

Quick guide

European Union legislation and Wales

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Introduction

The European Union (“EU”) makes laws in a number of significant areas which have been devolved to the National Assembly and to Welsh Ministers.

Although Wales is not one of the 27 EU Member States, both the National Assembly and Welsh Government have important roles in implementing certain EU laws and in getting Wales’ voice heard at the EU level by influencing the negotiating position of the UK Government and Parliament.

This guide provides an overview of the types of legislation made by the EU and sets out the roles and responsibilities of the Welsh Government and National Assembly in:

- implementing certain EU laws to suit Welsh needs;
- indirectly influencing EU legislative proposals; and
- monitoring that EU laws do not breach the subsidiarity principle.

The legislative framework: Treaties of the European Union

The legislative and structural arrangements of the EU are enshrined in two core treaties – the [Treaty on European Union \(TEU\)](#) and the [Treaty on the Functioning of the European Union \(TFEU\)](#)– which were last updated by the [Treaty of Lisbon](#) in 2009. These treaties define areas of:

- **Exclusive EU legislative competence** (these are customs union, competition rules, monetary policy for those countries who have joined the Euro, conservation of marine biological resources under the common fisheries policy, common commercial policy);
- **Shared legislative competence** between EU and Member States (these are the internal market, social policy, economic, social and territorial cohesion, agriculture and fisheries, environment, consumer protection, transport, trans-European networks, energy, area of freedom and justice and common safety concerns in public health matters);
- **Co-ordination** between Member States in areas of economic and employment policy;
- **Competence of the EU to support, co-ordinate and supplement** actions of national governments in a number of defined areas (e.g. protection and improvement of

human health).

The treaties also create the EU institutions and define their core powers and roles. They also enshrine the principles of subsidiarity and proportionality in the workings of the EU.

Both treaties also enable the EU institutions to make different types of legislation that can apply to all Member States, as well as defining the basic processes through which EU laws are adopted.

The TFEU also makes a clear distinction between “legislative acts” (EU regulations and Directives adopted through the “ordinary” and “special” legislative procedures by the Council of Ministers and European Parliament, the co-legislators of the EU) and “non-legislative acts”. The latter may, nevertheless, constitute legislation so that this distinction can be compared to that between primary and subordinate legislation.

“Non-legislative acts” is a broad category of actions, which includes “soft” EU law such as recommendations and guidelines which are non-binding, however, it also includes binding “delegated acts” and “implementing acts”,¹ which are prepared by the European Commission under powers delegated to it by the Council of Ministers and European Parliament, and which take the form of regulations, directives or decisions.

This distinction is significant for two reasons:

- Only “legislative acts” are subject to the subsidiarity protocol early warning check by national and regional parliaments (see below); and
- In terms of volume, the number of regulations adopted as “non-legislative acts” (over 2,500 “implementing acts” and “delegated acts” are adopted per annum) dwarfs the number of EU Directives and Regulations adopted by the Council and Parliament (around 40-50 per annum).

EU laws: Regulations, Directives and Decisions

There are 3 types of legislation which is produced by the institutions of the EU. These laws take precedence over national law and are binding on national authorities:

1. Regulations

EU regulations are the most direct form of EU law. Under Article 288 of the TEU, the EU has the power to issue regulations which are “binding in every respect and directly applicable in each member state”.² EU regulations automatically become law in all member states although national implementation measures are often required to deal with administrative

¹ Articles 290 and 291 of the TFEU: **Delegated Acts** give the Commission the responsibility to supplement the EU Regulations/Directives on the grounds of efficiency, through enabling technical experts to deal with complex issues and enabling amendments to be made more quickly than would be possible otherwise. **Implementing Acts** are designed to ensure harmonised implementation across the EU by all Member States, e.g. in implementing rules for EU funding programmes. See [Clifford Chance, Briefing note: Sea of Change – Regulatory reforms to 2012 and beyond, May 2011 \[Accessed 21 June 2011\]](#)

² [Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Article 288 \[Accessed on 17 June 2011\]](#)

and enforcement issues.

Regulations can be passed either jointly by the Council of the European Union and the European Parliament or by the European Commission alone.

2. Directives

EU directives lay down certain end results that must be achieved in every Member State. In order to meet these goals, Member States have to adapt their laws, but are free to decide how to do so.

Directives may concern one or more Member States or all of them and are used to bring different national laws into line with each other. They are particularly common in relation to matters affecting the operation of the single market.

Each Directive specifies the date by which the national laws must be adapted - giving national authorities the room for manoeuvre within the deadlines necessary to take account of differing national situations.³

3. Decisions

Decisions are addressed to either a member state or a legal person (an individual person, organisation or company) and are only binding upon those to whom they are addressed. They can require those to whom they are addressed in Member States either to do something or stop doing something, and can also confer rights on them.

Decisions do not normally create generally applicable EU law.

In addition to these pieces of legislation, the EU also issues **non-binding instruments**, such as **recommendations** and **opinions**, as well as rules governing how EU institutions and programmes work.⁴

The role of the National Assembly and the Welsh Government

As a “regional” legislature operating within a Member State, the National Assembly has a role in indirectly influencing the position of the UK Government and in scrutinising the Welsh Government’s strategic priorities in relation to the EU. The National Assembly has previously done this by undertaking committee inquiries on key strategic priorities at early stages in the EU policy-making process, before the European Commission publishes its legislative proposals.

Assembly Members may also ask questions to the relevant Welsh Minister at any time during the EU legislative process about the impact of a EU legislative proposal on Wales and the preparations taking place within Welsh governmental departments ahead of its implementation.

The National Assembly also has a general role in promoting Welsh interests amongst the EU institutions. This includes talking directly to the European Commission, the European

³ [European Commission, What are EU directives? \[Accessed on 17 June 2011\]](#)

⁴ [European Commission, What is EU law? \[Accessed on 17 June 2011\]](#)

Parliament (in particular the four Welsh MEPs), the representatives from Wales on the EU's two consultative bodies - the Committee of the Regions (comprised of local and regional politicians) and the Economic and Social Committee (experts representing sectoral interests) - and through participating in formal and informal EU networks.

The Welsh Government has a number of formal and direct responsibilities in relation to EU legislation. This includes:

- **Transposing EU Directives:** The Welsh Government is generally responsible for the transposition (i.e. implementation) of EU Directives made in areas which have been devolved to the National Assembly and Welsh Ministers. These are done through Statutory Instruments which are laid in the National Assembly by Welsh Ministers and scrutinised as subordinate legislation⁵ by an Assembly Committee. The power to make such statutory instruments may be contained either in specific Acts of Parliament or the Assembly, or by virtue of section 2(2) of the European Communities Act 1972 (for those subjects of which Welsh Ministers have been designated by Order in Council).

Implementation is also monitored at the Member State level by the European Commission who can take national governments to the European Court of Justice ("ECJ") in case of failure or breach of their implementation obligations. Such a finding at the ECJ would result in the Member State (the UK in this case) being fined.

Any fine paid by the UK Government, as a result of Wales's failure to implement EU obligations, would be reclaimed from the Welsh block grant.

In transposing EU directives into Welsh law, the Welsh Ministers work within the guidance set out in the UK Government's [Transposition guide: how to implement European directives effectively](#) and in the Concordat on Co-ordination of EU Policy as set out in Part 2 Section B of the [Memorandum of Understanding](#) between the UK and devolved governments.

- **Complying with all EU laws:** The Welsh Government, along with other designated authorities in Wales (such as local authorities), also has a responsibility to ensure compliance with other EU laws (including Regulations in addition to Directives) that come within the scope of the National Assembly's legislative powers or the functions of Welsh Ministers. This requirement is contained in section 80 Of the Government of Wales Act 2006.

The National Assembly ensures that such laws are complied with by holding Welsh Ministers to account for their decisions and responsibilities through its business and committee structures.

⁵ For further information about subordinate legislation please see Research Service [Quick Guide: Subordinate Legislation](#).

Defining subsidiarity

The principle of subsidiarity regulates the exercise of the EU's powers. Its role within the EU is formally defined in Article 5 of the TEU as follows:

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.⁶

In practice this means that the EU should only take action to achieve its objectives if action taken by other tiers of government (local, regional, national) would not be sufficient and effective. The aim of such an approach is to ensure that decisions are taken at the closest level possible to the citizen.

The Subsidiarity Protocol

In order to enshrine this principle, the Treaty of Lisbon established the **Subsidiarity Protocol** – a mechanism by which parliaments of the Member States are given greater scope to enforce subsidiarity and participate meaningfully alongside the EU institutions at an early stage in the legislative process.

All legislative proposals adopted by the Commission are sent to national parliaments of the EU Member States at the same time that they are sent to the European Parliament, Council and the EU's two consultative bodies (the Committee of the Regions and the Economic and Social Committee)⁷.

The protocol provides all national parliaments of Member States with an eight-week “early warning” period to submit a reasoned opinion stating why it considers that the draft legislative proposal in question does not comply with the principle of subsidiarity. This notification right is granted to all national parliaments of Member States and could lead to the draft legislative proposal in question being:

- maintained, amended or withdrawn by the EU Commission; or
- blocked by the European Parliament or the Council.

Turning such objections into practice however is dependent on a variety of procedures.

The Lisbon Treaty states that if one third (currently 9 out of the 27 member states) of the national parliaments of the EU contest the conformity of a draft legislative act with the principle of subsidiarity, then the EU Commission must re-examine the draft and explain why it is maintaining it (the ‘**yellow card**’ procedure). A different threshold of a quarter of member states (either 6 or 7 member states) applies if the draft legislation in question

⁶ [Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Article 5 \[Accessed on 17 June 2011\]](#)

⁷ It is standard practice for the European Commission to send all of its Communications - legislative and non-legislative - to the EU Institutions, national governments and national parliaments. The early warning subsidiarity check however only applies to *draft* legislative proposals.

relates to the area of freedom, security and justice.⁸

If a simple majority of national parliaments challenges the conformity of a draft legislative proposal (currently 14 or more member states) with the principle of subsidiarity ('**orange card**') and the Commission maintains its proposal, the matter is referred to the European Parliament and Council, which issue a decision at first reading.⁹

If they believe that the legislative proposal is incompatible with the principle of subsidiarity, they may reject it subject to a 55 per cent Council majority or a majority vote in the European Parliament.¹⁰

The **Committee of the Regions** may also refer directly to the Court of Justice of the European Union in the case of a breach of the principle of subsidiarity by one of the main EU institutions.¹¹

The National Assembly and subsidiarity

Because the National Assembly is considered a "regional" legislature rather than a national parliament at the EU level, it has no direct legal grounds to question EU legislative proposals on the basis of subsidiarity. Nevertheless, Article 6 of the 2nd Protocol to the Lisbon Treaty states that "It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers."¹²

The National Assembly's **Standing Orders** do therefore enable an Assembly Committee to consider draft EU legislation in order to consider whether it complies with the principle of subsidiarity, providing that it relates either to the legislative powers of the National Assembly or the executive functions of Welsh Ministers. This responsibility has been given to the Constitutional and Legislative Affairs Committee.

If the Committee decides that the draft EU legislation in question does not comply with the subsidiarity principle, Standing Orders allow it to make written representations on behalf of the National Assembly to relevant committees in the House of Commons and the House of Lords, who may take account of those representations in reaching their own conclusions..

⁸ [European Parliament, The principle of subsidiarity \[Accessed on 17 June 2011\]](#)

⁹ Ibid

¹⁰ [European Parliament, The principle of subsidiarity \[Accessed on 17 June 2011\]](#)

¹¹ [Europa Website, Glossary: Subsidiarity \[Accessed on 17 June 2011\]](#)

¹² [Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Protocol 2, Article 6 \[Accessed 22 June 2011\]](#)

Useful links

Information about EU legislation and draft EU legislative proposals are to be found on the following websites:

- All EU Regulations, Directives, Decisions and recommendations are available on the [EUR-Lex](#) website;
- The legal database [Lexis Library](#) also contains all pieces of EU legislation;
- The [European Parliament's Legislative Observatory](#) tracks proposals going through the EU decision-making process in the European Parliament;
- The [European Law Monitor](#) provides citizens across Europe with the ability to find and track new EU proposals;
- A concise summary of the main aspects of EU law is available on the [Europa – Summaries of EU Legislation](#) web pages.

Further information

For further information on the European Union or any constitution-related issue, please contact **Owain Roberts** (Owain.Roberts@wales.gov.uk) or **Gregg Jones** (Gregg.Jones@wales.gov.uk), Research Service.

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