

## Chapter 4. EU Law

The Law of the European Union is a self-standing legal system different from Public International Law and from national legal systems. There is a hierarchy of sources of EU Law: the so-called primary law is at the top, international treaties concluded by the EU with third countries have a lower legal rank than primary law, but higher than secondary law. In the following passages the individual sources of EU law will be discussed as well as the mutual relations between EU Law and national law. Finally, this chapter shall discuss the enforceability of EU Law both by judicial and by extra judicial means in case rights and obligations resulting from EU law have not been complied with on a voluntary basis.

### 4.1. Primary Law

The Primary Law is **equivalent to constitutional law of national states**. It has the highest legal rank. The primary law is composed of the founding treaties concluded by the founding Member States, its successive reforms, accession treaties of those states who joined the European Communities or later the European Union during its existence. Also, the Charter of Fundamental Rights of the EU is part of the EU Primary Law.

There are three founding treaties of the European Communities we mentioned in the previous chapter. The oldest founding treaty signed in 1951 which came into effect in 1952 established the European Community for Carbon and Steel. Since this treaty was signed in Paris, it is referred to as the Paris Treaty. Only this first European Community for Carbon and Steel was established for a definite period of time of 50 years, the remaining two communities were set up for an indefinite period of time. The founding members of all three European Communities are identical: France, Germany, Italy and the three Benelux countries (Belgium, Netherlands and Luxembourg).

In 1957 two more communities were established by **the Rome Treaties**, in particular the European Economic Community, which later evolved into the EU, and the Euratom Community. The Rome Treaties came into effect in 1958. The founding treaties specified the scope of activity of the individual European Communities, established the bodies of the European Communities and detailed their powers. The founding treaties also established the principle of mutual cooperation between the European Communities and their Member States. The successive reforms of the founding treaties include in chronological order the Single European Act, the Maastricht Treaty, the Treaty of Amsterdam, the Treaty of Nice and the Lisbon Treaty. Each of the reforms of the founding treaties conceded more powers to the European Parliament at the expense of the Council of Ministers (Council of the EU), extended the powers of the EU at the detriment of the sovereign powers of its Member States and extended the list of areas where the EU bodies are able to adopt secondary legislation by qualified majority rather than by unanimity. Adopting secondary legislation by unanimity in sensitive areas, such as taxation, has become an exception under the Treaty of Lisbon, whereas the adoption of legislation by qualified majority vote in the Council of Ministers (Council of the EU) has become a rule.

**To reform the founding treaty**, the wording of the reform has to be ratified by all Member States. If a single Member States votes against the reform, it cannot come into effect. The ratification procedure in the individual Member States is stipulated by their constitution. For instance, in the Czech Republic, the ratification of international treaties is implemented by the Czech Parliament, where the two chambers have to vote in favor of adopting an international treaty, which is followed by a countersignature by the Czech President. However, there are some EU Member States which require a referendum for adopting a reform of the founding treaties of the EU. The adoption of reforms to the founding treaties is thus a very lengthy and complex procedure.

**EU Law as a whole takes precedence over national law.** This rule is based on the case-law of the Court of Justice of the EU and has not been enshrined into the founding treaties as yet.

## 4.2 International Treaties concluded between the EU and third countries

While implementing its objectives and powers, the EU often concludes treaties with third countries, in particular in relation to the common commercial policy which aims at liberalizing the world trade. The EU is one of the founding members of the World Trade Organization and it has concluded a number of free trade agreements (FTAs) promoting international trade in goods and services. The legal nature of these international treaties has been discussed by the Court of Justice of the EU as it we not clear whether the entire agreements continue only elements which are part of the EU's exclusive powers or whether they also intervene with the shared powers between the EU and its Member States. In its opinion on the EU – Singapore Free Trade Agreement the Court of Justice of the EU expressed its view that such a FTA has a mixed nature. To conclude it, it is not sufficient to be ratified at EU level, but it also requires the ratification by all EU Member States, The same mixed nature has been attributed to the CETA, the Comprehensive Economic and Trade Agreement concluded by the EU and its Member States on the one hand and by Canada on the other hand.

Before adopting an international treaty, its compatibility with the EU primary law may be assessed by the Court of Justice of the EU to make sure that such a treaty is not contrary to the principles of functioning of the EU. When the EU wished to conclude an accession treaty to the Council of Europe's European Convention on Human Rights, the Court of Justice of the EU declared that the draft accession treaty is contrary to the EU legal order and thus cannot be adopted in the proposed wording. This preliminary review is similar to a review carried out by national constitutional courts with respect to international treaties to be ratified by national states. For instance, the Czech constitutional court reviewed the draft Lisbon Treaty twice to make sure it is compatible to the Czech constitution and it found that indeed it was in line with the Czech constitutional order.

Very often, the EU's Free Trade Agreements concluded with third countries include a chapter on the protection of foreign direct investment which limits the sovereign capacity of EU Member States to conclude bilateral investment treaties with countries where the EU has already concluded or launched negotiations on the protection of foreign direct investment. EU

Member States must thus abstain from concluding bilateral investment treaties with such third countries.

### 4.3 Secondary Law

The EU bodies have vested powers to adopt EU legislation which is referred to as EU secondary law. The sources of EU secondary law, mostly **regulations, directives and decisions**, are **proposed by the European Commission**, which holds a monopoly with respect to drafting proposals of EU legislation. The European Parliament is not authorized to propose EU secondary law. Once the European Commission has made a proposal for a regulation, directive or decision, it **forwards the proposal to the Council of Ministers (Council of the EU) and to the European Parliament to be adopted**. Most legislation is adopted at first reading, however, if the two institutions disagree, a second reading will take place. If there is no agreement at the stage of the second reading of the draft legislation, a conciliation committee composed of an equal number of representatives of the Council of Ministers and the European Parliament assisted by members of the European Commission meets to discuss a compromise wording of the draft legislation. The founding treaties require the legislative process to be as transparent as possible, however, the so called trialogue meetings which have proliferated in the past years and have been criticized by the European Ombudsman for their lack of transparency, have been heavily criticized by those in favor of more transparency in the work of the EU institutions,

Once the proposed legislation has been adopted by the Council of Ministers and the European Parliament, it is **published in the Official Journal of the EU in all the EU official languages** (at the time of writing there were 24 EU official languages). Due to a lack of EU staff speaking Gaelic (Irish), only EU regulations are published in Irish, whereas the Irish rely on the rest of EU legislation in the English language. The adopted secondary legislation comes into effect on the day stipulated in its final provisions. If such a date has not been specified, the act becomes effective on the 20th day following its publication in the Official Journal of the EU. The Official Journal of the EU is publicly available at **eur-lex.europa.eu** free of charge. There are two series of the Official Journal (OJ), the L series publishes legislation, that is regulations, directives, and decisions, whereas the C series publishes communications, for instance opinions adopted by advisory bodies to the EU (the Committee of Regions, the European Economic and Social Committee) or notifications by EU bodies, for instance notifications of open competitions by the European Personnel Selection Office (EPSO) inviting candidates to submit their applications to work for the EU.

#### 4.3.1 Regulations

Regulations represent a binding source of EU secondary law. They are mostly adopted in the field of EU's exclusive powers since they leave no room for maneuver for the EU Member States. They are binding in their entire wording and they are binding for everyone, not only the EU Member States, but also for individuals, natural persons and legal entities alike. Regulations are very similar to acts or statutes adopted at national level which bind everyone as well. There is no need for EU Member States to transpose regulations into the national legal systems. The objective of regulations is to unify the legal system of EU Member States in the specific area

which they govern. To this end, regulations exert what is called a direct effect. Direct effect means that individuals can rely directly on the provisions of the regulation in their mutual relations (this is called horizontal direct effect), but also state authorities can rely directly on the provisions of the regulation before a law court in their dealing with individuals and vice versa (this is called vertical direct effect).

The following box provides an example of what an EU regulation looks like.

Selected provisions of the Brussels I Recast Regulation can be found below:

*REGULATION (EU) No 1215/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)*

*SCOPE AND DEFINITIONS*

*Article 1*

*1. This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (acta iure imperii).*

*General provisions*

*Article 4*

*1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.*

*2. Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that Member State.*

*FINAL PROVISIONS*

*Article 81*

*This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.*

*It shall apply from 10 January 2015, with the exception of Articles 75 and 76, which shall apply from 10 January 2014.*

*This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaties.*

*Done at Strasbourg, 12 December 2012.*

*For the European Parliament, The President, M. SCHULZ*

*For the Council, The President, A. D. MAVROYIANNIS*

#### 4.3.2 Directives

**Directives** are another binding source of EU secondary law. They are mostly adopted in the fields of shared powers between the EU and its Member States. They are not binding in their entire wording, but they are binding in terms of achieving the objective envisaged in the directive. EU Member States are obliged to transpose the directives into their national legal orders within a period of two or three years, depending on the complexity of the issues dealt with by the directive. Thus, directives do leave Member States with some room for maneuver, unlike regulations, and their objective is to harmonize the legislation of EU Member States rather than to unify it. A failure of a Member State to transpose a directive correctly and in time has a number of consequences both for the Member States concerned, and for individuals wishing to benefit from the corresponding directive.

If a Member State fails to transpose a directive in time, the European Commission being the Guardian of the Treaties may initiate an infringement procedure against that state before the Court of Justice of the European Union. In the initial stage of the procedure, the Commission will provide the Member State concerned with some extra time to transpose the directive. If the Member State fails to complete the transposition, the Court of Justice of the EU will decide that

the Member State has breached the founding treaties by not transposing the EU directive and it can also impose a fine on the breaching Member State which will become part of the EU budget. The fines are usually very high and motivate the Member State concerned to adopt the necessary legislation to comply with the EU directive.

As for the effects of a directive which was not transposed with respect to individuals, if the directive granted specific rights to individuals (for instance the right to terminate a contract in case of a purchase made outside the usual business premises) and individuals have suffered harm due to the impossibility of exercising these rights (for instance as in the famous *Faccini Dori* judgment discussed below), the directive can have a limited vertical direct effect. This means that individuals can sue the state for damages they incurred as a result of the state's failure to transpose a directive in time. However, the state can never rely on the directive with respect to individuals, nor can individuals rely on the provisions of the directive in their mutual relations before a law court. Hence, directives have no horizontal direct effect.

To have a better idea of what directives look like, you can find selected provisions from the Services Directive in the following box.

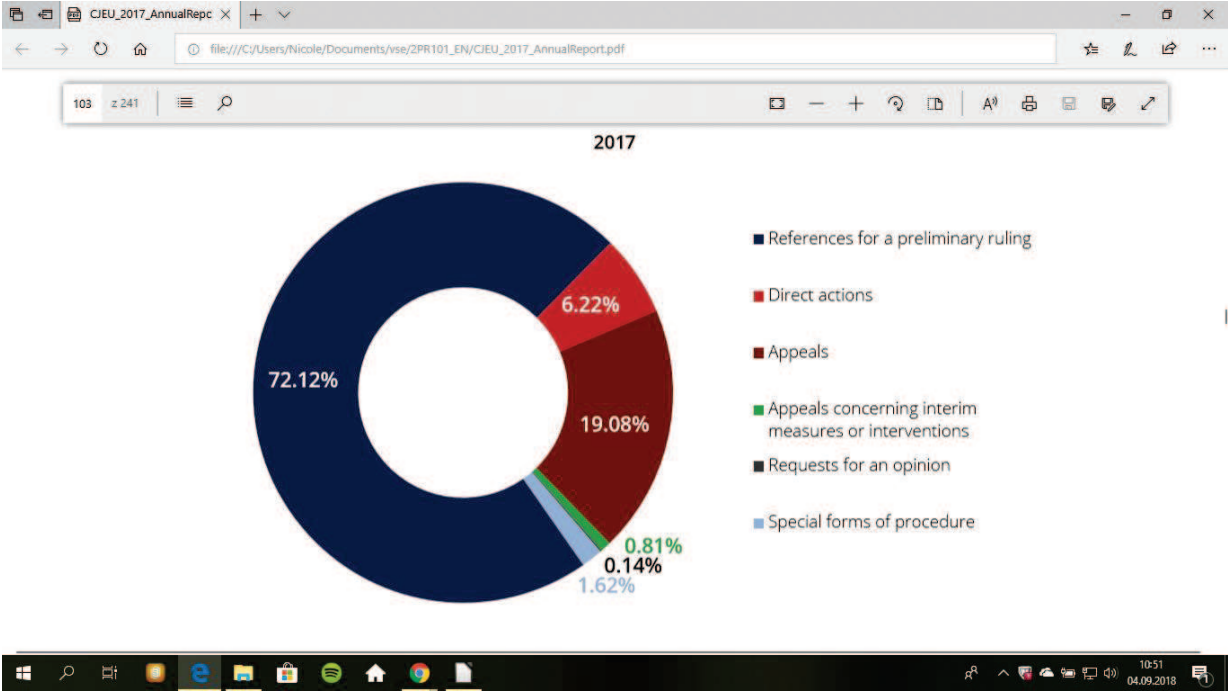
<p style="text-align: center;">DIRECTIVE 2006/123/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 December 2006 on services in the internal market GENERAL PROVISIONS Article 1 Subject matter</p> <p>1. This Directive establishes general provisions facilitating the exercise of the freedom of establishment for service providers and the free movement of services, while maintaining a high quality of services.</p> <p style="text-align: center;">ADMINISTRATIVE SIMPLIFICATION Article 5 Simplification of procedures</p> <p>1. Member States shall examine the procedures and formalities applicable to access to a service activity and to the exercise thereof. Where procedures and formalities examined under this paragraph are not sufficiently simple, Member States shall simplify them.</p> <p style="text-align: center;">Article 6 Points of single contact</p> <p>1. Member States shall ensure that it is possible for providers to complete the following procedures and formalities through points of single contact:</p> <p>(a) all procedures and formalities needed for access to his service activities, in particular, all declarations, notifications or applications necessary for authorisation from the competent authorities, including applications for inclusion in a register, a roll or a database, or for registration with a professional body or association;</p> <p>(b) any applications for authorisation needed to exercise his service activities.</p> <p style="text-align: center;">FINAL PROVISIONS Article 44 Transposition</p> <p>1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 28 December 2009. They shall forthwith communicate to the Commission the text of those measures. When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.</p> <p>2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.</p> <p style="text-align: center;">Article 46 Addressees</p> <p>This Directive is addressed to the Member States.</p>
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The last binding source of EU legislation in a decision. In order for a decision to be considered a secondary source of law, it has to be proposed by the European Commission and adopted by the Council of Ministers and by the European Parliament. Having said this, decisions adopted by the Court of Justice of the EU are not considered secondary legislation, since they interpret secondary legislation rather than create it. In recent years, decisions have become rather a rare source of EU secondary legislation. If adopted, they are binding on its addressees which are specified in the final provisions of the decision. The addressees can be either EU Member States only, or both EU Member States and individuals.

#### 4.4 Enforcement of EU Law by Law Courts

Since EU Law is most often applied by **national courts as first instance courts**, we speak about **decentralized enforcement of EU Law**. The Court of Justice of the EU only provides a binding interpretation of EU law if national courts expressly ask it to do so by means of making a **preliminary reference**. Parties to national court proceedings cannot force the national court to make a preliminary reference to the Court of Justice of the EU. It is entirely at the liberty of the judges deciding a particular case to refer a case for a preliminary ruling to Luxembourg. **The Court of Justice does not serve as an appeals court** with respect to the decisions delivered by national courts.

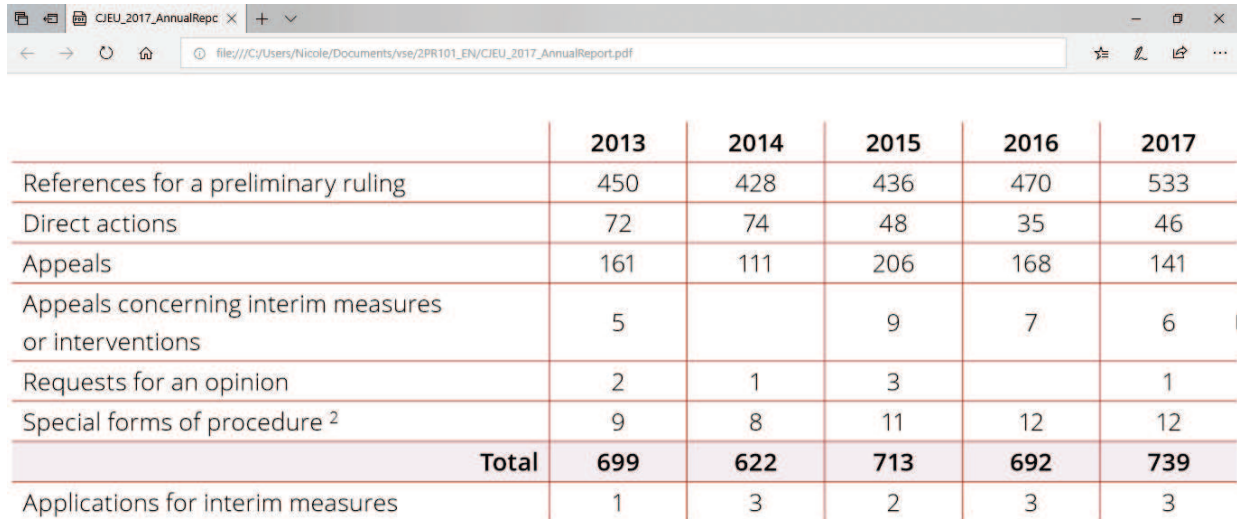
Looking at the breakdown of the judicial activities of the Court of Justice of the EU, it is clear from the figure below, that the highest judicial authority of the EU spends most of its time resolving preliminary references which may serve as precedents for similar cases in the future. It also resolves direct actions, such as infringements by EU Members States and it deals with appeals against the General Court, a lower court instance which is part of the Court of Justice of the EU.



Source: Court of Justice of the European Union, 2017 Annual Report

Since the decisions of the Court have to be translated into all official languages of the EU prior to being published, it takes more than one year (between 15 and 16 months on the average) for a judgment on a preliminary reference to be delivered.

The absolute number of cases dealt with by the Court of Justice of the European Union in 2017 is shown in the table below:



	2013	2014	2015	2016	2017
References for a preliminary ruling	450	428	436	470	533
Direct actions	72	74	48	35	46
Appeals	161	111	206	168	141
Appeals concerning interim measures or interventions	5		9	7	6
Requests for an opinion	2	1	3		1
Special forms of procedure <sup>2</sup>	9	8	11	12	12
<b>Total</b>	<b>699</b>	<b>622</b>	<b>713</b>	<b>692</b>	<b>739</b>
Applications for interim measures	1	3	2	3	3

Source: Court of Justice of the European Union, 2017 Annual Report

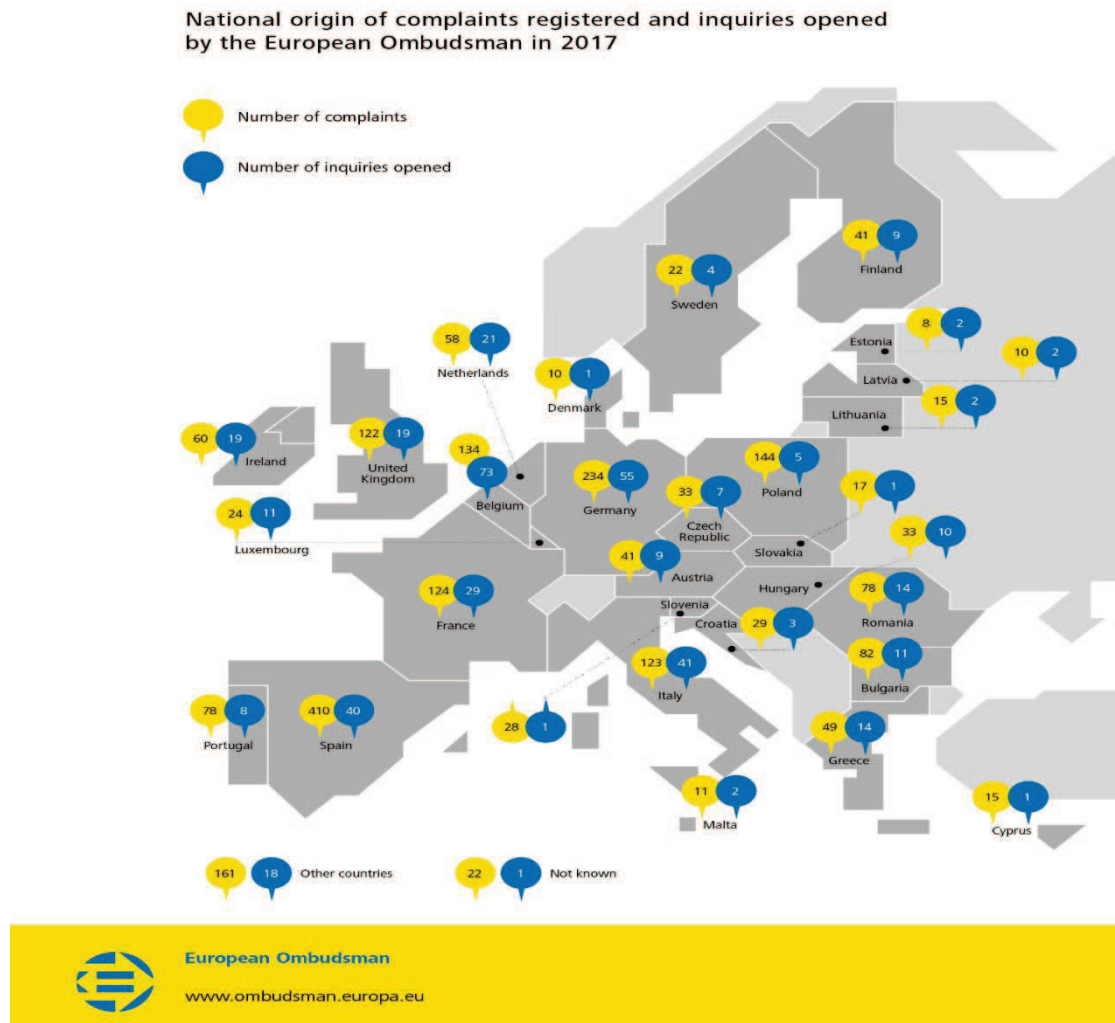
The access of **individuals as non-privileged applicants** to the General Court of the Court of Justice of the EU is extremely limited to cases when **an EU body or institution breach the rights of an individual**, which does not happen very frequently. Individuals have been availed of three different types of actions they may use. The action for annulment, the action for damages and the action for failure to act. The first one is used most frequently in competition cases and in cases where individuals require access to documents which have been made inaccessible by the requested EU institution.

#### 4.5 Extra judicial enforcement by EU Law

Since the European Commission as a Guardian of EU law cannot force national judges to decide quickly, it promotes a number of out-of-court dispute settlement mechanisms, which can be more speedy and cheaper for the participants in certain circumstances, such as **mediation for resolving disputes between private parties**. If a public authority is involved in the dispute, an individual may direct his or her complaint either to the European Ombudsman, to the SOLVIT network or to the Petitions Committee of the European Parliament. The powers of these different avenues of extrajudicial resolution of disputes differ as explained below.

#### 4.5.1 European Ombudsman

The European Ombudsman is in charge of resolving cases of **maladministration committed by an EU body or an EU institution with respect to an EU citizen or an EU resident**. If EU Law was breached by a national body, the European Ombudsman cannot deal with the case, but will inform the complainant that he or she should contact the national or the regional ombudsman to resolve the issue.



Source: European Ombudsman, 2017 Annual Report

A typical example of maladministration committed by EU bodies is undue delay, discrimination, and a failure to provide a document which is not classified.

Usually, the European Ombudsman manages to reach a friendly solution to a complaint in some 80 per cent of cases which are admissible. Individuals complain against the European Commission most often, since it has the highest number of staff out of all EU institutions and it is also most likely to come into direct contact with EU citizens.

The office of the European Ombudsman receives complaints in all EU official languages and it strives to achieve a settlement within a period of 9 months. The services of the European Ombudsman are operative as of 1995 and they are free of charge for the complainants. The



operation of the watchdog of the EU administration is fully covered by the EU budget. The European Ombudsman has its main office in Strasbourg and a smaller office in Brussels in the building of the European Parliament. However, there is no need for the EU citizens to lodge a complaint in person. Online means of communication are very common, such as an interactive web form or an email.

The European Parliament elects the European Ombudsman for a renewable period of 5 years. The European Ombudsman regularly reports to the Petitions Committee of the European Parliament. It also publishes its annual reports and reports on the cases resolved online. Apart from dealing with individual complaints, the European Ombudsman may decide to launch an investigation on its own initiative, when it appears that there is a systemic problem in the EU public administration rather than an individual shortcoming of an EU official or of a procedure.

#### 4.5.2 SOLVIT

The SOLVIT network is an informal problem SOLVIT network for problems of **nationals of one Member State with the public administration of another Member State**. Perhaps you are a professional and wish to work in a different Member State, where the public administration fails to recognize your professional qualification. Your home SOLVIT center can help to resolve this issue in terms of weeks and free of charge by contacting the lead SOLVIT center of the target EU Member State.

##### ***Austrian physiotherapist authorised to practice in Portugal***

*An Austrian physiotherapist applied for professional recognition in Portugal. One year later he still had not had a response from the Portuguese authorities. When enquired how things were progressing, he was asked to wait until they called back.*

*This delay was jeopardizing his chances of working in Portugal. He had been offered a job but couldn't take it without having his professional qualifications recognised.*

*Thanks to SOLVIT Portugal, the physiotherapist obtained the recognition and was able to start working in Portugal. Solved within 5 weeks.*

Source: European Commission, 2018

SOLVIT can also be used by businesses, for instance when they have difficulties with their VAT refund from another Member State when importing goods for further sale in their home country.

##### ***French company gets VAT refund from Germany***



*A French company requested a VAT refund from the German authorities – but the request remained unanswered for 10 months.*

*Thanks to SOLVIT's intervention, the procedure was speeded up and the company received the amount it had asked for.*

*Solved within 6 weeks.*

Source: European Commission, 2018

Apart from all EU Member States, SOLVIT centers are also operative in three more states which are part of the European Economic Area: Norway, Iceland and Lichtenstein. The European Commission regularly assesses the timely resolution of complaints and the success rate of their resolution and urges lenient Member States to reinforce the staff of the SOLVIT centers in order to maintain an efficient problem solving network.

#### 4.5.3 European Parliament's Petitions Committee

The Petitions Committee of the European Parliament is the only European Parliament committee which has direct contact with EU citizens. It receives petitions (both individual and collective ones) from EU citizens when national authorities violate EU law. Very often, EU citizens complain about the breach of EU environmental law. For instance, a state authority authorizes a construction of a housing estate or of a hotel in an area which should be protected due to its enhanced environmental value and is part of the Natura 2000 network. Such an authorization clearly breaches EU law. The European Parliament may decide to set up a fact finding mission to investigate a petition, but its resources are limited. Hence, it is impossible to set up a fact finding mission to investigate each petition *in situ*. Yet, if it finds the petition substantiated, it may invite its author(s) to present it and to provide further details during the meeting of the Petitions Committee. Also, if the breach of EU law by a Member State is particularly serious and alarming, the Petitions Committee may decide to discuss this issue in a plenary session. Out of some 1000 petitions received each year, fewer than 10 make it to the plenary session of the European Parliament each year.

#### 4.6 Summary

The European Commission may propose secondary legislation only if it has an express authorization to do so in the founding treaties. In the field of exclusive powers, usually regulations are proposed and adopted. In the field of shared powers, directives are preferred. The differences between the addressees and effects of EU secondary legislation have been summarized in the table below.

	<b>Addressees</b>	<b>Effects</b>
<b>Regulation</b>	All Member States, natural and legal persons	Directly applicable; binding in their entirety
<b>Directive</b>	Member States	Binding with respect to the intended result. Directly applicable only under particular circumstances
<b>Decision</b>	Member States and/or natural or legal persons	Directly applicable; binding in their entirety
<b>Recommendation</b>	Member States and/or EU bodies/individuals	Not binding
<b>Opinion</b>	Member States and/or EU bodies/individuals	Not binding

## 4.7 Self-assessment questions/tasks

1. Who creates EU Primary Law?
2. What are the binding sources of EU secondary law?
3. What does “direct effect” mean? What is the difference between the direct effect of regulations and directives?
4. What does decentralized enforcement of EU law mean?
5. What is the purpose of preliminary reference?
6. Who can initiate an infringement procedure and why?
7. Can EU nationals appeal to the Court of Justice of the EU if they are unhappy with a judgment delivered by their national court(s)?
8. What is the difference between the powers of the European Ombudsman, the Petitions Committee and the SOLVIT network? Give a practical example of a case resolved by each of these out-of-court disputes settlement avenues.

## 4.8 Further reading/listening

Craig, P.; de Búrca, G., Text, Cases and Materials, 5th ed., Oxford: OUP, 2011, pp. 103-130.

Online book on EU Institutions and EU Law available at

[http://europa.eu/documentation/legislation/pdf/oa8107147\\_en.pdf](http://europa.eu/documentation/legislation/pdf/oa8107147_en.pdf); pp. 80-114

A link to a video on how the office of the European Ombudsman works:

[https://www.youtube.com/watch?v=tY\\_4YEyFxyM](https://www.youtube.com/watch?v=tY_4YEyFxyM)

A link to a video on how the SOLVIT network may assist EU citizens:

<https://www.youtube.com/watch?v=Mc8D8KDq6iA>

A link to a video on how the SOLVIT network may assist EU businesses

<https://www.youtube.com/watch?v=7BeEqT6oy-g>