R v *Gould*, 1968 – Precedent in criminal appeals (32) 

Divisional Courts

Divisional Courts are, in civil cases, bound by the decisions of the House of Lords, the Court of Appeal (Civil Division) and generally by their own previous decisions. However, a Divisional Court of Queen's Bench decided in *R* v *Greater Manchester Coroner, ex parte Tal* [1984] 3 All ER 240 that a Divisional Court would normally follow a previous decision of another Divisional Court but could in rare cases exercise its power to refuse to follow a previous Divisional Court decision if the court was convinced that the previous decision was wrong. In criminal cases there is, under ss 12–15 of the Administration of Justice Act 1960, an appeal from the Divisional Court of the Queen's Bench Division straight to the House of Lords, and the Divisional Court is not bound by the decisions of the Criminal Division of the Court of Appeal. The decisions of Divisional Courts are binding on judges of the High Court sitting alone and on magistrates' courts but not on Crown Courts (see below).

The High Court

At the next lower stage, a High Court judge, although bound by the decisions of the Court of Appeal and the House of Lords is not bound by the decisions of another High Court judge sitting at first instance (*Huddersfield Police Authority* v *Watson* [1947] 2 All ER 193). Nevertheless, such a judge will treat previous decisions as of strong persuasive authority. If a judge of the High Court refuses to follow a previous decision on a similar point of law, the Law Reports will contain two decisions by judges of equal authority and the cases will remain in conflict until the same point of law is taken to appeal before a higher tribunal whose decision will resolve the position (and see the statement of Nourse, J in the *Colchester Estates* case considered later in this chapter).

The Crown Court

A judge sitting in the Crown Court, the jurisdiction of which is largely confined to criminal cases, is bound by decisions made in criminal matters by the House of Lords and Court of Appeal (Criminal Division) but not apparently by decisions of the Divisional Court of the Queen's Bench Division (*R* v *Colyer* [1974] Crim LR 243). A judge sitting in the Crown Court and exercising a civil jurisdiction, e.g. licensing, is bound by the decisions of the House of Lords, Court of Appeal and the High Court.

Magistrates' courts and county courts

These courts are bound by the decisions of the higher courts. Their own decisions are not reported officially and have no binding force on other courts at the same level.

The Employment Appeal Tribunal (EAT)

As regards this tribunal, only the decisions of the Court of Appeal and the House of Lords on matters of law are binding, though the decisions of the earlier Industrial Relations Court and the High Court in England are of great persuasive authority and the tribunal would not lightly differ from the principles which are to be found in those decisions (*per* Bristow, J in

Portec (UK) Ltd v *Mogensen* [1976] 3 All ER 565 at p 568). These remarks remain valid even though the *Portec* case was overruled in terms of its decision by *Wilson* v *Maynard Shipbuilding Consultants AB* [1978] 2 All ER 78. Nevertheless, Wait, J, who as President of the EAT presided in *Anandarajah* v *Lord Chancellor's Department* [1984] IRLR 131, ruled that no assistance could be derived from precedent in deciding whether a dismissal was unfair (see further Chapter 19).

The EAT is not bound to follow its own decisions and the decision of an employment tribunal binds no one except the parties to the dispute.

The Judicial Committee of the Privy Council

The decisions of the Judicial Committee of the Privy Council are in general not binding, either on the Committee itself or on other English courts, save the Ecclesiastical and Prize Courts. Its decisions are technically only of persuasive authority in English law, and this derives from the fact that the Judicial Committee hears appeals from overseas territories. Thus, when it hears an appeal from Belize, it may not apply a rule of law used (say) in a previous appeal from the Channel Islands.

As regards the relationship of the Judicial Committee and the House of Lords, where the law applicable to the case is English, the Committee will feel bound to follow a relevant decision of the House of Lords but not otherwise (*Tai Hing Cotton* v *Liu Chong Hing Bank* [1985] 2 All ER 947).

Although in general terms the decisions of the Privy Council are persuasive only, there may rarely be cases where a decision of the Privy Council can overrule a decision of the House of Lords. This occurred in a case concerning provocation as a defence to a charge of murder which, if accepted by the court, can reduce the charge to one of manslaughter. The difficulty, as Chapter 24 will further illustrate, is whether in the act put forward as a provocation any special characteristics of the defendant can be taken into account as leading him or her to be provoked when a person without those characteristics would not. In *R* v *Smith (Morgan James)* [2000] 4 All ER 289, the House of Lords ruled that the defendant's depressive illness could be taken into account. In *Attorney-General for Jersey* v *Holley* [2005] 2 AC 580 the Privy Council ruled that alcoholism could not. The matter came before the House of Lords in *R* v *James* [2006] 1 All ER 759. James had killed his wife after they had separated and psychiatric evidence was adduced and James sought to regard this as a special characteristic, though the killing was not spontaneous. Should the House of Lords follow *Holley* or *Smith*, bearing in mind that the Privy Council in *Holley* had said *Smith* was wrongly decided?

The House of Lords followed *Holley*. Why? Because the Privy Council which heard the *Holley* case consisted of nine of the Lords of Appeal in Ordinary: a very strong court. We have seen that the House of Lords can overrule its own decisions and in effect surely that is what it was doing here under the guise of the Privy Council.

Could it happen once the Supreme Court is in place? Under the Constitutional Reform Act 2005, the judges of the Privy Council are those who have held high judicial office and former holders who are privy councillors. Since the judges of the Supreme Court and former judges of the court are within this category, the answer is yes, if the Privy Council had a high percentage of Supreme Court judges and/or former judges on the bench when the relevant decision was made.

General exceptions to the rule of binding precedent

Having examined the relationship of the above courts with regard to the rule of binding precedent, it should be noted that a court is not always bound to follow a precedent which

according to the rules outlined above ought to be binding on it. It is by avoiding the following of precedents that judges can, and do, make law.

Thus, when the court in question is invited to follow a binding precedent, it may refuse to do so, for example:

(a) by distinguishing the case now before it from the previous case on the facts. A case is *distinguished* when the court considers that there are important points of difference between the facts of the case now before it and a previous decision which it is being invited to follow. As Lord Halsbury said in *Quinn* v *Leatham* [1901] AC 495:

> Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law but govern and are qualified by the particular facts of the case in which such expressions are found.

This process of narrowing down the implications of the *ratio decidendi* of a previous case by 'distinguishing' is a device often used by a court which does not wish to follow an earlier decision which would otherwise be binding on it.

If a court deems that an earlier case was wrongly decided but cannot overrule it because the *ratio decidendi* of the case now before it does not cover all the matters raised in the earlier case, it may, by way of *obiter dictum*, *disapprove* the earlier case which is then to some extent affected as a precedent. Examples of distinguishing are to be found by comparing the decisions in *Ingram* v *Little* (1961) and *Lewis* v *Averay* (1971) (see Chapter 12);

(b) by refusing to follow the previous case because its *ratio* is obscure. Thus, in *Harper* v *NCB* [1974] 2 All ER 441 the Court of Appeal refused to follow the decision of the House of Lords in *Central Asbestos Co* v *Dodd* [1972] 2 All ER 1135 because the majority of three to two judges who found for Dodd left behind no discernible *ratio*. It was unclear whether the decision that Mr Dodd, who brought an action against his employers because he contracted an industrial disease in the course of his employment after the time limit of three years had elapsed, succeeded (i) because he knew that the injury arose from his employment but did not know that he could sue; or (ii) because he knew he could sue but not that the disease arose from his employment;

(c) by declaring the previous case to be in conflict with a fundamental principle of law, as where, for example, the court in the previous case has not applied the doctrine of privity of contract (see *Beswick* v *Beswick* (1967) (see further Chapter 10));

(d) by finding the previous decision to be *per incuriam*, i.e. where an important case or statute was not brought to the attention of the court or ignored (see view of Bristow, J in *Miliangos*) when the previous decision was made;

(e) because the previous decision is one of several conflicting decisions at the same level. In this connection, the comments of Nourse, J in *Colchester Estates (Cardiff)* v *Carlton Industries* [1984] 2 All ER 601 are of interest. He said that as a general rule, a judge faced with two conflicting authorities of judges of the same rank should feel himself bound by the later of them. This would not, however, be the rule if it appeared to the judge deciding the case that the later judgment was wrong in not following the first, as, for example, where some other binding authority had not been cited to the earlier judge or judges;

(f) because the previous decision had been overruled by statute.

(g) effect of the Human Rights Act 1998. We have already noted that the courts will not be bound by previous interpretations of statute law that does not take account of Convention rights. This is true also of the common law that must also be developed so as to be compatible

with the Convention. Furthermore, there is no protection for the common law as there is for primary legislation where the courts can only declare primary legislation incompatible and then it is a matter for Parliament to decide how to deal with the matter.

(h) references to the European Court of Justice (ECJ). The Court of Appeal ruled in *Trent Taverns Ltd* v *Sykes* (1999) *The Times*, 5 March that it could, in the exercise of its discretion, make a reference to the ECJ in a case where the relevant point of Community law had already been decided by the Court of Appeal since the ordinary rules of precedent did not apply to such references.

It should be noted that when a reference is made to the European Court, it is to rule on the law not the facts of the case. If the European Court does give a contrary ruling on the facts in reaching its decision, a national court can refuse to follow it. This arose in *Arsenal Football Club plc* v *Reed* [2003] 1 All ER 137. Arsenal claimed that Mr Reed was passing off his merchandise as official Arsenal merchandise from his stall outside the ground. Mr Reed displayed a disclaimer saying that his goods were not official Arsenal merchandise. In the High Court Mr Justice Laddie ruled that there was no passing off because *of the fact of the disclaimer*. The ECJ ruled that there was *in spite of the fact of the disclaimer*. The ECJ therefore took a different view of the facts from Laddie J and he refused to follow the ECJ. The matter was resolved by the Court of Appeal in *Arsenal Football Club plc* v *Reed* (2003) *The Times*, 22 May. The Court of Appeal *accepted the view of the facts* taken by the ECJ that in spite of the disclaimer there had been a passing off by Mr Reed. Nevertheless, the case is still a valid and almost singular illustration of a judge refusing to apply an ECJ ruling.

(i) Some miscellaneous rulings. In *R (on the application of Kadhim)* v *Brent LBC Housing Benefit Board* [2001] QB 955 the Court of Appeal ruled that a precedent may be departed from where the previous court had assumed the correctness of the precedent without hearing argument. Furthermore, in *Bakewell Management Ltd* v *Brandwood* (2002) *The Times*, 19 April the High Court ruled that a High Court judge ought not to regard himself or herself as able to depart from an applicable Court of Appeal decision on the basis that a new argument not presented to the Court of Appeal had been presented to him or her. That was all the more so where the House of Lords had refused leave to appeal against the earlier Court of Appeal decision.

Cases heard in the county court and in the magistrates' courts are not generally reported, and for this reason do not create binding precedents. It would not be desirable to report such cases, for English law already possesses such a large number of reported cases that decisions are sometimes made in which relevant precedents are not cited or considered, and may therefore be *per incuriam*. Some judges feel that this position is exacerbated by unreported cases stored in computers (see above).

Persuasive precedents

These consist of decisions made in lower courts, and generally in the Judicial Committee of the Privy Council of *obiter dicta* at all levels and also decisions of Irish, Scottish, Commonwealth, and United States courts, the reason being that these nations also base their law on the common law of England and Wales, though some parts of the law of Scotland are derived from Roman law. Cases coming to the House of Lords from Scotland do not bind English courts. They are only persuasive unless the legal principles involved are the same in both systems of law. The House of Lords normally gives a direction as to the binding nature of such decisions; for example, *Donoghue* v *Stevenson* (1932) (see Chapter 21), which is a fundamental case on the law of negligence, is binding on both jurisdictions, although it was an appeal from the Scottish Court of Session.

In the absence of any persuasive authority from the above sources, the court may turn to textbooks and sometimes to Roman law. The weight which a court will give to persuasive authority may depend upon the standing of the judge whose decision or *dictum* it was and whether it was a reserved judgment, i.e. a case in which the court took time to consider the judgment. Reserved judgments are highly regarded. Undefended cases in which the issues have not been fully argued on both sides do not carry great weight.

Declaratory and original precedents

One further classification of precedents must be noted. They may be either 'declaratory' or 'original':

- *a declaratory precedent* is one which is merely the application of an existing rule of law;
- *an original precedent* is one which creates and applies a new rule. Original precedents alone develop the law; declaratory precedents are merely further evidence of it. Thus, if a judge says: 'The matter before us is not covered by authority and we must decide it on principle . . .' an original precedent is indicated.

Reversing, overruling and *res judicata*

It often happens that when a case has been decided in (say) the High Court, a decision is taken to appeal to an appellate court, in this case the Court of Appeal. The Court of Appeal will re-examine the case and, if it comes to a different conclusion from the judge in the High Court, it reverses his decision. Reversal, therefore, applies to a decision of an appellate court in the same case. Sometimes, however, the case which comes before the appellate court has been decided by following a previously decided case, the judge having followed precedent. In this case, if the appellate court decides to differ from the decision reached in the lower court, it is said to overrule the case which formed the basis of the precedent.

In this connection, it was held to be in order for a court, in this case a county court, to adjourn proceedings pending a ruling by the House of Lords on a similar issue on which the Court of Appeal had already ruled instead of following the Court of Appeal ruling (see *Kingcastle Ltd* v *Owen-Owen* (1999) *The Times*, 18 March).

Reversal affects the parties, who are bound by the decision of the appellate court, and it affects precedent because lower courts will in future be bound to follow the decision. *Overruling affects precedent*, but does not reach back to affect the parties in the original case now regarded as wrongly decided, and it is not necessary, for example, for a successful claimant to return his damages. Furthermore, the case could not be tried again because the rule of *res judicata* would apply. So the rule of *res judicata* (a matter which has been adjudicated on) protects defendants against a multiplicity of actions in regard to the same issues.

Res judicata does not apply where the decision is affected by *judicial bias*. This is illustrated by the various proceedings brought in connection with the application for extradition of General Pinochet, the former head of the state of Chile, to Spain to face charges of murder of Spanish citizens in Chile and the taking of such citizens as hostages and the torturing of them. On the basis of these allegations, the House of Lords ruled in 1998 (see *R* v *Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet* [1998] 3 WLR 1456) that Pinochet was not entitled to immunity as an ex-head of state. However, lawyers acting for him discovered that one of the Law Lords, who was part of the court that heard the case, had been the chairman and an unpaid director of Amnesty International, which had been allowed to intervene in the appeal and was vigorously seeking Pinochet's extradition. In 1999 (see *R* v *Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet* [1999] 1 WLR 272) the House of Lords

re-heard the case with a different court and set aside the 1998 ruling, although the matter was in a sense *res judicata*.

The rule of *res judicata* can in modern law be divided into what is called cause of action estoppel and issue estoppel. Cause of action estoppel prevents a party to an action from suing again on the same matter in order to try to overturn the earlier decision. The earlier decision must stand once all rights of appeal have been exhausted or abandoned. The matters in issue must be the same, otherwise the rule does not apply. Thus, the failure or settlement of a claim for unfair dismissal (see Chapter 19) does not prevent a claim being made for unpaid wages (see *Dattani* v *Trio Supermarkets* [1998] ICR 872 – a ruling of the Court of Appeal).

A claimant is also barred by cause of action estoppel from bringing a claim which could have been brought at the same time as another claim brought by a *different claimant* having the same cause of action against the same defendant. Thus, in *Talbot* v *Berkshire County Council* [1993] 4 All ER 9, Talbot and his passenger were injured when his car ran into water on the highway and went off the road. The passenger sued Talbot and the Council, and damages were awarded to her as to two-thirds against Talbot for his negligence and one-third against the Council for its negligence. Talbot, who had been unaware of the claim against the Council because of the involvement of insurance companies, then tried to claim against the Council. The Court of Appeal said he could not. Talbot's claim could have been brought at the same time as the passenger's and was, therefore, barred by cause of action estoppel.

Issue estoppel is different and the court may in some cases allow an issue which was dealt with in an earlier action between the parties to be litigated again in a later claim between them.

Arnold v *National Westminster Bank plc*, 1990 – Cause of action and issue estoppel (**33**)

Advantages and drawbacks of case law

The system of judicial precedent has several *advantages*. Up to a point it can claim the *advantage of certainty*, since it is possible to predict the ruling of a court because judicial decisions tend to be consistent. Nevertheless judges have a habit of distinguishing cases on the facts and, as we have seen, avoiding the following of cases in a variety of other ways. This means that the claim to certainty has to be taken with reservations. Another claim put forward in favour of case law is its *power of flexibility and growth*. New decisions are constantly being added as new cases come before the courts. In this way the law tends to keep pace with the times and can adapt itself to changing circumstances. Judicial precedent covers a *wealth of detail*. There is a case in point for every rule, and there is a *practical character* to judicial rulings. Legal rules are made only as the need arises, and the law is not made in advance on the basis of theory. When a case arises, a decision is taken and the ruling is usually recorded, so that when a similar case arises again the law will be there to be applied.

Case law has certain *drawbacks*. These drawbacks are in some cases merely the converse aspects of the advantages. For example, Jeremy Bentham criticised *the principle of the 'law following the event'*, and applied the epithet 'dog's law' to the system. 'It is', he says, 'the judges that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does something you want to break him of, you wait till he does it then beat him. This is the way you make laws for your dog: this is the way the judges make law for you and me.'

A further criticism is that *the binding force of precedent limits judicial discretion*. It has been said that judges are engaged in 'forging fetters for their own feet'. This can be illustrated by

the doctrine of common employment, which was laid down by the House of Lords in *Priestley* v *Fowler* (1837) 3 M & W 1. This doctrine said that if an employee was injured by a fellow employee whilst both were acting within the scope of their employment, their employer was not liable vicariously for that negligence. The rule operated in a most unjust fashion during the period of great industrial development, but it continued to bind judges for over a century until it was finally abolished by the Law Reform (Personal Injuries) Act 1948. All the judges could do in the meantime was to try to limit its scope.

Limiting the scope of a decision may lead to the court's making *illogical distinctions*. Judges and counsel pay attention to differences in cases which are fundamentally similar, in order to uphold the doctrine of precedent and still not feel bound to follow an inconvenient rule. Often these distinctions have real substance, but occasionally they are illogical and serve to complicate the law.

Difficulties of the kind outlined above may not now arise in such an acute form because, as we have seen, the House of Lords is no longer bound by its own decisions, though this tends to detract from the element of certainty.

A further criticism must be noted – that of *bulk and complexity*. The number of reported cases is so large that the law can be ascertained only by searching through a large number of reports. This search has been eased somewhat where case law has been codified by statute in order to produce a rational arrangement. The Bills of Exchange Act 1882, the Sale of Goods Act 1893 (now 1979), and the Law of Property Act 1925 have to a large extent produced order in what might have been called chaos, but case law still tends to develop even around a codifying statute, and its sections soon have to be read in the light of interpretative cases.

Finally, it is a major criticism of our system of case law that only the House of Lords gives the ultimate authoritative judicial ruling on a matter. However, whether this happens depends upon the litigants or, at least, the losing party footing the bill to get to the House of Lords or, increasingly more unlikely these days, legal aid doing so. It would be an improvement if we had a system under which the High Court or Court of Appeal could refer a question of law to the House of Lords at public expense, rather on the lines of Art 177 (now 234) of the EC Treaty which allows reference to the Court of Justice by domestic courts on matters involving Community law.

Precedent in the European Court

In line with the normal Continental approach, there is no doctrine of binding precedent, though the body of decisions which the court is making in the interpretation of the Treaty are having strong persuasive influence. These decisions are cited before the court in argument and are also quoted in judgments. In terms of the interpretation of legislation, the European Court has much broader powers than those which English courts have. There is no question of being restricted, for example, to the words of the Treaty or regulations. The court may consider the reasons for enactment and the general objectives and policy of the Communities. It can have regard to *travaux préparatoires*, i.e. statements and publications made prior to enactment and *doctrine*, i.e. views of learned writers as to what the law should be.

The European Union

On 1 January 1973 the United Kingdom became a member of the European Community (now the European Union) and in consequence subject to an additional source of law.

Membership of the EU

Twenty-five countries are now members of the European Union. They are: France, Germany, Italy, Belgium, the Netherlands, Luxembourg, the United Kingdom, the Republic of Ireland, Denmark, Greece, Spain, Portugal, Sweden, Finland, Austria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovenia and Slovakia. Bulgaria and Romania plan to join in 2007 and Turkey has applied to join.

Union or Community?

The parts of the European co-operation arrangements include:

(*a*) The European Community (economic co-operation: the old EEC);
(*b*) The European Atomic Energy Community (EURATOM);
(*c*) The European Coal and Steel Community (ECSC); and
(*d*) The Maastricht areas referred to above.

As we have seen, when referring to all of them the correct legal reference is to the European Union and the same is true when referring to the Maastricht areas of co-operation. Otherwise, the correct reference is to the European Community, which took over from the earlier EEC, or to EURATOM or ECSC as the context requires.

The European Court has no automatic jurisdiction in the Maastricht areas and so rightly continues to call itself the Court of Justice of the European Communities, although confusingly the Council of Ministers calls itself the Council of the European Union, even when passing EC legislation!

The expressions 'Community' and 'Union' are used indiscriminately in this book as they are in real life and if the reader is more at home with 'Union' then there is no reason why that expression should not be used throughout.

The European Economic Area (EEA) Agreement came into force on 1 January 1994. It extends the EC's Single Market to Austria, Finland, Iceland, Norway and Sweden. Some 1,500 EC measures, such as the rules on competition, will apply to these countries and, as we have noted, Austria, Finland and Sweden now have full membership of the EU, while Norway has decided not to join. The EEA was implemented in the UK by the European Economic Area Act 1993.

The institutions of the Union

The five basic institutions of the Union are:

- the Parliament
- the Council
- the Commission
- the Court of Justice
- the Court of First Instance.

Consideration has already been given to the courts listed above.

The Parliament

This is a large assembly that currently has 732 members directly elected by their member states. *It is important to note that it is not the legislature of the Union.* In this sense it differs from Parliaments modelled on the Westminster Parliament. However, the powers of the Parliament have been extended by the Single European Act of 1986 and the Treaty on European Union

1992 (the Maastricht Treaty). These extensions have in some ways remedied the defect that critics had of the Parliament in that *the unelected Council is the primary legislature.*

The Treaty of Amsterdam extended its powers in the field of co-decision (see below). The Parliament now has a legislative role at a number of levels as follows.

Advisory and consultative. This procedure represents the only original involvement of the Parliament in legislation. Under this procedure the Commission puts forward proposals to the Council for consideration. At this stage the Parliament has a right to be *consulted* and can give *an opinion*. The final decision is taken by the Council. This procedure is retained for matters concerned with the Common Agricultural Policy.

Co-operation. Under this procedure the Parliament has the opportunity to express an opinion and propose amendments:

- when a proposal of the Commission is submitted to the Council; and
- when the Council has considered the opinion of the Parliament and reached what is called a 'Common Position'. The procedure is a right to influence but not veto. The procedure is restricted to matters concerning economic and monetary union.

Co-decision. This procedure is the same as the co-operation procedure to the point where a Common Position is reached. After that it changes and the Parliament may approve the Common Position in which case the Council will adopt it. In the case of rejection, the matter is referred to a *Conciliation Committee* of 12 persons from the Council and 12 MEPs charged to reach an agreement acceptable to both sides. If there is no such agreement or the agreement is unacceptable to the Parliament, the proposal lapses. The Parliament may propose amendments to the Common Position, and then:

- the Council and the Commission will consider the amendments;
- the Council may, if it approves all the amendments, adopt the measure as amended; or
- find the amendments or some of them unacceptable (in this case the Conciliation Committee is convened; if a joint approach is agreed between the two sides of the Committee, the measure must be adopted within six weeks by the Council and Parliament);
- if the Committee cannot agree, the proposal will lapse, though it could be adopted unilaterally by the Council subject in this case to a power of veto in the Parliament.

This procedure applies to the majority of single-market proposals, culture and public health and importantly consumer protection.

Assent. The assent procedure applies in regard to applications for membership of the Union and agreements between the Union and other states, or international organisations. The Council may only adopt a proposal by the Commission through this procedure by obtaining the formal assent of the Parliament.

The Council

If the Union can be said to have a legislature this is it. It is a body composed of one minister to represent each member state. These persons change in accordance with the subject under discussion. For example agricultural ministers attend when agricultural policies are involved and finance ministers where economic issues are under discussion or review. This body is not to be confused with the European Council which meets twice a year at least with the Commission President, foreign ministers and a Commissioner.

The main function of the Council is to ensure that the treaty objectives are attained. It acts normally on a proposal from the Commission. Because it is not a permanent body the day-to-day work of looking into Commission proposals is delegated to COREPER (the

Committee of Permanent Representatives) that consists of more junior representatives of the member states.

The Commission

The Commission is the central administrative and policy making body of the Union. It consists of 25 members one for each member state. The nominee commissioners are approved by the Parliament and one of them acts as President.

Functions. The Commission initiates legislation and the Council legislates following proposals by the Commission. The Council can, however, ask the Commission to undertake research and submit proposals in the relevant area. It is a very powerful body in view of this power of initiation of proposals. The Commission also enforces the treaty obligations of the member states and can take such a state before the Court of Justice if it fails to comply. It can also impose penalties and fines on those in breach of competition law who ignore decisions against them. The Commission has extensive powers of investigation in the furtherance of its functions.

The Executive of the Commission executes the decisions of the Commission. In regard to the external policies of the Union the Commission is the negotiator. The agreements that it makes are concluded by the Council after consultation with the Parliament if this is a treaty requirement.

Types of Union law

Primary legislation: the Treaty of Rome

The Treaty of Rome (as amended) contains primary legislation in the following areas:

- free movement of goods (Arts 30–31);
- agriculture (Arts 32–38);
- free movement of persons, services and capital (Arts 39–60);
- visas, asylum, immigration (Arts 61–69);
- transport (Arts 70–80);
- common rules on competition, taxation and approximation of laws (Arts 81–97);
- economic and monetary policy (Arts 98–124);
- employment (Arts 125–130);
- common commercial policy (Arts 131–134);
- customs co-operation (Art 135);
- social policy, education, vocational training and youth (Arts 136–150);
- culture (Art 151);
- public health (Art 152);
- consumer protection (Art 153);
- trans-European networks (Arts 154–156);
- industry (Art 157);
- economic and social cohesion (Arts 158–162);
- research and technological development (Arts 163–173);
- environment (Arts 174–176);
- development co-operation (Arts 177–181).

Although we refer to the above as ‘legislation’, the relevant Articles are, in the main, defining legislative objectives and require implementing secondary legislation to firm up the

objectives. This is the task of the Council and the Commission through the exercise of their powers under the treaty.

Secondary legislation

This is as follows:

Regulations

These are generally applicable throughout the Union so that they may give rise to rights and obligations for states and individuals without the need for further national legislation. Regulations in the areas of agriculture and transport are examples of this type of legislation.

Directives

These are binding in terms of the result to be achieved, e.g. reform of company law. However, the member states must enact national laws to achieve the required effect. The UK's response to many Directives on company law is included in the Companies Act 1985.

Decisions

These are of more particular application and also are immediately operative. Decisions may be addressed to a state or individual or a corporation and an example would be a Commission ruling that a company was adopting restrictive practices in its operations within the Union contrary to Arts 81/82 of the treaty (see Chapter 16). Such a Decision could also impose a fine. Decisions have the force of law but affect the recipient only.

Union law: direct effect in the UK

The position is as follows:

Primary law (or legislation)

This is law contained in treaty Articles. If they are sufficiently precise, they are effective in the UK. They then have what is known as *vertical effect*, i.e. they create rights against 'emanations of the state', e.g. government departments, local authorities and hospital trusts. They also have *horizontal effect* in that rights are created in individuals against other individuals and organisations in the private sector of industry. An example is provided by Art 141 on equal pay that is directly applicable in a vertical and horizontal sense in the UK.

If an Article is not sufficiently precise to be enforced as such it is not directly applicable at all in the UK and requires national legislation to implement it.

Secondary legislation

Here the position is as follows:

Regulations. These are usually directly applicable with vertical and horizontal effect.

Directives. These are not directly applicable in that normally the member state has to pass legislation to implement them. If there is no such implementation after the expiry of the deadline set to member states for implementation, a Directive can be directly applicable if it is sufficiently precise but only in a vertical sense in creating rights against emanations of the state.

Decisions. These are binding upon the person or organisation to which they are addressed.