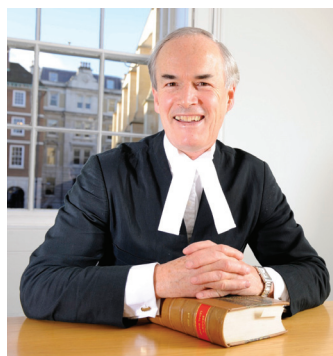


# Making the most effective use of EU law

Quite aside from the debate whether Britain should be in or out of Europe, EU law provides an array of rules, rights and options for litigators, says **Robert McCracken QC**



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**Whether we like it or not EU law, often in the form of directives, governs many of the rights of citizens and obligations of public bodies in the UK. As lawyers we don't always realise how best to take advantage of that for our clients. Here are ten of the most useful points which I have noted over the years.**

**1. EU rules OK:** English courts are often reluctant to accept their 'duty of cooperation'. So it is important to be able demonstrate why they must and provide authority for that alarming proposition. Article 4 (3) of the Treaty on European Union (TEU) requires member states to "take any appropriate measure whether general or particular to ensure fulfilment of the obligations" of EU law.

**2. Member states have many organs:** the European Court of Justice has developed a doctrine whereby the courts have to treat

all 'organs' or 'emanations of state' as subject to the duties imposed on the member state. So, in *Costanzo* the local Council of Milan was bound to comply with an EU directive on tendering for its football stadium. Privatised utilities may well also be emanations.

**3. Pay attention to preambles:** EU legislation tends to be drafted more broadly than UK parliamentary draftsmen would like. So it's important in approaching EU law to think about its purpose, often clarified in preambles (as in early English legislation).

**4. Directives are binding:** Member states can choose how to transpose into domestic law and implement directives but they must achieve the result required by the directive (article 188 of Treaty on the Functioning of the European Union or 'TFEU')

**5. Canon of convergent construction:** Our courts must strain to interpret our legislation as far as possible to be consistent with EU law. The principle, from the case of *Marleasing*, is sometimes known as the 'principle of sympathetic interpretation'. The House of Lords in *Litster* held that it went so far as to require words to be read into domestic legislation.

**6. Doctrine of direct effect:** What if a directive has been inadequately transposed or not transposed at all? If it's not

possible to interpret our legislation to achieve the required result then subjects are entitled to rely on sufficiently clear obligations of the directive against emanations of state such as local authorities (known as 'vertical direct effect'). This is so even if that means another subject loses a benefit such as a planning permission (so-called 'triangular direct effect'). The doctrine cannot be invoked against a party who isn't an emanation of state ('horizontal direct effect').

**7. Duty to provide an equivalent and effective remedy:** The Court of Justice held in *Francovich* that there is a duty on the courts of member states to nullify the unlawful consequences of a breach of EU law. Thus the House of Lords in *Berkeley (No 1)* held that where a planning permission had been granted in breach of the directive on environmental assessment it must be quashed. Some judges do not like this and try to wriggle out of the duty.

**8. Obey domestic procedural rules:** The supremacy of EU law does not mean that you can disregard our rules of procedure. The Court of Justice held in *Fantask* that procedure is a matter for the legal system of each member state.

**9. Disapply incompatible domestic legislation:** The *Simmmenthal* case held that domestic legislation which is



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incompatible with EU law must be disapplied. A public law example of this in practice is the obligation to disregard the requirement for bringing public law challenges 'promptly'. The Court of Justice held in *Uniplex* that the requirement for promptitude in public procurement challenges was incompatible with the principle of certainty.

**10. Brussels is closer than Luxembourg:** All courts may, and final courts of appeal must, refer unanswered points of EU law to the Court of Justice in Luxembourg (article 267 TFEU), though it can be difficult to persuade them so to do. But anyone can make a complaint to the European Commission who may take infringement proceedings against the UK (article 258 TFEU). If there is a persistent and substantial non compliance by the UK it is worth doing. Individuals have, without costs risk, made a great difference to the rule of law in the UK by that route. **SJ**