at EU level, or whether it will only work effectively if implemented globally.
- **House of Commons European Scrutiny Committee:** The House of Commons European Scrutiny Committee scrutinises draft EU legislation (and Commission Green Papers and White Papers) on behalf of the House of Commons. Later stages of legislation are also considered – for example, amended proposals, Presidency compromise proposals and amendments proposed by the European Parliament. The scrutiny process can be rapid. The Committee produces weekly Committee Reports, which draw proposals to the attention of the House, and recommend some draft legislation for debate, usually in one of three European Committees (European Committee B has responsibility for HM Treasury matters), and (more rarely) on the floor of the House.
- **Role of the Foreign Office:** Proposals are transmitted to Parliament via the Foreign and Commonwealth Office, who deposit them with the Vote Office within two working days of their arrival. Within 10 working days of their deposit, the Government department taking responsibility for the relevant proposal submits an Explanatory Memorandum on it. Among other things, this will include a statement of the Government's view of the document's policy implications. If the proposal is substantially amended, a supplementary memorandum must be submitted. Explanatory Memoranda are public documents and available from the Cabinet Office website [here](#).
- **HM Treasury and the Department for Business, Innovation and Skills:** The Government department most usually concerned with financial services is HM Treasury. The Department for Business, Innovation and Skills is concerned, among other things, with consumer credit, consumer protection, e-commerce, unfair commercial practices and unfair terms in consumer contracts.
- **UK Transposition Guidance:** In May 2011, the UK Department for Business, Innovation and Skills published "*Transposition Guidance: How to implement European Directives correctly*"¹⁵. This guidance seeks to help government departments and regulators in the UK to determine how to implement Directives in accordance with the guiding principles of EU law. In particular, the guidance explains the UK Government's desire to use a "copy-out" approach to EU legislation and to avoid the "gold plating" of Directive requirements (i.e., going beyond the requirements or restrictions set out in Directives).

- **Recent example:** By way of example, following an Explanatory Memorandum of HM Treasury expressing concerns on the subject, the House of Commons European Scrutiny Committee published its report on the Commission's CRD IV proposals on 25 October 2011, and the House of Commons subsequently resolved that it considered the draft Capital Requirements Regulation does not comply with the principle of subsidiarity for the reasons set out in the Annex to the Committee's report (broadly, because of its requirement for "maximum harmonisation"). The House therefore instructed the Clerk of the House to forward its reasoned opinion to the presidents of the relevant EU institutions.

Decisions

- 3.9 Decisions are directly applicable and binding on those to whom they are addressed, which may be a Member State or an individual¹⁶. Decisions may require the addressee to perform or refrain from an action, or may confer rights or impose obligations on them.
- 3.10 Decisions, like Regulations and Directives, may be adopted either by the Council or jointly by the Council and the European Parliament. The Commission may also, in certain areas, issue Decisions, for example with regard to competition policy and the abuse of a dominant position¹⁷.

4. THE CONCEPT OF "LEGAL BASE"

All EU legislation must be based on a specific Treaty article or articles set out in the TEU or TFEU, which is referred to as its "legal base". The legal base prescribes the legislative procedure and type of legislation that can be adopted.

5. TYPES OF LEGISLATIVE PROCEDURES

- 5.1 There are two types of EU legislative procedures for Directives and Regulations:
- (A) **the ordinary legislative procedure**¹⁸ – which consists of the joint adoption by the European Parliament and the Council of a Regulation, a Directive or a Decision following a proposal from the Commission. This is described in more detail in section B below; and
 - (B) **the special legislative procedures**¹⁹ – which cover the consultation procedure and the consent procedure. Under these procedures, a Regulation, a Directive or a Decision is adopted by the Council, but only after consultation with, or consent from, the European Parliament. This is described in more detail in section C below.
- 5.2 Both of these procedures commences with a proposal for legislation from the Commission. The Commission consults before making a formal proposal. This consultation can include consultation of national experts and green and white papers. The directorate of the Commission usually taking the lead with respect to financial

services issues is the Internal Market and Services Directorate. The Internal Market and Services Directorate is based in Brussels and has a staff of approximately 500, working under the political authority of Commissioner Michel Barnier and managed by Director General Jonathan Faull. An organisation chart of the Directorate is available at ec.europa.eu.

- 5.3 The Commission submits its legislative proposal to the Council and the European Parliament. The Commission usually consults the Economic and Social Committee for an opinion. The proposal is, as noted above, also transmitted to national parliaments.
- 5.4 The Commission may amend its proposal at any time before the Council has acted on it.

Withdrawal of a legislative proposal

- 5.5 There is no specific procedure or measure expressly set out in the TFEU allowing the Commission to withdraw a legislative proposal prior to its adoption. That said, prominent academics have argued that this power is inherent to the ordinary legislative procedure set out in Article 294 TFEU and that the Commission therefore “has the power to withdraw a proposed measure before it is adopted and submit a modified version, or refuse to proceed again if it feels that any such measure will be amended in ways to which it is fundamentally averse”.
- 5.6 The Commission has announced relatively recently that it would be withdrawing a number of legislative proposals, presumably on this basis. In particular, in October 2013 the Commission published a Communication that said that it proposed to withdraw a number of legislative proposals. The Commission indicated that in some of those cases it would consider whether the policy objectives could be served by modifying the proposals or by withdrawing them and opening the way for an alternative initiative.
- 5.7 Alternatively, the Commission may choose to withdraw a proposal following a threshold number of Member States submitting reasoned opinions objecting to the proposal on the grounds of subsidiarity (See paragraphs 3.7 and 3.8 above, and Box 3, for more detail on subsidiarity).

6. INFLUENCE AND LOBBYING

- 6.1 Once a Directive or Regulation has been adopted at the European level, it is binding at the Member State level.
- 6.2 In other words, at this stage Member States lose the opportunity to influence that legislation, although where the legislation contemplates further secondary legislation (e.g. Level 2 implementing measures) it may be possible to influence the content of that further legislation.
- 6.3 There are many lobbyists in Brussels, often employed by consulting firms. Lobbying is addressed further in Box 4 below.

BOX 4

Lobbying in Brussels

- Information about who is involved in influencing the EU decision making process can be obtained from the [Transparency Register](#). This is a voluntary register of lobbyists, but registration is necessary to obtain an annual access pass for the European Parliament and senior Commission officials are usually reluctant to speak to lobbyists who are not registered.
- The Transparency Register shows organisations and self employed individuals who have agreed to be bound by a Code of Conduct. Since June 2011, it has been operated by the European Parliament and the Commission, and it replaces earlier, separate registers. Although the Council supports the initiative, it does not currently take part in it.
- The Transparency Register includes various trade associations, but corporate stakeholders are also included.
- The European Parliament resolved in May 2011 that a 'legislative footprint' of exchanges between the lobbyists and the relevant rapporteur will be annexed to Parliamentary reports.

7. CHALLENGES

- 7.1 Challenges arising from the multi-lingual nature of EU legislation, including the need for legislative acts to be translated into the 24 current official languages of the European Union²⁰, are well known. The latest example of a Directive giving rise to difficulty in implementation is the Solvency II Directive, which was negotiated in English and contains concepts not easily understood in at least some other languages.
- 7.2 All official language versions of EU legislation are equally valid and there have been a number of cases before the European Court of Justice in which different language versions of a piece of EU legislation have been cited to support or to argue against particular points.
- 7.3 Where there is uncertainty as to the meaning of EU legislation, or there are inconsistencies between different language versions of EU legislation, a purposive approach is to be adopted to determine the meaning and effect of the legislation. More information on purposive interpretation is to be found in Box 5 below.
- 7.4 The involvement of three institutions in the legislative process (the Commission, the Council and the European Parliament), brings its own challenges.

- 7.5 The legal services staff of the three institutions have come together to write a *Joint Practical Guide* for persons involved in drafting EU legislation. Other sources of guidance are also available (such as the Council's *Manual of Precedents*, the Commission's *Manual on Legislative Drafting*, the *Inter-Institutional Style Guide* published by the Office for Official Publications of the European Communities, and the models drafted by the Commission in *LegisWrite*). However, the iterative process by which amendments to the Commission's legislative proposals are put forward by different institutions has the potential to lead to unhappy results.

BOX 5

Purposive interpretation of EU legislation:

- In the case of *James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd*²¹ Lord Denning summarised the purposive approach of the European Court of Justice (the “ECJ”) to legislative interpretation, as follows²²:

“[European judges] adopt a method which they call in English by strange words – at any rate they were strange to me – the “schematic and teleological” method of interpretation. It is not really so alarming as it sounds. All it means is that the judges do not go by the literal meaning of the words or by the grammatical structure of the sentence. They go by the design or purpose ... behind it. When they come upon a situation which is to their minds within the spirit – but not the letter – of the legislation, they solve the problem by looking at the design and purpose of the legislature – at the effect it was sought to achieve. They then interpret the legislation so as to produce the desired effect. This means they fill in gaps, quite unashamedly, without hesitation. They ask simply: what is the sensible way of dealing with this situation so as to give effect to the presumed purpose of the legislation? They lay down the law accordingly.”

Textual analysis of EU legislation:

- With EU legislation as much as with national legislation, the starting point is the language of the legislation in question. Only if the language contained in the legislation is ambiguous is it necessary to consider the purposive/teleological method of interpretation²³. This point has been reiterated by the ECJ in numerous cases, including in the case of *Feinchemie Schwebda*²⁴, in which it was stated that legal certainty requires that clear legislation should be given its plain meaning.

- The ECJ has also made it clear that purposive interpretation does not mean that EU legislation can mean “whatever you want”. Recently, in *Commission v France*²⁵, it was said, in relation to an overly strained purposive interpretation proposed by the relevant member state:

“This finding is not undermined by the Member State’s argument to the effect that a more dynamic and purposive approach to interpreting the directive would enable a more rapid development of technologies to take place.”

- However, it should be noted that the ECJ is less concerned about precise wording when it interprets the EU Treaties themselves, or when general principles of EU law are involved.

Ambiguous EU legislation:

- Where the language contained in EU legislation is ambiguous, the ECJ will interpret the legislation in a purposive/teleological manner and will seek to give effect to the general purpose expressed in the legislation. The purposive approach to interpretation used by the ECJ has been described in a number of cases, including:
 - the *Hönig* case²⁶: “...it is necessary in interpreting a provision of Community law to consider not only its wording but also the context in which it occurs and the objects of the rules of which it is part...”; and
 - the *easyCar* case²⁷: “...the meaning and scope of terms for which Community law provides no definition must be determined by considering their usual meaning in everyday language, while also taking into account the context in which they occur and the purposes of the rules of which they are part...”.
- Purposive construction of legislation can be defined as the process by which the courts, where appropriate to do so, can give the legislation a meaning different from the literal meaning of the words used. So where the court determines that the literal meaning does not accord with the legal meaning and the legislative purpose, it may then use principles of interpretation such as strained construction or the implication of terms to give effect to the legislative purpose.
- In order to ascertain the purpose of a given piece of legislation the ECJ will analyse the relevant recitals. However, it should be noted that certain limits apply to this approach:
 - the ECJ is not normally prepared to give effect to recitals that are drafted in normative terms; and
 - whilst the ECJ recognises that recitals can help to establish the purpose of a provision, it has stated on numerous occasions that recitals cannot take precedence over the relevant operative

provisions of EU legislation. Therefore, if a recital is irredeemably inconsistent with the operative text then the ECJ will ignore the recital and give effect to the text of the operative provisions.

- The ECJ is also entitled to refer to preparatory documents and legislative proposals as aids when ascertaining the purpose of EU legislation, although this is not common. For example:
 - in *Provincia Autonoma di Trento and Ufficio del medico provinciale di Trento v Dega di Depretto Gino SNC*²⁸ the ECJ referred to an Opinion of the Economic and Social Committee; and
 - in *R v London Boroughs Transport Committee, ex parte Freight Transport Association Ltd*²⁹ the House of Lords referred to a Commission Green Paper.
- However, as a general rule, a declaration contained in the minutes of meetings concerning the preparation or adoption of EU legislation cannot be relied upon as an aid to the interpretation of that legislation³⁰, unless the declaration is expressly referred to in the provisions of the legislation³¹.
- It should be noted that, given that Directives are legal instruments proposed by the Commission, the views of the Commission are likely to be given particular weight and importance when the terms of Directives are being interpreted.

Additional factors to consider when interpreting EU legislation:

- In addition to the purposive method of interpretation used by the ECJ, the following principles must also be considered when interpreting and applying EU legislation:
 - EU legislation should generally be interpreted applying EU law principles of interpretation³² and in applying national law, national courts must consider the application of the duty of consistent interpretation. This duty stems from the *Von Colson*³³ case in which the ECJ held that in applying national law, "*national courts are required to interpret their national law in light of the wording and purpose of the directive*". The ECJ in the *Marleasing*³⁴ case held that this obligation applies to all domestic legislation which is relevant to the subject matter of the directive in question, regardless of when that national legislation was introduced. However, as was held in the *Pupino*³⁵ case, this duty does not require national courts to distort any reasonable meaning of the words, nor to adopt a construction which is *contra legem*;
 - the official language versions of EU legislation are all equally authentic. In the case of divergence between different language versions, the provision in question should generally be given a purposive interpretation³⁶; and
 - derogations in EU legislation should be narrowly construed³⁷.

- We have described above the purposive approach to the interpretation of EU legislation traditionally taken by the ECJ. However, there are examples of circumstances where, despite the existence of ambiguous EU legislation, the ECJ has been willing to take a more literal approach to interpreting such legislation.
- The case of *Commission v United Kingdom*³⁸, in relation to the recovery of input VAT by taxable persons not established in the EU, is a recent example of the ECJ adopting a literal interpretation over a purposive interpretation of ambiguous EU legislation.
- The case of *Commission v United Kingdom* has been contrasted with *Ministre du Budget v Société Monte Dei Paschi Di Siena*³⁹, a case which also involved the absence/omission of certain language from EU legislation, and in which the ECJ instead adopted a purposive approach to interpretation.

B. Ordinary and special legislative procedures

1. ORDINARY LEGISLATIVE PROCEDURE

- 1.1 The ordinary legislative procedure⁴⁰ is summarised in **Annex 1**.
- 1.2 The procedure provides that neither the European Parliament nor the Council may adopt legislation without the other's assent.
- 1.3 The Council must approve the measure, usually by a qualified majority vote.
- 1.4 **Annex 2** contains an explanation of qualified majority voting and unanimity.

2. SPECIAL LEGISLATIVE PROCEDURES: THE CONSULTATION PROCEDURE

- 2.1 There are three stages in the consultation procedure, which is part of the special legislative procedures:
 - (A) the Commission submits a legislative proposal to the Council;
 - (B) the Council consults the European Parliament; and
 - (C) the Council adopts the measure, either by qualified majority voting or by unanimity, depending on the legal base in question.
- 2.2 The Council must re-consult the European Parliament if amendments are made.
- 2.3 The European Parliament's powers under the consultation procedure are limited as the Council is not obliged to take account of its views. Furthermore, the Council is not required to wait until the European Parliament has been consulted before considering a proposal.
- 2.4 The consultation procedure is used in a limited number of legislative areas, including social security and social protection⁴¹; measures concerning family law with cross-border implications⁴²; operational police co-operation⁴³; competition law⁴⁴; harmonisation of turnover taxes and indirect taxation⁴⁵; limited internal market provisions⁴⁶; certain areas of social policy⁴⁷; provisions of a fiscal nature relating to environment and energy⁴⁸; and certain international agreements⁴⁹.

3. SPECIAL LEGISLATIVE PROCEDURES: THE CONSENT PROCEDURE

- 3.1 The consent procedure brings together a number of procedures, the common thread being that the European Parliament must affirm (usually by an absolute majority of the votes cast) a legislative proposal before it can be adopted by the Council (usually by unanimity).
- 3.2 The European Parliament cannot propose amendments.
- 3.3 The consent procedure therefore effectively gives the European Parliament the right of veto.
- 3.4 The precise procedure (namely, who has the legislative initiative and which institutions other than the European Parliament have to be consulted or give their consent) depends on the legal base in question.
- 3.5 The areas covered by the consent procedure include combating discrimination⁵⁰; membership of the EU⁵¹; withdrawal from the EU⁵²; certain international agreements⁵³; and the reserve power to adopt measures necessary to attain a Treaty objective where no specific legal basis exists in the TFEU⁵⁴.

C. Post-Lisbon supervisory and legislative framework

1. LAMFALUSSY APPROACH TO ADOPTION OF EUROPEAN FINANCIAL SERVICES LEGISLATION

- 1.1 The Lamfalussy approach⁵⁵ is a four-level legislative procedure adopted by the EU for the development of legislation for the financial services industry that involves the following:
 - (A) a legislative act (“**Level 1**”) – the framework legislation is proposed and adopted under the ‘ordinary legislative procedure’. The ordinary legislative procedure is described in Annex 1. Individual articles in the Level 1 legislation specify where power is delegated to the Commission to adopt Level 2 measures. The Level 1 legislation may be a Directive or a Regulation;
 - (B) implementing measures drafted and adopted by the Commission, following advice from the European Supervisory Authorities (the “**ESAs**”, which are described below) (“**Level 2**”);
 - (C) consultation and guidance by the ESAs (“**Level 3**”); and
 - (D) supervision and enforcement, principally by the regulators in each Member State (“**Level 4**”).
- 1.2 Until recently, three ‘Level 3 Committees’ existed – the Committee of European Banking Supervisors (“**CEBS**”), the Committee of European Insurance and Occupational Pensions Supervisors (“**CEIOPS**”) and the Committee of European Securities Regulators (“**CESR**”). These brought together regulators from each Member State to agree on the details of implementing measures and to coordinate the supervision of cross-border institutions. The failings in prudential regulation that were highlighted by the financial crisis led to criticism that these committees did not have sufficient powers or influence to address the complex challenges of cross-border regulation.
- 1.3 Following recommendations contained in the 2009 de Larosière Report, the Commission proposed to establish a new European Systemic Risk Board, responsible for macro-prudential oversight, and a European System of Financial Supervisors, comprising three new European Supervisory Authorities (the “**ESAs**”) to replace Level 3 Committees;
 - (A) the European Banking Authority (“**EBA**”);
 - (B) the European Insurance and Occupational Pensions Authority (“**EIOPA**”); and
 - (C) the European Securities and Markets Authority (“**ESMA**”).
- 1.4 The ESAs have legal personality and are EU institutions established by Regulations. They have been established to oversee the financial system at a micro-prudential level, and to achieve convergence between

Member States on technical rules and coordination between national supervisors. The ESAs' powers go beyond those of the Level 3 Committees and their role is no longer essentially merely advisory.

2. LEVEL 1 – LEGISLATIVE ACTS

- 2.1 Level 1 framework legislation is adopted under the legislative procedures referred to in section A.5 above.
- 2.2 This legislation (in the form of a Directive or Regulation) specifies the procedure under which legislative power is delegated to the Commission, and whether the process the Commission is to follow requires the relevant ESA to submit draft legislation to the Commission⁵⁶.
- 2.3 The Regulations establishing the ESAs require that each of the ESAs has a stakeholder group. Accordingly, the EBA has a Banking Stakeholder Group, ESMA has the Securities and Markets Stakeholder Group and EIOPA has two stakeholder groups (one of which is the Insurance & Reinsurance Stakeholder Group).
- 2.4 In addition, the ESAs establish further committees and working or expert groups. For example, ESMA has established Standing Committees chaired by senior national representatives which bring together national experts with support from ESMA staff who act as rapporteurs. These Standing Committees generally establish Consultative Working Groups of market participants (practitioners, consumers and end-users) to provide technical advice to the relevant expert group during the drafting process.
- 2.5 The key point to appreciate is that, once the framework (Level 1) legislation has been adopted, the ability to influence legislation made under the delegated powers will depend on the ability to influence the decision-making process of the Commission. As the Commission acts on advice provided by the ESAs, who must publicly consult on any proposed technical standards, it may be possible to influence Level 2 legislation through such consultations.

3. LEVEL 2 – NON-LEGISLATIVE ACTS: INTRODUCTION

- 3.1 Specific provisions in Directives or Regulations may delegate legislative authority to the Commission. These delegations may be made under:
 - (A) Article 290 TFEU (delegated acts); or
 - (B) Article 291 TFEU (implementing acts).
- 3.2 For Article 290 measures, the Commission presents the delegated act to the Council and the European Parliament. The Council (by a qualified majority) and the European Parliament (by a majority) may be able to block or revoke the exercise of delegations (the conditions to which the delegation is subject are set out in the legislative act)⁵⁷. The delegated act may enter into force only if no such objection has been expressed by the Council or the European Parliament within a period set by the legislative (Level 1) act.
- 3.3 For Article 291 measures, either the examination procedure⁵⁸ or advisory procedure⁵⁹ applies⁶⁰. In both cases, committees comprising representatives of the finance ministers of Member States and chaired by the

Commission scrutinise the proposed implementing acts⁶¹. Each Member State sends a delegation to represent it at the committee meeting and each such delegation is considered to be one member of the committee⁶².

3.4 The committees also advise the Commission on policy issues and are consulted by the Commission when drafting legislative proposals in their policy areas, which cover:

- (A) **securities** – the relevant committee is the European Securities Committee;
- (B) **banking** – the relevant committee is the European Banking Committee;
- (C) **insurance** – the relevant committee is the European Insurance and Occupational Pensions Committee (“EIOPC”);
- (D) **occupational pensions** – the relevant committee is EIOPC; and
- (E) **cross-sector groups** – the relevant committee is the European Financial Conglomerates Committee.

3.5 The delegated act may itself take the form of a Directive or a Regulation.

4. LEVEL 2 – NON-LEGISLATIVE ACTS: THE EXAMINATION PROCEDURE

4.1 Under the examination procedure, the relevant committee must deliver a binding opinion by way of qualified majority voting on the draft measure. This is the same majority as laid down in the TEU and TFEU. The votes of the representatives of the Member States within the committee are weighted in the manner set out in the Treaties (see **Annex 2**).

4.2 If the relevant committee delivers a positive opinion, the Commission adopts the implementing act.

4.3 If the relevant committee delivers a negative opinion, the Commission may amend its proposal and resubmit it to the same committee or send it to an appeal committee.

4.4 Where the committee delivers no opinion, the Commission may, with certain exceptions, decide whether or not to adopt the measure⁶³.

5. LEVEL 2 – NON-LEGISLATIVE ACTS: THE ADVISORY PROCEDURE

5.1 With respect to the advisory procedure, the relevant committee only issues non-binding opinions.

5.2 If the opinion is delivered by way of a vote, the vote is of a simple majority of the committee's component members.

5.3 The Commission decides whether the measure is adopted, taking account of the conclusions drawn from the discussions within the committee and of the opinion delivered⁶⁴.

6. LEVEL 2 – BINDING TECHNICAL STANDARDS

6.1 The Level 1 framework legislation may delegate to the Commission the power to adopt technical standards (in the form of Regulations or Decisions) that have been prepared by the relevant ESA.

6.2 These binding technical standards⁶⁵ are differentiated from the Level 2 acts referred to above in that they are technical in nature (i.e., without policy choices) and their content is delineated by the Level 1 framework legislation on which they are based.

6.3 In summary:

(A) the relevant ESA, following open public consultations, adopts by qualified majority voting⁶⁶ a draft technical standard which it then submits to the Commission; and

(B) the Commission then decides whether to endorse it. The Commission may endorse the draft technical standard in part only or with amendments⁶⁷.

7. LEVEL 3 – ESAS

7.1 The ESAs advise the Commission in preparing the Level 2 measures referred to above.

7.2 The ESAs may also adopt “comply or explain” guidelines.

8. LEVEL 4 – ENFORCEMENT

8.1 The Commission, as guardian of the Treaties, is responsible for ensuring that Member States transpose Directives properly and that EU legal requirements are applied. The ESAs support the Commission in this regard by advising the Commission on whether Member States have transposed Directives properly.

8.2 The Commission can, and frequently does, initiate proceedings before the ECJ against Member States that fail to transpose Directives properly or at all.

OTHER POWERS OF THE ESAS

The ESAs have certain other powers which are beyond the scope of this document. For example, the ESAs have some powers to arbitrate certain disputes between national regulators. In addition, in limited cases, the ESAs may adopt decisions requiring compliance by financial institutions with directly applicable EU law (e.g. Regulations).

Annex 1

Ordinary Legislative Procedure

A. PROPOSAL⁶⁸

Under the ordinary legislative procedure the Commission submits a proposal to the European Parliament and the Council.

B. FIRST READING⁶⁹

1. The European Parliament adopts its position by simple majority and communicates it to the Council.
2. If the Council approves (by qualified majority voting) the European Parliament's position, the proposed act is adopted in accordance with the position of the European Parliament.
3. If the Council does not approve the European Parliament's position, it communicates its position (adopted by qualified majority voting, except in a limited number of fields subject to unanimous vote) to the European Parliament.

C. SECOND READING⁷⁰

1. If, within three months of such communication, the European Parliament:
 - 1.1 approves the Council's position at first reading or has not taken a decision, the proposed act as amended by the Council is adopted;
 - 1.2 rejects, by a majority of its members, the Council's position, the proposed act is not adopted; or
 - 1.3 proposes, by a majority of its members, amendments to the Council's position, the amendments are put to the Council and the Commission for their opinion.
2. If, within three months of receiving the European Parliament's amendments, the Council, acting by a qualified majority (or unanimously on amendments on which the Commission had delivered a negative opinion):
 - 2.1 approves all the amendments, the proposed act is adopted; or

2.2 does not approve all the amendments, the Conciliation Committee is convened within six weeks.

D. TRIALOGUE

1. Prior to the meeting of the Conciliation Committee, negotiations between the representatives of the European Parliament and the Council, with participation from the Commission, are conducted during informal “trialogues”.
2. The purpose is to reach agreement on a package of amendments acceptable to the Council and the European Parliament.
3. The participants in the triilogue report to their delegation in the Conciliation Committee.
4. Any agreement in the triilogue is informal and requires formal approval by the respective institutions.

E. CONCILIATION⁷¹

1. The Conciliation Committee is composed of an equal number of representatives of the Council and the European Parliament.
2. It must reach agreement on a joint text, by a qualified majority of the Council or their representatives and by a majority of the members representing the European Parliament, within six weeks.
3. The Commission assists the Conciliation Committee in reconciling the positions of the European Parliament and the Council.
4. If, within six weeks of it being convened, the Conciliation Committee does not approve a joint text, the proposed act is not adopted.

F. THIRD READING⁷²

1. If the Conciliation Committee approves a joint text, the European Parliament (acting by a majority of the votes cast) and the Council (acting by a qualified majority) each have six weeks from that approval in which to adopt the proposed act in question in accordance with the joint text.
2. If they fail to do so, the proposed legislation is not adopted.

The ordinary legislative procedure is described in detail on the Commission website at ec.europa.eu, including a flowchart at ec.europa.eu and a step by step guide at ec.europa.eu.

Annex 2

Voting of the Council of the European Union: Qualified majority voting and unanimity

A. QUALIFIED MAJORITY VOTING

1. Qualified majority voting is a weighted system of voting, under which each Member State is allocated a number of votes. Votes are weighted roughly according to the size of a Member State's population.
2. The following table summarises the number of votes for each Member State in the Council:

Member State	Number of votes per Member State
France, Germany, Italy and the United Kingdom	29
Poland and Spain	27
Romania	14
Netherlands	13
Belgium, Czech Republic, Greece, Hungary and Portugal	12
Austria, Bulgaria and Sweden	10
Croatia, Denmark, Finland, Ireland, Lithuania and Slovakia	7
Cyprus, Estonia, Latvia, Luxembourg and Slovenia	4
Malta	3
Total	352

Note: All 28 Member States are represented on the Council.

3. A minimum of 260 votes out of 352 (approximately 73.9%) is required to reach a qualified majority. In addition:
 - a majority of Member States (in some cases two thirds) must approve the decision; and

Note: A majority of Member States requires 15 Member States (for a simple majority). For a two-thirds majority it requires 19 Member States.

- the European Council or a member of the European Council may ask for confirmation that the votes cast in favour represent at least 62% of the EU's total population⁷³. If this proves not to be the case, the act shall not be adopted.

Comment: So, if a Member State wants to block a proposal that requires a qualified majority vote, it needs to build a blocking group which can cast 93 votes (including that Member State's votes).

4. The existing arrangements for qualified majority voting will prevail until November 2014, after which qualified majority voting will require at least 55% of the members of the Council, comprising at least 15 (of the 28 Member States) and representing Member States comprising at least 65% of the EU population. A blocking minority will have to include at least four Council members⁷⁴. This new system is known as "double majority" voting.
5. A transitional regime has been introduced so that, between 1 November 2014 and 31 March 2017, a Member State may ask for the existing formula to be used⁷⁵.

B. UNANIMITY

Unanimity means that every Member State has a veto on the measure being considered. However, abstention is not sufficient to exercise this veto. The Member State must actively vote against the measure.

Annex 3

Summary of principal EU institutions

	Created	Membership	Principal purpose(s)	Part of the EU legislative process?	Frequency of meetings	Located
European Commission	Created by the EU founding Treaties in the 1950s.	28 members, one from each EU Member State.	Proposes new laws, manages the EU's budget and allocates funds, acts as "guardian of the treaties" and represents the EU Member States in international bodies.	Yes. Proposes new legislation to the Council and the Parliament.	Weekly, with extra meetings if emergencies arise.	Brussels.
Council of the European Union	Created by the EU founding Treaties in the 1950s.	One member from the Government of each Member State, as required by the Council configuration, and the European Commissioner responsible for the area concerned.	Debates and passes EU laws and the EU budget, co-ordinates Member States' policies, develops common foreign and security policy and concludes international agreements.	Yes. Debates and adopts laws with the Parliament.	Dependent on the Council configuration but can be as frequently as monthly.	Brussels.
European Parliament	Created as the Assembly in 1951, renamed the European Parliament in 1962.	At present, 766 directly elected MEPs.	Debates and passes EU laws, scrutinises EU Institutions and debates and adopts the EU budget.	Yes. Debates and adopts laws with the Council.	Plenary sessions are held monthly.	Strasbourg, with its secretariat in Brussels and Luxembourg.

	Created	Membership	Principal purpose(s)	Part of the EU legislative process?	Frequency of meetings	Located
European Council (not to be confused with the Council of the European Union)	Created informally in 1974, acquired formal status in 1992.	Head of State / Government of each Member State, the President of the European Council, the President of the Commission and the High Representative for Foreign Affairs and Security.	Defines the political direction and priorities of the EU and provides a forum for dealing with issues between Member States.	Not directly.	Twice every six months.	Brussels.
Court of Justice of the European Union	The ECJ was created in 1952, the General Court in 1988 and the Civil Service Tribunal in 2004.	The ECJ consists of one judge per EU country, assisted by nine Advocates-General.	To ensure EU law is uniformly interpreted and observed.	Not directly, although it enforces the law once it has been created.	N/A.	Luxembourg.
European Central Bank	1999	The Executive Board has six members, the Governing Council has 23 members (the eurozone central bank governors and the Executive Board) and the General Council has 30 members (all the EU central bank governors and the President and Vice-President of the ECB).	Managing the euro, safeguarding price stability in the EU and framing and implementing the EU's monetary and economic policy.	No.	Twice monthly.	Frankfurt.
Court of Auditors	1975	One member from each EU Member State.	Audits the EU's finances and helps improve the EU's financial management.	No.	N/A	Luxembourg.

	Created	Membership	Principal purpose(s)	Part of the EU legislative process?	Frequency of meetings	Located
European Banking Authority (EBA)	2011	<p>Governed by a Board of Supervisors comprising members appointed by Member States and representing Member States' respective banking regulators. The Chairperson chairs meetings of the Board of Supervisors as well as those of the Management Board. The Chairperson's term of office is five years and it may be extended once. The current Chairperson is Andrea Enria.</p> <p>The EBA is managed by a management board which is chaired by the chair of the Board of Supervisors.</p>	<p>Advises the Commission on Level 2 measures under Directives and Regulations regarding the banking sector and, in some cases, prepares drafts of those measures for adoption by the Commission.</p> <p>Issues Level 3 guidance regarding EU banking legislation.</p> <p>Advises the Commission on Level 4 (enforcement against Member States).</p> <p>Some powers to arbitrate certain disputes between national regulators. In addition, in limited cases, may adopt decisions requiring compliance by financial institutions with directly applicable EU law on banking matters (e.g. Regulations).</p>	Yes. See last column.	The Board of Supervisors met or had conference calls ten times in 2013.	London.

	Created	Membership	Principal purpose(s)	Part of the EU legislative process?	Frequency of meetings	Located
European Securities and Markets Authority (ESMA)	2011	Governed by a Board of Supervisors comprising members appointed by Member States and representing Member States' respective securities / securities market regulators. The Chairperson chairs meetings of the Board of Supervisors as well as those of the Management Board. The Chairperson's term of office is five years and it may be extended once. The current Chairperson is Steven Maijoor. ESMA is managed by a management board which is chaired by the chair of the Board of Supervisors.	<p>Advises the Commission on Level 2 measures under Directives and Regulations regarding securities / securities markets and, in some cases, prepares drafts of those measures for adoption by the Commission.</p> <p>Issues Level 3 guidance regarding EU securities / securities markets legislation.</p> <p>Advises the Commission on Level 4 (enforcement against Member States).</p> <p>Some powers to arbitrate certain disputes between national regulators. In addition, in limited cases, may adopt decisions requiring compliance by financial institutions with directly applicable EU law on securities / securities markets matters (e.g. Regulations).</p> <p>Supervises credit rating agencies.</p>	Yes. See last column.	The Board of Supervisors met or had conference calls at least nine times in 2013.	Paris.

	Created	Membership	Principal purpose(s)	Part of the EU legislative process?	Frequency of meetings	Located
European Insurance and Occupational Pensions Authority	2011	Governed by a Board of Supervisors comprising members appointed by Member States and representing Member States' respective insurance / pensions regulators. The Chairperson chairs meetings of the Board of Supervisors as well as those of the Management Board. The Chairperson's term of office is five years and it may be extended once. The current Chairperson is Gabriel Bernadino. EIOPA is managed by a management board which is chaired by the chair of the Board of Supervisors.	<p>Advises the Commission on Level 2 measures under Directives and Regulations regarding the insurance / pension fund sectors and, in some cases, prepares drafts of those measures for adoption by the Commission.</p> <p>Issues Level 3 guidance regarding EU insurance / pension fund legislation.</p> <p>Advises the Commission on Level 4 (enforcement against Member States).</p> <p>Some powers to arbitrate certain disputes between national regulators. In addition, in limited cases, may adopt decisions requiring compliance by financial institutions with directly applicable EU law on insurance / pension fund matters (e.g. Regulations).</p>	Yes. See last column.	The Board of Supervisors met six times in 2013.	Frankfurt.

ENDNOTES

- ¹ *Van Gend en Loos v Nederlandse Administratie der Belastingen* (Case 26/62), which sets out the criteria for establishing direct effect. An example of an article in the Treaties having direct effect is what was Article 119 of the Treaty of Rome (equal pay for equal work as between men and women doing like work, now Article 157 TFEU).
- ² Article 17(4) TEU. As from 1 November 2014, the Commission shall consist of a number of members corresponding to two thirds of the number of Member States, unless the Council, acting unanimously, decides to alter this number (Article 17(5) TEU).
- ³ Article 17(7) TEU.
- ⁴ *Ibid.*
- ⁵ Article 8(3) of the Rules of Procedure of the European Commission and Article 250 TFEU.
- ⁶ Article 14(2) TEU.
- ⁷ Article 15(1) TEU.
- ⁸ Called “legislative acts” under Article 289(3) TFEU.
- ⁹ Article 288 TFEU.
- ¹⁰ *Ibid.*
- ¹¹ Case 102/79 Commission -v- Belgium [1980] ECR 1473, paragraph 11.
- ¹² See *Franco vich v Italian Republic* (Case C-6/90).
- ¹³ See *M.H. Marshall v Southampton and South West Hampshire Area Health Authority* (Case 152/84 and Case C – 271/91) and *Foster v British Gas* (Case C-188/89).
- ¹⁴ *Foster v British Gas* (Case C-188/89) para 20.
- ¹⁵ www.gov.uk
- ¹⁶ Article 288 TFEU.
- ¹⁷ Articles 101 to 102 and Article 105 TFEU. There is a right of appeal to the ECJ in respect of a decision (Article 263 TFEU).
- ¹⁸ Article 289(1) TFEU.
- ¹⁹ Article 289(2) TFEU.
- ²⁰ Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish.
- ²¹ [1977] 2 WLR 107.
- ²² It should be noted that the English Courts have developed their own doctrine of purposive interpretation. However, the English doctrine is more literalist than the ECJ variety, permitting a strained interpretation only in comparatively rare cases. That is, the version of purposive interpretation applied by the English Courts does not require or permit a wholesale jettisoning of the grammatical meaning.
- ²³ In *Elisabeth Schulte and Wolfgang Schulte v Deutsche Bausparkasse Badenia AG* (Case C-350/03 [2005] ECR I-9215) Advocate General Léger summarised the position as follows: “Careful examination of the case-law shows that purposive interpretation is used only where the provision in question is open to several interpretations. ...teleological interpretation is not used where, as in the present case, the text in question is absolutely clear and unambiguous. In that case, the provisions of Community law are sufficient in themselves....”
- ²⁴ Case C-361/06 [2008] ECR I-0000.
- ²⁵ Case C-227/07 [2008] ECR I-0000.
- ²⁶ *Hans Hönic v Stadt Stockach* (Case C-128/94 [1995] ECR I-3389).
- ²⁷ *easyCar (UK) Ltd v OFT* (Case C-336/03 [2005] ECR I-1947).
- ²⁸ Case C-83/96 [1997] ECR I-5001.
- ²⁹ [1991] 1 WLR 828.
- ³⁰ *The Queen v Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen* (Case C-292/89, [1991] ECR I-745).
- ³¹ *VAG Sverige* (Case C-329/95, [1997] ECR I-2675).
- ³² *Ekro BV Vee-en Vleeshandel v Produktschap voor Vee en Vlees* (Case C-327/82, [1984] ECR 107).
- ³³ *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* (Case C-14/83, [1984] ECR 1891).
- ³⁴ *Marleasing SA v La Comercial Internacional de Alimentacion SA* (Case C-106/89, [1990] ECR I-4135)
- ³⁵ *Maria Pupino* (Case C-105/03 [2005] ECR I-5285).
- ³⁶ *Régina v Pierre Bouchereau* (Case C-30/77, [1977] ECR 1999). The ECJ has continued to rely heavily on different language versions of EU legislation in order to decide certain cases.
- ³⁷ *Kingdom of Belgium v Commission* (Case C-5/01 [2002] ECR I-11991).
- ³⁸ Case C-582/08 [2010] SWTI 2279.
- ³⁹ Case C-136/99 [2000] ECR I-6109.
- ⁴⁰ Set out in Article 294 TFEU.
- ⁴¹ Article 21(3) TFEU.
- ⁴² Article 81(3) TFEU.
- ⁴³ Article 87(3) TFEU.
- ⁴⁴ Article 103 TFEU.
- ⁴⁵ Article 113 TFEU.
- ⁴⁶ Article 115 TFEU.
- ⁴⁷ Article 153(2) TFEU.
- ⁴⁸ Article 192(2) and Article 194(3) TFEU.
- ⁴⁹ Article 218 TFEU.
- ⁵⁰ Article 19(1) TFEU.
- ⁵¹ Article 49 TEU.
- ⁵² Article 50 TEU. However, if agreement is not reached in two years, the relevant Member State shall cease to be bound by the Treaties.
- ⁵³ Article 218 TFEU.
- ⁵⁴ Article 352 TFEU.
- ⁵⁵ Named after Alexandre Lamfalussy, who chaired the EU group that proposed the process for the development of EU securities legislation in 2001 (later extended to the fields of banking, insurance and pensions legislation).
- ⁵⁶ Articles 290-291 TFEU.
- ⁵⁷ Article 290(2) TFEU.
- ⁵⁸ Article 5 of Regulation (EU) No. 182/2011 of the European Parliament and of the Council (the “Regulations”).
- ⁵⁹ Article 4 of the Regulations.
- ⁶⁰ Article 2 of the Regulations.
- ⁶¹ Article 3 of the Regulations.

- ⁶² See the Rules of Procedure for each of the relevant committees.
- ⁶³ Article 5 of the Regulations.
- ⁶⁴ Article 4 of the Regulations.
- ⁶⁵ Termed "regulatory technical standards" if the delegations are made under Article 290 TFEU and "implementing technical standards" if the delegations are made under Article 291 TFEU.
- ⁶⁶ As at section **A** of **Annex 2**.
- ⁶⁷ With regard to EIOPA, the procedure is set out in Articles 10-15 of Regulation (EU) No 1094/2010 of the European Parliament and of the Council establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority).
- ⁶⁸ Article 294(2) TFEU.
- ⁶⁹ Articles 294(3) to (6) TFEU.
- ⁷⁰ Articles 294(7) to (9) TFEU.
- ⁷¹ Articles 294(10) to (12) TFEU.
- ⁷² Articles 294(13) to (14) TFEU.
- ⁷³ Article 3 of Protocol (No 36) on transitional provisions (O.J. 115, 09.05.2008, pp. 0322 – 0326). The population of each Member State for these purposes is set out in Article 1 of Annex III to the Council's Rules of Procedure.
- ⁷⁴ Articles 16(4) and (5) TEU and Article 238(3) TFEU.
- ⁷⁵ Article 3 of Protocol (No 36) on transitional provisions (O.J.115, 09.05.2008, pp. 0322 – 0326).

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