ECL2000 INTRODUCTION TO EUROPEAN UNION LAW

The European Law Students' Association

MALTA

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THE BEGINNING OF THE EU

FIRST STEPS = ECSC TREATY, 1951

THE ECSC WAS REGARDED BY ITS PROPONENTS AS NOT MERELY ABOUT COAL AND STEEL BUT REPRESENTED A FIRST STEP TOWARDS EUROPEAN INTEGRATION.

- The Treaty establishing the European Coal and Steel Community, or Treaty of Paris came into force in 1952.
- The common coal and steel market was to be an experiment which could gradually be extended to other economic spheres.
- For the first time, 6 European States agreed to work towards integration.
- This Treaty laid the foundations of the Community by setting up an executive known as the 'High Authority', a Parliamentary Assembly, a Council of Ministers, a Court of Justice and a Consultative Committee.
- This was the first significant step towards European integration going beyond intergovernmentalism, establishing a supranational authority whose independent institutions had the power to bind its constituent Member States.
- The original blueprint for the ECSC Treaty was set out in the Schuman Plan of 1950. This envisaged linking the French and German coal and steel industries, under the control of a High Authority operating at a supranational level.
- At that time, the choice of coal and steel was highly symbolic: in the early 1950s, coal and steel were vital industries and the basis of a country's power.
- In addition to the clear economic benefits, the pooling of French and German resources was intended to mark the end of the rivalry between the two countries.
- The ECSC was not only economically inspired but represented an attempt to restabilize relations between France and Germany after the war.
- It was a limited framework of peaceful cooperation in order to avert rivalry over coal production.
- Supranational control over coal and steel production would remove national capability for armament production and reduced the likelihood of war.
- The ECSC Treaty created a **common market in coal and steel**, regulated by 4 institutions.
- It expired in 2002, but its functions were incorporated in the EC Treaty.

EEC AND EURATOM TREATIES, 1975

EXTENDED ECONOMIC INTEGRATION BEYOND COAL AND STEEL.

- Efforts to get the process of European integration under way again following the failure of the European Defence Community took the form of specific proposals at the Messina Conference on a customs union and atomic energy. They culminated in the signing of the EEC and EAEC Treaties.
- This conference generated agreement on moving in the direction of economic integration.
- The moves towards integration were not halted.
- This time, although the Treaties may have been politically motivated, the focus was specifically economic.

<u>EEC</u>

- The EEC was created by the Treaty of Rome (EEC Treaty), signed by France, Germany, Italy, Belgium, the Netherlands, and Luxembourg in 1975.

- The EEC established a common market to promote across the Member States a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, and an accelerated raising of the standards of living.
- It created a customs union incorporating the free movement of goods between Member States and a common customs tariff to be applied to good entering the EEC.
- The core framework was a common market, now known as the 'internal market', entailing gradual removal of barriers to trade, free movement rights for workers and the self-employed, and prohibition of anti-competitive practices.
- Common policies in agriculture and transport were introduced.
- The EEC Treaty set up the institutions of the EEC: The Assembly (now the EP), Council, Commission, and the European Court of Justice.
- The primary Treaty objectives were to
  1. establish a **common market**,
  2. to **approximate the economic policies** of the Member States,
  3. to **promote harmonious development** of economic activities throughout the Community,
  4. to **increase stability** and **raise the standard of living**, and
  5. **to promote closer relations between the Member States**.
- **Barriers to trade were to be abolished** and **a common customs tariff** was to be set up, **undistorted competition** was to be ensured, **national economic and monetary policies** were to be progressively coordinated, and **fiscal and social policies** gradually harmonized.
- The Commission was given a very important power as the initiator of legislation and overall 'watchdog' of the Treaties, as well as having certain decision-making powers of its own and being the negotiator of international agreements on behalf of the Community.
- The Council was given the power of approval of most Commission legislative proposals.
- **Voting in the Council was weighted, giving greater weight to the larger Member States than the smaller, to reflect differences in population.** However, voting procedure varied according to the nature of the issue.
- **The Parliamentary Assembly** (Parliament as from the SEA) **had few powers under the original Treaty provisions.** It had a consultative role in legislation but was largely a supervisory body whose powers involved questioning the Commission and receiving its annual report.

Community decision-making
Intergovernmentalism and supranationalism

The geographic reach of the Community expanded between the EEC Treaty & the SEA. This period was however marked by the tensions between an intergovernmental view of the Community, championed initially by the President de Gaulle of France, but not necessarily shared by other Member States, and a more supranational perspective espoused initially by Walter Hall stein, the Commission President.

Between the time of the Luxembourg Compromise until the adoption of the SEA, the trend within the Community was from early supranationalism towards greater intergovernmentalism and this was the subject of much comment.

The Luxembourg Accords

- The tension erupted into crisis in 1965, when the time came under the transitional provisions of the Treaty for the Council of Ministers to move from unanimous (unanimity rule) to qualified-majority voting in a number of areas.
- When a settlement was reached, this became known as the Luxembourg Compromise or the Luxembourg Compromise or the Luxembourg Accords.
- These Accords were essentially an agreement to disagree over voting methods in the Council.
- The French asserted that even in cases where the Treaty provided for majority decision-making, discussion must continue until unanimity was reached whenever important national interests were at stake. For many years, this view prevailed.

> P Dankert, *The EC – Past, Present and Future*: *"it has been a continuous 'to and fro' for years, as can be seen from the course of development of the Community institutions. The Council of Ministers, which was originally intended to be a Community body, has now become largely an intergovernmental institution thanks to the famous Luxembourg Agreement, which, under French pressure, put an end to the majority decisions which the Council was supposed to take according to the Treaty on proposals submitted by the European Commission. The rule that decisions could only be taken unanimously had the effect of gradually transforming the Commission into a kind of secretariat for the Council which carefully checked its proposals with national officials before deciding whether ir not to submit them. This in turn has a negative effect on the EP which can only reach for power, under the Treaty, via the Commission.'*

- Recourse to qualified-majority voting became the exception rather than the norm. The 'return to intergovernmentalism', as some termed it, with primacy being accorded to an individual Member State's wish even if it was against the majority, affected the dynamics of decision-making in the following years.
- This shift of power away from the Commission towards the Council diluted the role of Parliament, which exercised supervisory powers over the Commission.
- The Community was experiencing internal crisis.
- Eventually, agreement was reached on the Luxembourg Compromise, which stated that, when vital interests of one or more countries were at stake, members of the Council would endeavour to reach solutions that could be adopted by all while respecting their mutual interests.

The emergence of the EPC, European Council, and Comitology

- The Luxembourg Accords enhanced Member State power by according states *de facto* veto, which even if not exercised cast a shadow over Council deliberations and impacted on the resulting Community legislation.
- The period between EEC Treaty and the SEA also saw other developments that enhance Member State power over decision-making.
- At the 1961 Bonn summit, Fouchet rejected the federal option, basing his plan on strict respect for the identity of the Member States. In the absence of a political community, its substitute took the form of European Political Cooperation (EPC) = **Failure of an attempt to achieve political union.**
- Intergovernmental cooperation in foreign policy began again in 1970. Quarterly meetings were held, and this became an essentially intergovernmental forum for cooperation in foreign policy, without any developed institutional structure. It became known as the European Political Cooperation (EPC).

- In 1974 the European Council (not Council) was established to regularize the practice of holding summits. This body consisted of the heads of governments of the Member States. This provided the Community with much needed direction but represented to some a weakening in the supranational elements of the Community. **The European Council was not within the framework created by the Treaties, and it was not until the SEA that it was recognised in a formal instrument**.
- These conferences started to provide political guidance.
- The EPC and European Council enabled Member State interests at the highest level to impact on matters of political or economic concern, and their decisions, while not formally binding, would normally constitute the frame within which binding Community initiatives would be pursued.
- The Member States also assumed greater control over the detail of Community secondary legislation, through the creation of what became known as Comitology. This enabled Member States to influence the content of secondary legislation in a way that had not ben envisaged in the original EEC Treaty.

Countervailing Trends: EP Direct Elections, Resources, Budgets, and the ECJ

- There were also trends that strengthened the supranational dynamic of the Community, or should have done so, in this period.
- Parliament was given new legitimacy and authority by introducing election by **direct universal suffrage** (In 2002, this was revised, introducing the general principle of proportional representation and other framework provisions for national legislation on the European elections).
- In 1976, **direct elections to the Parliament** were finally agreed by the Member States, and the first elections took place in 1979. Parliament became the first Community institution with a direct mandate of sorts, but the elections were not an unqualified success. **The equivocal impact of EP direct elections was further underlined because its only role in the legislative process was a right to be consulted when a specific Treaty Article so provided.**
- M Holland, *European Integration from Community to Union*: '*The decision to run each of the nine European elections independently and according to national electoral rules did little to persuade voters that the elections were ant different from their respective national elections…as a result, turnout was disappointingly low.'*
- The role of Parliament in the budgetary powers was extended.
- The **judicial contribution** to the supranational dynamic of the Community was especially important in this period. It will be seen that often when the Community's political process were less active or in crisis, the Court contributed to its legal development and to the process of integration in a variety of ways.
- The ECJ sanctioned a broad reading and as a result enhanced the Community's sphere of competence. It used the doctrine of **direct effect** in the 1960s and 1970s to make Community policies more effective.
- The principle of **supremacy** of Community law over national law served to reinforce these judicial strategies.

MERGER TREATY, 1965

Dr Ivan Sammut

In 1957, we have 3 different communities, the coal and steel, the EU economic, and the EUROATOM. These 3 communities had their own institutions – courts, councils, assembly and so on. But they were the same 6 members. Therefore, they thought to unit so that they

would have one court, one council, one assembly and so on and this is what led to the Merger Treaty. In the first amendment, in 1965, they decided that once we have the same membership, why don't we merge the institutions of the 3 communities so that legally we have one body that can do the work for the 3 communities. The merger treaty of 1965 is the agreement between the states where they decided to join the 3 communities together.

The first institutional change came about with the Merger Treaty which merged the executive bodies. This set up a single Council and Commission of the European Communities (the ECSC, EEC and the European Atomic Energy Community) and introduced the principle of a single budget.

SINGLE EUROPEAN ACT (SEA), 1986

THE FIRST SUBSTANTIAL CHANGE TO THE TREATY OF ROME
The SEA helped 'kick-start' fulfilment of the community's economic objectives
Summary:

- The principle aim of the SEA was to complete the internal market by removing barriers to trade. This extended the Union's powers.
- Introduced a new 'cooperation' procedure which enhance the EP's role in law-making.
- It extended EEC competencies to economic and social cohesion, research and technological development, and environmental protection.

THE 1960S AND 1970S WERE OFTEN REFERRED TO AS A PERIOD OF POLITICAL STAGNATION OR MALAISE IN THE COMMUNITY, WITH THE COMMISSION HAVING CONSIDERABLE DIFFICULTY IN SECURING COUNCIL AGREEMENT TO ITS PROPOSALS. THE RESULT WAS THAT THE ATTAINMENT OF TREATY OBJECTIVES WAS OFTEN SIGNIFICANTLY DELAYED.

- The malaise of the 1960s and 1970s is reflected in the reports during this period that attested the need for institutional reform, combined with a change of approach from the key institutional players.
- After the Fontainebleau European Council summit of 1984, two committees were established to consider Treaty revision and political integration, one considered further European identity, and the other looked at political reform. The latter was no acted on.
- The 1985 European Council in Milan agreed, voting for the first time by majority only, to convene an intergovernmental conference to discuss Treaty amendment – the powers of the institutions, the extension of Community activities to new areas, and the establishment of a 'genuine' internal market. This led to the SEA.

Substantive changes:
<u>Improvement in the decision-making capacity of the Council of Ministers</u>

- Qualified-majority voting by the Council was introduced into a range of areas which had previously provided for unanimity.
- Qualified majority voting replaced unanimity in four of the Community's existing areas of responsibility.
- Qualified majority voting was also introduced for several new areas of responsibility, such as the internal market, social policy, economic and social cohesion, research and technological development, and environmental policy.
- Finally, qualified majority voting was the subject of an amendment to the Council's internal rules of procedure.

Other:
- Article 18 EC set out the internal market aim of 'progressively establishing the internal market over a period expiring on 31 December 1992' and also defined the internal market as 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured'.
- The new Article 95 EC became the principal Treaty provision for the enactment of measures to complete the single market – this became the vehicle for the Commission's programme for completion of the internal market.
- Thirdly, the SEA added new substantive areas of Community competence, some of which had already been asserted by the institutions and supported by the Court, without any express Treaty basis.

Institutional changes:
Growth of the role of the EP/Parliament's powers were strengthened by:
- Making Community agreements on enlargement and association agreements subject to Parliament's assent. Here, the EP was also given a veto over accession of new Member States and the conclusion of agreements with associate states.
- The most important change enhanced the EP's power in the legislative process, through **the creation of the new legislative 'cooperation' procedure**, which made the EP a real player in the Community's legislative process for the first time, thereby transforming Community decision-making. Introducing a procedure for cooperation with the Council, which gave Parliament real, albeit limited, legislative powers; it applied to about a dozen legal bases at the time and marked a watershed in turning Parliament into a genuine co-legislator.

Others:
- The SEA gave a legal basis to EPC and **formal recognition to the European Council, although not within the Community Treaties.**
- A Court of First Instance (CFI) was created to assist the Court of Justice.
- The so-called 'Comitology' procedure, under which the Council delegates powers to the Commission on certain conditions, was formally included within the EC.

Dr Ivan Sammut
The first major amendment to the EEC Treaty post 1957 was in 1986 which is called the single-European act which is a vanishing treaty because it is **a list of amendments**. One of the most important objectives of this act was to **further increase European integration** so that the EU, the EEC at the time, would move from a common market to a common union. The EEC started as a common market (4 freedoms) but then the SEA tried to prepare the European Union to integrate further and to achieve an economic union (a common market plus more integration). The economic union is more than just the free circulation, you have the **streamlining of policies**. The single market means that we abide by the same standards. With that being said, the most important treaty revisions were the Maastricht amendments.

Reaction:
- **The SEA represented the most important revision of the Treaties since they were first adopted and heralded a revival of the Community momentum towards integration.**
- Some saw it as a positive step forward for the Community after a period of malaise, others regarded it as a setback for the integration process.

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MAIN AMENDMENTS

Every treaty in the EU has built on the one prior to it. They do not exist in a vacuum but are all dependant on the other.

- MAASTRICHT 1992 -

- The Treaty on European Union (TEU) created the European Union.
- It created a new entity incorporating the existing Communities and amended the existing Treaties.
- The establishment of the EMU including a single currency.
- Institutional change: It created a three-pillar structure, for what was henceforth to be the European Union, comprising the three Communities, a Common Foreign and Security Policy, and Cooperation on Justice and Home Affairs respectively.
- This structure was devised to allow Member States to cooperate within new policy areas outside the mechanisms of the Community Treaties.
- For the most part, the ECJ had no jurisdiction in matters within the second and third pillars.
- The Member States were unwilling to subject the 2 last areas to the normal supranational methods of decision-making that characterized the Community Pillar, with all that this entailed for the central role of the Commission & ECJ. These areas were at the core of national sovereignty.
- The decision-making structure was more intergovernmental for these areas. It was based on national autonomy, resting largely with the Council, representing the Member States. It is known as 'intergovernmental' since it entailed agreement between the member States acting as independent sovereign states.
- By contrast, the decision making within the Community framework had significant 'supranational' elements, for here the institutions, acting partly or entirely independent of the Member States, had a key role.

Changes to community treaties (EC)

- The TEU renamed the EEC Treaty to 'EC Treaty', reflecting the fact that the activities of the EEC now went beyond its original economic goals (common market).
- The increase of Parliament's legislative involvement, by introducing the so-called co-decision procedure which allowed the EP to block legislation of which it disapproved, if it was subject to this procedure.
- Qualified majority voting was extended.
- The Court of Auditors was placed on a footing equal to that of the other four institutions.
- Provisions were provided for a European Central Bank (ECB) and a Parliamentary Ombudsman.
- It also made substantive changes: established the principle of subsidiarity.
- A concept of European Citizenship was introduced.
- There were new provisions on economic and monetary union which laid the foundations for the introduction of the single currency.
- Further areas of competence added, and existing areas expanded.

Common Foreign and Security Policy

- The Second and Third Pillars created by the TEU remained apart from the Community institutional and legal structure and were characterised by a more **intergovernmental** and less supranational decision-making structure.
- However, these Pillars were not entirely disconnected from the Community, since they involved the Community institutions.

- This rules still applied to the CFSP even after the Lisbon Treaty removed the three-pillar structure.

Justice and Home Affairs

- While the Third Pillar existed, the decision-making process was more intergovernmental than under the Community Pillar. Decision-making was dominated by the Council, and the ECJ's powers were limited.

Reaction

- Criticised for the complexity of the new 'Union' structure.
- Described as "chaos and fragmentation".
- It was perceived as lack of unity and increasing fragmentation.
- The EU established a complex and fragmented constitutional structure, creating a Europe of 'variable geometry'. The three pillars were incorporated within the overarching new entity, the EU. The Community institutions were shared within this framework, but whilst the supranational elements of decision-making were contained entirely in the first pillar, the second and third pillar processes were intergovernmental.

- AMSTERDAM 1997 -

- THE AIMS OF THE IGC WERE MORE MODEST THAN THOSE OF THE MAASTRICHT TREATY.
- DECLARED TO BE ABOUT CONSOLIDATION RATHER THAN EXTENSION OF COMMUNITY POWERS.
- THE MOST IMPORTANT MATTER ORIGINALLY INTENDED FOR THE IGC AGENDA WAS PREPARING THE UNION FOR ITS ENLARGEMENT – THIS WAS POSTPONED UNTIL THE NICE IGC.

HOWEVER, THIS TREATY DID ACHIEVE THE REFORM OF THE EC LEGISLATIVE PROCESS.

- It deleted obsolete provisions from the EC Treaty, and adapted others, and
- Renumbered all the Articles, titles, and sections of the TEU and the EC Treaty (remember that the Maastricht treaty was more than just an amending Treaty, it created the TEU while amending the EC Treaty).

TEU

- The common provisions of the TEU were changed to enhance the EU's legitimacy.
- The principle of openness was added so that decisions were to be taken 'as openly as possible' and as closely as possible to the citizens.
- New objectives were listed.
- A new article provided that if the Council found a 'serious and persistent breach' by a Member State of principles set out in Article 6, it could suspend some of that State's rights under the Treaty.

Changes to the Community Pillar (Pillar one)

Institutional changes

- The co-decisions procedure was amended and extended, this consolidating the EP in the decision-making process.
- The EP's power was further augmented by amendment to the procedure for appointing the Commission President, requiring Parliamentary assent – enhanced the Community's legitimacy in relation to its citizens.
- The principle of **access to documents**, while Article 286 EC dealt with **data protection.**

Substantive changes

- The Treaty of Amsterdam moved provisions across the three-pillar structure of the EU.
- The major structural change was **the incorporation into the Community Pillar of a large part of the former Third Pillar** on the free movement of persons, covering visas, asylum, immigration and judicial cooperation in civil matters.
- **[Policies were transferred from pillar III to pillar I**. Immigration, asylum and civil cooperation were transferred. Once it is transferred, the Member States are going to 'transfer' sovereignty; their powers from being able to determine the rules together were transferred to the supranational infrastructure. Therefore, the Member States here, have given up some of their powers in these fields to the EU institutions. **The community method** works whereby you have the 3 main institutions, the commission has the sole right to initiate policy (for an EU law to be able to have a chance to make it as a law, it has to be the commission). **Until Amsterdam, these policies were purely supranational**].
- **[**When this transfer happened, the transfer wasn't done in a perfect way that fits the supranational method; there were still a number of exceptions with regards to these two fields. For example, the commission did not automatically gain the right to initiate policy, there were exceptions. You have a situation whereby the process of integration did not happen in a perfect way and the process of transferring policies is called **communitarisation]**.
- A further substantive innovation was Article 11 EC, which provided that the Council could authorise 'closer cooperation' (Nice Treaty – enhanced cooperation) between Member States – the transfer of provisions, together with the extension of supranational elements into previously intergovernmental area of Union activity, seemed to herald a more integrated EU legal order. However, other provisions introducing 'closer cooperation' indicated movement the other way, towards **further fragmentation**. This meant that some Member States could choose to cooperate, as a small group, in specific areas.

Changes to the Common Foreign and Security Policy Pillar

- A number of changes were made to the Second Pillar, although without greatly changing its structure or the nature of institutional involvement since the Maastricht Treaty.
- The Secretary-General of the Council was nominated as 'High Representative' for CFSP (The common Foreign and Security Policy) to assist the Council Presidency
- An article was added that conferred power on the Council to 'conclude' international agreements, whenever this was necessary in implementing the CFSP.

Policy and Judicial Cooperation in Criminal Matters (PJCC) – the new third pillar

- A major criticism of the Maastricht Treaty was that many of the JHA (Justice and Home Affairs) policies were **unsuited to the intergovernmental processes established**.
- The parts of JHA dealing with visas, asylum, immigration, and other aspects of free movement of persons were incorporated into EC Title IV.
- The remaining Third Pillar provisions were subjected to **institutional controls** closer to those under the Community Pillar, and the Third Pillar was renamed 'Police and Judicial Cooperation in Criminal Matters' (PJCC).
- The ECJ had jurisdiction over certain measured adopted under the third pillar, thereby further eroding the distinction between the Community Pillar and the Third Pillar – the strictly intergovernmental character of the Third Pillar was being broken down, notably as the European Court of Justice & the European Parliament acquired enhance roles under this pillar.

Why?

The overall **aim** of the remodelled Third Pillar was to **provide citizens with a high level of safety within an area of freedom, security, and justice,** by developing 'common action' in three areas.

Reaction

- The two most salient benchmarks were institutional reform to cope with prospective enlargement, and broader concerns about the EU's legitimacy. Viewed against these two, the Treaty of Amsterdam does not fare well. Institutional reform to cope with enlargement was not addressed, and there was relatively little to address broader concerns about the EU's legitimacy, although
  1. The extension of co-decision,
  2. The creation of the new Title IV EC (Visas, Asylum and Immigration),
  3. Provisions concerning access to documents, data protection, non-discrimination, and the like were beneficial in this respect.
- **The Treaty eroded the distinction between Pillars that had been crafted but four years earlier, especially in relation the Third Pillar. It also constitutionalised and legitimated mechanisms for allowing different degrees of integration and cooperation between groups of states** ('Closer cooperation').

- NICE 2001-

- THE FOCUS IS NOW ON ENLARGEMENT AND THE BUSINESS LEFT UNCOMPLETED BY THE TREATY OF AMSTERDAM.
- IT ADDRESSED IMPORTANT INSTITUTIONAL ISSUES IN PREPARATION FOR THE ACCESSION OF TEN NEW MEMBER STATES IN 2004 RELATING TO
  1. QUALIFIED MAJORITY VOTING
  2. THE CO-DECISION PROCEDURE
  3. THE COMPOSITION OF THE INSTITUTIONS.

The failure of the Treaty of Amsterdam to address the EU's institutional structure pending enlargement meant that a further IGC was inevitable, and it was called to address (1) The composition of the Commission, (2) the weighting of votes in the Council, and (3) the extension of qualified-majority voting. Despite its relatively modest agenda, the deeper legitimacy issues that surfaced during the Maastricht IGC could not be avoided when issues of institutional reform were on the table. Questions of 'simplifying' the complex Treaty structure and establishing a basic constitutional text, of enhancing the EU's transparency and accountability, and of clarifying the EU's powers *vis-à-vis* the Member States were also discussed during this period.

The Community Pillar

- The Nice Treaty made a number of changes to the EC Treaty, in particular relating to the Community's institutional structure.
- The major political achievement was agreement on the issues relevant to enlargement:
  - The weighting of votes in the Council,
  - The distribution of seats in the European Parliament,
  - The composition of the Commission.
- The EP's power was further enhanced by extension of the co-decision procedure to a considerable range of Treaty provisions.
- The Nice Treaty also made **changes to the Court system**, in particular by strengthening the powers of the CFI.

‘Enhanced cooperation’
‘Closer cooperation’ was renamed ‘enhanced cooperation’, the latter requiring, significantly, the participation of a minimum of only eight Member States, rather than ‘a majority’, as previously under the Treaty of Amsterdam.
The Nice Treaty relaxed a number of the conditions required before enhanced cooperation could be used.
(Enhanced cooperation is a procedure where a minimum of 9 EU countries are allowed to establish advanced integration or cooperation in an area within EU structures but without the other EU countries being involved. This allows them to move at different speeds and towards different goals than those outside the enhanced cooperation areas. The procedure is designed to overcome paralysis, where a proposal is blocked by an individual country or a small group of countries who do not wish to be part of the initiative. It does not, however, allow for an extension of powers outside those permitted by the EU Treaties.

Authorisation to proceed with the enhanced cooperation is granted by the Council, on a proposal from the Commission and after obtaining the consent of the European Parliament)

The Charter of Human Rights
- The Charter was ‘solemnly proclaimed’ by the Commission, European Parliament, and Council and received political approval of the Member States at the Nice European Council in December 2000.
- The Charter was a significant development. In substantive terms, despite criticisms of its content, the document was largely welcomed as a step forward for the **legitimacy**, identity, and human rights commitment of the EU.
- In terms of process, the mode by which it was drafted and adopted also attracted positive comment as an improvement to the method by which treaties had traditionally been negotiated.
- The decision to establish the Convention on the Future of Europe was strongly influenced by the process that led to the Charter of Rights.

Enlargement
- The driving force behind the Treaty of Nice was, as we have seen, to make the institutional changes necessary for further enlargement.
- This was especially pressing because the 2004 enlargement brought ten further states into the EU.
- The policy of conditionality means that candidate states were required to adapt their laws and institutions in significant ways before any date for accession was set at a time when they had little or no influence on European laws and policies.

Reaction:
- The aspirations underlying the Nice IGC were limited, the primary aim being institutional reform in the light of enlargement, a task left unresolved in the Treaty of Amsterdam.
  Viewed from this limited perspective, the Treaty of Nice did the job:
  It produced answers on:
  1. key issues of Council voting,
  2. distribution of EP seats,
  3. and the size of the Commission
- There was a lingering dissatisfaction with the outcome which was in part procedural & in part substantive. With regards the substantive, the Nice Treaty may well have addressed the primary institutional issues, but it was readily apparent that there were equally important issues that were not touched. Declaration 23 called for a ‘deeper and wider debate about the future of the European Union.’ THIS CALL WAS ECHOED AT THE

2001 LAEKEN SUMMIT, WHICH RESOLVED TO CONVENE A 'CONVENTION ON THE FUTURE OF EUROPE' TO DRAFT A CONSTITUTIONAL TREATY.

THE FAILED CONSTITUTIONAL TREATY

[In 2002, the EU created, or attempted to create what was known as the Constitutional Convention. In 2004, they came up with the Constitutional Treaty, which is not a vanishing treaty, **but a new treaty which replaces the old ones by itself**. This was meant to prepare the EU for the next decade or so. The idea here was to create a new treaty which would have abolished the existing treaties and incorporated what already existed. Some member states had to hold referenda and France and the Netherlands voted against, keeping in mind that politically, the founding members carry more weight when it comes to the EU decisions. The EU can exist without the UK, but cannot exist without France, Italy and so on. The end result is that the Constitutional Treaty failed and was abandoned. It was replaced by a new reform treaty which was negotiated in 2007, signed in Lisbon which establishes what was established by the constitution by amending the existing treaties. Therefore, they achieve the same objectives but rather than replacing them with a new treaty, they continue adding amendments].

The Laeken summit

Declaration 23 appended to the Nice Treaty explicitly envisaged that **the four issues** would be considered further at the Laeken European Council meeting scheduled for December 2001. The nature of subsequent reform was however transformed during 2001. A growing consensus emerged among the major institutional players about two critical issues:

- **In terms of the content of the reform agenda**: it came to be accepted that the four issues left over from the Nice Treaty were not discrete. The realisation that the issues left over from Nice **raised broader concerns** coincided with a growing feeling that **there should be a more fundamental re-thinking of the institutional and substantive fundamentals of the EU**.
  A pressing concern in the Laeken Declaration and the Convention of the Future of Europe was to contain EU power.
- **In terms of the reform process**: it came to be accepted that if a broad range of issues was to be discussed, then **the result**, whatsoever it might be, **should be legitimated** by input from a broader 'constituency' than hitherto. This momentum was **fuelled by dissatisfaction with the traditional process of Treaty reform**, dominated by the paradigm, of the IGC.
  This emerging consensus was reflected in the Laeken European Council, which gave formal approval, through the Laeken Declaration, **to the broadening of the issues left open post-Nice**. These four issues became the 'headings' within which a plethora of other questions were posed, concerning virtually every issue of importance for the EU.

The Laeken summit resolved to convene a 'Convention on the Future of Europe' to draft a Constitutional Treaty.

Convention on the Future of Europe

- The Convention was composed of representatives from national government, national parliaments, the EP, and the Commission. The accession countries were also represented.
- The Convention discussed draft Articles in the 'proposal stage'.
- Institutions and their respective powers were not included since it was felt that they were too contentious to be dealt with other than in plenary session.
- A Constitutional Treaty was not pre-ordained. The possibility of a constitutional text was mentioned only at the end of the Laeken Declaration.

- The Convention, once established, developed its own institutional vision. The idea took hold that the Convention should indeed produce a coherent document in the form of a Constitutional Treaty: the 'Convention moment'.

The IGC and non-ratification

- The IGC amended some provisions in the Draft Treaty, but the Member States could nonetheless not agree on a final text in December 2003. It was still necessary for the Constitutional Treaty to be ratified in accordance with the constitutional requirements or choices of each Member State.
- 15 Member States ratified the Treaty, but progress with ratification came to an abrupt halt when France and the Netherlands rejected the Constitutional treaty in their referenda.
- The Constitutional Treaty never 'recovered' from the negative votes and did not become law. THIS TREATY WOULD HAVE REPLACED THE FOUNDING TREATIES, SETTING OUT THE INSTITUTIONAL AND SUBSTANTIVE PROVISIONS OF THE EU IN A SINGLE DOCUMENT.
- However, the Lisbon Treaty, which has now been ratified, **drew very heavily on the Constitutional Treaty** and the great majority of the major changes in the Lisbon Treaty were taken over from the Constitutional Treaty without further debate.

Reaction:

The principal areas of debate were:

1. **Whether it was wise for the EU ever to have embarked on this ambitious project**: on this view, grand constitutional schemes of the kind embodied in the Constitutional Treaty were (1) **unnecessary**, because the EU could function on the basis of the Nice Treaty and (2) **dangerous** because the very construction of such constitutional document brought to the fore contentious issues, which were best resolves through less formal mechanisms. There is force in this view. It should nonetheless be recognised that the four issues left over from the Nice Treaty were not discrete, they raise broader issues concerning the nature of the EU, its powers, mode of decision-making, and relationship with the Member States.
2. **The way in which the Convention operated**: thus, some cast doubt on the participatory credentials of the Convention, pointing to the increasing centralisation of initiative in the Praesidium. This was problematic and did not conform to some 'ideal-type' vision of drafting a Constitution. The Convention did not however exist within an ideal-type world. It conducted its task against the real-world conditions laid down by the European Council.
3. **The content of the Constitutional Treaty**: some were critical about the **further federalisation** they believed to result from the Treaty, focusing on, for example, the shift from unanimity to qualified-majority voting in the Council. Others were equally critical about what they saw as **the increased intergovernmentalism in the Treaty**. There were also significant differences of view concerning **particular provisions of the Constitutional Treaty**.

LISBON 2007
REMOVAL OF THE PILLAR SYSTEM

FOLLOWING THE ABANDONEMENT OF THE CONSTITUTIONAL TREATY, AND A PERIOD OF REFLECTION OF ALMOST 2 YEARS, A NEW AMENDING TREATY, THE TREATY OF LISBON (THE 'REFORM TREATY') WAS SIGNED IN DECEMBER 2007.

UNLIKE THE FAILED CONSTITUTIONAL TREATY, THE TREATY OF LISBON DID NOT REPLACE BUT **AMENDED THE EC TREATY AND THE TEU**, THOUGH IT

INCORPORATES MANY OF THE PROVISIONS OF THE ABANDONED CONSTITUTIONAL TREATY.
THE EU IS HENCEFORTH TO BE FOUNDED ON THE TEU AND THE TFEU, AND THE TWO TREATIES HAVE THE SAME LEGAL VALUE. THE UNION IS TO REPLACE AND SUCCEED THE EC.

[When the Constitutional Treaty failed, in 2007 the Member States tried to achieve the same thing by keeping the existent framework and doing the necessary changes. The policy issues found in the TEU were removed and put into the TFEU. The EU was achieved as a LEGAL AND NOT POLITICAL (THAT'S MAASTRICHT) concept].

IGC

- The Member states were not willing to allow the work that had been put into the Constitutional Treaty to be lost.
- The European Council concluded that 'after two years of uncertainty over the Union's treat reform process, the time has come to resolve the issue and for the Union to move on." It was agreed to convene an IGC which was to carry out its work in accordance with the detailed mandate of the changes that should be made to the Constitutional treaty, in order that a revised Treaty could successfully be concluded considered by the June 2007 European Council.
- A reform treaty was drawn up, which, like the Treaties of Maastricht, Amsterdam and Nice before it, made fundamental changes to the existing EU treaties in order to strengthen the EU's capacity to act within and outside the Union, increase its democratic legitimacy, and enhance the efficiency of EU action overall.
- The Reform Treaty was to contain two principal substantive clauses, which amended respectively the TEU and the EC Treaty, the latter of which would be renamed the Treaty on the Functioning of the European Union, TFEU:

⇒ **The Union should have a single legal personality** – The Treaty of Lisbon merges the EU and the European Community into a single European Union.
⇒ The word 'Community' is replaced throughout by the word 'Union'.
⇒ The word 'constitution' was not to be used. The European Council's reasoning was readily explicable in political terms: The imperative was to conclude this stage of Treaty reform, and insofar as the constitutional terminology of the Constitutional Treaty was felt to be a **political obstacle**, then it was to be ditched.
⇒ The 'Union Minister for Foreign Affairs' was to be called High Representative of the Union for Foreign Affairs and Security Policy.
⇒ The terms 'law' and 'framework' were to be abandoned.
⇒ There was to be no flag, anthem or motto.
⇒ The clause in the Constitutional Treaty concerning the primacy of EU law was to be replaced by a declaration.

The reality is nonetheless that insofar as the Constitutional Treaty partook of the nature of a constitution, none of the changes identified by the European Council were significant. A constitutional document does not cease to be so because the words law or law-making are not used, nor for any of the reasons listed.

- **The Union replaces and succeeds the European Community. However, Union law is still shaped by the following three treaties**:
  1. TEU
  2. TFEU
  3. Treaty establishing the European Atomic Energy Community.

- Matters moved rapidly. An Intergovernmental Conference was convened to take forward the Reform Treaty.

THE LISBON TREATY WAS INDEED THE SAME IN MOST IMPORTANT RESPECTS AS THE CONSTITUTIONAL TREATY.

Substantive architecture: General

- The Constitutional Treaty had a pretty clear 'constitutional architecture' – the Lisbon Treaty fares less well in this respect.
- The revised TEU has some constitutional principles for the EU. But there are nonetheless matters not included within the revised TEU, which had properly been in Part I of the Constitutional Treaty.
- The framers of the Lisbon Treaty had however to ensure that there was some difference to the 'naked eye' between what was contained in the revised TEU and what had been included within Part I of the Constitutional Treaty.
- **The Lisbon Treaty did, however, improve the architecture of the TFEU.** It is divided into seven Parts.
- The worthiest change is that the provisions on Police and Judicial Cooperation in Criminal Matters, the Third Pillar of the old TEU, have been moved into the new TFEU.
- All the remaining TEU third-pillar provisions on Justice & Home Affairs were moved to the TFEU in a section entitled 'Area of Freedom, Security and Justice.'
- **By moving the remaining elements of Justice and Home Affairs from the TEU to the TFEU, the Treaty of Lisbon dismantled what remained of the EU's three pillar structure. More significantly still, the changes shifted much decision-making in this area from an intergovernmental basis to a European, supranational basis.**

Common Foreign and Security Policy

- The Lisbon Treaty is not built on the pillar system, but the distinctive rules relating to the Common Foreign and Security Policy, CFSP, mean that in reality there is still something akin to a separate 'Pillar' for such matters.
- The intergovernmental character of decision-making on Common Foreign and Security Policy remained unchanged, with all action requiring the Council's unanimous approval.
- **The approach for the CFSP in the Lisbon Treaty largely replicates that in the Constitutional Treaty**.
- Member States now have an obligation to assist should another Member State become the victim of armed aggression – 'solidarity clause'.

Institutional changes

- The elevation of the Europe Council to a full Union institution,
- The creation of new positions of President of the European Council and High Representative of the Union for Foreign Affairs and Security Policy,
- The limitation of the European Parliament's maximum membership of 750.

Streamlining law-making

- EU law-making was streamlined through adjustments to qualified majority voting (QMV) preventing a very small number of the larger Member States from vetoing (blocking) proposed legislation.
- QMV became the standard system and was extended to further policy areas.
- Unanimity is still required in areas such as tax, foreign policy, defence and social security.
- The European Council acquired new and controversial powers:

⇒ By unanimous vote it can propose amendments to certain parts of the EU Treaties, with adoption following ratification by Member States (Previously such changes could only be affected by an amending Treaty).
⇒ The European Council, acting unanimously, could amend the Treaties s as to allow QMV to operate in certain areas previously requiring unanimity.

Legislative procedures:

- Ordinary legislative procedure (formerly the co-decision procedure) became the standard legislative procedure and was extended to new areas.
- The other legislative procedures requiring decisions by the Council, and in some cases involving only consultation with Parliament, continue to apply, for instance to areas of foreign and security policy and tax.

Role of national parliaments

- National parliaments can scrutinise and submit opinions on proposed EU legislation, allowing them to ensure that subsidiarity us applied (decisions be taken as closely as possible to the citizen and that action at EU level is justified).

Areas of competence

- New joint competence.
- There are now categories of competence specified in the Lisbon Treaty.
- The Lisbon Treaty makes provision not only for the existence and scope of EU competence, but also for whether the competence should be exercised. This issue is governed by the principle of subsidiarity, which was initially introduced by the Maastricht Treaty. A revised version of the principle is contained in this Treaty.

Citizens' initiative

- This allows for at least one million citizens from different Member States to directly request the Commission to initiate proposals within an area of EU competence.

External relations

- **The EU acquired legal personality** (previously held by the EC but not the EU) allowing it to conclude international agreements and join international organisations.

Reaction

- The most prominent 'official' reaction in the EU was one of relief that the Treaty reform had finally been concluded.
- Treaty reform had been on the agenda for almost a decade, since the conclusion of the Nice Treaty. The **failure of the Constitutional Treaty**, more especially its rejection by two of the founding states, had taken its toll on the EU, sapping energy and morale.
- The 'non-official' reaction by academics, onlookers, EU observers, and the like was mixed, just as one might have expected. Indeed, the very diversity of opinion that marked reaction to and assessment of the Constitutional Treaty, continued in relation to the Lisbon Treaty, primarily because the latter drew so heavily on the former.
- Thus, debates as to whether it was wise to embark on 'general' Treaty reform, and discourse as to whether the content of the resulting Treaty was too 'federal' or too 'intergovernmental' continued in relation to the Lisbon Treaty, as did discussion of the desirability and impact of major changes, such as the creation of the long-term Presidency of the European Council.

Conclusions

i. Formal Treaty amendment has not been spread evenly over the EU's history. The period between the founding of the EEC and the SEA was relatively stable in this respect. The period since the SEA has been one of almost continuous Treaty revision, with the Maastricht, Amsterdam, and Nice Treaties coming in quick succession.
ii. Treaty reform is a continuation of politics by other means. The Lisbon Treaty represents the cul- mination of a decade of attempts at Treaty reform. It too is to be amended in a minor respect in relation to the provisions concerning Economic and Monetary Union, but subject to this change it is likely to constitute the basic Treaty regime for some time to come, more especially given the dif- ficulty of securing agreement on Treaty amendment in an EU of twenty-seven Member States.
iii. The period since the inception of the EEC has seen very significant institutional and substantive changes to its powers.
iv. In institutional terms the European Parliament has moved from a player very much on the fringes of decision-making to become an institutional force in its own right, with a major role in the legislative process. The European Council has gone from strength to strength, beginning as an institution that existed outside the strict letter of the Treaties, to become a major institutional player, a position further reinforced by the Lisbon Treaty. Treaty amendments have also impacted on the powers and institutional dynamics of the Commission and Council.
v. In substantive terms the many complex Treaty changes should not mask the basic fact that each successive Treaty amendment has seen an increase in the areas over which the EU has competence. The time when the EU could be regarded as solely 'economic' in its focus, if it ever truly existed, has long gone. The rationale for this will be explored in subsequent chapters. Suffice it to say the following. There is debate as to the relative importance of Member States and other players, such as the Commission, during the process of Treaty amendment. There is however no doubt that the Member States are central to the pace and direction of Treaty amendment, and that they have been willing to accord the EU competence over an increased range of areas.

Martina Camilleri

The European Commission
The **EXECUTIVE BODY** of the European Union

HISTORY
- At the beginning, each Community had its own executive body.
- By means of the Merger Treaty of 1965, both the executive structures of the ECSC, EEC and Euratom and the budgets of those institutions were merged into a single Commission of the European Communities.
- When the ECSC Treaty expired, it was decided that ECSC assets should revert to the Commission.

COMPOSITION
1. The President
2. 7 vice-presidents
3. 20 other commissioners

} the College of Commissioners

- The Lisbon Treaty opted for the slimmed down Commission – one national from each Member State, including the president and the High Representative for Foreign Affairs.
- This system is to be established by the European Council.
- The European Council decided thar the European Commission would continue to consist of a number of members equal to the number of Member States.
- (One commissioner per state – no Member State would have been willing to give up its seat in the Commission).

HOW ARE THESE APPOINTED?
President

The Lisbon Treaty now provides for the Commission President to be indirectly elected. During the deliberations in the Convention on the Future of Europe, it was felt that this would enhance the legitimacy of the Commission President, thereby strengthening his claim to be President of the Union as a whole.

1. After taking into account the results of the European elections and having appropriate consultations, the European Council, acting by **a qualified majority**, proposes the candidate for President of the Commission to Parliament.
2. The candidate is elected by Parliament by **a majority of its component members** – article 14(1) TEU duly states that the European Parliament shall elect the President of the Commission.
3. If the candidate does not get the requisite majority support, then the European Council puts forward a new candidate within one month, following the same procedure – therefore, the candidate must secure the support of the dominant grouping within the EP.

The fact that the Council has a say is a form of retention of state power. In the deliberations in the Convention on the Future of Europe, the Member States were unwilling to surrender all control over choice of Commission President to the European Parliament.

Commissioners

The Lisbon Treaty has retained greater Member State influence over the choice of Commissioners.

1. Member States make suggestions for Commissioners.
2. The Council of the EU acting by a qualified majority and by common accord with the President-elect, adopts a list of the other persons whom it proposes for appointment as members of the Commission, on the basis of suggestions made by Member States.

3. The Body of Commissioners (the President and the other members of the commission including the High Representative of the Union for Foreign Affairs and Security Policy) is then subject to a vote of approval by the European Parliament.
4. After the Parliament has given its assent, for which a simple majority is sufficient, the President and the other Members for the Commission are appointed by the Council, acting by a qualified majority).

(A qualified majority in the Council is sufficient for the appointment of the High Representative of the Union for Foreign Affairs and Security Policy (Article 18(1) TEU)).

THE PRESIDENT

- The Commission operates under the guidance of its President.
- The President enjoys a prominent position – he is no longer merely 'first among equals.'
- He lays down guidelines for the working of the Commission.
- He decides on its internal organisation.
- He appoints Vice-Presidents of the Commission, with the exception of the High Representative of the Union for Foreign Affairs and Security Policy, who is an **ex officio Vice-President of the Commission.**
- The responsibilities incumbent on the Commission are allocated among the Commissioners by the President, who has the power to reshuffle the portfolios.
- The Commission President can request the resignation of a commissioner.
- He is responsible for ensuring that the action taken by the Commission is consistent and efficient.

THE VICE-PRESIDENTS

- The Vice-Presidents act in the name of the President as his or her representatives.
- They steer and coordinate the work of several Commissioners in their area of responsibility.
- A Commission proposal will not even reach Commission discussions without having been recognised as a necessary measure by the First Vice-President.

THE COMMISSIONERS

- Commissioners must be chosen on grounds of general competence & their independence must not be in doubt.
- They must be completely independent in their performance of their duties and can neither seek nor take instructions from a government or any other body.
- They work in the general interest of the European Union.
- While they come from Member States, THEY DO NOT REPRESENT THEIR OWN STATE.
- They meet collectively as the College of Commissioners.
- The Commissioners take decisions by majority vote.
- They have their own personal staffs (or cabinets).
- Compulsorily retired if he/she no longer fulfils the conditions for performance of the job, or for serious misconduct – made by the ECJ on application by the Council.
- A Commissioner shall resign if the President so requests.

ACCOUNTABILITY

- Personal accountability – commissioners.

- Collective accountability – The Commission is collectively accountable to Parliament. If Parliament adopts a motion of censure against the Commission, all of its members are required to resign.

ORGANISATION & OPERATION

- The Commission works under the political guidance of its President.
- The Commission has a **Secretariat-General** consisting of **33 directorates-general**, which develop, manage and implement EU policy, law and funding.
- There are also **20 special departments** (services and agencies), which deal with ad hoc or horizontal issues.
- There are also **6 executive agencies** which perform tasks delegated to them by the Commission, but which have their own legal personality.
- Bearing a few exceptions, the Commission acts by a majority of its members.
- It meets every 6 weeks to discuss politically sensitive issues and adopt the proposals that need to be agreed by oral procedure, while less sensitive matters are adopted by written procedure.

POWERS

The powers of the Commission are set out in Article 17 TEU:

> 1. The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. It shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Treaties. With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union's external representation. It shall initiate the Union's annual and multiannual programming with a view to achieving interinstitutional agreements.
>
> 2. Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise. Other acts shall be adopted on the basis of a Commission proposal where the Treaties so provide.

1. Legislative power

The Commission is first of all the driving force behind Union policy. It is the starting point for every Union action, as it is the Commission that has to present proposals and drafts for Union legislation to the Council.

- The Commission is the only institution which is **allowed to propose new laws**. After which, the Council and Parliament can adopt them. This is known as the ordinary legislative procedure. This is also known as **the right of initiative**.
- The Commission's main role is to take the initiative in **proposing EU legislation**, for instance, the College of Commissioners was the first to conceive of the possibility of reducing roaming tariffs in Europe. This proposal was then examined and adopted by the other European institutions.
- It draws up proposed acts to be adopted by the two-decision making institutions, Parliament and the Council.
- The power of proposal is the complete form of power of initiative, as it is always exclusive and constrains the decision-making authority to the extent that it cannot take

a decision unless there is a proposal and its decision has to be based on the proposal as presented.

- **The Commission is not free to choose its own activities. It is obliged to act if the Union interest so requires.**

How the Commission impacts on the legislative process:

1. The Commission plays a central part in the legislative process. It is accorded the right of legislative initiative. Most proposals will have to be approved by the Council and the EP, **but the Commission's right of initiative has enabled it to act as a 'motor of integration' for the EU**. The Council is, however, *de facto* the catalyst for many legislative initiatives.
2. Secondly, the Commission develops the overall **legislative plan for any single year**. The agenda-setting aspect of the Commission's work is significant in shaping the EU's priorities for the forthcoming year. This role is framed in terms of the Commission initiating the annual and multi-annual programme with a view to achieving inter-institutional agreement.
3. The Commission affects EU policy by developing general policy strategies.
4. The Commission exercises legislative power though its capacity, in certain limited areas, to enact EU norms without the formal involvement of any other EU institutions.
5. Finally, the Commission exercises delegated power. The Council and the EP delegate power to the Commission to make further regulations within particular areas.

2. Administrative power

- Article 17(1) – the Commission shall manage programmes. Policies, once made, have to be administered. Legislation, once enacted, must be implemented.
- The Commission implements the budget. Once the budget has been adopted, each Member State makes the payments due to the EU through monthly contributions to the EU budget which are deposited in a bank account in the name of the European Commission at the national ministry of finance or central bank.
- It also enforces competition rules.
- The Commission also administers a number of executive agencies which helped the European Commission manage EU programs.
- The Commission exercises the powers conferred on it for the implementation of the legislative acts laid down by Parliament and the Council.
- The Commission will maintain a general supervisory overview, to ensure that the rules are properly applied within the Member States.
- It has become common for the Commission to exercise direct administrative responsibility for the implementation of certain EU policy.

Simply put someone needs to run the EU on a daily basis and the Commission does a large part of the administrative and executive work.

3. Executive power

Two are of particular importance:

(1) Those relating to finance

- The Commission plays an important role in the establishment of the EU's budget: it draws up the draft budget, which it proposes to the Council and Parliament.
- Every year, each institution other than the Commission draws up estimates, including all tis revenue and expenditure which it sends to the Commission. The Commission then sends the EU agencies' statement of estimates to parliament and the Council and

proposes the amount of the contribution for every EU body and the number of staff it considers it needs for the following financial year.
- It also has significant powers over expenditure and structural policy.

(2) Those concerning external relations.
- The Commission also exercises executive powers in the sphere of external relations –
  1. It represents and acts on behalf of the EU both in **formal negotiations** and in the more **informal and explanatory exchanges**.
  2. It has **important negotiating and managing responsibilities** in respect of the various special external agreements that the EU has with many countries.
  3. It **represents the EU at international organizations**.
  4. It has responsibilities for acting as a **key point of contact between the EU and non-member States**.
  5. It is entrusted with important responsibilities with regard to **applications for EU membership**.
- Where the Council has given a mandate, the Commission is responsible for negotiating international agreements which are then submitted to the Council with a view to their conclusion.
- As regards FSP, it is the High Representative who negotiates agreements.
- The Commission has representations in all EU member States and 139 delegations across the globe, for example, to negotiate trade agreements between the EU and other countries.

4. Judicial power
- The Commission enforces European Law, acting as Guardian of the treaties.
- It is required under the Treaties to ensure that the treaties themselves, and any decisions taken to implement them are properly enforced.
- This role is exercised mainly through the procedure applied to Member States where they have failed to fulfil an obligation under the Treaties.
- All Member States are primarily responsible for the correct and timely application of EU Treaties and legislation. The Commission, however, monitors the application of Union law.
- If a Member State fails to properly incorporate directives into national law, or if it suspected of breaching EU law, the Commission could open the formal infringement procedures. Eventually the Commission may even refer the Member State to the European Court of Justice, but this usually is not necessary.

<u>Two kinds of judicial powers – Article 17(1) TEU:</u>

(1) The Commission shall **ensure the application of the Treaties and the law** made pursuant thereto,
(2) It shall **oversee the application of Union law under the control of the ECJ**.
- The Commission brings actions against Member States when they are in breach of EU law. The actions will assume the form of *Commission v. UK etc.* (Recourse to formal legal action will be a last resort and will be preceded by Commission efforts to resolve the matter through negotiation.
- The Commission also acts in certain areas as investigator and initial judge of a Treaty violation, whether by private firms or by Member States. The two most important areas are competition policy and state aids. The Commission's decision will be reviewable by the General Court.
- The Commission's investigative & adjudicative powers provide it with a significant tool for the development of EU policy.

Closely connected with the role of the guardian is the task of representing the Union's interests. As a matter of principle, the Commission may serve no interest other than those of the Union. It must constantly endeavour, in what often prove to be difficult negotiations within the Council, to make the Union interest prevail and seek compromise solutions that take account of that interest.

The Council of the European Union

It is in the Council that the individual interests of the Member States and the Union interest are balanced. Even though the Member States primarily defend their own interests in the Council, its members are at the same time obliged to take into account the objectives and needs of the Union as a whole. The Council is a Union institution and not an intergovernmental conference. Consequently, it is not the lowest denominator among the Member States that is sought in the Council's deliberations, but rather the right balance between the Union's and the Member State's interests.

COMPOSITION

- Article 16(2) TEU: The Council shall consist of a representative of each Member State at ministerial level, who is authorised to commit the government of that state.
- The members of the Council are politicians as opposed civil servants.

ORGANISATION & OPERATION

- The Council meets when convened by the President of the Council on his or her own initiative, or at the request of one of its members, or at the request of the Commission.
- The Lisbon Treaty now provides that meetings are divided into two parts:
  (1) Those dealing with legislative acts – must meet in public,
  (2) Those dealing with non-legislative acts.
- Council meetings are arranged by subject matter with different ministers attending from the Member States and are regulated by the Council's Rules of Procedure.

Council configurations

- The Council of the EU is a single legal entity, but it meets in 10 different 'configurations', depending on the subject being discussed.
- There is no hierarchy among the Council configurations, although the General Affairs Council has a special coordination role and is responsible for institutional, administrative and horizontal matters. The Foreign Affairs Council also has a special remit.
- The General Affairs Council (GAC) deals with matters that affect more than one EU policy and also has the important job of preparing the agenda for the European Council.
- The Foreign Affairs Council is chaired by the High Representative for Foreign Affairs and Security Policy, and national foreign ministers will normally attend.
- Any of the Council's 10 configurations can adopt an act that falls under the remit of another configuration. Therefore, with any legislative act the Council adopts no mention is made of the configuration.
- **The ministers responsible for these matters** (the configurations) **within the Member States will attend such meetings. They will be supported by their own delegations of national officials with expertise in the relevant area.**
- The Commission attends Council meetings and has a particular role in relation to the GAC.

PRESIDENCY

Appointment

- The regime in the Lisbon Treaty is that the High Representative of the Union for Foreign Affairs presides over the Foreign Affairs Council (FAC).
- The European Council decides by qualified majority on the list of other Council formations, and **the Presidency of these formations**.
- The Presidency of Council formations other than the FAC must be in accord with **the principle of equal rotation**.
- The presidency of the Council, other than the FAC, is held by pre-established groups of three Member States for a period of 18 months. **The groups are made on a basis of equal rotation among the Member States**. Each member of the group in turn chairs for a six-month period all Council configurations, except the FAC.
- The President will, 7 months before taking office, set the dates for Council meetings in consultation with the Presidencies preceding and following its term in office.
- Every 18 months, the 3 Presidencies due to hold office prepare, in consultation with the Commission, the High Representative, and the President of the European Council, **a draft programme of Council activities for that period**, which has to be endorsed by the GAC.
- During the actual 6-month tenure, the President sets the provisional agenda for 14 days before the meeting. This agenda is divided into legislative activities and non-legislative activities.

Role

- The position of President of the Council has assumed greater importance in recent years. It has become vital to the good working of the Council.
- The President may develop policy initiatives within areas of concern either to the Council, or to the Member State that holds Presidency.
- Prior to the Lisbon Treaty the President of the Council also held the Chair of the European Council. This is no longer so – there is a separate president of the European council, who holds office for two-and-a half years.

PREPARATORY BODIES – COREPER

'The Committee of Permanent Representatives of the Governments of the Member States to the European Union.'

- Article 16(7) TEU & Article 240(1) TFEU – the work of the Council is to be prepared by the Committee of Permanent Representatives (Coreper) and that it shall carry out the tasks assigned to it by the Council.
- Coreper is **the Council's main preparatory body**. All items to be included into the Council's agenda (except for some agricultural matters) must first be examined by Coreper, unless the Council decides otherwise.
- It is **not an EU decision-making body**, and **any agreement it reaches can be called into question by the Council**, which alone has the power to make decisions.
- Coreper does not have the power to make formal substantive decisions, but in practice Coreper 'has evolved into a veritable decision-making factory'.
- It is assisted in its preparatory work by some ten committees and around a hundred specialised working parties.

Composition

- Coreper is composed of **the 'permanent representatives' from each member state**, who, in effect, are their country's ambassadors to the EU. They express the position of their government.
- It is staffed by senior national officials.
- It operates at 2 levels:
  1. Coreper I: is composed of each country's **deputy permanent representatives**. Its meetings are chaired by the deputy permanent representative of the country holding the presidency of the General Affairs Council.
  2. Coreper II: is composed of each member states' **permanent representatives**. It is chaired by the permanent representative of the country holding the presidency of the General Affairs Council.
     It is more important and consists of permanent representatives who are of ambassadorial rank. It deals with the more contentious matters.
- The two configurations of Coreper (Coreper I and II) meet every week.

Main tasks

- Coordinates and prepares the work of the different Council configurations
- Ensures consistency of the EU's policies
- Works out agreements and compromises which are then submitted for adoption by the Council.
- Coreper plays an important part in EU decision-making because it considers draft legislative proposals that emanate from the Commission and help to set the agenda for Council meetings. The agenda is divided into 2 parts: A & B.

THE COUNCIL SECRETARIAT

- In addition to Coreper, the Council also has its own General Secretariat, under the responsibility of a Secretary-General, which provides direct administrative support to it.

In all this, the Ministers who sit in the Council are supported by the General Secretariat and the Committee of Permanent Representatives (COREPER). The General Secretariat functions as a general supporting staff preparing meetings, drafting reports, agendas and so on. They are Civil Servants of the EU and do not represent an individual Member State. COREPER, in contrast, is composed of representatives from the States themselves such as ambassadors and national Civil Servants. They prepare the work of the Ministers taking seats in the Council and where the Council shares power with Parliament, COREPER works with them.

TASKS/POWERS OF THE COUNCIL

Article 16

1. The Council shall, jointly with the European Parliament, exercise legislative and budgetary functions. It shall carry out policy-making and coordinating functions as laid down in the Treaties.

So, what is it the council really does with the support of COREPER and the General Secretariat?

1. **Legislative Power**
   - On the basis of proposals submitted by the Commission, the Council adopts EU legislation in the form of regulations and directives, either jointly with Parliament (ordinary legislative procedure) or alone, following a consultation of Parliament.
   - All proposals for new EU law must be checked by the Council. The Council may then choose to **approve, amend or reject it**. As such, the Council can stop almost every new law from being implemented.
   - The Council has to vote its approval of virtually all Commission legislative initiatives before they become law. The draft proposal from the Commission will be scrutinized by Coreper and the working parties.
   - The vote will be by unanimity, qualified, or simple majority depending upon the particular Treaty Article, **although it is deemed to act by qualified majority unless the Treaty stipulates to the contrary**.
   - The Council has become more proactive in the legislative process through Article 241 TFEU. This states that the Council may by simple majority request the Commission to undertake any studies which the Council considers desirable for the attainment of the common objectives, and to submit to it any appropriate proposals.
   - The Council can delegate power to the Commission, enabling the latter to pass further regulations within a particular area.
   - The increasing complexity of the EU's decisions-making process has necessitated greater inter-institutional collaboration between the Commission, the Parliament, and the Council.

2. **Budgetary power**:
   - The Council is one of the two arms of the budgetary authority, the other being Parliament, which adopts the European Union's budget.
   - Like new legislation, **the EU budget must be approved by the Council before money can be spent**. This power is shared with Parliament.
   - The Council, together with the EP, plays a major role in relation to the EU's budget, on which many initiatives depend.

3. **Foreign Affairs**
   - The Treaty of Lisbon gave legal personality to the European Union, which replaced the European Community. The new Treaty also abolished the three-pillar structure. Justice and Home affairs became a fully integrated EU policy area, in which the ordinary legislative procedure applies in almost all cases. **However, in foreign and security policy the Council still acts under special rules when it adopts common positions and joint actions or draws up conventions.**
   - Besides normal legal instruments, **the Council also decides on the EU's Common Foreign and Security Policy (CFSP)** which the High Representative then carries out.
   - The Council decides on the leading principles and guidelines for the CFSP as well as uncommon strategies that the EU will follow. Based on these leading principles and guidelines, the Council then adopts joint actions aimed at specific situations where the EU actions are deemed necessary, and it adopts common positions which cover more general geographical and thematical areas and form general guidelines that the Member States must conform to.
   - The Council has significant powers in relation to the Common Foreign and Security Policy (CFSP). Thus, it will be the Council which takes the necessary decisions for

defining and implementing the CFSP in the light of the guidelines of the European Council.

4. International agreements

- The Council concludes the European Union's international agreements, which are negotiated by the Commission and in most cases require Parliament's consent.
- The Council also concludes agreements on behalf of the EU with third states or international organizations.

DECISION MAKING/OPERATION

- Depending on the area concerned, the Council takes its decisions by a simple majority, a qualified majority or unanimously.

Qualified majority

As a general rule, a qualified majority is sufficient.

The Council makes decisions by qualified majority which means that, to make a decision, it must be supported by the ministers of 55% of the countries representing at least 65% of the EU's population but this qualified majority can force its will on a protesting minority. Four countries representing at least 35% of the population can block decision by voting against it and we have another exception: when making decisions on some subjects, qualified majority is not enough but instead unanimity is needed because these are subjects that lie at the heart of State Sovereignty and Member States prefer to keep these matters on an intergovernmental level rather than handing these powers over to the EU. In practice, however, the Council tries to reach unanimity not only on these subjects but also on subjects that only require qualified majority. As a result, there tends to be very few votes against or abstentions.
Due to the sharing of the legislative and budgetary powers with Parliament, the decision only passes when Parliament also signs off on it except in the case of the subject mentioned before where the Council must decide with unanimity. In those cases, Parliament's approval is not needed.

In general, the Council tends to seek unanimity even when it is not required to do so. This preference dates back to the 1966 Luxembourg Compromise which ended a dispute between France and the other Member States in which France had refused to move from unanimity to QMV in certain areas.

The European Council

The EC is now the summit conference of head of state or government of the EU Member States.

HISTORY

- The first of these 'European Summits' took place in Paris in 1961 and they have become more frequent since 1969.
- The early European Council summits were viewed with suspicion by the Commission, since they were normally secret and the Commission was usually excluded.
- In the Paris European summit of February 1979, it was decided that these meetings of Heads of State or Government should henceforth be held on a regular basis under the name of 'European Council'.
- The SEA included it in the body of Community Treaties for the first time, defining its composition and providing for biannual meetings.
- The Treaty of Maastricht formalised its role in the EU's institutional process.

- The Treaty of Lisbon made the European Council a full institution of the EU and defined its tasks, which are **'to provide the Union with the necessary impetus for its development and define the general political directions and priorities thereof'.**

RATIONALE

Member States' interests are already represented in the Council, and we must therefore press further to understand the rationale for the creation of the European Council. It was in part due to disagreements between the Member States themselves. These would normally be resolved through the Council, but if the disagreements were particularly severe on important issues, such as the budget, then resolution might be possible only by intervention at the highest level, through the Heads of Government themselves. The European Council was also due to the need for a focus of authority at the highest political level, in order that the general EU strategy could be planned, and that its response to broader world problems could be properly focused.

COMPOSITION

1. The Heads of State or Government of the Member States.
2. President of the European Council.
3. President of the European Commission.
4. High Representative of the Union for Foreign Affairs and Security Policy.

- The European Council members meet in the format of 'intergovernmental conferences' (IGCs). These conferences of representatives of the governments of the Member States are convened to discuss and agree on EU treaty changes. Before the Lisbon Treaty came into force, this was the only procedure for treaty revisions. It is now called the 'ordinary revision procedure'.
- The IGC, convened by the President of the European Council, decides on treaty changes unanimously.
- The European Council meets around 4 times a year.

PRESIDENCY

Background

- Prior to the Lisbon Treaty, the Member State that held the Presidency of the Council also chaired the European Council for the same period.
- The prominent version of the 'separate hats' view was that there should be a President of the Commission and a President of the European Council, and that executive power would be exercised by both.
- The Presidency of the European Council would be strengthened and would not rotate between Member States on a six-monthly basis.
- The 'separate hats' view prevailed.

Lisbon Treaty

- The Lisbon Treaty, following the Constitutional Treaty, provided that the European Council should elect a President, by a qualified majority, for two-and-a-half years.
- Therefore, the president is elected by the European Council itself.
- Increased powers were given to the President of the EC within the Council.

ROLES

Article 15 TEU:

> 1. The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof. It shall not exercise legislative functions.
> 2. The European Council shall consist of the Heads of State or Government of the Member States, together with its President and the President of the Commission. The High Representative of the Union for Foreign Affairs and Security Policy shall take part in its work.
> 3. The European Council shall meet twice every six months, convened by its President. When the agenda so requires, the members of the European Council may decide each to be assisted by a minister and, in the case of the President of the Commission, by a member of the Commission. When the situation so requires, the President shall convene a special meeting of the European Council.
> 4. Except where the Treaties provide otherwise, decisions of the European Council shall be taken by consensus.

The European Council takes decisions with complete independence and in most cases does not require a Commission initiative or the involvement of Parliament.

1. **The European Council is central to the development of the Union** (major changes in the Treaties will be preceded by an IGC- normally a European Council meeting).
2. **The European Council will normally confirm important changes in the institutional structure of the EU** (such as the final decision on the enlargement of the Parliament following German unification was taken by a summit of the European Council).
3. **The European Council can provide the focus for significant constitutional initiatives that affect the operation of the Union** (inter-institutional agreements between the three major institutions will often be made or finalised at a summit meeting).
4. **The European Council will consider the state of European economy as a whole** (initiatives to combat unemployment, promote growth, and increase competitiveness).
5. **Conflict resolution is another issue addressed by the European Council.**
6. **The European Council plays a role in the initiation/development of particular policy strategies.**
7. **The European Council is central in external relations** (it will consider important international negotiations & it issues declarations relating to more general international affairs)
8. **The European Council will consider new accessions to the EU.**

ROLE OF THE EUROPEAN COUNCIL

- A classic example of change in the original institutional structure of the Treaty to accommodate political reality.
- It evolved from a series of ad hoc meetings outside the letter of the Treaty to a more structures pattern of summits.
- It is central to the EU's decision-making process but DOES NOT EXERCISE LEGISLATIVE FUNCTONS.
- The reality is that no important developments internally or externally occur without having been considered by the EC. The concluding resolutions do not have the force of law, but they nonetheless provide the framework in which the other institutions consider specific policy issues.
- It has become the institutional mechanism whereby the Commission can secure broad agreement from Member States for major initiatives.
- The European Council's agenda is prepared by the GAC.

- The Commission President is a member of the European Council, and many European Council initiatives are the result of Commission suggestions fed into the agenda prepared by the GAC.

HIGH REPRESENTATIVE OF THE UNION FOR FOREIGN AFFAIRS AND SECURITY POLICY

- There were debates in the Convention on the Future of Europe as to the changes that should be made concerning institutional responsibility for external relations – the Constitutional Treaty created the post of EU Minister for Foreign Affairs, who was to conduct the Union's common foreign and security policy.
- The substance of the provisions in the Lisbon Treaty is, however, the same as in the Constitutional Treaty.
- **The High Representative is appointed by the European Council by qualified majority, with the agreement of the Commission President** (the EC usually decides on issues by consensus, but a number of important appointments are made by QMV).
- **The European Council defines the principles of and general guidelines for, the CFSP, and decides on common strategies for its implementation**.
- The incumbent is one of the Vice-Presidents of the Commission and is responsible for external relations and for coordinating other aspects of the Union's external action.

Powers

1. Conducts the EU's Common Foreign and Security Policy,
2. Takes part in the work of the European Council,
3. Chairs the Foreign Affairs Council,
4. A Vice-President of the Commission.

Roles

- The idea that executive power within the Union is shared between the European Council and the Commission is personified in this post.
- It has been argued that the triple hats worn by the High representative could lead to institutional schizophrenia, with the incumbent being subject to conflicting loyalties.

The European Parliament

The EP represents the peoples of the EU Member States.
Parliament asserts its institutional role in European policymaking by exercising its various functions. Parliament's participation in the legislative process, its budgetary and control powers, its involvement in treaty revision and its right to intervene before the Court of Justice of the European Union enable it to uphold democratic principles at European level.

HISTORY

- The story of the EP is one of gradual transformation from a relatively powerless Assembly under the 1952 ECSC Treaty to the considerably strengthened institution it is today.
- The Assembly was given few powers under the ECSC Treaty and under the original EEC and Euratom Treaties – it was intended to exercise consultative supervisory powers, but not to play any substantial legislative role.

COMPOSITION AND FUNCTIONING

- The Parliament sits in Strasbourg but there is a secretariat based in Luxembourg.

Article 14(2) TEU:

> The European Parliament shall be composed of representatives of the Union's citizens. They shall not exceed seven hundred and fifty in number, plus the President. Representation of citizens shall be degressively proportional, with a minimum threshold of six members per Member State. No Member State shall be allocated more than ninety-six seats.
>
> The European Council shall adopt by unanimity, on the initiative of the European Parliament and with its consent, a decision establishing the composition of the European Parliament, respecting the principles referred to in the first subparagraph.

- MEPs shall be free & independent and agreements concerning the resignation from office of a MEP before the end of the parliamentary term are null and void.
- MEPs shall be entitled to table proposals for EU acts; and can access the EP's files.
- The issue of pay has been of particular significance, since hitherto this was determined by national rates of pay, which differed markedly as between Member States.
- Parliament is to be composed of no more than 751 representatives of the EU's citizens (750 + the President).
- The representation of citizens is 'degressively proportional' with a minimum threshold of six members per Member State. No Member State can have more than 96 seats.
- The concept of degressive proportionality means that although the total number of seats is allocated on the basis of Member State population size, more populous Member States agree to be **under-represented** in order to favour a greater representation of less populous Member States: the larger the country, the smaller the number of seats relative to its population.

<u>Political grouping</u>

- Members do not sit in national delegations, but according to their political affinities in transnational groups.
- MEPs sit according to political grouping, rather than nationality.
- Currently 7 political group, the largest 3 being: the centre-right European People's Party, the Party of European Socialists, and the Group of the Alliance of Liberals and Democrats for Europe.

ELECTIONS

- Following the Maastricht Treaty, citizens of the EU resident in any Member State gained the right to vote and to stand as candidates in European Parliament elections.
- **Elections to the European Parliament** take place every five years by direct universal suffrage, and with more than 400 million people eligible to vote, it is considered the second largest democratic elections in the world.
- Each Member State lays down its own election procedure, but must apply the same basic democratic rules.
- Although there are some common rules regarding the elections, **some aspects can vary** by country, such as whether it is possible to vote by mail or from abroad.
- **Election days** can also be different. The elections normally start on a Thursday (the day on which the Netherlands usually vote) and finish on a Sunday (when most countries hold their elections).
- The **number of members** elected in each country depends on the size of the population, with smaller countries getting more seats than strict proportionality would imply. Currently, the number of MEPs ranges from six for Malta, Luxembourg and Cyprus to 96 for Germany.

- Elections are contested by national political parties but once MEPs are elected, most opt to become part of **transnational political groups**. Most national parties are affiliated to a European-wide political party.
- **Now that it is directly elected, the Parliament enjoys democratic legitimacy and can truly claim to represent the citizens of the EU.**
- The turnout at EP elections has however been low which is worrying given that the traditional EU discourse on democracy relies on the democratic legitimacy of the EP.

PRESIDENCY

- Under the Rules of Procedure, the President of Parliament is elected from among its members for a renewable term of two-and-a-half years.
- The Parliament elects its own President, together with 14 Vice-Presidents and collectively they form the **Bureau of Parliament** (the regulatory body responsible for the Parliament's budget & for administrative, organisational, and staff matters).
- Roles of the President:
  (1) Represents Parliament vis-à-vis the outside world and its relations with the other EU institutions.
  (2) Oversees debates in plenary and ensures that parliament's Rules of Procedure are adhered to.
  (3) After the EU budget has been adopted by Parliament, the President signs it, rendering it operational.
  (4) The Presidents of both Parliament and the Council sign all legislative acts adopted under the ordinary legislative procedure.

POLITICAL BODIES

1. The Bureau (regulatory body responsible for the Parliament's budget and for administrative, organisational, and staff members),
2. The Conference of Presidents (consists of the President + the leaders of the various political groups – the political governing body of the Parliament),
3. The five Quaestors (responsible for administrative and financial matters directly concerning members who assist the Bureau in an advisory capacity),
4. The Conference of Committee Chairs,
5. The Conference of Delegation Chairs.

COMMITTEES & DELEGATIONS

- The Parliament has 20 standing committees, two subcommittees and 39 delegations.
- The committees are vital to the EP since they consider legislative proposals from the Commission.
- Parliament may also establish special committees or committees of inquiry.

PARLIAMENT'S SECRETARIAT

- The Parliament is helped by a secretariat of approx. 3,500 staff, headed by a Secretary-General who is appointed by the Bureau.

THE PLENARY

- The Plenary Sessions represent the culmination of the legislative work done in committees and in the political groups.
- These sessions are where the Parliament formally sits to vote on EU legislation and adopt its position on political issues. The MEPs (the Members of the European Parliament)

meet around once a month in Strasbourg for a four-day part session from Monday to Thursday. In addition to these twelve annual Strasbourg sessions, the Parliament may also meet in additional two-day plenary sessions in Brussels up to six times a year.

- The European parliament has 751 elected members from 28 Member States of the European Union and conducts its plenary debates in 24 languages.
- The agenda for the plenary sitting is published online. This agenda is deemed to be definitive only after the adoption by the Conference of Presidents (of political groups) - in principle each Thursday before the Strasbourg part-session.
- The European Commission and the Council of the European Union take part in the sittings in order to **facilitate cooperation between the institutions in the decision-making process**.

DEVELOPMENT OF POWERS

1. Legislative Power

EP's role in the legislative process has strengthened over time. The raising of the co-decision procedure to the level of ordinary legislative procedure has, in effect, turned the EP into a co-legislator alongside the Council.

- The changes in the EP's role in the legislative process, most especially through what is now the ordinary legislative procedure, have brought it from the fringes of the EU to become a major player in the shaping of legislation.
- Prior to the Single European Act 1986, the general rule was that the EP only had the right to be consulted on legislation, and that was only where the particular Treaty Article so specified.
- **The SEA**: introduced the cooperation procedure, which brought the EP into the legislative process more fully.
- **Maastricht Treaty**: The co-decision procedure was introduced by the Maastricht Treaty, and in effect made the EP a co-equal partner, or something close thereto, with the Council in the areas where it applied.
  The co-decision procedure was introduced in certain areas of legislation. The Maastricht treaty did not remove the cooperation procedure. This marked the beginning of Parliament's metamorphosis into the role of co-legislator.
  It also gave Parliament **the right of legislative initiative**, but it was limited to asking the Commission to put forward a proposal.
- **Treaty of Amsterdam**: extended the co-decision procedure to most areas of legislation and reformed it, making Parliament a co-legislator on an equal footing with the Council.
- **Lisbon Treaty**: renamed the ordinary legislative procedure and its remit has been extended to approx. 40 further areas. The ordinary legislative procedure became the most widely used decision-making procedure.
- The co-equal status of the EP and Council is affirmed in the TEU, which now states that the EP shall, jointly with the Council, exercise legislative and budgetary functions.
- The EP now has veto power over delegated acts.
- In the standard way new EU law is made, all proposals for new EU legislation must be checked by Parliament. Parliament may then choose to approve, amend, or reject a proposal.
- Union legislation cannot be passed without agreement between the Council & the EP.

The Cooperation Procedure (repealed by the Treaty of Lisbon)

- This procedure has been abrogated by the Treaty of Lisbon. The procedure was used primarily in the field of economic and monetary policy. Though the opinion of the

European Parliament (EP) weighed heavily in this procedure, the EP could not block legislative proposals under this procedure.

- In short, the cooperation procedure proceeded as follows: the European Commission submitted a proposal. The European Parliament adopted an opinion on this proposal after which the Council of Minister took a position. The EP could indicate whether it agreed of disagreed with the position of the Council. The Council could then unanimously approve or reject the proposal.

The Ordinary Lgislative Procedure – how do proposals become EU law?
The codecision procedure was first introduced in 1992 and its use extended in 1999. With the adoption of the Lisbon Treaty, codecision was renamed the ordinary legislative procedure and it became the main decision-making procedure used for adopting EU legislation. It applies to around 85 policy areas.
At a glance
Legislators: The Council of the EU and the European Parliament
Right of legislative initiative: The European Commission
Main elements of the procedure:

1. The European Commission submits a proposal to the Council and the European Parliament
2. The Council and the Parliament adopt a legislative proposal either at the first reading or at the second reading
3. If the two institutions do not reach an agreement after the second reading a conciliation committee is convened
4. If the text agreed by the conciliation committee is acceptable to both institutions at the third reading, the legislative act is adopted

If a legislative proposal is rejected at any stage of the procedure, or the Parliament and Council cannot reach a compromise, the proposal is not adopted and the procedure ends.

2. Budgetary Power:

- **Lisbon Treaty**: eliminated the distinction between compulsory and non-compulsory expenditure and put Parliament on an equal footing with the Council in the annual budgetary procedure, which now resembles the ordinary legislative procedure.
  It further extended the budgetary powers of the EP, stipulating that the Parliament must approve the multiannual financial plan and giving it co-decision powers on all expenditure.
- The EP has important powers in relation to the budget – Parliament remains one of the two arms of the budgetary authority.
- It used its power over the budget to pressure for more general changes in the inter-institutional allocation of power.
- Like new legislation, the EU budget must be approved by Parliament before money can be spent. Additionally, after the money has been spent Parliament must officially discharge the budget of the previous year to confirm the money was spent for the planned purposes.
- This gives Parliament a say in the EU finances, both before and after, money is spent.
- Finally, Parliament has to provide its consent to the multiannual financial framework.

3. Control over the executive branch (The Commission)
Motion of censure

- The EP has always had the power to censure the Commission and require its resignation, since the Treaty of Rome.

- Such motion of no confidence requires a two-thirds majority of the votes cast.
- A successful vote on a motion of censure leads to the resignation of the Commission as a body, including the Vice-President of the commission & High representative of the Union for Foreign Affairs and Security Policy.
- The supervisory powers of the Parliament have since been boosted. It is now also empowered to set up special committees of inquiry to look specifically at alleged cases of infringement of Union law or maladministration.
- The EP monitors the activities of the other institutions, principally the Commission, through the asking of questions and the establishment of committees of inquiry.
- **Maastricht Treaty:** provided for the appointment by the Parliament of an Ombudsman.

The Ombudsman

- The Ombudsman is to receive complaints from Union citizens or resident third-country nationals or legal persons, concerning 'instances of maladministration in the activities of Union institutions, bodies, offices or agencies' as well as to '**conduct inquiries** for which he finds grounds, **either on his own initiative or on the basis of complaints** submitted to him direct or through a member of the European Parliament.'
- Only EU and not national institutions are subject to the jurisdiction of the Ombudsman.
- The EU bodies which are subject to the Ombudsman's jurisdiction must supply information requested and give access to files, except where grounds of secrecy are pleaded.
- The Ombudsman sends a report to the Parliament and to the institution under investigation, and the complaint is informed of the outcome.
- The annual Reports form the Ombudsman contain a wealth of valuable information about the complaints received and their resolution.

4. Dismissal and Appointment Power

The Commission's accountability to Parliament has gradually been strengthened. **Maastricht Treaty**: gave Parliament the power of final approval over the membership of the Commission.

Process: The President, the nominated Commissioner, and the High Representative are subject to a vote of consent by the EP, but the formal appointment of the Commission is made by the European Council, acting by qualified majority.

- **Treaty of Amsterdam**: the appointment of the President of the Commission was made subject to Parliament's approval, thus increasing its powers of control over the executive.

  Process: article 14(1) TEU: the EP shall elect the President of the Commission. In truth, the EC, acting by QMV, taking into account the EP elections and after having held appropriate consultations, proposes to the EP a candidate for President of the Commission. The candidate is then elected by the EP.
- In the case of members of the Court of Auditors, and the president, Vice-President and Executive Board of the ECB, Parliament is merely consulted.

5. Others

Parliament has a right of assent to all major international agreements concerning an area covered by co-decision, and to accession treaties concluded with new Member States laying down the conditions of admission.

DEMOCRATIC DEFICIT

As an institution representing the citizens of Europe, Parliament forms the democratic basis of the European Union. If the EU is to have democratic legitimacy, Parliament must be fully involved in the EU's legislative process and exercise political scrutiny over the other EU institutions on behalf of the public.

- While changes in the legislative process have enhanced the power of the only directly elected European institution, the problems of the EU's democratic legitimacy are not thereby resolved.
- Auel and Rittiberger argued that the driving force of the increase in powers of the EP was the need to alleviate the legitimacy deficit.
- Input legitimacy = the idea that political choices are legitimate because they reflect the 'will of the people', which is normally identified through the legislature.
- Output legitimacy = the idea that the political choices thus made effectively promote the welfare of that community.
- Transfers of competence from Member States to the EU thereby created an asymmetry between input and output legitimacy, and hence a legitimacy deficit since the normal mechanism for input legitimacy, through national parliaments, was reduced as increasing areas were regulated by the EU.
- One response to this legitimacy deficit was to increase the power of the EP.
- With that being said, Parliament's, EUs only directly elected body, strangely **doesn't have a say in legislation on all subjects** – there are certain areas where the assent of the EP is required for legislation.

- The consultation procedure continues to apply in areas covered by Articles 27, 41 and 48 of the TEU and other areas.
- The consent procedure was introduced by the SEA. Following the Maastricht Treaty, the procedure applied to the few legislative areas in which the Council acts by unanimous decision. Under the Lisbon Treaty, some new provisions fall under the consent procedure

Martina Camilleri

The European Parliament

The organisation and operation of the EP are governed by its Rules of Procedure. The political bodies, committees, delegations and political groups guide Parliament's activities.

- Article 14 TEU
- Represented the peoples of the EU Member States through direct elections.
- The name was not officially changed to 'European Parliament' until the EC Treaty was amended by the TEU.

COMPOSITION

- The representation of citizens is 'degressively proportional', with a minimum threshold of six members per Member State. No Member State can have more than 96 seats.
- The concept of 'degressively proportional' means that although the total number of seats is allocated on the basis of Member State population size, more populous Member States agree to be under-represented in order to favour a greater representation of less populous Member States: the larger the country, the smaller the number of seats relative to its population.
- The Bureau is made up of the President, 14 Vice-Presidents and 5 Quaestors.
- There is also a **Conference of Presidents**, which consists of the President of the Parliament and the chairmen of the political groups – responsible for the organisation of the Parliament's work, and relations with the other EU institutions and with non-Union institutions.
- MEPs have a uniform salary which is paid from the EU budget.

THE PRESIDENT

- Under the Rules of Procedure, the President of Parliament is elected from among its Members.
- Represents Parliament vis-à-vis the outside world & in its relations with the other EU institutions.
- The President oversees the debates in plenary and ensures that Parliament's Rules of Procedure are adhered to.
- After the EU budget has been adopted by the EP, the President signs it, rendering it operational.
- The Presidents of both Parliament and the Council sign all legislative acts adopted under the ordinary legislative procedure.

THE PLENARY

- The plenary is the EP sensu stricto and its sittings are chaired by the President.
- Held in public & is web streamed.

POLITICAL BODIES

- Parliament's political bodies comprise the Bureau, the Conference of Presidents, the five Quaestors, the Conference of Committee Chairs, and the Conference of Delegation Chairs.

COMMITTEES AND DELEGATIONS

- Members sit in 20 committees, two subcommittees and 39 delegations. Parliament may also establish special committees, or committees of inquiry.
- Each committee/delegation elects its own Bureau.

Martina Camilleri

POLITICAL GROUPS

- Members do not sit in national delegations, but according to their political affinities in transnational groups.
- Under the Rules of Procedure, a political group must comprise Members elected from at least one quarter of the Member States and must consist of at least 25 Members.

PARLIAMENT'S SECRETARIAT

- Headed by the Secretary-General who is appointed by the Bureau.
- Currently comprises 12 Directorates-General and the Legal Service.
- Task: coordinate legislative work and organise the plenary sittings and meetings. It also supports parliamentary bodies and MEPs in the exercise of their mandates.

ELECTION

- Before the introduction of direct elections, MEPs were appointed by each of the Member States' national parliaments.
- Elections are held every 5 years: 'legislative period'.
- The Election of representatives of the EP is through direct elections.
- Each Member State lays down its own election procedure, but must apply the same basic democratic rules:
  1. Direct general election,
  2. Proportional representation,
  3. Free and secret ballots,
  4. Minimum age and so on.
- Now that it is directly elected, the Parliament enjoyed democratic legitimacy and can truly claim to represent the citizens of the EU.
- The Parliament lends legitimacy to the Union institutions involved in the decision-making process –
  A great deal of progress has been made in this area over recent years.
  1. The rights of Parliament have been continually extended,
  2. The Treaty of Lisbon has explicitly established the obligation for action by the EU to adhere to the principle of representative democracy. As a result, all citizens of the Union are directly represented in the and entitled to participate actively in the EU's democratic life.

DEFICIT

- **As an institution representing the citizens of Europe, Parliament forms the democratic basis of the EU. If the EU is to have democratic legitimacy, Parliament must be fully involved in the EU's legislative process and exercise political scrutiny over the other EU institutions on behalf of the public.**
- The reason for this deficit is that, quite simply, no government in the normal sense exists at EU level. Instead, the functions analogous to government provided for in the Union treaties are performed by the Council and the European Commission.

Nevertheless, the Treaty of Lisbon:

(1) Gave the Parliament extensive powers in respect of **appointments to the Commission** – ranging from election by the Parliament of the President of the Commission on recommendation of the European Council, to the Parliament's vote of approval of the full College of Commissioners.

(2) In the **legislative process** – the raising of the co-decision procedure to the level of ordinary legislative procedure has turned the EP into a 'co-legislator' alongside the

Council. Union legislation cannot be passed without agreement between the Council and the EP.

(3) Further extension of its **budgetary powers** – the EP must approve the multiannual financial plan and the Treaty of Lisbon also gave it co-decision powers on all expenditure.

(4) **Right of assent**

(5) **Supervisory powers**

- the Commission must answer to Parliament, defend its proposals before it and present it with an annual report on the activities of the EU for debate.
- Parliament can, by a two-thirds majority of its Members, pass a motion of censure and therefore compel the Commission to resign as a body.
- Empowered to set up special committees of inquiry to look specifically at alleged cases of infringement of Union law or maladministration.
- The EP has also made use of its power to appoint an Ombudsman to whom complaints about maladministration in the activities of Union institutions or bodies, with the exception of the CJEU, can be referred.

POWERS

Parliament's participation in the legislative process, its budgetary and control powers, its involvement in treaty revision and its right to intervene before the Court of Justice of the European Union enable it to uphold democratic principles at European level.

A. Participation in the legislative process
   - Ordinary legislative procedure
   - Consultation
   - Cooperation (abolished)
   - Consent
   - Right of initiative

B. Budgetary powers

C. Scrutiny over the executive
   - Investiture of the Commission
   - Motion of censure
   - Parliamentary questions
   - Committees of inquiry
   - Scrutiny over the CFSP

D. Appointment of the Ombudsman

The European Council

- Article 15 TEU.
- Represents the interests of Member States.
- Main task: define the general political aims & priorities of the EU.

COMPOSITION

- The Heads of State or Government, the President of the Commission, the President of the European Council, and the High Representative of the Union for Foreign Affairs and Security Policy.
- The Treaty of Lisbon created the office of the President of the European Council – selected by QM of the Members of the European Council.

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PRESIDENT

- Tasks: the preparation and follow-up of European Council meetings and representing the EU at international summits in the area of foreign and security policy.

- Does not exercise legislative functions.
- It establishes the general policy guidelines for EU action. These contain basic policy decisions or instructions and guidelines to the Council or the European Commission.
- Its role is to provide a general political impetus rather than act as a decision-making body in the legal sense.
- It defines the EU's **'general political directions and priorities'** (Article 15(1) TEU).
- It is central to the development of the Union, keeping in mind that major changes in the treaties will be preceded by an IGC normally a European Council meeting.
- It takes decisions with complete independence and in most cases does not require a Commission initiative or the involvement of Parliament.
- It maintains an organisational link with the Commission.

POWERS

- Institutional
- Foreign and security policy matters

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COMPETENCE

The scope of the EU's legislative competence is limited, as the EU is not a sovereign state. Moreover, the competences of the Union are defined in the EU Treaties.
The principle of conferral, article 5 TEU: the EU acts only within the limits of the competences that EU countries have conferred upon it in the Treaties. Since the Lisbon Treaty, these competences are defined in articles 2-6 of the TFEU. Moreover, competences not conferred on the EU by the Treaties remain with EU Member States.

Impetus for reform

- The EU can only act within the limits of the powers assigned to it, this is provided by article 5(2) TEU of the Lisbon Treaty.
- It was not easy, prior to the Lisbon Treaty, to specify with exactitude the division of competence between the EU and Member States – an issue identified for further inquiry after the Nice Treaty 2000.
- The Laeken Declaration specified in greater detail the inquiry into competence that had been left open after the Nice Treaty 2000. Four principal forces drove the reform process:
  a. **Clarity:** reflected the concern that the Treaty provisions on competences were unclear, jumbled, and unprincipled.
  b. **Conferral:** this captured not only the idea that the EU should act within the limits of the powers attributed to it, but also carried the more positive connotation that the EU should be accorded the powers necessary to fulfil the tasks assigned to it by the enabling Treaties.
  c. **Containment:** reflected the concern that the EU had too much power, and that it should be substantively limited.
  d. **Consideration:** of whether the EU should continue to have the powers that it had been given in the past, a re-thinking of the areas in which the EU should be able to act.

The emphasis was on the first three.

Lisbon strategy

A. Categories and consequences

- The Lisbon Treaty repeats the minor modifications the provisions in the Constitutional Treaty. The provisions are contained in the TEU and in the TFEU.
- It is the TEFU that contains the main provisions on competence: There are categories of competence that apply to specified subject matters areas, and concrete legal consequences flow from such categorization.
- The principal categories are:
  1. Where the EU's competence is exclusive,
  2. Where it is shared with the Member States,
  3. Where the EU is limited to supporting/coordinating action
- There are special categories for EU action in the sphere of economic and employment policy & Common Foreign and Security Policy.

B. Express and Implied power

Explicit powers = clearly defined in the Treaties
Implied powers = where the EU has explicit powers to act in a particular area, it must have similar powers to conclude international agreements with non-EU countries or international organisations in the same field.

- Firstly, there can be disagreement as to the ambit of a particular Treaty Article, and this is so irrespective of the category of competence which applies to the area. Treaty articles may be drafted relatively specifically, or they may be framed in broader open-textured terms. The ECJ has in general been disinclined to place limits on broadly worded Treaty Articles. It can however do so.
  Germany v. European Parliament and Council
  The tobacco Advertising case
  The EU adopted a directive on the approximation of laws relating to the general prohibition of advertising and sponsorship of tobacco products, with a view to eliminating obstacles to the functioning of the internal market and distortions of competition resulting from differences in the relative national rules. Consequently, Germany initiated proceedings requesting the annulment of the Directive as its real objective was the protection of public health. Moreover, the protection of public health cannot be the subject of harmonisation.
- Secondly, the EU institutions may claim that a particular Treaty Article contains an implied power to make the particular regulation. Under the narrower formulation, the existence of a given power implies the existence of any other power that is reasonably necessary for the exercise of the former. Under the wider formulation, the existence of a given objective implies the existence of power reasonably necessary to attain it. Both have been accepted.
  Germany v. Commission [1987] ECR 3203
  In this case, the Commission made a decision pursuant to Article 118 which established a prior communication and consultation process in relation to migration policies affecting workers from non-EC countries. A number of States challenged this measure as being *ultra vires* the Commission. Article 118, which concerned collaboration in the social field, did not expressly give the Commission power to make binding decisions. The ECJ held that the migration policy in relation to non-Member States could fall within Article 118, to same extent at least, because of the effects of such migration on the employment situation in the EC.
- The CFI has, however, more recently held that it is only exceptionally that such implicit powers are recognized, and in order to be so recognized they must be necessary to ensure the practical effect of the provisions of the Treaty or the basic regulation at issue.

EXLUSIVE COMPETENCE

Only the EU can act

- Article 2(1) TFEU
- Carries the consequence that only the Union can legislate and adopt legally binding acts. The Member States can only do so if empowered by the Union or for the implementation of Union acts.
- Article 3(1) TFEU: subject matter areas that fall within exclusive competence.
  - These are limited.
  - The consequences of inclusion are severe: the Member States have no autonomous legislative competence, and they cannot adopt any legally binding act. They can neither legislate, nor make any legally binding non-legislative act.
  - There are problems of demarcating borderlines between the different categories. Such problems can arise in demarcating the line between exclusive and shared competence.
- Article 3(2) TFEU: states that the Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a

legislative act of the Union, or is nec- essary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope.

- The EU is also accorded exclusive competence to make an international agreement, provided that the conditions in Article 3(2) TFEU are met. This is known as conditional exclusivity.

> The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope.

  - The reality is that it will be rare, if ever, that the EU lacks power to conclude an international agreement.
  - Article 3(2) TFEU stipulates three instances in which the EU has exclusive external competence. The interpretation of this provision is by no means easy

Analysis of article 3(2) TFEU

1. *'When its conclusion is provided for in a legislative act of the Union'*

Article 3(2) TFEU does not state that the Union shall have exclusive exter- nal competence where a Union legislative act says that this shall be so. Nor does it state that the EU shall have such exclusive external competence only in the areas in which it has an exclusive internal competence. Thus express external empowerment to conclude an international agreement is taken to mean exclusive external competence, with the corollary that Member States are pre-empted from concluding any such agreement independently, and from legislating or adopting any legally binding act.

2. *'Or is necessary to enable the Union to exercise its internal competence'*

The effect would be that the EU would have exclusive external competence to conclude an international agreement that was necessary to enable the EU to exercise an internal competence, even where the internal competence only allowed supporting action, provided that the international agreement did not contain provisions that went beyond this type of action.

3. *'Or insofar as its conclusion may affect common rules or alter their scope'*

The reality is that this phrase has been interpreted broadly by the ECJ, such that in most instances where the EU has exercised its power internally it will be held to have an exclusive external competence.

SHARED COMPETENCE

Member States can act only if the EU has chosen not to do so.

- Article 2(2) TFEU

> When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.

- Shared competence is the general residual category
- Article 4(2) states that shared competence applies in the 'principal areas' listed, implying thereby that the list is not necessarily exhaustive.

- There can be boundary problems between shared competence and the other two principal categories, exclusive competence and the category where the EU is limited to taking supporting, coordinating, or supplementary action.
- For example, it is not easy to decide which aspects of social policy come within shared competence
- Article 2(2) TFEU stipulates that the Member State can exercise competence only to the extent that the Union has not exercised or has decided to cease to exercise its competence within any such area. Member State action is therefore pre-empted where the Union has exercised its competence, with the consequence that the amount of shared power held by the Member State in these areas may diminish over time

<u>One can conclude that:</u>

1. Member States will lose their competence within the regime of shared power only to the extent that the Union has exercised *its* competence. The real limits on Union competence must be found in the detailed provisions which delineate what the EU can do in the diverse areas where power is shared.
2. The pre-emption will occur only *to the extent* that the EU has exercised its competence in the relevant area. There are different ways in which the EU can intervene in a particular area. The EU may choose to make uniform regulations, it may harmonize national laws, it may engage in minimum harmonization, or it may impose requirements of mutual recognition. Thus, for example, where the EU chooses minimum harmonization, **Member States will have room for action in the relevant area.** Where the Union has taken action in an area governed by shared competence, 'the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area'. It is nonetheless still possible for Union acts to cover the entire area subject to shared power, provided that the EU could do so under the relevant Treaty provisions.
3. The possibility that the EU will cease to exercise competence in an area subject to shared competence, the consequence being that competence then reverts to the Member States
4. The final qualification concerns Article 4(3) and Article 4(4) TFEU. The essence of both Treaty provisions is to make clear that the Member States can continue to exercise power even if the EU has exercised its competence within these areas. Thus even if the EU has defined and implemented pro- grammes relating to research, technological development, and space, this does not preclude Member States from exercising their competence in such areas. The same reasoning is applied in the context of development cooperation and humanitarian aid.

- The reality is that shared competence is simply an umbrella term, with the consequence that there is significant variation as to the division of competence in different areas of EU law.
- It follows that the precise configuration of power sharing in areas such as the internal market, consumer protection, energy, social policy, the environment, and the like can only be determined by considering the detailed rules that govern these areas, which are found in the relevant provisions of the TFEU.
- There is no magic formula that applies to all areas of shared power that determines the precise delineation of power in any specific area.

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SUPPORTING, COORDINATING, OR SUPPLEMENTARY ACTION

The EU has competence to support, coordinate or supplement the actions of the Member States – legally binding EU acts in these areas cannot imply harmonisation of national laws or regulations.

- Allows the EU to take action to support, coordinate, or supplement Member State action, without thereby superseding their competence in these areas, and without entailing harmonization of Member States' laws
- While the EU cannot harmonize the law in these areas, it can pass legally binding acts on the basis of the provisions specific to them, and the Member States will be constrained to the extent stipulated by such acts.
- The meaning of supporting etc action, and hence the precise extent of EU power, varies somewhat in the different areas listed, but it is clear that the EU has a significant degree of power in these areas, albeit falling short of harmonization.
- The TFEU has to be read as a whole as it becomes clear that there are other important areas in which the EU is limited to supporting etc.
- There are boundary problems such as difficulties in deciding which aspects of social policy fall within shared competence, and which come within this category.
- Each substantive area begins with a provision setting out the objectives of Union action. The EU is to complement national action on these topics.
- While harmonization is ruled out, the EU still has significant room for intervention through 'persuasive soft law', in the form of guidelines on best practice, monitoring, and the like, and through 'legal incentive measures.' These fall short of harmonization.
- The standard approach under the Lisbon Treaty is for the EU to be empowered to take measures to attain the objectives listed in that area. The language of the empowerment varies. It is sometimes framed in terms of taking 'incentive measures', on other occasions the language is in terms of 'necessary measures', in yet other instances the terminology is 'specific measures'.
- Whatsoever the precise terminology these measures constitute legally binding acts, normally passed in accordance with the ordinary legislative procedure.
- The boundary of this EU legislative competence is that such legal acts must be designed to achieve the objectives listed for EU involvement in the area. These objectives are however normally set at a relatively high level of generality, with the consequence that the EU is legally empowered to take binding measures provided that they fall within the remit of these broadly defined objectives and do not constitute harmonization of national laws.

In brief:

1. EU action designed to support, coordinate, or supplement Member State action does not supersede Member State competence.
2. Legally binding acts of the Union adopted on the basis of the provisions specific to these areas cannot entail harmonisation of Member States' laws.

ECONOMIC, EMPLOYMENT, AND SOCIAL POLICY

- The EU may adopt guidelines and initiatives to co-ordinate member state approaches in relation to the three policy areas: (1) **economic policy**, (2) **employment policy**, (3**) social policies.**
- The Lisbon Treaty has a separate category of competence for these matters.
- The explanation for this separate category was political. There would have been significant opposi- tion to the inclusion of these areas within shared competence, with the consequence of pre-emption of state action when the EU exercised power within this area.

It is equally clear that there were those who felt that the category of supporting, coordinating, and supplementary action was too weak. This was the explanation for the creation of a separate category.

- The placement of this category is after shared power, but before the category of supporting, coordinating, and supplementary action.
- Boundary problems are evident here, particularly in relation to social policy. The difficulties in this area are especially marked, since certain aspects of social policy fall within shared competence and other aspects appear to fall within the category of supporting, coordinating, and supplementary action.
- The Treaty schema for competence in Article 2 TFEU is in general premised on the ascription of legal consequences for EU and Member State power as the result of coming within a particular cat- egory. Article 5 TFEU is an exception in this respect, since Article 2(3) TFEU does not spell out the legal consequences of inclusion within this category.

COMMON FOREIGN AND SECURITY POLICY AND DEFENCE

- The TEU also gives the EU competences to define and implement a common foreign and security policy, including the progressive framing of a common defence policy.
- The three-pillar structure that characterized the previous Treaty has not been preserved in the Lisbon Treaty. There are nonetheless distinct rules that apply in the context of foreign and security policy, and this warrants a separate head of competence for this area.
- Decision-making in this area continues to be more intergovernmental and less supranational by way of comparison with other areas of Union competence.
- The decision-making process if different. For example, in CFSP, both the EU High Representative for Foreign Affairs and Security Policy and EU member states have the right to initiate policy, not the Commission alone. The Commission is able to initiate a joint proposal with the High Representative, but not by itself.

FURTHER LIMITATIONS TO THE USE OF EU COMPETENCE

The use of EU competence is governed by the principles of subsidiarity and proportionality.

Subsidiarity

It is the principle whereby the EU does not take action (except in the areas that fall within its exclusive competence), unless EU action is more effective than action taken at national, regional or local level. In case of breach of subsidiarity, the Committee or Regions or EU countries may challenge the act.

Proportionality

Under this principle, the action of the EU must be limited to what is necessary to achieve the objectives of the Treaties. The content and form of the action must be in line with the aim pursued.

PRINT CASES 22-30

WHO DECIDES IN CASE OF CONFLICTS RELATED TO EU AND MEMBER STATE COMPETENCES?

- Examples of limitation of EU legislative competence.
- Example of broadening EU competence.
- Exercise of competences of Member States subject to requirement of EU law – criminal law example.
- “Criminalisation” incompatible with EU Law.

- Criminal sanctions incompatible with EU law.
- Criminal sanctions incompatible with EU law and proportionality.
- Criminal injuries compensation legislation incompatible with EU law.

Etc.

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The EU legal order

The EU is an autonomous entity with its own sovereign rights & a legal order independent of the Member States, to which both the Member States themselves & their nationals are subject within the EU's areas of competence.

The EU legal order is a legal order in its own right.

COMPARING THE EU WITH INTERNATIONAL LAW

- International Law regulates the relationship between states whereas National Law regulates the relationship between an individual and the State (Public Law) or the relationship between individuals (Private Law).
- International law regulates the relationship between states whereby the individual as such is not a subject of international law but rather is an object in the sense that **normally an individual is not bound by an international treaty**. International law is normally state v. state.
- As regards enforcement of International Law and Domestic Law, in International Law there is no constitutional set-up. **Any international law is just a voluntary restraint**.
- Domestic Law on the other hand, unless one lives in a failed state (state institutions do not exists or if they fail to protect the individual), is enforced in ways which are specific to that particular state, so be it a democracy or a dictatorship.
- If you look at EU law, you will find both elements of private and public law, but EU law is born out of an international treaty.
- The European community is not just an agreement but is a way of enforcing the agreement. EEC treaty is being entered upon by sovereign states. So, **EU law is born out of an international treaty**. Therefore, EU law is de facto international law. The origins of EU law are international law.
- European law started from international law but what happened is more than that.
- In the case of the EU, the states are agreeing to form a community, a Union, and are **giving up their freedoms, sovereignty**, the power to do whatever they want because together, in a community, they can do a better job. Of course, this giving up of sovereignty does not apply in all areas – keeping in mind that the EU only has the power to act within the limitations imposed on it by the Treaties – the principle of conferral.
- By establishing the Union, the Member States have limited their legislative sovereignty and, in so doing, have created a self-sufficient body of law that is binding on them, their citizens and their courts.

In Malta, we have the **dualist theory**. When Malta enters into an international agreement, International Law is like a 'contract' with other countries. **For the agreement to be binding, it has to first be taken to Parliament**. **Once it is approved by Parliament then Malta is bound but that contract is not enforceable in a court of law**. For it to be applicable it has to be enacted into Maltese law by an Act of Parliament.

So, in Malta, International Law is only enforceable in a Maltese Court once it is transposed/enacted into Maltese law.

The European Union Act copies and pastes all the thousands of pages of EU legislation into Maltese Law. In Malta we are dualist, therefore EU regulations cannot apply to the Maltese legal order unless they are enacted through Parliament. With that being said, Parliament cannot discuss everything which is why we have this act. Therefore, **EU law is not Domestic Law and neither International Law as it not only regulates the relationships as States but also those of citizens.** The origin of EU law is, however, International Law.

An important point to make is that when the States of the EU joined the EU, they remained States. Unlike Texas for example, which cannot leave the United States without a constitutional amendment. We can leave the EU through the given procedure. We have not lost our sovereignty but are more so sharing it. Those areas which do not fall under the EU treaty, leave us completely free.
UNLIKE INTERNATIONAL LAW, IN THE EU THE SUBJECTS ARE NOT ONLY THE STATES BUT ALSO INDIVIDUALS. AS INDIVIDUALS WE ARE MEMBERS OF THE EU IN OUR OWN RIGHT. Although EU law is derived from international law, it is different from it. EU law is unique as it is a class of its own.
The EU law is enforceable side-by-side in the national legal order. In the same way, you cannot be just a citizen of the EU because the EU is not a State although it acts very much like one. To be a citizen of the EU you must be a citizen of the member states.

THE EU'S SYSTEM OF LAWS

- National law derives its validity from the fact that the State that enacts it is sovereign and is capable of enforcing it in its national territory.
- The EU is not merely a creation of law but also pursues its objectives purely by means of law. **It is a Union based on law.**
- It lays down the procedure for decision-making by the Union institutions and regulates their relationship to each other. It provides the institutions with the means – in the shape of regulations, directives and decisions – of enacting legal instruments binding on the Member States and their citizens.
- The individuals themselves become a main focus of the Union – the EU's legal order accords them rights and imposes obligations on them, so that as citizens both of their state and of the Union they are governed by a hierarchy of legal orders – A PHENOMENON FAMILIAR FROM FEDERAL CONSTITUTIONS.
- Like any legal order, that of the EU provides a self-contained system of legal protection for the purpose of recourse to and the enforcement of Union law.
- Union law also defines the relationship between the EU and Member States.
- The Member States are answerable to the citizens of the EU for any harm caused through violations of Union law.

The EU founding treaties as the primary source of Union law

- The treaties are legal instruments created directly by the Member States.
- These founding treaties and the instruments amending and supplementing them, and the various accession treaties contain the basic provisions on the EU's objectives, organisation and modus operandi, and parts of its economic law.
- They set the constitutional framework for the life of the EU, which is then fleshed out in the Union's interest by legislative and administrative action by Union institutions.

The EU legal instruments as the secondary source of Union law

- Law made by the Union institutions through exercising the powers conferred on them.
- This consists of legislative acts, non-legislative acts, non-binding instruments, and other acts that are not legal acts.

THE EU'S LEGAL NATURE

- The EU's legal nature **was set out in two precedent-setting judgements of the CJEU** in 1963 and 1964 relating to the then EEC, the judgements are still valid for the EU in its current form.

Direct Applicability

VAN GEND & LOOS

- Facts of the case: the Dutch transport company Van Gend & Loos filed an action against the Netherlands customs authorities for imposing an import duty on a chemical product from Germany which was higher than duties on earlier imports.
  This company considered this an infringement of **Article 12** of the EEC Treaty, which **prohibits the introduction of new import duties or any increase in existing customs duties between the Member States**.
- The court in the Netherlands referred the matter to the CJEU for clarification as regards the scope & legal implications of the abovementioned article of the Treaty establishing the EC.
- The outcome of these proceedings depended on the question of whether individuals too may invoke article 12 of the EEC Treaty.
- The Court of Justice used this case as an opportunity to set out a number of observations of a fundamental nature concerning the legal nature of the EEC.

The Court stated:

'The objective of the EEC Treaty, which is to establish a Common Market (the 4 freedoms), *the functioning of which is the direct concern to the interested parties of the Community,* ***implies that this Treaty is more than an agreement which merely creates mutual obligations between contracting states****...It is also confirmed more specifically by the establishment of Institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens. The conclusion to be drawn from this is that* ***the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which compromise not only Member States but also their nationals.'***

- Therefore, the Court ruled that, in view of the nature and objective of the Union, the provisions of Union law were in all cases directly applicable.

Implications:

1. in establishing direct applicability, what this means is that Union law confers rights and imposes obligations directly not only on the Union institutions and the Member States but also on the Union's citizens.
2. Direct applicability confers on individuals' rights that are enforceable before the courts of a Member State – national courts are obliged to safeguard these rights.
3. The question from this bald statement remains as to which provisions of Union law are directly applicable. Treaty articles, regulations, decisions, and directives are capable of direct effect.
4. It is especially important where a Member State has failed to meet its obligation to implement an EU measure or where the implementation is partial or defective.
5. It became apparent that **the EEC Treaty was different from other treaties** and that **individuals could derive rights from its provisions, which could be enforced at national level**.

The direct applicability of a provision of Union law leads to a second, equally fundamental question: what happens if a provision of Union law gives rise to direct rights and obligations for the Union citizen and thereby conflicts with a rule of national law?

Supremacy/primacy of Union law over national law

COSTA V. ENEL

- A year later, the Costa v. ENEL case gave the Court of Justice an opportunity to set out its position in more detail.
- Facts of the case: in 1962, Italy nationalised the production and distribution of electricity and transferred the assets of the electricity undertakings to the national electricity board, ENEL. As a shareholder of Edison Volta, one of the companies that was nationalised, Mr Costa considered that he had been deprived of his dividend and consequently refused to pay an electricity bill. In proceedings before the arbitration court in Milan, one of the arguments put forward by Mr Costa to justify his conduct was that the nationalising act infringed a number of provisions of the EEC Treaty. In order to be able to assess Mr Costa's submissions in his defence, the Court requested that the CJEU interpret various aspects of the EEC Treaty.

In its judgement, the CJEU states the following in relation to the legal nature of the EEC:

*'**By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply**.*

*By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly **real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community**, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.'*

On the basis of its detailed observations, the Court reached the following conclusion:

*'It follows from all these observations that **the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature*** (because it is coming from Brussels and not from Rome)*, **be overridden by domestic legal provision**, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.*

*The transfer by the states from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with **it a permanent limitation of their sovereign rights**, against which **a subsequent unilateral act incompatible with the concept of the Community cannot prevail.'***

Implications:

1. Union law, which was enacted in accordance with the powers laid down in the treaties, has primacy over any conflicting law of the Member States.
2. The legal consequence of this rule of precedence is that, in the event of a conflict of laws, national law which is in contravention of Union law ceases to apply and no new national legislation may be introduced unless it is compatible with Union law.
3. Such a conflict between Union law and national law can be settled only if one gives way to the other. The only way of settling conflicts between Union law and national law is to **grant Union law primacy** and allow it to supersede all national provisions that diverge from a Union rule and take their place in the national legal orders.
4. Precious little would remain of the EU legal order if it were to be subordinated to national law.

5. Union rules could be set aside by national law, there would no longer be any question of the **uniform and equal application of Union law** in all Member States. Nor would the EU be able to **perform the tasks entrusted to it by the Member States**.
6. The Union's ability to function would be jeopardised.
7. Once again it fell to the Court of Justice, in view of these implications, to establish the principle of the primacy of Union law that is essential to the existence of the EU legal order.
8. The ECJ erected the second pillar of the EU legal order alongside direct applicability, which was to turn that legal order at last into solid edifice.

In Costa v. ENEL, the Court made two important observations regarding the relationship between Union law and national law:

1. The Member States have definitively **transferred sovereign rights** to a Community created by them, and subsequent unilateral measures would be inconsistent with the concept of Union law.
2. It is a principle of the treaty that no Member State may call into question the status of Union law as **a system uniformly and generally applicable throughout the Union**.

The Court has since consistently upheld its finding and has, in fact, developed it further in one respect. The Court since has confirmed the principle of primacy also with regard to the relationship between Union law and national constitutional law.

Conclusion:

The community of law of the EU and its underlying legal order can survive only if compliance with and safeguarding of that legal order are guaranteed by the two cornerstones: the direct applicability of Union law and the primacy of Union law over national law. These two principles, the existence and maintenance of which are resolutely upheld by the Court of Justice, guarantee the unform and priority application of Union law in all Member States.

EU institutions only have powers in certain areas to pursue the objectives specified in the treaties. This means that they are not free to choose their objectives in the same way as a sovereign state. The EU is therefore neither an international organisation in the usual sense nor an association of states, but rather an autonomous entity somewhere in between the two. In legal circles, the term 'supranational organisation' is now used.

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Subsidiarity

In areas in which the European Union does not have exclusive competence, the principle of subsidiarity, laid down in the TEU, defines the circumstances in which it is preferable for action to be taken by the Union, rather than the Member States.

The idea that matters should be dealt with at the level closest to those affected.

Objectives

- The principle of subsidiarity and the principle of proportionality govern the exercise of the EU's competences.
- In areas in which the European Union does not have exclusive competence, the principle of subsidiarity seeks to safeguard the ability of the Member States to take decisions and action and authorises intervention by the Union when the objectives of an action cannot be sufficiently achieved by the Member States but can be better achieved at Union level.
- The purpose of including a reference to the principle in the EU Treaties is also to ensure that powers are exercised as close to the citizen as possible.

Definition

- The principle of subsidiarity, when applied in the context of the EU, serves to regulate the exercise of the Union's non-exclusive powers.
- It rules out Union intervention when an issue can be dealt with effectively by Member States at central, regional, or local level.
- It means that the Union is justified in exercising its powers when Member States are unable to achieve the objectives of a proposed action satisfactorily and added value can be provided if the action is carried out at Union level.
- Under article 5(3) TEU, there are 3 preconditions for intervention by Union institutions in accordance with the principle of subsidiarity:
  (a) The area concerned does not fall within the Union's exclusive competence,
  (b) The objectives of the proposed action cannot be sufficiently achieved by the Member States (necessity),
  (c) The action can therefore, by reason of its scale or effects, be implemented more successfully by the Union (added value).

Scope

1. The demarcation of Union competences

- The principle of subsidiarity applies only to areas in which competence is shared between the Union and the Member States.
- Following the entry into force of the Lisbon Treaty, the competences conferred on the Union have been more precisely demarcated: the TFEU divides the competences of the Union into 3 categories & lists the areas covered by the 3 categories.

2. Where it applies

- Applies to all EU institutions and has practical significance for legislative procedures in particular.
- The Lisbon Treaty has strengthened the role of both the national parliaments and the Court of Justice in monitoring the compliance with the principle of subsidiarity.

Closely linked to the question of the 'existence' of competence is the principle of subsidiarity, which is intended to regulate the 'exercise' of competence.

Pre-Lisbon

- Introduced by the Maastricht Treaty.
- The pre-Lisbon formulation was contained in Article 5 EC which affirmed that the Community only has competence within the areas in which it has been given power. It also made it clear that subsidiarity would have to be considered only in relation to areas which did not fall within the Community's exclusive competence.
- The problem was that pre-Lisbon there was no simple criterion for determining the scope of the Community's exclusive competence, since the Treaty was not framed in those terms (the demarcation was only introduced by virtue of Lisbon).
- The subsidiarity principle had 3 components:
  1. The Community was to take action **only if the objectives of that action could not be sufficiently achieved by the Member States**,
  2. The Community could **better achieve the action**, because of its scale or effects,
  3. If the Community did take action, then **this should not go beyond what was necessary to achieve the Treaty objectives**.
- The first two parts of this formulation entailed what the Commission termed a test of comparative efficiency, in the sense of determining whether it was better for action to be taken by the Community or the Member States, while the third part of the formulation brought in a proportionality test.
- It was required that all 3 institutions have regard to the principle when devising Community legislation.

Post-Lisbon

JM Barroso – "For me, subsidiarity is the translation of a democratic principle"

- The subsidiarity principle has been retained in the Lisbon Treaty.
- It **distinguishes between the existence of competence and the use of such competence**; the latter being determined by subsidiarity and proportionality.
- Article 5(3) – (4) TEU

> 3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar 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 level.
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> The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.
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> 4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.
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> The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

The Lisbon Treaty contains a Protocol on the Application of the Principles of Subsidiarity and Proportionality

Subsidiarity calculus

- The Subsidiarity Protocol imposes an obligation on the Commission to consult widely before proposing legislative acts.
- The Commission must provide a detailed statement concerning the proposed legislation so that compliance with subsidiarity and proportionality can be appraised.
- The conclusion that the objective can be better attained at EU level has to be substantiated in this statement.

Judicial review

- The ECJ has jurisdiction to consider infringement of subsidiarity in actions brought by Member States.
- Compliance with the principle of subsidiarity may be reviewed retrospectively (following the adoption of the legislative act) by means of a legal action brought before the Court of Justice of the European Union. This is stated in the protocol.
- Legal actions of this kind may be brought by Member States or notified by them on behalf of their national parliament or chamber thereof, in accordance with their legal system.

Enhanced role for national parliaments

- The most important innovation in the Protocol for Subsidiarity is **the enhanced role accorded to national parliaments**.
- National parliaments monitor compliance with the principle of subsidiarity.
- The Commission must send all legislative proposals to the national parliaments at the same time as the Union institutions.
- A national parliament or Chamber thereof may, within 8 weeks, send the Presidents of the Commission, European Parliament, and Council **a reasoned opinion as to why it considers that the proposal does not comply with subsidiarity**. That is, it will have to present reasoned argument as to why the **Commission's comparative efficiency calculus is defective.**
- Where non-compliance with subsidiarity is expressed by national parliaments that represent one-third of all the votes allocated to such Parliaments, the Commission must review the proposal. After such review, the Commission may decide to maintain, amend, or withdraw the proposal, giving reasons for the decision.
- The EP acting by a majority of votes cast, or 55% of members of the Council, can decide that the legislative proposal is not compatible with subsidiarity and that it should not be given further consideration.
- It should be noted that national Parliaments are only afforded a role in relation of subsidiarity and not proportionality, even though the Protocol imposes obligations on the Commission to ensure compliance with the principles of subsidiarity and proportionality.

Political control: evaluation

- It is clear that there will be many areas in which the comparative efficiency calculus in Article 5(3) TFEU favours Union action, more especially in an enlarged EU.
- It is equally clear that subsidiarity has impacted on the form of Union action: if EU action is required, the Commission will often proceed through directives rather than regulations, and there has been a greater use of guidelines and codes of conduct.
- The Commission is likely to take seriously any such reasoned opinion, particularly if it emanates from a larger Member State.

Legal control: evaluation

- The Protocol provides for recourse to the ECJ for infringement of subsidiarity in an action brought by a Member State.
- The Protocol also provides for the action to be notified by the State on behalf of the national parliament.
- If the Member State has voted for the legislative act in the Council, it will be odd for it then to contend before the Court that the measure violates subsidiarity.

Martina Camilleri

The ECJ as a constitutional court

Essay structure: first speak about the ECJ as a constitutional court based on its structure and procedure and then move on to its role as an interpreter of the Treaties.

The Court of Justice has shown itself to be a very important factor – some would say even a driving force – in European integration.

- JHH Weiler: "the Court itself: no longer an instance for dispute settlement, but a judicial giant which has successfully positioned itself at the constitutional centre of Europe in which national legal orders suddenly feel under threat."
- Procedure:
  1. There is no further appeal from the judgements of the ECJ (contrast with the General Court).
  2. The Court, while generally building on its case law does not consider itself bound by a strict system of precedent.
- The ECJ has various heads of jurisdiction.

- In the name of preserving 'the rule of law', the Court has developed principles of a constitutional nature as part of EU law, which bind the EU institutions and Member States when they act within the sphere of EU law.
- The ECJ, as interpreter of the Treaties, adjudicates on the limits of EU competence as against the Member States.

The role of the ECJ in the 1960s and 1970s which are often referred to as a period of political stagnation or malaise as a result of the Luxembourg Accords which undoubtedly put the Community in distress, being unable to reach agreement.

- The ECJ fashioned seminal principles of the EU legal order: e.g. direct effect (*Van Gend & Loos* case) and supremacy (*Costa v ENEL* case). These principles have defined the very nature of the EU, constitutionalising it and distinguishing it from other international Treaties.
- These were especially significant in the years of so-called institutional malaise or stagnation.
- The Court rendered the Treaty and EC legislation effective when the provisions had not been implemented as required by the political institutions and the Member States → This was exemplified by **the ECJ's role in the creation of the internal market**, requiring the removal of national trade barriers, at a time when progress towards completing the Single Market through legislative harmonisation was hindered by institutional inaction.
  Free movement of goods: judgement of 20 February 1979 in the *Cassis de Dijon* case ECR 649. The Court ruled that any product legally manufactured and marketed in a Member State must in principle be allowed on the market of any other Member States.

It is therefore important to view the ECJ's role from a dynamic, rather than static, perspective. It was suggested, after the revival of the political process of integration leading to the SEA, that the Court should therefore adopt a 'minimalist role'. The reality is that the ECJ has not been a consistently 'activist' court at all times or in all policy spheres. It may, for example, simultaneously create new methods of enforcement (as seen in the *Francovich and Bonifaci* case ECR 1-5357: the Court developed another fundamental concept; the liability of a Member State towards individuals for damage caused to them by an infringement by that Member State owing to its failure to transpose a directive into national law or to do so in

good time), while reducing its intervention in an areas where the legislative institutions have become more active.

[in other words, perhaps it would be unfair to mistakenly portray the ECJ as an all-powerful overriding institution that develops measures that are not laid down in the Treaties, when it is not supposed to. The ECJ only intervenes when it needs to, that is, when the institutions are active in a given area, the ECJ steps down into the 'minimalist role' that was suggested after the revival of the political process of integration].

The Court is moreover aware of the political environment in which it acts, and its judgments are at times influenced by relatively 'non-legal' arguments made by Member States.

The Court's approach to interpretation

- One of the greatest merits of the Court has been its statement of the principle that the Treaties must not be interpreted rigidly but must be viewed in the light of the state of integration and of the objectives of the Treaties themselves. this principle has allowed the EU to legislate in areas where there are no specific Treaty provisions, such as the fight against pollution where the Court in fact authorised the EU to take measures relating to criminal law where 'necessary' in order to achieve the objective pursued as regards environmental protection.
- Arguably the Court's 'constitutional' role.
- This is generally described as purposive or teleological, although not in the sense of seeking the precise purpose of the authors of a text.
- The Court examines the whole context in which a particular provision is situated and gives the interpretation most likely to further what the Court considers that provision sought to achieve. This may not be the literal interpretation of the Treaty, or of the legislation, and may not comport with the express language.
- It interprets 'in the spirit' of the Treaties.
- Sir Patrick Neill argued that the Court was a dangerous institution, skewed by its own policy considerations and driven by an elite mission.
- When faced with criticism, Advocate General Jacobs, in defence of the Court's 'constitutional' role, argued that it plays an essential role in preserving the balance between the Union and the Member States, and in developing constitutional principles of judicial review.

F Jacobs, Is the Court of Justice of the European Communities a Constitutional Court?

> If then, the Court sometimes performs the task of a Constitutional Court, and if it has developed constitutional principles in its case law, we can understand why, in some quarters, the Court's activities have been misunderstood. The Court has sometimes been criticized as a 'political' Court. Such criticisms are probably based on unfamiliarity with the very notion of constitutional jurisprudence, which, as we have seen, is not familiar in all the Member States, and which requires what may seem novel judicial techniques, different approaches to interpretation, even a different conception of the law. Yet, in the Community system, which is based on the notion of a division of powers, some form of constitutional adjudication is inescapable, if indeed the Community is to be based, as its founders intended, on the rule of law.

- The ECJ has overall pursued a policy of legal interpretation, giving substance to an 'outline' Treaty, thereby enhancing the effectiveness of EU law and promoting its integration into national legal systems.

- While excessive concentration on the Court should be avoided, its role as an institutional actor in the integration process should be recognised.

Opinions:

- For liberal intergovernmentalists, the central message is that states are the driving forces behind integration, that supranational actors are there largely at their behest, and that such actors have little independent impact on the place of integration. The supranational institutions are viewed as agents for the Member States, who accord power to such institutions for their own self-interest.
- It is clear that political scientists who have studied the Court often disagree with liberal intergovernmentalism. Stone Sweet argues against the view that the Court can be regarded as some perfect agent for Member State governments, and contends that ECJ decisions often produce 'unintended' consequences not readily foreseen by those who designed the EC.

A Stone Sweet, The Judicial Construction of Europe[280]

> There are a number of reasons why the constitutionalization of the Rome Treaty generated an expansive logic of its own, entailing an increasing demand for law, rule clarification, and capacities for monitoring and enforcement. From the beginning the central mission of the EC was to create the conditions for the development of the Common Market. Yet impersonal exchange, across jurisdictional boundaries, is problematic for reasons that social scientists have explored at length . . . As elsewhere, the success of integration has depended heavily on the extent to which the EC could develop effective organizational capacities: to guarantee property rights, to enforce competition rules, to adjudicate legal claims, to build a European framework for regulating market activities, and so on. At the very least constitutionalization accelerated this process. In my view, one can go further: the ECJ authoritatively reconstituted the Community in ways that linked the demand for and supply of European law and courts to the activities of market actors, and then to all activities governed by EC law. Constitutionalization not only positioned the courts as primary arenas for negative integration; it made them supervisors of positive integration, and creators of a growing corpus of rights which the Court found in the Treaty itself.
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> . . . With constitutionalization, the national courts too, developed into privileged sites for deliberation and rulemaking, not least because they are charged with supervising the transposition and implementation of EC law by national authorities . . . .

The judicial activism debate

The decisions of the ECJ do have a significant influence on the functioning of other institutions and some argue that the ECJ has a pro-integration agenda.

- The Court has been criticised for its judicial activities influencing the European **integration process**.
- It has been claimed that the ECJ has been a **policy-making body** and has proven so with its rulings from the 1960s:
  1. *Van Gend en Loos* in 1963 when the ECJ established **direct effect** (European Community law applies directly to individuals, even if it was not implemented by the state, and it must be enforced by the national courts).
  2. *Costa v ENEL* in 1964 when the ECJ established the **supremacy of EU law** (EU law takes precedence over national law).

3. *Cassis de Dijon* case in 1979 when the ECJ established the principle of **mutual recognition** (goods made and legally sold in one Member State may also be sold in all other Member States – this supported the development of a single market).

- The critics of the ECJ need to consider, however, the role of that the ECJ plays. It has been created to interpret the Treaties, the texts of which have of which have been agreed upon by the politicians, not lawyers, through negotiations and compromises.
- The texts of the Treaties are thus often very **general** and **do not contain precise definitions and explanations that legislation should provide**.
- The gaps in existing legislation are therefore filled by the court in the **'spirit of the Treaties.'** And since the spirit of the Treaties may be more **pro-European integration** than the Member States and their representatives themselves, the ECJ need to find a balance in its interpretations.
- The debate around the activism of the ECJ is discussed by lawyers and political scientists. While lawyers see the law as neutral, political scientists stress the political attachment of all European legal acts. They ask questions about the legitimacy of the Court to act and make new laws: How far should the political and policy-making functions of the Court go? Does it have its own integration agenda?
- The ECJ's acts are based on the Treaties negotiated and signed by the Member States. However, while fulfilling its duties, the Court has established its own role in the European integration.