Basics of European Union Law

Fundamenta Fontium Iuris Internationalis
A szegedi nemzetközi jogi iskola tankönyvei

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Basics of European Union Law

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"Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity."
The Schuman Declaration (9 May 1950)

Preface

European integration has been in the making since its inception and all steps of development have always taken a legal form. The legal system of the European Union is shaping the every-day lives of not only the citizens and businesses of the EU but, through its international legal, trade and other relations, also of most of the world. Thus the European institutions are influential global actors and European law has an extensive global impact.

This book is aimed at providing a first insight into the main areas of EU law. Accordingly, following a short introduction and introducing the basic concepts, the origins of European integration are discussed. Then, the EU institutions, the sources of EU law and EU decision-making are put in the focus of the three subsequent chapters. As the judiciary system plays a crucial role in EU law-making and law enforcement, it is introduced in a separate chapter, just like EU citizenship, an area directly regulating the legal rights and obligations of more than 500 million people. Since European integration was originally launched as an economic cooperation in the first place, the overview of the two main areas of EU law regulating economic activities – the internal market acquis and the competition regulation scheme – close up the main contents.

As this book has primarily been written for university students (including students from outside the EU) who do not necessarily have any prior knowledge on the EU, its institutions, its legal system and its decision-making, therefore all concepts and facts are introduced at a basic level only. In order to assist students in their better acquiring the contents of the book, each chapter starts with the defined learning goals and ends with a short summary.

Obviously, the scope of the book cannot go beyond the date of finalisation of its manuscript, that is, the summer of 2017. Nevertheless, as European integration is not yet (and never will be) ready, we look forward to the changes to come after this date, and hope to make the Reader similarly curious about the way in which European integration – and EU law with it – is developing in the time to come.

The Editors

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1. Introduction and basic concepts (Imola Schiffner – Szilvia Váradi)

Learning goals

After reading this chapter, you will be able to:

1. Unfold why European integration is considered as a cooperation of states unique in economic history.
2. Identify the most important symbols of the European Union and the founding element of the European integration.
3. Understand the legal characteristics of the European Union law.

The European Union (EU) is a unique economic and political union between 28 European countries that together cover much of the continent. The EU has delivered more than half a century of peace, stability and prosperity, helped raise living standards and launched a single European currency: the euro. In 2012, the EU was awarded the Nobel Peace Prize for advancing the causes of peace, reconciliation, democracy and human rights in Europe.

Thanks to the abolition of border controls between EU countries, EU citizens can travel freely throughout most of the continent. And it has become much easier to live, work and travel abroad in Europe. The single or 'internal' market is the EU's main economic engine, enabling most goods, services, money and people to move freely.

One of the EU's main goals is to promote human rights both internally and around the world. Human dignity, freedom, democracy, equality, the rule of law and respect for human rights: these are the core values of the EU. Since the Lisbon Treaty's entry in force in 2009, the EU's Charter of Fundamental Rights brings all these rights together in a single document. Furthermore, the enlarged EU still puts an emphasis on making its governing institutions more transparent and democratic.

The symbols of the European Union

Political symbols serve an *identifying function* for the European Union as well. They are the external signs through which European citizens, aware of their belonging, can be influenced to set aside their differences and act in the common public good and, therefore, to perceive the European Union as their home. In this sense, symbols may help to consolidate the fledgling European demos. Political symbols such as the flag, the anthem, the motto, the currency and Europe Day may therefore contribute, by creating emotive images and rites, even subliminally, towards making the European Union more legitimate in the eyes of its citizens and

help them to identify with the plan for a common destiny. In other words, they help to construct a *political identity*, so that a set of values that identify us as belonging to the same community are felt to be binding. Though, the founding treaties of the European Communities and the European Union contain no provisions on the flag, the motto, the anthem or Europe Day.

The flag of the European Union

Among the Union's symbols, the flag contains *a circle of 12 golden stars on a blue background*. It was originally adopted by the Council of Europe on 8 December 1955 and was taken up by the European Communities (EC) in 1986. Its symbolic description states that against the background of blue sky, twelve golden stars form a circle representing the union of the peoples of Europe. The number of stars is fixed, twelve being the symbol of perfection and unity.

The symbolic components to be considered are therefore: the circle; the stars, including their number and shape; the colours. The circle has no beginning or end, no direction or orientation, and is homogeneous, perfect and indivisible. A circle leads back to itself and is therefore a symbol of unity, of the absolute and of perfection. For this reason it is a good illustration of the union of the peoples of Europe to which the official symbolic description refers. However, it is just as good an illustration of the parity of the member states.

In flags, the star illustrates independence, unity, liberty, renewal and hope. One of the features of the stars of the European flag is that they have five points which do not touch one another; they are also known as pentagrams or pentacles. In the European flag, the pentagram fits in well with the circle, which is also a symbol of perfection. Symbolically, therefore, the European Union is not a closed society; it is not, as is often said with a negative connotation, a fortress; on the contrary, the European Union is above all open to the accession of the states of Europe and is an active member of the international community, being open to the outside world and playing its part in the life of international relations. The number of stars is fixed and was set at 12 in 1955.

The colours of a flag have their own expressive and symbolic value. The rectangle of the European flag is blue, the colour of the sky and the universe. Blue is also traditionally the colour of the European continent. Many parliamentarians referred to this symbolism when the Council of Europe was preparing to adopt the flag.

Therefore the European flag satisfies all the requirements of an ideal emblem: its good symbolism is simple and easy to interpret and is easily recognisable; it is harmonious, original and also simple to produce. It is therefore a perfect flag from a geometric, symbolic and political point of view.

The European Union anthem

The European anthem is the *prelude to the Ode to Joy, the fourth movement of Beethoven's Ninth Symphony*. It is precisely this exhortation to fraternity and friendship, to love and to peace, of which the Ode is a highly figurative symbol. That explains why the Council of Europe and then the European Communities decided to take as their official anthem a hymn to fraternity going beyond the confines of nations and beyond the differences between peoples, in order to bring about something more sublime and exceptional in European society.

The motto of the European Union

For quite a long time, no official motto was declared for European integration. Then, in 2000, "*United in diversity*" became the motto of the European Union. Like the other symbols, the motto clearly highlights the sense of European identity that is the birth right of every EU citizen, over and above the actual European Union. It signifies how Europeans have come together, in the form of the EU, to work for peace and prosperity, while at the same time being enriched by many different cultures, traditions and languages of the European continent.

This phrase clearly explains both the notion of unity and the notion of diversity. The concepts expressing unity are not new. They recall, and appropriately take up, the formula of *ever closer union* included in the preamble to the Treaty on European Union (TEU). The path towards ever closer ties is gradual and proceeds, as heralded right from the *Schuman Declaration* of 9 May 1950, from concrete achievements that create actual solidarity. However, unity is not an end in itself but has a specific goal: forging a common destiny. The notion of diversity is nevertheless also explained. It lies in the strong call for peoples to be proud of their national identities and history and for the respect of everyone's rights.

Striking a balance between unity and diversity is crucial. Too much unity would run the risk of standardisation and therefore the destruction of national identities. Too much diversity could easily prevent intentions from converging and, in the long term, undermine the construction of a re-united Europe. It is seen as crucial to seek unity in basic values and the combined presence of unity and difference. Europe has to be organized on the basis of its diversity and not against its diversity. A reasonable balance therefore has to be struck between the needs of diversity and the need to form a coherent whole.[1]

Europe Day

In all the member states *9 May* is celebrated as Europe Day. It involves all of the EU citizens, because it celebrates the declaration delivered on 9th May 1950 by Robert Schuman. On that day, five years after the end of the Second World War

[1] The symbols of the European Union. CVCE website.

in Europe, the French Foreign Minister Robert Schuman made the initial appeal for the construction of Europe. This declaration announced the creation of the European Coal and Steel Community (ECSC). During the European Council in Milan in 1985 the heads of State and government decided to set 9 May as Europe Day. Celebrated each year since 1986, Europe Day is the occasion for events and celebrations and it also provides an opportunity to reflect on the current and real situation which changes daily. It is a day of information, guidance and discussion of European Union themes, especially, but not just, in schools and universities, with events of a particular cultural and educational content.

The Founding fathers of European integration

It is impossible to dissociate some names from the initial stages of European integration. In the past a great number had already put forward the idea of a united Europe, e.g. *Aristide Briand* and *Richard Nikolaus de Coudenhove-Kalergi*, and also in a more distant past, *Victor Hugo* when he delivered his famous speech on the United States of Europe on 21 August 1849 at the Peace Congress. There was also *Winston Churchill* who put forward his vision of a united Europe as a remedy to nationalist passions during his speech to students at the University of Zurich in 1946.[2]

Winston Churchill

Winston Churchill was the British Prime Minister (1940-45 and 1951-55), who called firstly for the creation of a *United States of Europe*. Following the Second World War, he was convinced that only a united Europe could guarantee peace. His aim was to eliminate the European ills of nationalism and war-mongering once and for all. He formulated this concept in his famous speech held at the University of Zurich in 1946 (Textbox 1.1). With this concept of a United States of Europe, Churchill was the first who suggested a European integration to prevent the atrocities of two world wars from ever happening again, calling for the creation of a Council of Europe as a first step.[3]

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2 Fondation Robert Schuman.

3 In 1948, in The Hague, 800 delegates from all European countries met, with Churchill as honorary president, at a grand Congress of Europe. This led to the creation of the Council of Europe on 5 May 1949, the first meeting of which was attended by Churchill himself.

Textbox 1.1 Excerpts from Winston Churchill's Zurich speech of 1946

There is a remedy which (...) would in a few years make all Europe (...) free and ... happy (...). It is to re-create the European family, or as much of it as we can, and to provide it with a structure under which it can dwell in peace, in safety and in freedom. We must build a kind of United States of Europe.[4]

The structure of the United States of Europe, if well and truly built, will be such as to make the material strength of a single state less important.

If at first all the States of Europe are not willing or able to join the Union, we must nevertheless proceed to assemble and combine those who will and those who can.

Konrad Adenauer

Konrad Adenauer was the first Chancellor of the Federal Republic of Germany, who stood at the head of the newly-formed state from 1949 to 1963. A cornerstone of Adenauer's foreign policy was reconciliation with France. Together with French President Charles de Gaulle they made from the one-time arch-enemies Germany and France cooperating partners, which became one of the milestones on the road to European integration.

Adenauer was a great proponent of the European Coal and Steel Community. His point of view was that European unity was essential for lasting peace and stability, so he worked for the reconciliation of Germany with its former enemies, especially France. In 1963, the Élysée Treaty, also known as the Treaty of Friendship, set the seal on this reconciliation. With this Treaty, Germany and France established a firm foundation for relations that ended centuries of rivalry between them.[5]

Robert Schuman

French foreign minister between 1948 and 1952, Robert Schuman is regarded as one of the founding fathers of European unity. Schuman was born in Luxembourg and was influenced by his background in the French-German border region. He became a key negotiator of major treaties and initiatives such as the Council of Europe, the Marshall Plan and NATO: all initiatives aimed at increased cooperation within the western alliance and to unite Europe.

He recognised that only a lasting reconciliation with Germany could form the basis for a united Europe. In cooperation with Jean Monnet he drew up the internationally renowned *Schuman Plan*, which he published on 9 May 1950, the date now regarded as the birth of the European integration. He proposed

[4] Winston Churchill's speech to the academic youth held at the University of Zurich, 19 September 1946.

[5] Official website of the European Union.

joint control of coal and steel production, the most important materials for the armaments industry. The basic idea was that whoever did not have control over coal and steel production would not be able to fight a war. In this document he proposed to Germany and the rest of the European countries to work together towards a merger of their economic interests. He was convinced that when these were tied together, it would render war not merely unthinkable, but materially impossible.

Schuman informed the German chancellor Adenauer of the plan, who immediately recognised the opportunity for a peaceful Europe and agreed. Shortly afterwards, the governments of Italy, Belgium, Luxembourg and the Netherlands also reacted. The six states signed the agreement for the European Coal and Steel Community (ECSC) in Paris in April 1951. In this way, Europe began as a peace initiative. Schuman also supported the formation of a common European defence policy, and held the post of President of the European Parliament from 1958 to 1960.[6]

Jean Monnet

Jean Monnet was a French political and economic adviser who dedicated himself to the project of European integration. Monnet was from the Cognac region of France and left school at 16 to travel internationally as a cognac dealer in order to continue his family's business, and later he also worked as a banker. During both world wars he held high-level positions relating to the coordination of industrial production in France and the United Kingdom. Monnet recognised that it was time to take real steps towards European unity and he and his team began work on the concept of a European Community.

He was the inspiration behind the Schuman Plan, which foresaw the merger of west European heavy industry. This Declaration was instigated and prepared by Monnet and proposed to place all German-French production of coal and steel under a centralised authority, and after the creation of the European Coal and Steel Community (ECSC), he was the first president of its High Authority.[7]

Political leaders of the European Union

European Council President[8]

The European Council President is appointed by the national leaders (heads of state or government of EU member states) for a two-and-a-half-year term, with the

6 Official website of the European Union.

7 Official website of the European Union.

8 Please note that Chapter 3 contains detailed information about these key political leaders.

possibility of renewal once. The President leads the European Council's work in setting the EU's general political direction and priorities – in cooperation with the Commission. He promotes cohesion and consensus within the European Council and represents the EU externally on foreign and security issues. The President may not hold a national office at the same time, and also has his own private office, the Cabinet of the President. His staff and his office are located in the Council's Europa building in Brussels, Belgium. The role of the President is set out in article 15 of the Treaty on the European Union (TEU).[9]

European Commission President

The President of the European Commission is the head of the European Commission. The President is appointed by the national leaders (heads of state or government of EU countries) with the approval of the European Parliament for a five year term, with the possibility of renewal once.[10] According to the founding Treaties, he decides on the organization of the Commission, allocates portfolios to members of the Commission and can make changes at any time. The President gives political guidance to the Commission, calls and chairs meetings of the college of the Commissioners. He leads the Commission's work in implementing EU policies.

European Parliament President

The President would elected by Members of the European Parliament for five years.[11] The role of the President is to ensure parliamentary procedures are properly followed. He oversees Parliament's various activities and committees, represents Parliament in all legal matters and in its international relations and gives final assent to the EU budget.

High Representative of the Union for Foreign Affairs and Security Policy

The High Representative is appointed by the European Council, which comprises the heads of state or government of all EU member states, for a five-year term, which coincides with the five-year mandate of the European Commission. The High Representative has also the role of Vice-President of the European Commission

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[9] The President of the European Council at the time of finalisation of this manuscript is Donald Tusk. He replaced Herman Van Rompuy on 1 December 2014 and has won a second term as European Council President in 2017.

[10] The composition of the European Commission at the time of finalisation of this manuscript is valid between November 2014 and October 2019. For this period, Jean-Claude Juncker is the President of the Commission.

[11] The President at the time of finalisation of this manuscript is Antonio Tajani, who is in office between January 2017 and July 2019.

(thus often referred to as High Representative Vice-President or simply HRVP) and is charged with coordinating and carrying out the EU's foreign and security policy – known as the Common Foreign and Security Policy (CFSP) and the Common Security and Defence Policy (CSDP).[12]

Legal characteristics of the European Union law

The European Union is a supranational and *sui generis* entity. A supranational union is a supranational polity which lies somewhere between a confederation and a federation. Confederation is an association of states, while a federation is a state.

The European Economic Community (EEC) was described by its founder Robert Schuman as midway between confederalism, which recognises the complete independence of states in an association and federalism which seeks to fuse them in a super-state.

The EU has *supranational* competences, but it possesses these competences only to the extent that they are conferred on it by its member states. Within the scope of these competences, the EU exercises its powers in a sovereign manner, having its own legislative, executive, and judicial authorities (*sui generis union*). Unlike states in a federal super-state, member states retain ultimate sovereignty, although some sovereignty is shared with the supranational body.

The supranational action may be time-limited. A supranational union, because it is an agreement between sovereign states, is based on international treaties. The European treaties in general are different from classical treaties as they are constitutionalizing treaties; they provide the basis for a European level of governance and rule of law.

Within the Community areas *decision-making* is *partly intergovernmental and partly supranational*. The latter provides a higher degree of institutional scrutiny both via the Parliament and through the Consultative Committees. *Intergovernmentalism* provides for less democratic oversight, especially where the institution such as the Council of Ministers or the European Council takes place behind closed doors, rather than in a parliamentary chamber. A supranational authority may have some independence from member state governments in specific areas, although not as much independence as with a federal government.

The EU has *legal supremacy* over its member states only to the extent that its member state governments have conferred competences on the EU. It is up to the individual governments to assure that they have full democratic backing in each of the member states. The citizens of the member states, though retaining their nationality and national citizenship, additionally become citizens of the EU.

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[12] Federica Mogherini is the High Representative at the time of finalisation of this manuscript. Her term of office officially started on 1 November 2014 which will run until 31 October 2019.

The European Union, the only clear example of a supranational union,[13] has a parliament with legislative oversight, elected by its citizens. To this extent, a supranational union like the European Union has characteristics that are not entirely dissimilar to the characteristics of a federal state like the United States of America.

Because decisions in some EU structures are taken by majority votes, it is possible for a member state to be obliged by the other members to implement a decision. The states retain the competence for adding this additional supranational competence.

Historically the concept was introduced and made a concrete reality by Robert Schuman when the French Government agreed to the principle in the Schuman Declaration and accepted the Schuman Plan. They agreed about the means: putting the vital interests, namely coal and steel production, under a common High Authority, subject to common democratic and legal institutions.

Due to the complexity of the European Union governing system today supranationalism exists only in the two European Communities inside the EU, i.e. the Economic Community (EEC) and the European Atomic Energy Community (Euratom, a non-proliferation community, in which certain potentialities have been frozen or blocked).

The leaders of the European integration created a *three-pillar system under the Maastricht Treaty* in 1992, mixing intergovernmental and supranational systems. Two pillars governing external policy and justice and home affairs are not subject to the same democratic controls as the Community system.

In 2009, the Lisbon Treaty abolished the pillar structure of the EU, the Common Foreign and Security Policy (CFSP) (the former second pillar) remains mainly intergovernmental, with unanimity as the main decision-making procedure, but it was a very important step that from that time the whole legal and political system of the EU became supranational.

Summary

1. The European Union is a unique economic and political union between 28 European countries.
2. Political symbols of the EU: the flag, the anthem, the motto, the currency and Europe Day.
3. Founding fathers of the integration are: Winston Churchill, Konrad Adenauer, Robert Schuman, Jean Monnet.
4. Sovereignty is a legal theory. It refers to the capability of states to make their own laws independently. The EU member states have given up their sovereignty to the EU in the areas covered by the Treaties.

[13] For more information on this topic, please see Avbelj 2011, 744-763.

5. The federalism reflects the relationship between states where each has conceded some independence in order to share in decision-making in defined areas.
6. The supranationalism refers to decision-making above the level of states, but capable of binding the states concerned.
7. The intergovernmentalism represents a way for limiting the conferral of powers upon supranational institutions, halting the emergence of common policies. In the current institutional system of the EU, the European Council and the Council play the role of the institutions which have the last word about decisions and policies of the EU, institutionalizing a de facto intergovernmental control over the EU as a whole, with the possibility to give more power to a small group of states.

2. The origins and evolution of European integration (Imola Schiffner – Anita Pelle)

Learning goals

After reading this chapter, you will be able to:

1. Understand the historical background of European integration.
2. Identify the most important historical steps towards establishing European integration, determine the various modifications in the Treaties and identify the most important amendments of the European Union legal system.
3. Recall the subsequent enlargements of the EC/EU.
4. Determine the so-called internal market.
5. Understand the importance of the Maastricht Treaty
6. Identify the important reform achievements before the Eastern enlargement and recall the steps of Hungary's accession to the EU.
7. Assess the EU in 2017 in light of the scenarios on the future of the EU with 27 members after the United Kingdom's withdrawal.

The idea and dream of a politically integrated Europe has a long past. Across the centuries numerous intellectuals and political leaders have attempted to bring order and unity in Europe. On the other hand, there had also been schemes for a peaceful, voluntary association of states on terms of equality, especially after the harrowing experience of the First World War. In 1923, for instance, the Austrian founder-leader of the *Pan-European Movement*, Count Coudenhove Kalergi, had called for the creation of an United States of Europe, citing such examples as the successful assertion of Swiss unity in 1848, the forging of the German Empire in 1871 and, before all else, the independence of the United States of America in 1776.

On 5 September 1929, in a now famous speech to the *League of Nations Assembly* in Geneva, the French Foreign Minister Aristide Briand, with the backing of his German counterpart, Gustav Stresemann, proposed the creation of a European union within the framework of the League of Nations. In that case, though, the immediate aim went no further than securing closer cooperation between the states of Europe, leaving their national sovereignty intact.

After the Second World War it was the earnest desire to create a better, freer and more just world in which international relations would be conducted in a more orderly way. On 19 September 1946, Churchill spoke at the University of Zurich in favour of the creation of a kind of United States of Europe against the threat of Soviet danger. This would include a democratized Germany and would involve Franco-German cooperation.

The most important post-war steps towards European unification were the creation of the Organization for Economic Cooperation and Development (OECD),

the Western European Union (WEU), the North Atlantic Treaty Organization (NATO) and the Council of Europe.

The first post-war European organization in 1948 was established in connection of Marshall Plan which offered an economic reconstruction with American support. The European response was to set up the Organization for European Economic Cooperation (OEEC), which was later renamed the *Organization for Economic Cooperation and Development* (OECD).

The founding of the OEEC was followed in 1949 by NATO, a military pact between the USA, Canada and most of the free states of Europe. The next organization to be founded was the WEU in 1954, which was intended to strengthen security cooperation between the countries of Europe. This widened the existing Brussels Treaty between the United Kingdom, France, Belgium, Luxembourg and the Netherlands to include the Federal Republic of Germany and Italy, and has subsequently also taken in Portugal, Spain and Greece.

The second group of organizations strengthened the cooperation concentrated on the European Region. The *Council of Europe* founded on 5 May 1949 to foster political cooperation. The aims were to make the European unity and solidarity stronger. In pursuing its aims of forging closer links between the countries of Europe and promoting their economic and social progress it has been highly successful. Under its auspices a wide range of economic, cultural, social and legal conventions have been concluded, the most significant and best known of them being the *European Convention for the Protection of Human Rights and Fundamental Freedoms* adopted on 4 November 1950.[14]

History of the European integration

Before the Treaty of Rome: ECSC

The historical roots of the European Union lie in the Second World War. When it ended, Europeans were determined to prevent such killing and destruction from ever happening again. On 9 May 1950 French Foreign Minister Robert Schuman presented a plan for deeper cooperation (Textbox 2.1).

[14] Borchardt 1995.

Textbox 2.1 Excerpts from the Schuman Declaration of 9 May 1950

Europe will not be made all at once, or according to a single plan.

It will be built through concrete achievements which first create a de facto solidarity.

The coming together of the nations of Europe requires the elimination of the age-old opposition of France and Germany. Any action taken must in the first place concern these two countries.

With this aim in view, the French Government proposes that action be taken immediately on one limited but decisive point:

It proposes that Franco-German production of coal and steel as a whole be placed under a common high authority, within the framework of an organization open to the participation of the other countries of Europe.

In this way, there will be realised simply and speedily that fusion of interest which is indispensable to the establishment of a common economic system; it may be the leaven from which may grow a wider and deeper community between countries long opposed to one another by sanguinary divisions. By pooling basic production and by instituting a new high authority, whose decisions will bind France, Germany and other member countries, this proposal will lead to the realisation of the first concrete foundation of an European federation indispensable to the preservation of peace.

The so called *Schuman Plan* proposed the creation of a *European Coal and Steel Community (ECSC)*, whose members would pool coal and steel production. It proposes that Franco-German production of coal and steel as a whole be placed under a common High Authority. With the *Treaty of Paris* of 18 April 1951 (entered into force on 23 July 1952 and expired on 23 July 2002) put in place a common market in coal and steel between the six founding countries (Belgium, the Federal Republic of Germany, France, Italy, Luxembourg and the Netherlands) cooperating within shared institutions.

It gave birth to the first institutions, such as the High Authority (now the European Commission) and the Common Assembly (now the European Parliament). The first presidents of those institutions were Jean Monnet and Paul-Henri Spaak respectively.

The cooperation made war between historic rivals France and Germany "not merely unthinkable, but materially impossible". It was thought – correctly – that merging of economic interests would help raise standards of living and be the first step towards a more united Europe. Membership of the ECSC was open to other European countries.

Treaty of Rome

Building on the success of the Coal and Steel Treaty, the six countries expanded cooperation to other economic sectors. The so called Spaak Committee produced the Spaak report which focused on economic unity, leading to the Treaties of Rome being signed in 1957 which established the European Economic Community (EEC) and the European Atomic Energy Community (Euratom) among the members.

The *European Atomic Energy Community* (Euratom) was designed to facilitate cooperation in atomic energy development, research, and utilization.

The *European Economic Community* (EEC) or "common market" had the main idea for people, goods and services to move freely across borders.

Textbox 2.2 The Preamble of the Treaty of Rome of 25 March 1957

DETERMINED to lay the foundations of an ever-closer union among the peoples of Europe,

RESOLVED to ensure the economic and social progress of their countries by common action to eliminate the barriers which divide Europe,

AFFIRMING as the essential objective of their efforts the constant improvement of the living and working conditions of their peoples,

RECOGNISING that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition,

ANXIOUS to strengthen the unity of their economies and to ensure their harmonious development by reducing the differences existing between the various regions and the backwardness of the less favoured regions,

DESIRING to contribute, by means of a common commercial policy, to the progressive abolition of restrictions on international trade,

INTENDING to confirm the solidarity which binds Europe and the overseas countries and desiring to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations,

RESOLVED by thus pooling their resources to preserve and strengthen peace and liberty, and calling upon the other peoples of Europe who share their ideal to join in their efforts,

HAVE DECIDED to create a European Economic Community.

The *Treaty of Rome* created the *common market*. In the Treaty of Rome the member states built a *European Economic Community* (EEC) based on a wider common market covering a whole range of goods and services. They established a common market, in which the signatory countries agree to gradually align their economic policies and created a single economic area with free competition between companies. It laid the basis for approximating the conditions governing trade in

products and services over and above those already covered by the other treaties (European Coal and Steel Community, EEC, and Euratom).

The custom duties between the six countries were completely abolished on 1 July 1968 creating the *custom union*. The Treaty broadly prohibited restrictive agreements and government subsidies which can affect trade between the six countries. The Treaty established certain *common policies* from the start as joint policies among the member countries, including: common agricultural policy, common trade policy, transport policy. The Treaty established *institutions* and decision-making mechanisms which make it possible to express both national interests and a joint vision. The main institutions were: the Council of Ministers, the Commission, the Parliamentary Assembly (later to become the European Parliament), the Court of Justice.

The two new communities (Euratom and EEC) were created separately from ECSC, although they shared the same court and the Common Assembly. The executives of the new communities were called Commissions, as opposed to the High Authority. However, in 1965 an agreement was reached to merge the three communities under a single set of institutions, and hence the Merger Treaty was signed in Brussels and came into force on 1 July 1967 creating the European Communities.

A growing Community: the first enlargements

After extensive negotiation, and following a change in the French Presidency, Denmark, Ireland and the United Kingdom (with Gibraltar) eventually joined the European Communities on 1 January 1973. This was the first of several enlargements which became a major policy area of the Union.

This was the so called *Northern enlargement*, completion of a process which started in the mid-1960s. The United Kingdom, which had refused to join as a founding member, changed its policy following the Suez crisis and applied to be a member of the Communities. This was also due to economic reasons; Britain was surprised at the success of the EEC and failed to secure a free trade deal with it. But France was against it. French President Charles de Gaulle also feared Britain's US influence and blocked the British membership. Once de Gaulle had left office, the door to enlargement was once again opened. The EEC economy had also slowed down and British membership was seen as a way to revitalise the Community.

As on the previous occasions, Denmark, Ireland, and Norway also sent their formal letters requesting a membership to the Communities. These countries were so economically linked to the UK that they considered they could not stay out of the EEC if the UK went in. However the Norwegian government lost a national

referendum on membership and hence did not accede with the others on 1 January 1973.

The next enlargement has occurred for different reasons. The 1970s also saw the Greece, Spain, and Portugal emerge from dictatorship. These countries desired to consolidate their new democratic systems by binding themselves into the EEC. Equally, the EEC was unsure about which way these countries were heading and wanted to ensure stability along its southern borders. Greece joined the EU in 1981 and the two Iberian countries in 1986. These were the so-called *Southern enlargements*.

Preparing for Maastricht

After the 1970s Europe experienced a downturn which led to leaders launching of the *Single European Act* (SEA) creating a *single market* by 1992. The single market initiative was supported by all member states. The SEA represented the first major revision to the EEC Treaty, signed in 1986 and entered into force in 1987. The objective of the SEA was to remove all remaining barriers to free movement, whether physical, technical or fiscal. The internal market was defined in the Treaty as *an area without internal frontiers in which good, persons, services and capital is ensured in accordance with the provision of the treaties*.

Textbox 2.3 Excerpt from Preamble of the Single European Act

(…) MOVED by the will to continue the work undertaken on the basis of the Treaties establishing the European Communities and to transform relations as a whole among their States into a European Union, in accordance with the Solemn Declaration of Stuttgart of 19 June 1983,

RESOLVED to implement this European Union on the basis, firstly, of the Communities operating in accordance with their own rules and, secondly, of European Co-operation among the Signatory States in the sphere of foreign policy and to invest this union with the necessary means of action.

Creating the European Union: the Maastricht Treaty

The *Maastricht Treaty* (formally, the Treaty on European Union, TEU) was signed on 7 February 1992 by the members of the European Community in Maastricht, the Netherlands and entered into force on 1 November 1993. It created the *European Union* (Textbox 2.4) and led to the creation of the single European currency, the *euro*. The European Union from that time consisted of three pillars:

the European Communities, common foreign and security policy and police and judicial cooperation in criminal matters.

Textbox 2.4 Excerpt from the Preamble of the Treaty on European Union

> By this Treaty, the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN UNION, hereinafter called the Union.

The *first pillar* consisted of the European Community, the European Coal and Steel Community (ECSC) and Euratom and concerns the domains in which the member states share their sovereignty via the Community institutions.

The *second pillar* established Common Foreign and Security Policy (CFSP), enshrined in Title V of the Treaty on European Union. This allowed member states to take joint action in the field of foreign policy. This pillar involved an intergovernmental decision-making process which largely relies on unanimity. The Commission and Parliament played a modest role and the Court of Justice had no say in this area.

The *third pillar* concerned cooperation in the field of Justice and Home Affairs (JHA), provided for in Title VI of the Treaty on European Union. The EU was expected to undertake joint action so as to offer European citizens a high level of protection in the area of freedom, security and justice. The decision-making process was also intergovernmental.

In addition to the above, the Maastricht Treaty also expanded the role of the European Parliament. The Treaty on European Union established the principle of subsidiarity as a general rule. This principle specifies that in areas that are not within its exclusive powers the Community shall only take action where objectives can best be attained by action at Community rather than at national level. The Treaty created the so called *EU citizenship* and the *Economic and Monetary Union* (EMU).

Post-Maastricht achievements

Austria, Finland and Sweden joined the EU on 1 January 1995. The thus 15 members of the EU covered almost the whole of Western Europe. In parallel, the communist regimes fell in Central and Eastern Europe (CEE) in 1989-1991, the reunified Federal Republic of Germany was formed in 1990, and the Soviet Union broke up in 1991. The countries of the CEE region, some of them newly formed (e.g. the three Baltic states) started to establish and strengthen relations with the European Communities. The EC member states decided in 1993 in Copenhagen that they would open up the possibility of accession to these countries, provided they meet certain criteria (Textbox 2.5). This way Europeanization was a main driving force of post-communist changes in this part of Europe.

Textbox 2.5 The Copenhagen criteria adopted at the Copenhagen Summit in 1993

1. Stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities;
2. A functioning market economy and the ability to cope with competitive pressure and market forces within the EU;
3. Ability to take on the obligations of membership, including the capacity to effectively implement the rules, standards and policies that make up the body of EU law (the *acquis*), and adherence to the aims of political, economic and monetary union.

The Union's capacity to absorb new members, while maintaining the momentum of European integration, is also an important consideration in the general interest of both the Union and the candidate countries.

The Treaty of Amsterdam

A few years after Maastricht, another Treaty change was adopted: the *Treaty of Amsterdam* was signed in 1997 and entered into force on 1 May 1999. The new Treaty also set out to simplify the Community Treaties, deleting more than 56 obsolete articles and renumbering the rest in order to make the whole more legible. It renamed the third pillar (Police and Judicial Cooperation in Criminal Matters) and shifted much of the former third pillar activities to the first pillar, so made a communitarization.

Textbox 2.6 Excerpt from the Preamble of the Treaty of Amsterdam adopted in 1997

(…)RESOLVED to implement a common foreign and security policy including the progressive framing of a common defence policy, which might lead to a common defence in accordance with the provisions of Article J.7, thereby reinforcing the European identity and its independence in order to promote peace, security and progress in Europe and in the world,

RESOLVED to facilitate the free movement of persons, while ensuring the safety and security of their peoples, by establishing an area of freedom, security and justice, in accordance with the provisions of this Treaty.

The *Schengen Agreements* had been incorporated into the legal system of the EU. The Treaty introduced a *High Representative for EU Foreign Policy* who puts a name and a face on EU policy to the outside world.[15] And from that time

[15] Javier Solana became the first permanent High Representative, who was in office between 1999 and 2009.

onwards there has been an opportunity to make enhanced cooperation in the framework of the EU.

The Treaty of Nice

With the accession procedure heading towards its end by the turn of the millennium, Treaty change became necessary again. The Treaty of Nice signed in 2000 and entering into force in 2003 introduced the institutional reforms necessary before the *Eastern enlargements* take place. So the purpose of this Treaty was to prepare the EU to the next and largest enlargement, which took place in 2004. One of the main provisions was to increase the number of seats in the European Parliament to 732. The Treaty presented that once the number of member states reached 27, the number of Commissioners appointed in the subsequent Commission would be reduced to below 27. The Treaty provided for the creation of subsidiary courts below the European Court of Justice and the Court of First Instance to deal with special areas of law such as patents.

Textbox 2.7 Excerpt from the Preamble of Treaty of Nice

(…) DESIRING to complete the process started by the Treaty of Amsterdam of preparing the institutions of the European Union to function in an enlarged Union,

DETERMINED on this basis to press ahead with the accession negotiations in order to bring them to a successful conclusion, in accordance with the procedure laid down in the Treaty on European Union

HAVE RESOLVED to amend the Treaty on European Union.

The *Council voting system* also changed, provided for a double majority of member states and votes cast, and in which a member state could optionally request verification that the countries voting in favour represented a sufficient proportion of the EU's population.

New provision was made for enhanced cooperation, where a minimum of nine member states agree to participate could start European projects.

Besides of Treaty of Nice in 2000 the *Charter of Fundamental Rights of the European Union* was signed.

It was annexed to the Treaty of Nice as a declaration, which meant that it did not at that time have legally binding status. The Treaty of Lisbon gave the Charter the same status as the Treaties, which means that has been a legally binding source of law since December 2009. The Charter incorporates rights from international sources. It recognises rights under six headings: dignity, freedom, equality, solidarity, citizen's rights and justice.

The failed Constitutional Treaty

The Convention on the Future of Europe was set in 2001. Under the Chairmanship of Valéry Giscard d'Estaing the Convention completed its work on 10 July 2003 by adopting the draft Constitutional Treaty (CT). The Constitutional Treaty was adopted at the Brussels Summit on 17-18 June 2004. As a tribute to the Treaty of Rome of 1957, the 25 member states signed the new Treaty on 29 October 2004 in Rome.

Textbox 2.8 Preamble of the Treaty establishing a Constitution for Europe

DRAWING INSPIRATION from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law,

CONVINCED that, while remaining proud of their own national identities and history, the peoples of Europe are determined to transcend their former divisions and, united ever more closely, to forge a common destiny,

CONVINCED that, thus 'United in diversity', Europe offers them the best chance of pursuing, with due regard for the rights of each individual and in awareness of their responsibilities towards future generations and the Earth, the great venture which makes of it a special area of human hope,

DETERMINED to continue the work accomplished within the framework of the Treaties establishing the European Communities and the Treaty on European Union, by ensuring the continuity of the Community acquis,

GRATEFUL to the members of the European Convention for having prepared the draft of this Constitution on behalf of the citizens and States of Europe.

The main goal of the CT was to create *more transparency and efficiency*. To achieve this goal it was intended to create a single legal framework and to give legal personality to the European Union. It specified the areas where the Union would have competences, and would establish the permanent President of the European Council and the Union Minister for Foreign Affairs.

However, because of the rejection of the draft Constitutional Treaty in both the French and the Dutch referenda in summer 2005, the EU leaders suspended the ratification deadline. The Constitutional Treaty eventually failed.

Treaty of Lisbon

Despite the failure of the CT it was also clear that new amendments of the founding Treaties were essential to the future effectiveness of the European Union. For

the reformed treaty to come into being, the EU has had to work through all the problems which come with getting a large collection of independent states to think and agree as one.

The so called *Reform Treaty* was signed by the EU member states on 13 December 2007 in Lisbon, and entered into force on 1 December 2009 as the *Treaty of Lisbon*. The new Treaty may have dropped the word constitution but key elements giving the EU the trappings of a global power and cutting national sovereignty remained.

The Treaty of Lisbon simplified the structure and organization of the EU. It renamed and changed the structure of the Founding Treaties, so created the *Treaty on the Functioning of the Union (TFEU) and the Treaty on European Union (TEU)*.

The Treaty also introduced a *single legal personality* for the Union that enables the EU to conclude international agreements and join international organizations.

New positions were established: the President of the European Council and the *High Representative of the Union for Foreign Affairs and Security Policy (HR)*.

The President of the European Council is appointed for 2.5 years and his main job is to prepare the Council's work, ensure its continuity and work to secure consensus among member countries.

The High Representative of the Union for Foreign Affairs and Security Policy (HR) has a dual role: representing the Council on common foreign and security policy matters and also being Commissioner for external relations. Following the Treaty of Lisbon the post is assisted by the *European External Action Service (EEAS)* that was set up in December 2010.

The Treaty of Lisbon clarified the distribution of competences between the EU and the member states. It confirms three principles of democratic governance in Europe: democratic equality, representative democracy, participatory democracy for example in form of citizens' initiative and enhanced role of the national parliaments.

The Treaty of Lisbon expanded the role of member states' parliaments in the legislative processes of the EU by giving them a prior scrutiny of legislative proposals before the Council and the Parliament can take a position.

The legislative power of the European Parliament increased, as the co-decision procedure with the Council of the EU is extended to almost all areas of policy. This procedure is slightly modified and renamed ordinary legislative procedure.

The Eastern enlargement and Hungary's accession to the EU

The countries in Central and Eastern Europe had emerged from dictatorship and strived for consolidating their democracies. They also intended to join the project of European integration and ensure they did not fall back into the Russian sphere of influence. On 1 May 2004 eight post-socialist countries (*Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia* and *Slovenia*) and two Mediterranean

countries (*Malta* and *Cyprus*) joined the European Union which thus became a union of 25 member states. In 2007 *Romania* and *Bulgaria* also acceded to the EU, which then encompassed 27 members.

This was the largest single enlargement in terms of people, and number of countries, though not in terms of GDP. The less developed nature of these countries was of concern to some of the older member states, who placed temporary restrictions on the rights of work of the citizens of these states to their countries. This was the *Eastern enlargement* of the EU accompanied by domestic democratisation and economic transition.[16]

The 2003 European Council summit in Thessaloniki set integration of the *Western Balkans* as a priority of EU expansion. The EU's relations with the Western Balkans states were moved from the *External Relations* to the *Enlargemen*t policy segment in 2005. *Croatia* joined the EU on 1 July 2013, following ratification of the 2011 Accession Treaty by all other EU countries. Albania and several successor states of Yugoslavia have all adopted EU integration as their foreign policy aim.

Brief history of Hungary's accession to the EU

As a result of preparatory talks since 1985, Hungary and the European Communities signed in Brussels an agreement on bilateral economic and trade cooperation, which came into force on 1 December 1989. After this, the EC launched its PHARE programme to provide financial, economic and technical support for Hungary and Poland for the reforms.

In 1990 the EU open up the chance of association to countries in Central and Eastern Europe. Still in that year, Hungary presents a memorandum containing Hungary's intention to join the EC. As a next step, on 16 December 1991, Hungary signs in Brussels the association agreement between the Republic of Hungary and the European Communities.

In 1993, the EU creates the political, economic and legislative requirements of membership, namely the Copenhagen criteria (see above). As the official possibility has been given, in 1994 Hungary is the first former socialist country to submit its formal application for membership to the European Union. In 1997, after approving a positive opinion, the EU decides to launch accession negotiations with the six countries that made the most far-reaching progress in preparations, including Hungary. The negotiations begin on March 30, 1998 and last until December 2002.

In 2003 Hungary holds a binding referendum on accession to the European Union, with 83.76% of voters supporting the plan. With the strong democratic support, on 16 April 2003, together with the nine other countries that had been successful in concluding the accession negotiations by that time, Hungary solemnly signs the document on Hungary's accession to the European Union in Athens.

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[16] Novotna 2007.

On 1 May 2004, Hungary joins the European Union whose member increases to 25 on that day. Then, after a transitional period, Hungary joins the Schengen Area on 21 December 2009, which is then expanded to include 24 members. With this legal act, border control ceases between Hungary and Slovakia, Hungary and Austria, and Hungary and Slovenia.

Hungary was holding the 6-month presidency of the European Union in the first half of 2011.

The EU in 2017

The EU faces great political and economic challenges following the Eurozone crisis and global recession. The migration crisis and the Brexit (the United Kingdom's foreseen withdrawal from the European Union upon the referendum held on EU membership on 23 June 2016 and according to the triggering of Article 50 of the TEU by the UK on 29 March 2017, see Textbox 2.9) have created great obstacles before enhanced cooperation; nevertheless, the EU is likely to continue to evolve in the future, in one way or another.

Textbox 2.9 Article 50 of TEU

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.
4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.

A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.
5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.1

On 1 March 2017 the European Commission released the *White Paper on the future of Europe: Reflections and scenarios for the EU27 by 2025* (EC 2017). In this document, whose title implies that the EU is preparing for the time after Brexit (EU27 refers to the EU without the United Kingdom), five scenarios are proposed:

- *Carrying on*: no fundamental change in the direction or depth of European integration and the institutional structure;
- *Nothing but the single market*: a substantial step backwards in integration, somewhat like a back-to-the-baseline scenario;
- *Those who want more do more*: differentiated integration (implying that certain constructs of European integration include only part of the EU member states) or multi-speed Europe (implying that part of the EU is taking larger steps forward in deepening integration and cooperation than others) – either of the two versions would most likely result in a double institutional structure, the 'internal' level being the Eurozone;
- *Doing much less more efficiently*: a vague scenario on reducing the areas of integration and cooperation while at the same time being more effective in the joint actions;
- *Doing much more together*: further deepening of integration eventually resulting in federation.

Following the release of the White Paper, heated debates have started on the direction of European integration in the time to come. The debates are to be concluded by the end of 2018 so that the conditions of the next term of the European Parliament and the European Commission (2019-2024) can be set in due time.

On 25 March 2017, upon the 60th anniversary of the Treaty of Rome, the heads of state and government of the 27 EU member states (without the British prime minister) reassure their intention to keep the EU together but, at the same time, gave way to a possibly differentiated or multi-speed Europe (Textbox 2.10).

Textbox 2.10 Excerpts from the Rome Declaration of 25 March 2017

We, the Leaders of 27 Member States and of EU institutions, take pride in the achievements of the European Union: the construction of European unity is a bold, far-sighted endeavour. (…) We have built a unique Union with common institutions and strong values, a community of peace, freedom, democracy, human rights and the rule of law, a major economic power with unparalleled levels of social protection and welfare.

(…) The European Union is facing unprecedented challenges, both global and domestic: regional conflicts, terrorism, growing migratory pressures, protectionism and social and economic inequalities. Together, we are determined to address the challenges of a rapidly changing world and to offer to our citizens both security and new opportunities.

We will make the European Union stronger and more resilient, through even greater unity and solidarity amongst us and the respect of common rules. Unity is both a necessity and our free choice. (…) Standing together is our best chance to influence them, and to defend our common interests and values. We will act together, at different paces and intensity where necessary, while moving in the same direction, as we have done in the past, in line with the Treaties and keeping the door open to those who want to join later. Our Union is undivided and indivisible.

(…) We have united for the better. Europe is our common future.

Summary

1. The European Coal and Steel Community (ECSC) was a sectoral economic integration which delegated some aspects of national sovereignty to a supranational authority.
2. The Treaty of Rome establishing the European Communities (EC) set out a plan for a customs union and common market. In the 1960s, the first common policies were launched.
3. Since the earliest enlargements it has been very important that any new member state has to agree to be bound by the *acquis* on joining the EU. The EU *acquis* is the full body of EU law and obligations binding the member states.
4. The Treaty of Maastricht created the European Union. It also introduced a pillar-system in the European Union; the first pillar was supranational (European Economic Community, Euratom and European Coal and Steel Community) and the second (Common Foreign and Security Policy) and third (Justice and Home Affairs) pillars were intergovernmental.

5. There was a democratic deficit in relation of the decision-making in the EU therefore the principle of subsidiarity tried to strengthen democracy in the functioning of the EU.
6. The Treaty of Amsterdam failed to prepare the EU for admission of new member states. Nevertheless, the Schengen cooperation was incorporated in the EU law by the Treaty of Amsterdam.
7. Then the Treaty of Nice eventually encompassed the institutional reforms essential before the Eastern enlargements.
8. The Charter of Fundamental Rights was adopted in 2000 regulating certain political, social, and economic rights for European Union (EU) citizens and residents into EU law.
9. The EU would be more efficient after the Treaty of Lisbon: the Treaty simplified the decision-processes. The EU would also be more democratic: the Treaty gave stronger role for the European Parliament and for the national parliaments. The EU would be more transparent: the Treaty clarified the competences of the EU. The EU is now more united in relation the world: the Treaty of Lisbon decided to establish the European External Action Service. Last but not least, the EU will be more secure: there are new possibilities to fight climate change and terrorism.
10. On 1 May 2004 8 Central and Eastern European countries (Estonia, Latvia, Lithuania, Poland, Czech Republic, Slovakia, Hungary, Slovenia) and 2 Mediterranean countries (Cyprus and Malta) joined the European Union, thus the EU became a Union of 25 countries. In 2007 Bulgaria and Romania also joined and in 2013 Croatia as well. This way in 2017 the EU consists of 28 member states.
11. Upon the referendum of 2016, the United Kingdom has triggered Article 50 of the Treaty on European Union which is to lead to its withdrawal from the EU by 2019.
12. The EU faces great political and economic challenges following the Eurozone crisis and global recession. In March 2017 a White Paper on the future of the EU27 was published by the European Commission as a basis for debates on what the post-Brexit EU should be like.

3. Institutions of the European Union (Márton Sulyok)

Learning goals

After reading this chapter you will be able to:

1. Identify and understand the institutional structure and organization of the European Union.
2. Identify and understand the internal connections within the institutional triangle of the EU and the role of the European Council.
3. Understand the main tasks of each of the EU institutions and bodies.

This chapter gives a detailed overview of and introduction to the several political and legal institutions of the European Union which are the engines of integration in cooperation with the 28 member states of the EU. These institutions, some to a greater some to a smaller extent, also realise supranational goals besides operating based on the intergovernmental principle.

As Peterson and Shackleton argue: "What sets the EU apart [from states and other international organizations], perhaps above all, is its unique institutions: they resemble no other bodies found at the national or international level."[17]They ask and answer the question "Why study EU institutions?" by providing eight reasons that are worth to be summarized here.

Peterson and Shackleton conclude that the (1) the EU is the most important non-state actor in contemporary international relations, and (2) its institutional structure is to be studied because it is a unique blend of continuity and change, as the EU institutions are (3) "vehicles used by the Union's member governments to enforce the terms of the bargains that they make with each other", and (4) they have legal authority to adopt rules in trying to integrate interest on the EU level.[18]

Also, they argue that any academic examination of EU institutions can lead to important results as (5) these institutions are powerful but still not loved by the citizens of the member states, while (6) they establish links between the EU institutions and the member states, and also between the EU and the wider world, (7) by producing politics that will be the result of the competition between the different institutions, which will be tested in this context on (8) how they manage the process of EU enlargement.[19]

Based on the above cornerstones, as part of this chapter, the broad and narrow interpretation of the concept of EU institutions will be put forward and analysed

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[17] Peterson –Shackleton 2012, 1.

[18] Peterson –Shackleton 2012, 8-11, quote from 8.

[19] Peterson – Shackleton 2012, 12-14.

as well as the detailed description of the different powers and competences of these institutions and their connections will be presented under a more functional approach. We will also take a look at how the numbers 3 and 7 are significant in some institutional structures at the EU level and what these numbers tell us about the different checks and balances that operate within the institutional structure of the EU.[20]

The concept of institutions in the European Union: broad and narrow interpretation, competences and powers and connections

If we look at the institutional structure of the EU, we can easily observe that there is both a broad and a narrow approach to define the notion of an EU institution. "There is no single, accepted definition of 'institution', but rather a variety of contending ones. The EU's treaties have followed the European tradition of defining institutions as organizations that enjoy special legal status."[21]At the basic level, every organization on the EU level associated with law-making, decision-making or any exercise of other public functions or power can be designated as an EU institution.

There are EU bodies like *specialized agencies* (Fundamental Rights Agency, FRA[22]), *service*s (European External Action Service, EEAS[23]) and *offices* (the European Anti-Fraud Office called OLAF[24], or the Office for the Harmonization of the Internal Market called OHIM[25]). Also, there are *committees* like the European Economic and Social Committee (EESC)[26] or the European Committee of the

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[20] Please note that this is an introductory book therefore not every aspect and competence of the major EU institutions is going to be examined in detail, just the ones that are generally considered basic and are the most important to understand the workings of European integration.

[21] Peterson– Shackleton 2012, 3.

[22] The FRA was established in 2007 (as part of the reforms initiated by the Lisbon Treaty), with the reorganization of EUMC (European Monitoring Centre Against Racism and Xenophobia. It assists the EU institutions, mainly the European Parliament, Commission and the Council in their activities directed at the protection of human rights, with evidence-based assistance.

[23] The EEAS was established in 2009 by the Lisbon Treaty and is responsible to conduct the external action of the EU.

[24] OLAF operates under the instructions of the European Commission, investigating fraud against the EU budget, corruption and serious misconduct within the European institutions, and develops anti-fraud policy.

[25] OHIM works in the field of trademark protection and intellectual property.

[26] Committed to European integration, the EESC contributes to strengthening the democratic legitimacy and effectiveness of the European Union by enabling civil society organizations from the member states to express their views at European level.

Regions (CoR)[27] that are merely advisory bodies, or we could call them forums for dialogue as well. These are mostly official, institutional platforms, where interest groups can voice their opinions on European issues and offer advice, input into legislation on the EU level.

This above category shall, however, be distinguished from the group of *EU institutions* (we could call them *the Magnificent Seven*), that are also specifically called so by the Treaty of Lisbon, which is currently the constitutional charter of the EU[28], setting out the institutional structure and the powers, competences of EU bodies. Under Article 13 of the Treaty on the European Union (TEU), the EU shall have an institutional framework aiming to promote its values, advance its objectives, serve its interests, those of its citizens and those of the member states, and ensure the consistency, effectiveness and continuity of its policies and actions. Based on these objectives, the institutions of the EU are as follows.

1. The *European Council* (EC)[29] is the supreme political body (summit) of the EU, where the most important political directions are designated for other institutions of the EU to follow. It is composed of the heads of state or government from the member states, the European Commission President, and the High Representative for Foreign Affairs & Security Policy. The European Council also sets political priorities for EU legislation and provides input into legislation through the European Commission.[30]
2. The *European Commission* (or Commission, COM) is a supranational EU institution, basically the holder of the executive power within the EU, which is delegated to it by the Council of the European Union. The Commission is often dubbed as the Guardian of the Treaties as it is the body responsible to monitor the member states' compliance with their obligations under EU law and the Lisbon Treaty. Mostly it provides legislative proposals to the European Parliament and the Council of the European Union, therefore, the Commission is also the engine of law-making at the EU level.[31]

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[27] The European Committee of the Regions is the voice of regions and cities in the European Union. It consists of 350 members that are regional and locally elected representatives from the 28 EU countries.

[28] The founding treaties of the EU have been called the basic constitutional charter of the EU, already in 1986, in a case decided by the CJEU's predecessor, the European Court of Justice (the basic constitutional charter, the Treaties (judgment in Les Verts v Parliament, C-294/83).

[29] Stages of development of the European Council: establishes in 1974 (as an informal forum), received formal status in 1992, and became an official EU institution in 2009 by the Lisbon Treaty.

[30] Not to be confused with the Council of Europe, which a larger European integration, consisting of 47 member states and corresponding to the geographic boundaries of the European continent.

[31] Not to be confused with the European Commission for Democracy through Law, or Venice Commission (CDL for short), which is an independent advisory body of the Council of Europe and provides constitutional assistance to the member states regarding their laws and constitutional arrangements.

3. The *European Parliament* (EP)[32] is the directly elected parliamentary body of the EU, consisting of MEPs (Members of the European Parliament) elected at the member state (MS) level. Its primary duty is taking care of legislation on the EU level and to represent the interests of EU citizens (i.e. citizens of the member states).
4. The *Council of the European Union* (also called The Council or Council of Ministers)[33]is an EU institution solely responsible for the representation of the member states, national interests in the process of EU decision-making and law-making. In legislation, it works closely (in a process called co-decision or ordinary legislation) with the European Parliament, based on the reforms introduced by the Lisbon Treaty.[34]Furthermore, there are other *sectoral EU institutions* as well, all responsible for the exercise of certain internal and sometimes external oversight above member states and their institutions as well as other EU institutions in legal and financial, monetary matters.
5. The *Court of the Justice of the European Union* (CJEU)[35] is the supreme judicial body of the European Union and is seated in the Grand Duchy of Luxembourg. It is the place where member states can question EU legislation, where the Commission can seek remedies against member states in violation of their obligations under the Treaties of the EU and in some cases where individuals can question EU legislation regarding their daily life.[36]
6. The *European Central Bank* (ECB)[37]was first formally designated as an EU institution by the Lisbon Treaty and is the central organ of the EEMU (European Economic and Monetary Union), and the central institution in the European System of Central Banks (ESCB) where it works together with all national (member state) central banks. Its main task is to maintain price

[32] The European Parliament is an important forum for political debate and decision-making at the EU level.

[33] The Council is a platform for dialogue between the representatives of the different member states, where they can seek counsel among themselves regarding their common interest.

[34] Not to be confused with the Council of Europe, which a larger European integration, consisting of 47 member states and corresponding to the geographic boundaries of the European continent. Also, not to be confused with the Committee of Ministers, which is the holder of the executive power within the Council of Europe.

[35] See more on the judicial system of the EU in Chapter 6.

[36] Not to be confused with the European Court of Human Rights, or the so-called Strasbourg Court that is the judicial body of the Council of Europe. Although it also accepts individual cases and cases between member states as well, it is part of a different regional integration in Europe that comprises 47 member states. However, all EU member states are members of the Council of Europe as well.

[37] The European Central Bank (ECB) is the central bank of the currently 19 European Union countries which have adopted the euro.

stability in the euro area and carry out its monetary policy. The provisions relevant to its operation are set forth by the Treaty on the Functioning of the EU (TFEU), under Articles 3(1)(c), 119, 123, 127-134, 138-144, 219 and 282-284.

7. The *European Court of Auditors* (ECA) was first formally designated as an EU institution by the Lisbon Treaty and is also a guardian, similar to the Commission in this respect. However, it guards not the Treaties but the financial interests of EU citizens, and contributes to the realization of the transparency of spending and accountability for financial management of EU funds and budget. It also acts as the EU's independent external auditor. The provisions relevant to its operation are set forth by the Treaty on the Functioning of the EU (TFEU), under Articles 285-287, 310-325.

Other types of classification[38] do not distinguish between institutions in the broad and narrow interpretation, but they apply a *functional approach* in trying to create a categorization of EU institutions. These classifications primarily focus on only three institutions, which they call the institutional triangle (corresponding to the first three in our first list). These institutions in the triangle are the ones responsible for legislation, i.e. Commission, Parliament and Council. In other words, the *decision-making bodies*.

For them, the European Council (as supreme political summit) provides political guidance, while the Committees (Economic and Social, Regions) act as professional advisory bodies in all decision-making processes. The above bodies are then supplemented by the organ that decides legal disputes, and handles *conflict resolution*: the Court of Justice of the EU.

Normally, EU institutions "must be able to point to a power within the [Lisbon] Treaty which authorizes their action. If they cannot do so then [their] act will be declared void due to lack of competence. […] [The CJEU] has interpreted the EU's powers broadly and purposively, in order to achieve the Treaty objectives."[39]The above introduced EU institutions thus all act within their *remit*, which means that the TEU's provisions give them a specific mandate, define their scope of activities, their purview. These are then further specified by the TFEU.[40]

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[38] Please see the institutional triangle on the website of the European Studies Hub of the University of Portsmouth.

[39] Craig – De Búrca 2011, 520.

[40] We will take a look at the content of these Treaty provisions when we examine the specific institutions in detail, below.

Showcase: an institution linking the EU to the wider world

Based on all the above information and on reason number (6) quoted in the introduction from Peterson and Shackleton, we shall now take a closer look at one of the institutions of the EU (considered in a broader sense) that connects the EU to the wider world.

The European External Action Service (EEAS) has been set up by the Lisbon Treaty after 2009. It currently represents the EU toward to outside world as an autonomous political entity, through defining the objectives of its autonomous foreign policy and communicating these to its allies in the international arena.

The head of the EEAS is called the *High Representative of the Union for Foreign Affairs and Security Policy* (HR), basically the foreign minister of the EU, and through this person's position, the HR is also connected to a very important EU institution (considered in a narrower sense), the European Commission. The HR also serves as the First Vice President (VP) of the Commission (and is thus often referred to as HRVP), responsible for areas of foreign policy and security (also called the Common Foreign and Security Policy, CFSP). Another very important person in the EEAS framework is the EU Special Representative for Human Rights (EUSR).[41] One tool to realize the objective of the EUSR for Human Rights is the engagement of certain countries in *Human Rights Dialogue* (HRD), which can either be conducted in an institutionalized (structured) way, which is the most common, or in an *ad hoc* (temporary) manner.[42]

[41] The EUSR for Human Rights has the main role as to enhance the effectiveness and visibility of EU human rights policy. The EUSR has a broad, flexible mandate, given the ability to adapt to circumstances, and works closely with the European External Action Service (EEAS) providing full support.

[42] There is an on-going HRD with China as well, which takes place in Rounds and normally touches upon a multitude of topics every year, such as national security issues: counter-terrorism, cyber-security and, the rights of persons belonging to minorities, especially in Tibet and Xinjiang, freedom of religion or belief, off-line and on-line freedom of expression, freedom of peaceful assembly and association, the due process of law, arbitrary detention, torture and the death penalty. The HRD Rounds also deal with certain high-profile cases involving human rights in China, like the cases of Liu Xiaobo, Pu Zhiqiang, Xu Zhiyong, Gao Zhisheng, Wang Yu and her son, Bao Zhuoxuan.

The European Council and the institutional triangle of the EU: from politics to people

Below, we shall describe the four main institutions of the EU, from a top-down approach, considering the EU decision-making process, from the political spark to actual legislation.[43]

The European Council: The summit where it all begins

A few times a year (at least four times), the heads of states and governments of EU member states – dignitaries as we refer to them – gather in a big European capital city and hold Council Summits, i.e. meetings of the European Council.[44]At such events, the dignitaries discuss political priorities for the European integration of the member states. This is how the European Council started to operate in the 1970s, first informally, and then this formation became formal at the time the Maastricht Treaty was signed in 1992.As the Lisbon Treaty has entered into force (from which time onwards it is a formal EU institution – in the narrow sense), it has its dedicated seat in Brussels and it has its own President, who is elected by the members for a once-renewable two-and-a-half-year term, has the task to call the meetings, to convene the European Council, and to represent the EU to the outside world.[45]

The European Council's main objective and purpose is to create a forum for dialogue for European leaders to discuss the general direction of policy-making in Europe, and to define their political priorities for the good of the EU. National and European problems are also addressed at these meetings (e.g. migration or economic crisis from the latest years), but no laws are passed. The European Council is the highest level of political cooperation in the EU.

As part of its responsibility, the EC deals with complex or sensitive issues that cannot be resolved at lower levels of intergovernmental cooperation and sets forth the priorities of the EU's Common Foreign and Security Policy (CFSP), taking account of EU strategic interests and defence implications.[46]Besides fulfilling the role of being a political compass for Europe providing guidance, the EC also nominates and appoints candidates to certain high-profile EU level roles, such as leaders of the ECB and the European Commission.

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[43] The legislative process as it is will be, however, discussed in Chapter 5.

[44] In practice, the meetings of the European Council are named and referred to by the date and the name of the city it has been held in.

[45] In European parliamentary tradition, this would mean, that if the EU were a state, the Council President would be its "president of the republic", its "head of state".

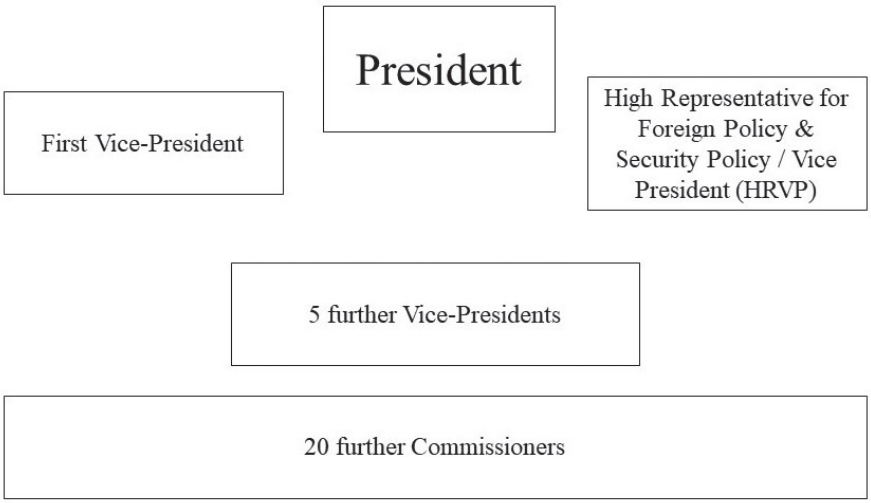
[46] CFSP is still represented globally by the HR as the 'foreign minister of the EU' who is at the same time a member and one of the Vice-Presidents of the European Commission.

The European Commission: The engine and the guardian

There is a two-fold approach to look at what we understand when we talk about the Commission. In a *broader structural and functional sense*, the many different structural units responsible for the day-to-day management (administrators, lawyers, economists, translators, interpreters, secretarial staff, etc.) refer to 'the Commission' (with its seats in Brussels and in Luxembourg). These different parts are organized into departments, also known as Directorates-General (DGs). Besides these different units at the EU level, the Commission also has Permanent Representations in all member states which operate like embassies of the EU in the member states. These are led by the Permanent Representative, i.e. the 'EU Ambassador' to the member state in question.

In a *narrower political sense* 'the Commission' can also refer to the actual *College of Commissioners*, which is a body made up of the 28 national (member state) commissioners (one from each MS) who represent EU objectives at the EU level and provide the Commission's political leadership during their 5-year term. Each Commissioner of the College is assigned responsibility for a specific policy area by the President of the Commission who is nominated, as one of the most important political leaders of the EU, by the European Council.[47]

Figure 3.1 The structure of the European Commission



Source: own edition based on EC 2014

[47] It is important to mention here that, over time, the role of the European Parliament has significantly increased and now all appointments to the Commission, including that of the President, are subject to the approval of the European Parliament which can also terminate the mandate of the Commission. Nevertheless, a detailed analysis of the issue will follow below, in the chapter about the powers of the European Parliament.

When it comes to the powers of the Commission, as argued above, the most important ones are being the engine of legislation and being the Guardian of the Treaties in the EU. Below, we separate and explain these two roles in detail.

The European Commission as the engine of legislation

Once the work of the European Council is done and agreements about the political priorities of European leaders take the form of so-called Council Conclusions[48], then the work of the Commission begins, when it comes to law-making in the EU. Based on the priorities defined by the European Council, it is the Commission's task *to provide legislative input* to the European Parliament and the Council of the European Union. The Commission can thus be considered the holder of the executive power at the EU level.[49]

However, it might also occur that policy initiatives or legislative proposals do not arrive directly from the *European Council's conclusions* to the Commission, but legislative ideas might also reach the Commission through ECI (*European Citizens' Initiative*). ECI is an important tool in the hand of EU citizens to try and directly affect law-making at the EU level, through establishing a direct channel to the Commission in addressing real-life, actual and current European issues and problems. In practice, 1 million citizens need to promote the same cause across at least 7 member states (within the period of one year) and, as a result, they might invite the Commission to bring forward proposals for legal acts in areas where the Commission has the power to do so. (However, in this case, the Commission is not obliged to propose legislation. If the Commission decides to put forward a legislative proposal, the normal legislative procedure kicks off: the Commission proposal is submitted to the legislator – generally the European Parliament and the Council or in some cases only the Council – and, if adopted, it becomes law.)[50]

To sum up: either Council Conclusions or a successful ECI can serve as triggers for any legislative initiative put forward by the Commission. Since the EU legislative process is going to be dealt with in detail in a separate chapter, let us move ahead and look at what happens once law-making is done, once a legislative measure is born as a result of the cooperation within the institutional triangle of the EU.

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[48] For an exhaustive list of Council Conclusions defining political priorities for the EU from 1975 to present day, see the official website of the Council.

[49] In European parliamentary tradition – if the EU were a state – this would mean that the Commission would be the government (executive) that could initiate laws made by the legislator, i.e. the Parliament.

[50] For more information on ECI as a direct democratic tool in the EU, see the official website of the EU.

The European Commission as the guardian of the Treaties

At this point, we need to address the second big field of responsibility for the Commission, which is being the Guardian of the Treaties. This implies that the Commission *monitors* how EU law is applied by the member states, and whether the member states are *in compliance with* primary and secondary EU law. As part of this duty, the Commission is entitled to commence *infringement proceedings* against one or more member states (under Article 258 TFEU), which might even turn into a judicial proceeding, ending up before the Court of Justice of the European Union.[51]

The European Parliament – the voice of the people?

Once the Commission places the order as we have seen above, the law-making machine of the EU is put in motion. The first and more and more influential actor in this process is going to be the *directly elected legislative body* of the EU: the European Parliament. Currently, it represents the interests of the more than 500 million EU citizens although the critics voice their concerns about the EP being too distant from the level of the citizens, from the level where the actual problems occur.[52]

This phenomenon of 'disillusion' (or some of time we could even say disappointment and apathy) is called *democratic deficit*, and the EU constantly strives to resolve the issues arising out of it, such as low participation (voter turnout) in EP elections across almost all member states. As part of this effort, over time, reforms have been introduced into the election and mandate distribution system as well through the Lisbon Treaty, which tried to reinforce the role and powers of the EP. Currently and, in fact, since 1979, the EP has directly been elected, through universal suffrage (voting), with a total number of seats at 751 at present. Mandates (seats) are assigned based on a delicate system in which no member state may now have less than 6 or more than 96 MEPs (Members of the European Parliament).

As referenced above, the Lisbon Treaty significantly *strengthened* the role of the EP, among others, by placing it *on an equal footing with the Council of Ministers*. The Lisbon Treaty, among others, has authorized the EP to propose changes to the Treaty; has extended the ordinary legislative procedure (co-decision) to 40 new fields including agriculture, energy security, immigration, justice and home affairs, health and structural funds; and has reinforced the role of the Parliament in the adoption of the EU budget. Also, MEPs may now give their consent on a wide range of international agreements negotiated by the European Union such as

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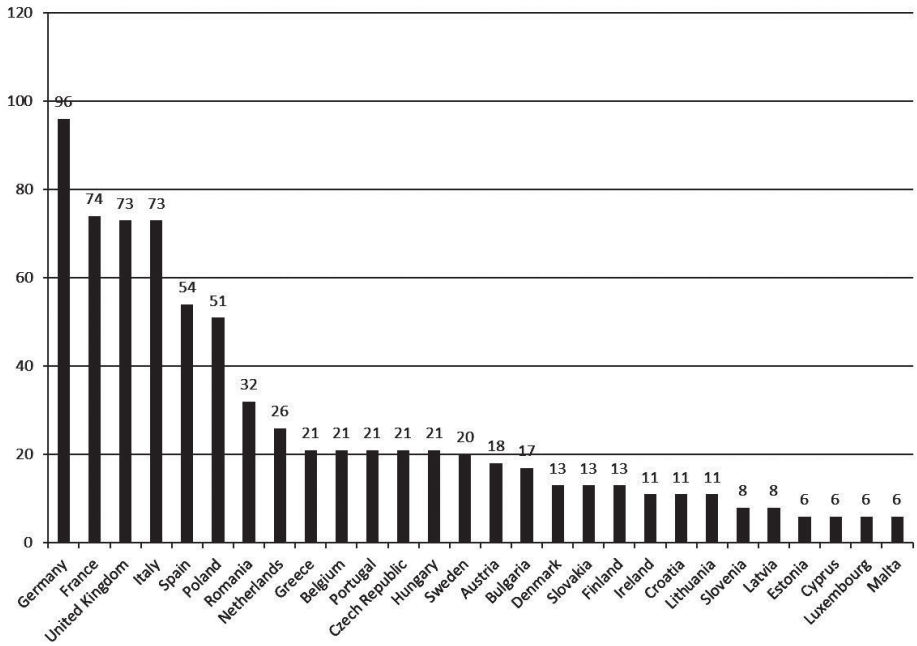
[51] More detailed information on this process can be found in Chapter 6.

[52] This is what we mentioned in the introduction in reference to Peterson and Shackleton, who argued that EU institutions are also being studied because they are powerful, but the citizens of the EU are still disillusioned with them, they do not love these institutions.

international trade agreements (like the impending TTIP, with the United States of America), and they can be and stay informed on the activities of the European Council, the so-called *rotating Council presidency* and the Union's external action realized through EEAS.

Figure 3.2 MEPs per country, 2014-2019



Source: own edition based on the website of the European Parliament

In a *functional approach*, the European Parliament holds three basic powers: (i) legislative, (ii) budgetary, and last but not least (iii) important control powers. In some sense, it is one actor in a carefully constructed system of checks and balances, as we will see. As for its *legislative* power, in most cases the EP shares this power with the Council, in particular through the ordinary legislative procedure.[53] As for *budgeting*, it is also a shared competence, and as such is shared between the EP and the Council.

The power of *control* that the EP has is an important one, as already argued above. The EP has control and exercises oversight over the institutions of the EU, in particular the Commission.[54] As part of the exercise of the accountability of the

[53] This will be discussed separately, in Chapter 5.

[54] In European parliamentary tradition, this would mean – if the EU were a state – that the legislative power would have oversight and could hold the executive power answerable [politically responsible/accountable] for its actions.

executive, the EP elects the President of the Commission; can give or withhold approval for the designation of Commissioners (by the European Council); and has the power to dismiss the Commission as a body by passing a motion of censure. It also exercises a power of control over the Union's activities through the written and oral questions it can put to the Commission and the Council.[55] The EP realizes these objectives through the work of its *temporary Committees* and *Committees of inquiry*, whose remit is not necessarily confined to the activities of European institutions. These committees can sometimes investigate and scrutinize action taken by the member states in implementing European policies.[56]

The Council: the voice of the member states

As it is the most important intergovernmental body of the EU, we shall now talk about the Council of the European Union or the Council (Council of Ministers). As described above, the Council is the holder of the executive power, which it generally delegates to the Commission (to enable it to initiate legislation and to 'guard the Treaties'). Together with the EP, the Council acts in a legislative and budgetary capacity (in a co-decision procedure, oriented by proposals from the Commission) and it is the lead institution for decision-making on CFSP and on the coordination of economic policies – the two most important core areas of intergovernmental decision-making. The Council is *the main decision-making body of the EU, where national (member state) ministers represent national (member state) interests*. With its seat in Brussels and some of its meetings held in Luxemburg, it is a forum for dialogue and coordination, in preparation for the work of the European Parliament, when it comes to adopting EU legislation.

The sessions of the Council are convened by the *Presidency*, which sets the agenda for the work of the Council. Under the Presidency, the *Council meets in different configurations* (ten in total), bringing together the competent member state ministers, such asthe General Affairs Council (GAC); Foreign Affairs Council (FAC); Economic and Financial Affairs Council (EFAC); Justice and Internal Affairs Council (JIAC), but further areas are also covered such as employment, social policy, health and consumer affairs; competitiveness; transport, telecommunications and energy; agriculture and fisheries; environment and education, youth and culture. The General Affairs Council is responsible for coordinating the work of the different Council formations, with the Commission's help.

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[55] In European parliamentary tradition, it is also standard procedure to address oral and written questions to the government in the plenary session of the parliament or through its committees.

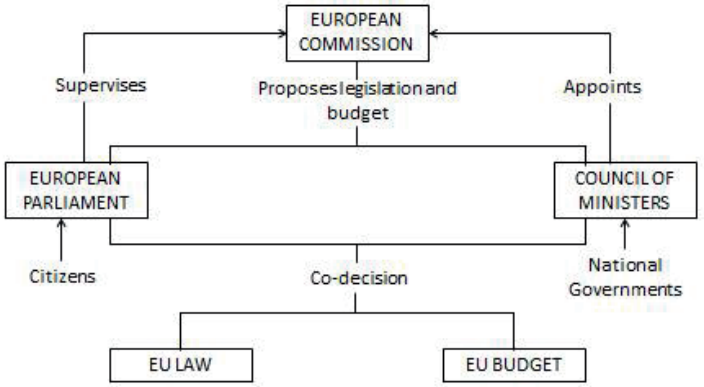
[56] One relevant example of this is the work of the so-called LIBE Committee, which is short for Civil Liberties, Justice and Home Affairs. This Committee can scrutinize member states' actions in realizing EU policies in the field of fundamental human rights as well as justice and home affairs.

We shall now introduce the working of the current, *rotating Council presidency* system. The first so-called *trio presidency* took place in 2007, with the aim of bringing an added value into the coordination of member state interest in EU decision-making: enhanced cooperation of consecutive Council leaderships. Under this framework, the presidency of the Council is held by groups of three member states for a period of eighteen months in total. Each member state holds the presidency for all the Council formations for six months, in rotation – and they adopt a coordinated, joint program for this time. The one constant in the system is that the Foreign Affairs Council is presided by the EUHR, responsible for CFSP as well as being the Vice President of the Commission).

Decisions to be made in the different Council formations are prepared by the *Committee of Permanent Representatives of the member states* (COREPER), assisted by working groups of national government officials. COREPER is a solely and exclusively preparatory body for the Council formations (configurations), and all items to be included into the Council's agenda (except for some agricultural matters) must first be examined by its meetings. (This coordination work obviously ensures that the EU's policies be consistent and based on consensus or compromise.) It is very important to underline that any agreement reached by COREPER can be changed by the Council, which alone has the power to make decisions.

COREPER meets every week in two formations. In COREPER II (or 2), member states' permanent representatives (as ambassadors to the EU) express the points of view of their national government. Its importance is shown that this section prepares the work for three important Council configurations: economy, justice and home affairs, and foreign affairs. Meanwhile, in COREPER I (or 1) the deputy permanent representatives convene and discuss. In addition, COREPER's work is also prepared by two groups of officials, both named after their first chairpersons. The *Mertens Group* (named after *Vincent Mertens de Wilmars*, Belgian diplomat), prepares the work of COREPER I, while the *Antici Group* (named *after Paolo Massimo Antici*, Italian diplomat) prepares the work of COREPER II. These are basically informal group sessions that help form an initial idea of the positions that the various member state delegations will take at the COREPER meeting.

Figure 3.3 Responsibilities and powers in the institutional triangle



Source: own edition

The Court of Justice of the European Union: the voice of reason?

The supreme judicial body of the EU (formerly European Court of Justice) is currently – according to the Lisbon Treaty – the Court of Justice of the European Union. It is seated in Luxemburg.[57]

Corresponding to the currently 28 member states of the EU, the Court of Justice of the European Union (CJEU) has 28 Judges, appointed by common accord (agreement) of the governments of the member states (in line with recommendations made by judicial panel based on lists of candidates put together by the member states).As for the internal management structure of the CJEU, the judges will elect from among themselves their President and their Vice-President. The Judges are assisted in their work by 11 Advocates General (AGs), who assist the CJEU by compiling legal opinions on the cases the Court is assigned, with full impartiality and independence.

Last but not least, we should look at the different competences and powers of the CJEU. As part of its conflict-resolution duties, it may start *infringement proceedings* upon the request of the Commission(acting in its duty as the Guardian of the Treaties) against member states who did not comply with their tasks (obligations) under EU law. These proceedings are – more often than not – politically charged as well, and can be used as tools for political or policy criticism against the member

[57] It should not be confused with the European Court of Human Rights (ECtHR), which is seated in Strasbourg. The ECtHR, however, is an organ of the Council of Europe (CoE), which is another European regional integration, consisting of 47 member states. Nonetheless, all EU member states are also members of the Council of Europe, but the two courts have separate mandates and jurisdictions, and the CJEU is solely entitled to adjudicate legal issues arising under EU law.

states. In turn, upon the request of national (member state) courts to that effect, it decides on questions regarding the interpretation of EU law, when national courts need to apply EU law in national legal proceedings. (The name of this procedure is *reference for a preliminary ruling*.). These proceedings are almost exclusively of a legal nature, not many of the preliminary rulings are brought in politically charged questions, as those not always arise in national court proceedings.

The CJEU also deals with many other kinds of disputes and their resolution: it can look at appeals, actions for the annulment of a legal measure, reviews, etc., but we shall not describe the details of these powers in this chapter.[58]

Summary

1. The broad and the narrow interpretation of EU institutions differentiate between the main decision-making bodies and other sectoral, consultative or advisory bodies within the EU institutional structure.
2. The European Council is a general policy-making summit where no laws are passed.
3. The European Commission is entitled to propose laws to be adopted by the joint decision of the European Parliament and the Council of the EU.
4. The European Parliament is a forum of direct representation of the people of the member states and, similarly to national parliaments, it has several legislative, budgetary and control powers (over the European Commission's exercise of executive power).
5. The Council of the European Union represents the interests of member states as an input into EU decision-making.

[58] More information on Court of Justice of the European Union can be found in Chapter 6.

4. Sources of EU law (Péter Kruzslicz)

Learning goals

After reading this chapter you will be able to:

1. Understand the basic characteristics of EU law as a sui generis legal system; make the difference between EU law and the international and national legal systems.
2. Define the notion of legal system and the notion of legal norm.
3. Identify the basic characteristics of the EU law as regards its subjects, objects and effects.
4. Get an overview of the typology of the different norms adopted and applied in the framework of EU law.
5. Define the most important sources of EU law, especially concerning their legal effects.

The European Union has got its own, proper (*sui generis*) legal system, as it already has been declared by the case-law of the Court of Justice of the European Union (CJEU).[59] As the new-born legal system of the European integration, EU law is different from national law and from international law. It has its own origins, and its own characteristics. The *sui generis* legal system of the European Union is different from national ones. Every State has its separate legal system. The member states of the European Union, all 28 of them, have also got their own legal systems. In this context, even if EU law is applied in the framework of the states and as part of the national legal systems, it is still different from national law.

Unlike national laws, EU law does not have its origin in the sovereignty of states. member states, by founding the European Communities or by acceding to them and to the European Union, have transferred some competencies originating from their national sovereignties to the European Communities or to the European Union. EU law has its origins in these competencies of the member states that they have attributed to the European Union. These are then exercised by the EU institutions and the member states in common.[60]

The *sui generis* legal system of the European Union is different from (primarily public) international law. Public international law is not considered as a proper legal system as its origins are not independent of national laws. The theories of monism or dualism (dealing with the question how the different national legal

[59] Judgement of the Court, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration, Case 26-62, 5th of February 1963. ECLI:EU:C:1963:1.

[60] The competences and the powers of the EU institutions, along with their detailed introduction, are discussed in Chapter 3.

systems accept the norms of public international law)[61]describe that reality. Even the existence of international law is related to national legal systems. States' willingness to enter into cooperation at an international level to realize certain objectives makes it possible for public international law to exist.

European integration has become independent of the states that have created it. Even though the European construct was originally initiated by the states, once the competencies have been attributed to the European Union, they no longer belong to the member states. Afterwards, they are exercised according to the Treaties – as these are this way sources of EU law and not of public international law.

The presence of a new (*sui generis*) legal system has resulted in revolutionary changes in the European legal framework. Not only national and international law are applied but a new dimension of law appears with its own sources and own rules creating a coherent system of general principles working inside the system. This revolutionary change was declared in the case-law of the CJEU and obliges the states and all persons to respect these specialities (the general principles) of EU law.

The CJEU, even in its previous form under its previous name (Court of Justice of the European Communities), has played a very important and innovative role by defining the specialities of EU law. In the framework of EU law, the general legal principle that *a judge cannot create legal norms*[62] is preserved. However, by the interpretation of the Treaties, the Court could declare the existence of a new legal system. The role played by the Court was essential. It not only gave a new legal dimension for the States and their population but also it created a tool vehicle for the realization and continued development of European integration. The basic idea and the motive behind this decision are simply to make the European integration, decided by the states according to the treaties, more efficient thanks to the legal tools offered by a new legal system.

Definitions related to the sources of EU law

EU law and its norms should be considered and studied as one *legal system* and its sources of law. A legal system is a coherent set of legal norms. On the one hand, we have legal norms, and on the other hand, those norms are brought together in a coherent system, just as the general principles of EU law create a coherent system that is respected by member states. This coherence reinforces the structure of the system as it is established through the principles regulating the development and the functioning of the system, the adoption and the application of the norms.

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61 Starke 1936, 66.

62 Ancient Roman maxim: Praetor jus facere non potest.

The sources of EU law are legal sources, so-called *legal norms* or *legal acts*. These terms are synonymous, with some nuances as differences between them. The 'legal norm' is the most general term. When one uses the expression of *source of law*, it highlights the origin of the norm, the document or the type of document that contains it (*formal source of law*). When one uses the term of legal act, it is the effect that a norm plays that becomes the centre of attention (*material source of law*).

A legal norm aims to regulate social matters with – not always – a binding effect. In a society, norms are only relevant if they regulate the cohabitation of many, in several communities. Consequently, we study these norms in those societies where we live, and where we meet these different norms. Legal norms always concern relations between legal and/or natural persons, and these relations as well as the norms relevant to them can take many forms. A legal norm is different from any other by the fact that for its adoption and application (but also for the monitoring of compliance with it), we might find ourselves dealing with a forum of public authority. Unlike religious norms or norms of courtesy, known for their stability and dynamism, the creation, application, and the enforcement of legal norms involve activities of public authorities.[63]

A legal norm is adopted in a *formal process* that is prescribed (defined) for its adoption. If adopted, it then applies with the guarantee of an intervention by the public authority (even if it does not have any binding effect); its effects are also safeguarded by legal rules. Finally, according to the effects of the norm that are prescribed, any non-compliance or violation of the legal norms can be sanctioned, of course, in a proceeding also provided by legal regulation, and also taking place before a forum of public authority.

General characteristics of sources of EU law

Sources of EU law have some basic characteristics mostly similar to those of any other legal system. They have their *subjects* (the people, states, entities these norms will effect), their *objects* (the subject matter, which they will regulate) and their *effects* (the conduct or legal status these norms will result in, once adopted). With regard to the process in the framework of which they are adopted, it is according to the above factors that they can be categorized. With their categorization, we can identify some types of norms that we simply call sources of law in terms of the EU.

The *subjects* of EU law can not only be states or public entities that participate directly in European construction (for example states adopting the Founding Treaties), but also any other natural or legal persons, and other bodies. That is the reason why a source of EU law directly creates rights and obligations for the

[63] In the context of EU law, these public authorities will be the EU institutions discussed in Chapter 3.

benefit of persons or burdening them. Of course, the subject of the norm depends on its type.

The *object* (subject matter) of EU law depends on the field, in which competencies originating from national sovereignty are transferred to the European Union by the member states. Consequently, unlike its constituent member states, the European Union cannot adopt a norm in any field of social life.[64] So, the definition of the object (subject matter) of an EU legal norm has a great impact. In a *substantive approach*, it means that the European Union only produces sources of law in the fields mentioned by the Treaties, and any norm adopted outside of those fields is invalid. In a *procedural approach*, it means that according to the object (subject matter) of the norms, in those different fields, different processes for the adoption of the norms can be defined.

As for the *effects*, it is very important that ordinarily EU law norms (created in a given subject matter) are *directly applicable*[65] and binding on the subjects. The idea of the *sui generis* legal system was pronounced by the CJEU early on, to strengthen the effect of the EU legal norms. According to the principle of the *primacy of EU law,*[66] they apply before national norms, in other words: they take precedence, they have the priority over national norms. Of course, there are exceptions from under direct and compulsory effect.

Although all sources of EU law are independent from the national norms and legal systems, they still have an effect on and inside the national legal system. As they are superior to national legal norms, or at least they have primacy over them, their effect becomes, even if only in restricted fields, very important.

To sum up, it is according to their effects, but also their subjects and object (subject matter), and to the process of their adoption that the different sources can be identified and distinguished.

Primary EU Law

The most important distinction between the sources of EU law is based on the fact whether they are *primary* or *secondary* sources. This distinction is important especially because it creates the only existing hierarchy between EU legal norms: a primary source is always superior to a secondary one. That means that no secondary source can be in collision with a primary one.

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64 Because of the transfer of competencies, once a competency, especially an exclusive one, has been transferred to the EU, a member state cannot adopt a norm in that field, for example, in the field of Common Agriculture Policy or Common Commercial Policy.

65 The direct effect of the EU law means that persons can directly invoke EU regulations before national judges, has been declared by the Court in the above mentioned case *van Gend& Loos.*

66 The primacy of EU law that means that EU norms applies before national norms, has been declared in the judgement of the Court, *Flaminio Costa v. E. N. E. L.*, case 6-64, 15th of July 1965.

From a more substantive approach, primary EU law is essential as it creates secondary EU law (more exactly, the legal channels through which secondary EU law can be created). Primary law concerns not only states that are responsible for its adoption, but thanks to the proper character of the EU law, it can also concern their citizens and other people as well. Primary law plays an important role also in the definition of the institutional and legal structure of European construct.[67]

Primary EU law is developing and becoming more and more detailed because of the deepening of the integration process. As the institutional structure and the legal framework of the European construct becomes more and more complex, and new fields are covered by the jurisdiction and competence of the European Union, the *structure* and the *content* of primary EU law is also developing.

Written sources of primary EU law are *the Treaties*. We can distinguish, according to the already mentioned criterion, three types: *founding*, *modifying* and *accession Treaties*. Accession Treaties are adopted when one or several states become members of the European Communities/Union, while the other two types concern the establishment of the foundations of European construct.

The difference between a founding and a modifying Treaty is not so evident from a substantive point of view. One would think that it is according to the importance of changes made by a new Treaty that we identify it as a founding, or with less important changes, a modifying one. However, in practice, we can see Treaties adopted bringing important changes being categorized as modifying treaties. It depends on the choice of the states adopting the treaty in question.

All the treaties are adopted with the same procedure which is basically identical to the process of adoption for international treaties. It also means that EU Treaties can be examined by national constitutional courts, just as international treaties are, before they enter to force in a given state. Once they have entered to force, however, they become, according to the above-mentioned case-law of the CJEU, sources of EU law binding on the member states as well.

So, EU Treaties are drafted and negotiated in intergovernmental conferences (IGCs) where representatives of the member states in the presence (but without any formal role) of the EU institutions, are working together on the sources of primary law. As in international law, it is up to the member states to define the content according to their interests and the compromises that they can form with the others.[68]

Once a treaty has been drafted, the high representatives of the member states sign it, declaring the willingness of their state to adopt the treaty through the

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[67] The Lisbon Treaty, a very important element of primary EU law, defines the institutional setting of the EU and the powers of these EU institutions as well, which is discussed in Chapter 3.

[68] For comparison, please consider Peterson's and Shackleton's argument about the role of EU institutions in securing the results of compromises member states managed to make with each other, in Chapter 3. The same logic applies to the formation of EU treaties as well, which can also define the powers of EU institutions as well.

act of signature. After signature, the treaties should be *ratified* by the member states in conformity with their national, constitutional rules on the ratification on international treaties: either through parliamentary ratification or ratification by a referendum (popular vote). Once every member state ratified the treaty, it can enter into force.

It is important to note that all EU Treaties (including accession treaties that are also concluded between the new and the already participating member states) should be *ratified by every state*. This can create some difficulties when one or a couple of member states are not willing to accept the changes introduced by the treaty in question.[69]Also, attention should be paid to the way of ratification. A referendum always implies more risks and, in the case of parliamentary ratification, the harmony between the treaty to be adopted and the constitutional system of the state might be brought into question, which can also create duties for the constitutional courts of the member states.

There is a professional consensus, although partly contested, on the existence of certain *unwritten sources of primary EU law*. These are considered to be the above-mentioned *general principles* of EU law. The qualification of these principles as primary EU law has an important impact as this way they can have priority in the hierarchy of EU norms over secondary law.

Nonetheless, the level of the development of EU law as an *autonomous* (*sui generis*) legal system certainly is evidence enough of the existence of such general principles (as sources of EU law) regulating the foundations and ensuring the coherence of the whole legal structure of European integration. These general principles are, by interpretation, also related to the treaties that are created, the so-called written primary law, even though these principles are not expressly written down in the treaties, but apply to them through the interpretation of primary EU law by the CJEU.

Secondary EU law

From a qualitative point of view, the most important part of the so-called *acquis communautaire*[70]of the EU is the whole set of norms produced by and applicable in the institutional framework of the European integration. This is *secondary EU law*. The massive production and the strengthened application of these norms adopted

[69] That was the case of Maastricht Treaty when Denmark voted negatively on the 2nd of June 1992, the Treaty was rejected by 50,7 % of voters, however, the process of ratification continued and Danish voters accepted the Treaty, after the Edinburgh Agreement, in a second referendum held in 1993. As another example, the Treaty establishing a Constitution for Europe was rejected both by Dutch and French voters, they blocked the ratification process and the Treaty has never entered to force.

[70] Body of EU law

by the EU institutions and the member states sometimes with the participation of third-party organizations, give the EU *normative authority and power*.[71]

As unwritten sources of secondary EU law, we can mention certain principles – those which by their importance are not considered *the general principles of EU law* as sources of primary EU law. Also, the *case-law of the CJEU* and to a lesser extent *certain customs and doctrines created by academia* are also considered *unwritten sources of secondary EU law*. All of the above, as they are secondary in nature, are based on primary EU law (i.e.: Treaties and general principles of EU law).

Nowadays, there is a consensus about the existence of a so-called *constitutional charter of the European Union law*[72] and in this charter we can find some basic rules (principles) that are important to guarantee others. This is how, for example, the Treaties refer to *human rights* as general principles of EU law. They are based on the Treaties, but work as principles so that their respect could be preserved.

The *CJEU* has played a *very strong and innovative role* in the process of European integration. Its case-law is greatly influential, despite the fact that EU law does not work as a common-law jurisdiction based on precedent. With its definition and rulings, the Court participated in the adoption of secondary norms in very different fields of EU law, by interpreting the treaties or even some secondary norms.[73]

As for the importance of *customs and doctrines* (based on academic literature), the general conception of legal systems needs to examined first. The examination of the *practice* (established protocols, usage in trade and commerce) can offer some important insight into, for example, the functioning of institutions or the commercial relations of the European Union, even without looking at the adopted legislation. Academic sources complement the practice of law as well. There are no written sources of law based on these, but their general acceptance in the every-day life of the EU makes them a valuable part of the EU's legal system.

Despite the many unwritten sources presented above, *secondary EU law is mostly comprised of written sources*: external and internal ones. In the latter category, we usually distinguish between legislative and executive acts of EU law.[74]

As *external sources* of secondary EU law, we can mention *conventions*, *agreements* and *treaties*. For their *adoption*, we use the general rules of *international public law*. However, as their existence is regulated by primary EU law, they

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[71] Please consider the argument made about the concept of EU institutions focusing on the legal and normative authority they have to create legal rules, in Chapter 3.

[72] The Court of Justice was the first to characterize the Treaties which were, by that time, the foundation of the European Communities as Constitutional Charter. Judgement of the Court *Les Verts*, case 294/83, 23th of April 1986. ECLI:EU:C:1986:166.

[73] This role of the CJEU is also discussed in Chapter 6.

[74] There are also some sources of secondary EU law without legal effect, but we shall not mention these right now.

will become sources of secondary EU law. Especially in the field of its external action[75], but also in commercial matters, the EU, and not the member states, uses these norms to contract with third parties.

Now, in terms of internal sources, the distinction between *legislative* and *executive* acts of secondary EU law is not an easy one to make, however, it is a very important one. The process in the framework of which norms should be adopted, depends on this categorisation, and the effect of the act in question depends on it as well. A complex jurisprudence of the CJEU explains the difference between these two categories.[76]

The most basic difficulty in distinguishing between legislative and executive acts, comes from the fact that from a certain point of view even legislative acts have an executive character in EU law, as they are adopted in the process of executing (performing) the treaties. Contrary to the national legal systems, under EU law, we have no proper distinctions between constitutional, legislative and regulatory norms. However, this distinction should be made regarding the question of competencies and procedures, and the application of these norms.

Legislative acts of secondary EU law are those that regulate general social matters in accordance with the treaties. They are generally adopted based on the proposal of the European Commission, by European Parliament and the Council of the European Union.[77] These legislative acts will usually have a general effect with an obligation of general application, and contain rights and obligations.

Types of secondary EU law

According to the different periods of European integration, the most important secondary sources of the EU law are *regulations* and *directives*. They both have the above-mentioned characters.

However, there is an important distinction between these two types, as *directives* are considered as *incomplete legal norms* at the time of their adoption by the European institutions and the contribution of the member states is necessary for them to become effective in the member states' legal systems. A directive only defines a *goal*, a *deadline* by which the goal should be achieved, but not the way to achieve it. The exact way to achieve the EU objective should be added by the member states themselves when they *implement* or *transpose* the directive. Member states should, within the deadline specified, *adopt national legislation* aiming to achieve the defined goal with methods and techniques that they judge

[75] A short description of the European External Action Service (EEAS) is to be found in the Chapter 3.

[76] See Articles 289, 290 and 291 of the Treaty on the functioning of the European Union and its interpretation by CJEU.

[77] For more details, please refer to Chapter 3, in terms of the operation of the institutional triangle in EU law-making.

adequate. (The process by which a member state *inserts* the directive into the national legal system is called implementation or *transposition*. Some authors even call it *transplantation*, as the member state needs to take it from the body of EU law and insert it into the body of national law, by replacing those "body parts" of the national legal system that are contrary to the directive.)

If the member states do not implement the directive in due time, then the principle of the direct application of EU law "kicks in" with some conditions. Directives can have a so-called *vertical direct effect*, in which case it will apply between public and private bodies. The so-called *horizontal direct effect* of the directive will apply between private bodies (or public bodies acting as private in a legal relationship). As we can see, even if the member states do nothing with it, the directive is designed to be a very efficient tool for legal harmonization,[78] which is one of the most important objectives of the EU.

Regulations, unlike directives, are *complete legal norms* at the time they are adopted by the EU institutions. From its publication, a regulation has the power to cause all the legal effects that it was intended to cause. Regulations can be considered the basic legislative acts of the EU. According to the field that they cover, regulations can be adopted through different processes – as the Treaties provide different competences to the EU in the different fields of matters.

The *executive acts* of EU law are also secondary sources (with a general scope of application) according to the Treaties, but they are adopted by the European Commission and they are aimed at the execution of general norms with more detailed legislation.[79]These can also be individual *decisions*; in this case, they only apply to those who are the recipients of the decisions, who are specifically mentioned in those decisions.

Such executive acts are, for example, the regulations, but as *executive regulations*, and decisions that can be general and individual. They have direct effect and primacy just as legislative acts but they have a substantially more detailed content in the execution of general acts and formally their scope of application is more precise and they are adopted in a different procedure.[80]

Last but not least, we must also mention some secondary sources of EU law *without legal effect*. Because they lack legal effect, some authors refuse to categorise them as sources of EU law. However, even though they cannot directly be considered as sources of rights or obligations, they still play an important role in the functioning of the EU legal system. They can give highly valuable explanations to other norms of EU law that have legal effect.

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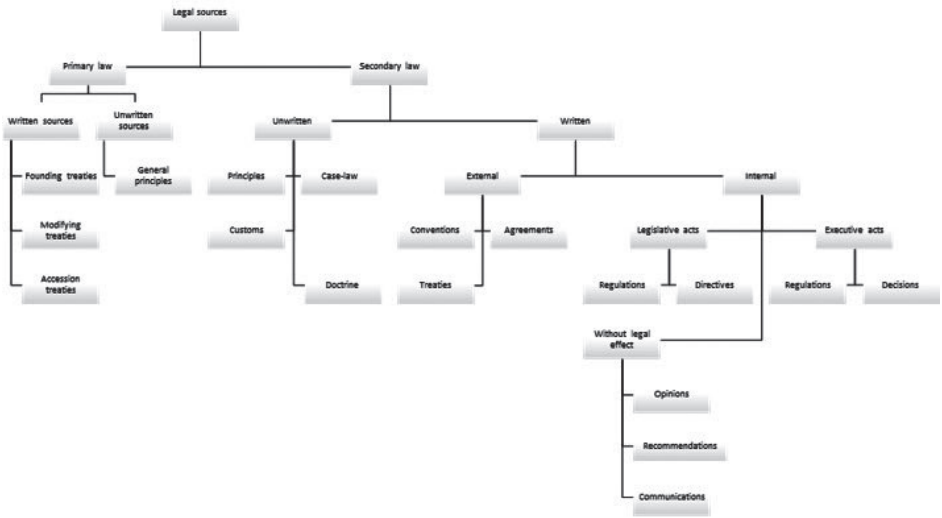
[78] In relation with the EU, legal harmonization or simply harmonization means to create, by the adoption of common rules as especially directives, standards that national legislations follow so that they become identical or at least similar.

[79] Executive acts in this way are connected to the role of the European Commission we call as "the Guardian of the Treaties" in Chapter 3.

[80] The legislative process of the EU is described in Chapter 5.

Among the sources of the secondary law without legal effect, we can include *opinions*, *recommendations* or *communications*. These are also prepared and drafted by the institutions and sometimes approved in the framework of a formal process, and they can contain very useful information helping the right application of other secondary legal norms with legal effect. They can be referenced in legal opinions or even in the argumentation of the parties before the courts.

Figure 4.1 Sources of EU Law



Source: own edition

Summary

1. The European Union has got its own, proper legal system; the so-called EU law is different from the national and the international legal systems.
2. A legal norm, such as sources of EU law, aims to regulate social matters with a binding effect.
3. The subjects of EU law can not only be states or public entities but also any other natural or legal persons.
4. The objects of EU law depend on the field where competencies originating from national sovereignty are transferred to the European Union.
5. The EU law sources are divided in primary and secondary EU law sources, the first category is superior to the second.

5. Decision-making in the European Union (Péter Kruzslicz)

Learning goals

After reading this chapter, you will be able to:

1. Identify the main actors of the decision-making process, and understand the problem of competencies concerning the adoption of secondary legal sources.
2. Identify the results of the decision-making process as legal sources of the EU Law.
3. Understand the reasons of the complexity of decision-making processes in the legal and institutional architecture of the European Union.
4. Have a clear overview on the process conducted for the adoption of written sources of the EU law according to public international law.

As discussed in the previous chapter, he European Union has got its own legal system and, as each legal system, it has its own legal sources. The norms and the acts, as sources of the EU law are adopted as the definition of source of law provides, in well-defined, legally regulated procedures. However, in a more common way, the general term *decision-making* is in use to describe different *processes leading to the adoption of different norms*.

The EU can adopt its primary EU law norms according to the rules of international public law. An agreement among member states is required and the process is regulated by international public law like for any other international treaty. For norms of secondary EU law, primary law defines the proceedings to be applied.

Moreover, in terms of secondary law, the question of competences is essential. The EU, unlike its member states, does not have a general competence to adopt secondary norms as it has got no sovereignty to exercise public power autonomously. That is why secondary law can only be adopted in the fields that the Treaties signed by the member states (giving up that part of their sovereign competences) have defined for the action of the EU. Secondary EU norms are adopted according to attributed (transferred) competences, and the attribution (transfer of competence) should be expressly laid down in the Treaties.[81]

[81] See Articles 4 first paragraph and Article 5 second paragraph of the Treaty on European Union.

The main actors of the decision-making process are the member states and EU institutions.[82] Even if some EU institutions participate considerably in the process, the adoption of primary sources of EU law is a task for the member states (as for international treaties, they are the holders of sovereignty). In the case of secondary sources, certain EU institutions, specifically the European Parliament and the Council of the European Union participate in the process.[83]

The result of the decision-making process is always a legal norm: either primary or secondary EU law, according to the subjects and the objects, which it binds and they can define the procedure to be applied. The sources of EU law already described by another chapter represent the static approach, while the approach detailed in this chapter is the dynamic one which represents the decision-making process. The two chapters are strongly connected in this way.

Some general characteristics of the EU decision-making process

To begin with, the continuous character of decision-making is the most important. Decision-making should be always subject to further analysis as it is a *process* always in motion. The different steps before and after the timeframe (period) that we are discussing, should also be taken in consideration for a better understanding of the whole system. The *participants*, actors to the process, all act according to this idea of being part of a greater procedure that continues to move forward after their contributions.

The decision-making process is always aimed at achieving a *decision*, and it is always by a *compromise* between the actors involved that the norm will finally be adopted. Searching for a compromise among the actors is a political fact that influences the whole of the process. However, the process itself is legally regulated, although legal regulation takes into account the political willingness of the actors involved to find a compromise and to successfully conclude (close) the decision-making process.[84]

In the EU decision-making process, we face a very complicated and particularly complex *institutional and legal architecture*. The above-mentioned characteristics also have an important impact on decision-making. According to the Treaties, we

[82] Relevant information on EU institutions important for the different EU decision-making processes is discussed in a separate, dedicated chapter (Chapter 5).

[83] See Articles 289 and 294 of the Treaty on the Functioning of the European Union.

[84] As other chapters describe the different competences, institutions, and sources of EU law, the task in this chapter is to rely on this information through the synthesis of all these facts.

can distinguish between almost fifty different procedures in terms of how to create and adopt secondary EU law.[85]

These procedures are often only different in some very marginal characteristics; however, these differences can be crucial for the successful adoption of a decision. Some of these differences may reflect the willingness of states (as the 'authors' of the Treaties) to create nuances among the decision-making procedures in order to strengthen some actors while weakening some others by giving them more or less *influence* over the process.

Finally, we would highlight the fact that, contrary to national public law, for the adoption of the norms of EU law, we need to talk about *decision-making* and not about legal procedures, in a general way. We think that this conceptualization underlines a more political then legal approach in better comprehending the process. By using this term ('decision-making') not only the processual character is strengthened in the eyes of the actors, but also the idea of seeking *efficiency* rather than deficiency.

Moving on, now a clear distinction should be made between the adoption of the sources of primary and of secondary EU law. The first process is regulated by international public law, and will be discussed separately. The second is more specialized according to the character of European integration, as procedures are regulated by primary EU law. Due to this, the adoption of secondary sources of EU law happens in a lot more complicated architecture, so we will only discuss the general setting that is the so-called *ordinary legislative process*.

Despite all the differences, the above-mentioned general characteristics are common to EU decision-making. The question of competences, the strong role of institutions, the complexity of legal sources, but also the processual character of the adoption and the *willingness* of the actors to seek compromise can be considered as essential for a better understanding of every different decision-making process, and all of these must be borne in mind when they are analysed.

The adoption of written sources of primary EU law

The written sources of primary EU law (the Treaties) are basically adopted with the same method that is in use for the adoption of any international, multilateral treaty. The actors in the negotiation and the ratification of the treaties are the member states without distinction among founding, modifying and accession Treaties.[86]

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[85] For different policies of the EU, the Treaties propose always a decision-making process, without such a proposition, the ordinary process applies.

[86] As explained in the Chapter 4 these treaties are always concluded by the States and are considered as sources of international law before becoming sources of EU law by their entry into force. Please refer to the Chapter 4 for more detailed information on these types of treaties.

Even though states are the masters of the Treaties, we can acknowledge an increasing participation of EU institutions as well in the process. We should first mention the role of the European Council but also of the European Commission in this framework. The European Council, when a need for a review of the Treaties is imminent, usually gives mandate for the organization of an intergovernmental conference (IGC) and the European Commission, especially in the case of accession treaties, oversees the quality of the text.

As the institution of the political leadership in the European Union, the European Council, described in the chapter on EU institutions, generally commands the adoption of new norms of primary EU law. Such an 'order of primary legislation' represents political willingness, dependent on the member states, to renew primary law. When the European Council gives the mandate, it proposes general aims (in the form of political priorities) to be achieved with the new regulation.

The European Commission, also presented in the chapter on institutions, has an important role thanks to the professional background that it represents, in the drafting of the treaties. It disposes of all necessary resources and capacities but also the professional competency to do so. Sometimes, legal opinions from the CJEU[87] can also be asked on clarifications for some specific legal aspects of new Treaties to be drafted.

Once the mandate has been given to adopt primary law, the intergovernmental conference (IGC) can start to negotiate the treaty. States are represented according to the rules of international public law,[88] by the representatives of their national governments. That is the method by which they are drafting the treaties built on compromises. If their positions are different, and the mandate given for the adoption of primary law is not clear enough, political leaders can also be consulted for searching a compromise at a higher level.

When the treaty has been drawn up, always according to the rules of international law, the next phase is the signature. It is organized during a European (Council) summit meeting as an important event with the highest representatives of the member states. Based on their respective national constitutional systems, the head of state or the head of government participates in the signature process along with the minister of foreign or European affairs. The European town where the signature takes place gives the name of the treaty according to tradition and for easier identification. (E.g. the Treaty of Lisbon was signed in Lisbon on the 13 December 2017.)

It is after signature that we enter the phase of ratification. As mentioned in the chapter on the sources of EU law, it is in accordance with the relevant national constitutional rules that the ratification takes place via parliamentary vote or by

[87] More information can be found in Chapter 6 on Court of Justice of the European Union.

[88] For reference in international public law, see the so-called Vienna Convention on the law of treaties, concluded on the 23th of May 1969.

referendum. In some European states, a referendum is obligatory for every treaty or for some of the treaties, for example, for founding or for accession treaties.

As part of the ratification process, all member states should ratify the new treaty for it to be able to enter into force. As member states are equal in their power to conclude an international treaty, even the veto of one of the states can cause the end of the process, and the treaty shall not be applicable without the agreement of every state. In the process of ratification, (and also as a separately important factor) the 'constitutional review of the international treaty (by the national constitutional court) can be an obstacle in front of the entry into force of the treaty. It is usually the national constitutional court that has the power to review the content of international treaties and examine whether they are in harmony with the national constitutional system and its provisions.[89]

As already discussed, the treaties of European law have a very special importance. Even though they behave as international treaties as regards the procedure of their adoption, before their entry into force, but also as regards to their legal effects, once they entered into force, they become part of the law of the EU as autonomous norms of this *sui generis* legal system according to the case-law of the CJEU.[90]

The adoption of written sources of secondary EU law

The *decision-making process* is the term most commonly used describing legal procedures conducted with the aim of adopting secondary EU law. These procedures are regulated in detail by the founding and modifying treaties, presently, by the Treaty of Lisbon, but they are also oriented by some unwritten customs and principles of EU law. Thanks to the application of these procedures, the European Union can become a normative power.

As a normative power, in the fields where competences have been attributed (transferred) to it by the member states, the European Union, according to the rules provided by the treaties, adopts a significant number of legal norms.[91]

The Lisbon Treaty aimed at simplifying these above procedures. It introduced a categorization for legislative procedures, making the distinction between *ordinary* and *extraordinary* legislative procedures. This reform has not withdrawn any existing procedures, but has chosen one that we will study in detail, to become

[89] Similarly to the European Commission, which we refer to as the Guardian of the Treaties, we call national constitutional courts as 'guardians of internal law' or 'guardians of national constitutional law'.

[90] Please refer to Chapter 4 for more information on the nature of the EU's legal system.

[91] As discussed before in Chapter4, the law of the EU disposes of a great number of different legal sources. Those sources are adopted in the framework of the same institutional and legal structure but in many different proceedings.

the ordinary one, which means the one applied by default for the adoption of legislative acts of secondary EU law.

As mentioned before, for different fields of competences where the EU has the power to adopt secondary law, the EU institutions adopt legislative and executive, external and internal secondary norms in the framework of different decision-making processes. These decision-making procedures differ mostly because of the different level of the different institutions being involved in the process, especially given whether the European Parliament has more or less influence.

The ordinary legislative procedure

The so-called ordinary legislative procedure was first introduced by the Maastricht Treaty in 1992 under the name *co-decision procedure*. As its first name indicates, the procedure was designed to create cooperation between the European Parliament and the Council of the European Union, the two legislative institutions of the European Union. This cooperation should be founded on a well-established balance among these institutions.[92]

Based on the above, a procedure was created, which permits to the Parliament to participate in decision-making with the same influence as the Council, aiming to create equality without causing a blockage in the proceedings. To put it in another way: the procedure lets the Parliament and the Council to have their own positions but obliges them at the same time to bring these positions closer and closer together so that a compromise can be found by the end of the process.

Even if the design of such a procedure was a very difficult task for the lawyers working on the Maastricht Treaty at that time, the procedure ended up being a real success story. With a well-structured participation of the Parliament, issues of democracy could be resolved without harming the efficiency of decision-making. Because of its success, the Treaty of Amsterdam extended the use of this procedure, and then the Lisbon Treaty renamed it as the ordinary legislative procedure.

As the ordinary procedure for adoption of legislative acts, this decision-making process is in use in more than eighty different fields of EU policymaking. Regulations and directives but also some decisions – with a binding effect only on those, to whom they are addressed to – are adopted in a very well-balanced cooperation between Parliament and Council as a result of this procedure. At present, the idea about extending it even more is in the public discourse on the EU level.

The detailed description of the ordinary legislative procedure can be divided into six different phases. In the following, we will look through these phases step-by-step for the sake of a better understanding of the process. However, as

[92] For basic information on the cooperation of these institutions, please refer to Chapter 3.

recalled above, it should always be considered a process, which can only be understood in its entirety (as part of a processual approach). The different steps should be examined with regard to the steps before and after them even though if a compromise is found at some part of the process, there is no need to continue with each and every step of the process, as it will be outlined below.

The preparatory phase: the role of the Commission

The preparatory phase is about initiating the legislative procedure. The European Commission has a key role to play here as it is the only EU institution having the right to initiate a legislative act (most often based on the political instructions of the European Council). By the end of the preparatory phase a legislative proposal should be presented by the Commission before both institutions participating in decision-making process: to the Council and the Parliament.[93]

The monopoly of the capacity to present legislative proposals reserved to the Commission is motivated by its capacity and competency. The European Commission has the necessary resources to elaborate proposals of great quality, but also it is the European Commission in the EU institutional structure that is known for representing the common European interest, so any proposals coming from it will follow the logic of strengthening the integration of the member states.

Even if only the Commission can submit proposals for legislative procedures, in turn, the Council or the European Parliament may ask the Commission to do so. The Council usually requests the Commission to carry out studies and if necessary to present legislative proposals. The Parliament may also ask Commission to submit legislative proposals by the vote of the majority of its members. Furthermore, the Commission should submit a proposal not only at the request of other EU institutions, but also following a European Citizens' Initiative (ECI). For a more democratic procedure, with the Lisbon Treaty, the so-called *Citizens' Initiative* was created. Similarly to direct democratic decisions in the member states, with a sufficient number of signatures coming from the citizens of a certain number of States, a legislative procedure can also be launched by European citizens, with a proposal coming from the Commission based on the Initiative.[94]

There are, however, some sectoral exceptions to the monopoly of the Commission. In the field of judicial cooperation, one quarter of member states can also launch an ordinary legislative procedure. Concerning the status of the European System of Central Banks, the European Central Bank can initiate a

[93] This short introduction describes the involvement of the European Council and the institutional triangle of the EU in decision-making as also described in Chapter 3.

[94] Further rules for ECI are detailed in Chapter 3, in the section on the European Commission.

legislative procedure. Finally, concerning the status of the CJEU, it is up to the CJEU to launch a legislative procedure if it is considered necessary.

In other aspects, the preparatory phase is not regulated in detail by the treaties. However, tradition suggests a strong cooperation between the Commission and other political actors, especially member states who have a significant effect on the elaboration of new proposal throughout memberships in different departments and units. In addition, also civil society organizations (CSOs) or lobbying bodies, associations are influential. Even though the Commission has the right to finalize the proposal by the vote of the College of Commissioners, it does not elaborate new legislative acts behind closed doors.

When the proposal has been decided by the College, it is submitted to the Parliament and the Council. At the same time, the Commission should send the proposal to national parliaments, as these will also be entitled to have a closer look (exercise scrutiny) at proposals or to ask for the reconsideration of these proposals when they consider that they go against the principles of subsidiarity and proportionality.[95]The Commission, in some cases, according to the treaties, may also send the proposal to the Committee of the Regions or to the Economic and Social Committee, and these committees have the right to give their opinion about proposals concerning their areas of activity.

First reading: dialogue within the institutional triangle

Even though a legislative act can be and sometimes is adopted in the first reading, this first work on the proposal by both actors (Parliament and Council) is more about clarifying their positions about the draft text. During the first reading, the Commission reserves a right to oversee the process by formally giving its opinion or even by modifying or revoking the proposal. Finally, in order to reach an agreement, by establishing a so-called tripartite dialogue (also called *trialogue* within the institutional triangle) direct meetings between representatives can also be organized.

In the first reading at the Parliament or at the Council there are no time limits to deal with the proposal. Parliament adopts its position by the majority of its members. The Council decides on its position by qualified majority voting (QMV).[96]

First, the Parliament should pronounce its opinion. The Parliament can adopt the proposal of the Commission or, more often, can introduce amendments. The legislative work, during every phase, is mostly textual. Instead of a general, political debate, according to the political position of the institution in play, changes and

[95] The fundamental principles of the application of the EU law –such as subsidiarity and proportionality – are discussed in Chapter 2 and 4.

[96] As discussed in Chapter 3, a common ground among the majority of the members of the Parliament and the Council will also influence the substance of the compromise.

amendments should be introduced to the text. Of course, by those amendments, the players can completely modify the Commission's initial proposal.

Second, the Council can give its own opinion whether by accepting the Parliament's position or by amending it. There is no difference between the scenarios, when it accepts the Parliament's position that adopted the proposal as submitted, or when it accepts a proposal amended by the Parliament. When the Parliament's position is accepted by the Council, the legislative act is adopted and the legislative process ends. When the Council adopts amendments to the Parliament's position, the text returns to the Parliament for a second reading, to be detailed below.

The first reading starts with the reception of the legislative proposal of the Commission by the Parliament and the Council and it ends with an adopted legislative act or with the Council's position, if the Council decides to amend the Parliament's position. Both institutions could give their opinion, but there is also a possibility to reach an agreement. Finally, we add that in order to speed up the procedure, the Council can also give its position before Parliament decides. Nonetheless, the first reading, as mentioned above, is mostly about clarifying positions inside the institutions and between them.

Second reading: the dialogue continues

If the first reading is particularly about the crystallisation of positions in the Parliament and in the Council as well as about communication of positions of the Parliament and of the Council, the second reading is more about approaching the diverging positions of these two institutions. Here there is a timeframe of three months to finish the second reading. When an institution does not pronounce its opinion before this deadline, it is considered (presumed) to have agreed to the position of the other.

Even at the first step of the second reading, we can see how the Council is lead to look for compromise by the end of the first reading. When it receives the Council's position, the Parliament can not only approve or amend but can also reject it. In this latter case, the procedure ends unsuccessfully. Consequently, the Council should pay attention not to enter into the second reading with a position completely unacceptable for the Parliament. (This logic is also driven by the necessity of looking for compromise.)

If the European Parliament approves the Council's position, the legislative act is adopted and the process is finished. Approvals by the Parliament are called *resolutions*, which accept the position sent by the Council by the end of the first reading. If the European Parliament amends the Council's position, the procedure continues before the Council. In any case, the Parliament decides by the simple majority of its present members.

After amendments by the Parliament on the Council's position, the Commission has the last word and gives its opinion, so with this, the institutional triangle comes to a full circle again in the legislative process. The opinion of the Commission about amendments decided by the Parliament is especially interesting, as it can change the majority that is required for the approval of amendments by the Council. Amendments with a positive opinion from the Commission can be approved with a qualified majority of the Council, but amendments for which the Commission has delivered a negative opinion, can only be approved unanimously.

In the second reading, as we mentioned above, it is about how to reach agreement within and between the two institutions, as the Council can only react to the amendments made by the Parliament. The Council can approve the amendments and then the act is adopted, or it may not approve all the amendments and in this case the procedure continues with the so-called conciliation phase and the third reading.

By the end of the second reading, whether we have a parliamentary resolution about the rejection or approval of the Council's position sent by the end of the first reading, in the first case, the procedure ends without an adopted legislative act, while in the second case without one. In other cases, we have the legislative act adopted due to a complete approval by the Council of all the amendments made by the Parliament in the second reading, or there is no document issued, which means that the Council did not approve all amendments and the Conciliation Committee should be convened.

Conciliation: making ends meet

It can happen that the second reading is not conclusive in a sense that it does not lead to an agreement between the Parliament and the Council, but it does not lead to a rejection of the proposal either. In this case, the Council's position adopted by the end of the first reading was amended by the Parliament in the second reading but the Council did not approve those amendments. This time, the ultimate tool to successfully find a compromise between the two institutions is the *Conciliation Committee*.

After the vote not approving all of the amendments of the Parliament adopted in the second reading, the two presidents –of the Parliament and of the Council – have six weeks to convene the Conciliation Committee, which then also has six weeks to agree on a text acceptable to both parties. If they do so, the procedure continues with a third reading, and if they do not, the procedure ends unsuccessfully.

The Conciliation Committee is a so-called *parity committee*, which means that it is composed of an equal number of members of the Parliament and Council representatives. When constituted, the presidents should pay attention to create a composition able to decide on an agreement acceptable for both institutions. It

means that usually those are elected to sit on this committee, who already have been working on the text, for example, by writing reports, etc.

The working method of the Committee is also textual. They look at the different positions and try to elaborate a textual version of the legislative act, which reflects the ideas and remarks of both institutions. It also means that there is no room for a general political debate, and the pressure is very high. After two readings, it is up to this Committee to decide whether or not the procedure will be successful.

If a jointly acceptable text is achieved, there is a formal vote thereon. Even if the representatives of the two institutions, Members of the Parliament and representatives of the Council are working closely in order to reach an agreement, the voting is done separately. Among the Members of the Parliament sitting on the Conciliation Committee an absolute majority is required, while the representatives of the Council vote by qualified majority, however, in some cases, unanimity can be required.

The only possible document adopted by the end of the conciliation phase is a joint text, a so-called *common project*. Once again, if such a text cannot be elaborated and adopted by the Committee by the end of the six weeks' deadline, the procedure ends without success. But in case of a common project successfully adopted, a third reading is necessary for the adoption of the legislative act as it can only be formally approved by the two institutions themselves.

Third reading: finalizing the compromise

After conciliation is concluded, the third reading is a formal step before a joint text adopted by the conciliation committee can become a legislative act. For that, both institutions should approve the joint text adopted by the Conciliation Committee. In the third reading, institutions can only approve or reject the text, amendments are no longer possible. The only agreement that can last and become a legislative act is the one reached by the Conciliation Committee.

For the approval of the texts by both institutions, the Parliament and the Council, there is a six weeks' time-limit. It means that both the Parliament and the Council must act within the six weeks after the date when the joint text was adopted by the Conciliation Committee. If one of the two institutions does not act within this time-limit, the procedure ends without adopted legislative act, unsuccessfully.

Based on the above, for the adoption of the legislative act according to the joint text, the Parliament and the Council should both approve the text. At the European Parliament, to do so, a simple majority of the voting members is required. At the Council, with some exceptions, a qualified majority should be met for the adoption of the joint text. As in the beginning of the second reading, the Parliament decides by a legislative resolution.

By the end of the third reading, whether we have a parliamentary resolution from the Parliament approving or rejecting the common project, or it failed to act within the six weeks, we can still have an approval, a rejection or no formal act from the Council within those six weeks. If the Council approves the joint text and so does the Parliament by the legislative resolution, then we have our legislative act adopted and the legislative process ends – this time successfully.

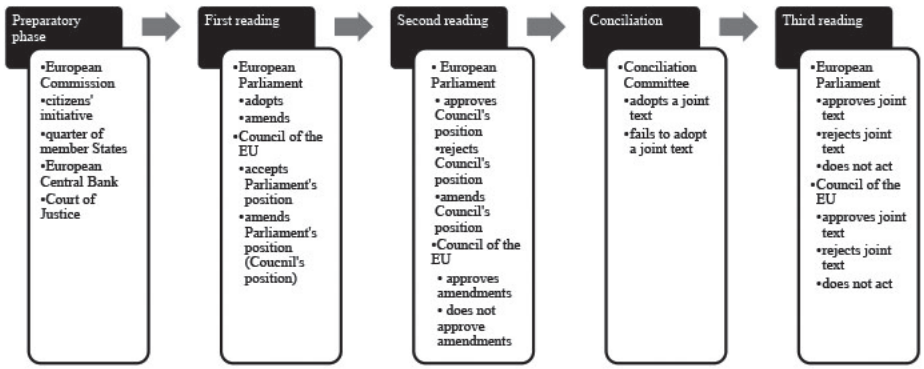
Publication of legal norms

Regardless the fact that the legislative act was adopted in the first, the second or the third reading, its publication is required so that it could enter into force. This last phase of the procedure is composed of two formal steps: first, the *signature* of the adopted legislative act by the Presidents of the Parliament and the Council, and second, the *publication* of the legislative act in the *Official Journal* (OJ) of the European Union.

The signatures of the Presidents are not only formal; they attest the originality of the text. The Presidents should approve by their signature that the text that they have signed is the one adopted by the institution that they preside.

The formal publication of the legislative acts – and every other secondary source of EU law – is also a very important last step that enables the act to enter into force. For the purpose of preserving legal security, it is important to let persons, especially those who are concerned by the newly adopted norm, to get access the content of the norm. Therefore, every decision-making process should end by the publication and dissemination of the decision.

Figure 5.1 The phases of the ordinary legislative process



Source: own edition

Summary

1. The main actors of the decision-making process are EU institutions and member states.
2. The EU, unlike its member states, does not have a general competence to adopt secondary norms; secondary law can only be adopted in the fields that the Treaties have defined for the action of the EU.
3. The result of the decision-making process is always a legal norm: either primary or secondary EU law, according to the subjects and the objects, which it binds and they can define the procedure to be applied.
4. The EU decision-making process is characterized by a complicated and particularly complex institutional and legal architecture, according to the Treaties; we can distinguish between almost fifty different procedures.
5. The Lisbon Treaty introduced a categorization for legislative procedures, making the distinction between ordinary and extraordinary legislative procedures for the adoption of secondary legal sources. The ordinary legislative procedure was created to permit to the Parliament to participate in decision-making with the same influence as the Council; it is in use in more than eighty different fields of EU policy-making.

6. The judicial system of the European Union (Szilvia Váradi)

Learning goals:

After reading this chapter, you will be able to:

1. Distinguish the judicial system of the EU from the system of other international organizations.
2. Distinguish the two distinct courts (Court of Justice and General Court) that exercise the judicial functions of the European Union.
3. Get a clear overview on the competences and the main procedures of the CJEU.
4. Understand the key function of the CJEU in the definition of the EU law, and understand its innovative case-law.

The Court of Justice of the European Union (CJEU) is the judicial institution of the European Union and of the European Atomic Energy Community (Euratom). The history of the Court of Justice reflects the history of the European Union, and it is closely linked to the European politics during the same period of time. To include a permanent court with a purely legal competence in a political construction such as European Coal and Steel Community (ECSC) founded in 1952, and later the broader European Economic Community (EEC) founded by the Treaty of Rome in 1957,was a natural result of centuries of institutional thinking in the West.[97]

Defining the Court

The founding of the Court of Justice connected with the idea of creating a new European spirit in politics, law and justice, supported by the great vision that conflicts in future Europe should not be caused by war or subject to political and economic struggles but should be solved by common institutions using legal means or negotiation in an atmosphere of collaboration between former enemies. The history of the Court of Justice and of the law developed by the Court combines elements well known in the European legal history with something ground-breaking, and in that way the Court has added a new dimension to our traditional concept of what a court is.

Every country has its own jurisdictional system, which usually regulated by legislation. A court is an institution that the government of the country sets up

[97] Tamm 2013, 10.

to settle disputes through a legal process. People come to court to resolve their disagreements. The court is a body of persons having judicial authority to hear and resolve disputes in civil, criminal, ecclesiastical, or military cases. The word court, which originally meant simply an enclosed place, also denotes the chamber, hall, building, or other place where judicial proceedings are held. The court is a place where trials and other legal cases happen; it decides what really happened and what should be done about it. Courts also provide a peaceful way to decide private disputes that people cannot resolve themselves.[98]

The tasks of the courts:

– Decision making – they have the power to make the final decision of disputes,
– Interpretation of law – advisory opinions for the lower courts.

The Court of Justice of the European Union has functions similar to those of a national supreme court or constitutional court. It is not a national court, nor an international court. It is a supranational court, which actually belongs to an abstract idea of Europe[99] and naturally to the European Union.

Institutional system of the Court of Justice of the European Union

The Court of Justice of the European Union consists of two courts, their seat is in Luxembourg[100].

Textbox: 6.1 Article 19 of the Treaty on European Union

1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.

Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law (…)

3. The Court of Justice of the European Union shall, in accordance with the Treaties:

(a) rule on actions brought by a Member State, an institution or a natural or legal person;

98 Encyclopaedia Britannica.

99 Tamm 2013, 14.

100 The official website of the Court of Justice of the European Union.

(b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions;
(c) rule in other cases provided for in the Treaties.

The European Court of Justice was created in 1952. It is formally the so-called *Court of Justice*. The Court of Justice is composed of 28 judges, one judge per member state (28 judges) and 11 Advocates General.

The judges and Advocates General are appointed by common accord of the governments of the member states after consultation of a panel responsible for giving an opinion on prospective candidates' suitability to perform the duties concerned. They are appointed for a term of office of six years, which is renewable. They are chosen from individuals whose independence is beyond doubt, and who possess the qualifications required for appointment to the highest judicial offices in their respective countries, or who have recognised competences. The judges must remain connected with member states' societies, mainly for functional reasons – EU law and national laws are deeply interconnected and the impact of the CJEU's jurisprudence depends on its relations with national courts. The judges must be independent from political parties or any other interests, in particular from those of their national governments. Doubts about the judge's independence weaken their authority and legitimacy.

The judges of the Court of Justice elect a President and a Vice-President from themselves for a renewable term of three years, so this choice is not controlled by the member states. The President directs the work of the Court and presides at hearings and deliberations of the full Court or the Grand Chamber. The Vice-President assists the President in the exercise of his duties and takes his place when necessary.

The Advocates General assist the Court. They are responsible for presenting a reasoned submission, a so-called *opinion* in the cases assigned to them, with complete impartiality and independence. She or he acts as a legal representative of the public interest, not as one of the parties. These opinions are adopted before the judgement to allow the Court sufficient time to consider them. They often provide a more detailed analysis of the context and the argument, which is considered in the judgement of the Court. However, they are not legally binding for the Court, although these advisory opinions are followed in about 80% of the cases.[101]The Advocates General have the same status and receive the same salary as the judges. There are eleven of them.[102]The terms of judges and Advocates General can be

[101] Chalmers et al. 2014, 159.

[102] Each of the larger member states has managed to have one of their nationals performing the functions of Advocates General. At present the following member states have permanent Advocates

renewed without any limitation; they usually hold office for two terms, which also helps in ensuring the continuity of the institution.[103]

The Registrar is the institution's secretary general, and manages its departments under the authority of the President of the Court. The judges supported by legal assistants.

An important change in the judicial architecture of the Court was the creation of the Court of First Instance as part of the Court of Justice of the European Communities in 1988. Since 2009, this court is called officially as the *General Court*. It was established in order to lighten the case load of the Court of Justice. The General Court is made up of at least one judge from each member state (45 judges were in office on 8 June 2017), and at the end of this reform process (by September 2019) the General Court will be composed of 56 judges(two from each EU member states).The judges are appointed by common accord of the governments of the member states after consultation of a panel responsible for giving an opinion on the candidates' suitability to perform the duties of a judge. Their term of office is six years, and it is renewable.

They appoint their President for a period of three years from themselves. The judges perform their duties in a totally impartial and independent manner.

Unlike the Court of Justice, the General Court does not have permanent Advocates General. The founding provisions, the so-called *Statute* of the Court of Justice of the European Union allows for the General Court to be assisted by Advocates General, but it has not been the case so far. Instead, each judge at the General Court is allowed to perform this function in difficult cases, which happens very rarely.[104]They appoint a Registrar for a term of office of six years. The General Court has its own Registry, but uses the administrative and linguistic services of the institution for its requirements.

A third court, the *Civil Service Tribunal*,[105] which was created in 2005, ceased to operate on 1 September 2016 after its jurisdiction was transferred to the General Court in the context of the reform of the European Union's judicial structure. 7 judges were elected. In December 2015, the Council together with the Parliament adopted a reform of the General Court in order to tackle the challenge of increasing caseload. It was decided to merge the Civil Service Tribunal with the General Court in September 2016.[106]

General: France, Germany, Italy, Poland, Spain and the United Kingdom. The remaining posts are rotate between the other member states.

[103] Saurugger – Terpan 2017, 49.

[104] Saurugger – Terpan 2017, 47.

[105] The tribunal is a body established to settle certain types of dispute; this is a special court or group of people who are officially chosen, especially by the government, to examine (legal) problems of a particular type:, e.g. an international war crimes tribunal, industrial tribunal, labour tribunal.

[106] Saurugger – Terpan 2017, 43-44.

Table 6.1 The changing structure of the Court of Justice

Dates	Structure
1952-58	Court of Justice of the European Coal and Steel Community
1958-88	Court of Justice of the European Communities
1988-2004	Court of Justice of the European Communities – including a Court of First Instance (attached to the Court of Justice)
2004-09	Court of Justice of the European Communities – including a Court of First Instance (attached to the Court of Justice) – including a Civil Service Tribunal (attached to the Court of First Instance)
2009-2016	Court of Justice of the European Union, composed of: – the Court of Justice – the General Court (formerly the Court of First Instance) – the Civil Service Tribunal
2016	Court of Justice of the European Union, composed of: - the Court of Justice - the General Court (formerly the Court of First Instance)

Source: own compilation

Another European court, the *Unified Patent Court*, should be created, provided that the 2013 agreement[107] ratified by 25 member states[108]. It will not be part of the CJEU and will be subject to the same obligations under EU law as any national courts in the member states, and will thus be obliged to make preliminary references. The Unified Patent Court (UPC) will be a court common to the Contracting member states and thus part of their judicial system. It will have exclusive competence in respect of European patents and European patents with unitary effect.[109]

[107] Agreement on a Unified Patent Court, Official Journal of the European Union 2013/C 175/01.

[108] Spain, Croatia and Poland are not contracting parties.

[109] The UPC will come into existence and start its operations immediately after the UPC Agreement enters into force. The Agreement will enter into force on the first day of the fourth month after the fulfilment of the following two requirements (whichever is the latest): 1. The deposit of the thirteenth instrument of ratification, including Germany, the United Kingdom and France (the three Contracting member states in which the highest number of European patents had effect in 2012). 2. The date of entry into force of the amendments to Regulation (EU) No 1215/2012 (Brussels I Regulation) concerning its relationship with the Agreement. The date for the entry into operation of the UPC has been not published, yet.

The role of the Court of Justice of the European Union

In the European Union the courts are extremely important. A feature of EU law is that there is a joint responsibility between national courts and the Union courts for the interpretation and maintenance of EU law. The Court of Justice has an exclusive responsibility to declare EU measures invalid and to provide authoritative explanations of EU law across Union, whilst the national courts have a monopoly over the adjudication of disputes.[110]

Those who drafted the founding provisions of the Court did well in not being too liberal in permitting individuals in general to bring cases directly before the Court. As a result private parties have no direct access to the Court of Justice, nor can they appeal decisions of the national courts to the Court of Justice. The role of the parties is confined to generating the dispute before the national court, which triggers the reference and submitting observations to the Court of Justice.[111] So the Court of Justice maintains a function as a supreme interpreter of what European Union law is.

The roles of the Court of Justice are the following:

- to ensure that "the law is observed" "in the interpretation and application" of the Treaties (efficient emergence of the European Law – the "effet utile" principle);
- to ensure uniform application and interpretation of EU law in every EU country in cooperation with the courts and tribunals of the member states;
- to review the legality of the acts of the institutions of the European Union;
- to ensure that the member states comply with obligations under the Treaties (so that they act in accordance with the EU rules);
- to interpret European Union law at the request of the national courts and tribunals;
- to provide judicial legal protection for private persons.

The procedure of the Courts in general

The Court of Justice does not have general jurisdictional power. The power connected to the procedures and every procedure has its own rules. *Parties* to the Courts can be: the member states; institutions of the EU (and body, office or agency of the European Union) and natural or legal persons.

For settling a dispute, Court of Justice sits as either a full court, or more commonly in *Chambers*, or in a *Grand Chamber* (with more judges) in accordance with the rules laid down in the Statute of the CJEU.

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[110] Chalmers et al. 2014, 164.

[111] Chalmers et al. 2014, 165.

A full court (28 judges) is used in particular cases prescribed by the Statute of the Court, these are the following: (1.) to dismiss the European ombudsman; (2.) compulsory retirement of a member of the European Commission or deprivation of his or her pension rights or other benefits; (3.) removal from office of a member of the Court of Auditors or suspension/withdrawal of his or her pension or other benefits; (4.) after hearing the Advocate-General, the Court of Justice may consider that the case brought before has exceptional importance. In practice, the application of a full court is extremely rare.[112]

The Grand Chamber of 15 judges shall be used upon request by a member state or an institution (which is a party to the proceedings), and in particularly complex or important cases. Other cases are heard by Chambers of three or five judges. (The judges should elect a President of the Chamber from themselves. The Presidents of the Chambers of five judges are elected for three years, and those of the Chambers of three judges for one year.)[113]

The General Court sits in Chambers of five or three judges or with a single judge. The Presidents of the Chambers of five judges are elected from their judges for a period of three years. The Grand Chamber (15 judges) justified by the legal complexity or importance of the case. Most cases are heard by Chambers of three judges.[114]

The cases are processed in two stages, written stage and oral stage (public hearing).

At the *written stage*, the parties give written statements to the Court and observations can also be submitted by national authorities, EU institutions and sometimes private individuals. Each case is assigned to one judge (the so-called *judge-rapporteur*) and one Advocate General. All of the documents are summarised by the judge-rapporteur and then discussed at the Court's general meeting, which decides: how many judges will deal with the case (3, 5, 15 judges or the full court, depending on the importance and complexity of the case), and whether a hearing (oral stage) needs to be held, or an official opinion from the Advocate General is necessary.[115]

In all proceedings, once the written procedure is closed, the parties may state within three weeks, whether and why they wish a *public hearing* to be held. After reading the proposal of the judge-rapporteur and hearing the views of the Advocate General, the Court decides whether any preparatory inquiries are needed, what type of formation the case should be assigned to, or a hearing should be held for oral argument, for which the President will fix the date.

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[112] Article 16, Statute of the Court of Justice of the European Union.

[113] Article 16, Statute of the Court of Justice of the European Union.

[114] Article 50.Statute of the Court of Justice of the European Union.

[115] Rules of Procedure of the Court of Justice of 25 September 2012.

Lawyers from both sides present their case to the judges and Advocate General, who may ask any questions from them. If the Court decided that an opinion of the Advocate General was necessary, it is given some weeks after the hearing. He or she analyses in detail the legal aspects of the case. The judges then deliberate and give their verdict (judgement).

The General Court procedure is similar, except that most cases are heard by three judges and there is no Advocate General.[116]

Court of Justice of the European Union as a multilingual institution

As each member state has its own language and specific legal system, the Court of Justice of the European Union is a multilingual institution. Its language arrangements have no equivalent in any other court in the world; since each of the official languages of the European Union can be the language of a case (in general other international courts use only two or three languages e.g. French and English).

The Court is required to observe the principle of multilingualism in full, because of the need to communicate with the parties in the language of the proceedings and to ensure that its case-law is disseminated throughout the member states. There are 24 official languages.[117]

In direct actions, the language used in the application (which may be one of the 24 official languages of the European Union) will, in principle, be the *language of the case*, that is to say the language in which the proceedings will be conducted. In appeals, the language of the case is that of the judgment or order of the General Court which is under appeal. With references for preliminary rulings, the language of the case is that of the national court which made the reference to the Court of Justice. Oral proceedings at hearings are interpreted simultaneously, as required, into various official languages of the European Union.[118]

English will remain an official language of the EU after the Brexit,[119] because it is used as a bridge between two other languages (e.g. Hungarian and Gaelic).[120] The French language was from the beginning and still is the working language of the Court in its internal deliberations.

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[116] Rules of Procedure of the Court of Justice of 25 September 2012.

[117] Art. 36-42. In Rules of Procedure of the Court of Justice of 25 September 2012.

[118] The official website of the Court of Justice of the European Union.

[119] It is a word that has become used as a shorthand way of saying the United Kingdom leaving the EU merging the words Britain and exit to get Brexit. A referendum was held on 23 June 2016, to decide whether the UK should leave or remain in the European Union. Leave won by 51.9% to 48.1%. The referendum turnout was 71.8%, with more than 30 million people voting.

[120] EU languages: Statement on behalf of the European Commission Representation in Ireland. 27 June 2016.

Judgement

The judges deliberate on the basis of a draft judgment drawn up by the ”judge-rapporteur”. Each judge of the formation concerned may propose changes. Decisions of the Court of Justice are taken by majority, and no record is made public of any dissenting opinions. Only the judges are present during the oral deliberations in the course of which the judgment is adopted. Judgments are pronounced in open court. Judgments and the Opinions of the Advocate General are available on the CURIA internet site[121] on the day they are delivered. They are, in most cases, subsequently published in the European Court Reports.[122]

There are no court fees for proceedings before the Court of Justice. On the other hand, the Court does not meet the fees and expenses of the lawyer entitled to practice before a court of a member state by whom the parties must be represented. A party, unable to meet all or part of the costs of the proceedings without having to instruct a lawyer, may apply for legal aid. The application must be accompanied by all necessary evidences establishing that party's lack of means.

Table 6.2 The Court in figures

Members	229 Members since 1952: – 141 Members, Court of Justice – 90 Members, General Court (since 1989) – 15 Members, Civil Service Tribunal (2005 - 2016)
	Court of Justice: – 28 Judges – 11 Advocates General – 1 Registrar
	General Court: – 44 Judges – 1 Registrar
Linguistic services	985 posts = 45 % of the institution's staff: – 602 lawyer linguists, 74 interpreters – 24 official languages of the Union – 552 language combinations – 1 160 000 pages translated + interpretation provided for 650 hearings and meetings annually

[121] The official website of the CIEU.

[122] Art. 86-92. In Rules of Procedure of the Court of Justice of 25 September 2012.

Staff	5 582 Civil Servants and temporary agents since 1952: – 2 168 posts = 1 304 women and 864 men (civil servants, temporary and contract agents) – 60 % women – average age: 47 years
Library	240 000 volumes: – 10 km of volumes on the shelves – 24 official languages of the Union and certain third country languages
Cases	33 764 judgments and orders delivered since 1952: – Court of Justice, roughly 20 244 – General Court, roughly 11 971 (since 1989) – Civil Service Tribunal, 1 549 (2005 - 2016)
	Court of Justice: – 692 Cases introduced – 704 Cases closed
	General Court: – 974 Cases introduced – 755 Cases closed
Visitors	426 384 visitors since 1968: – 675 groups of visitors/year – 15 349 people
Budget	EUR 399,34 Million for 2017

Source: Official website of the Curia. Figures as of 31/12/2016

Jurisdiction of the Court of Justice of the European Union

As we mentioned above, the CJEU does not have general jurisdictional power. The power connected to the procedures and every procedure has its own rules, so the main cases can be the following:

- interpreting the law (preliminary rulings)
- enforcing the law (infringement proceedings)
- annulling EU legal acts (actions for annulment)
- ensuring the EU takes action (actions for failure to act)
- sanctioning EU institutions (actions for damages)
- disputes between the EU and its staff
- actions relating to intellectual property
- arbitration

The Court of Justice deals mainly with requests for preliminary rulings and direct actions, which mainly seek:

- a declaration that a member states has failed to fulfil its obligations under EU law "actions for failure to fulfil obligations or infringement proceedings"
- annulment of an EU act "action for annulment"
- the lawfulness of the failure of the institutions, bodies, offices or agencies of the EU "actions for failure to act"
- appeals, against decisions made by the General Court, a remedy enabling the Court of Justice to set aside the decision of the General Court. (The decisions of the General Court may, within two months, be subject to an appeal before the Court of Justice, limited to points of law)
- requests for an opinion on the compatibility with the Treaties of an agreement which the European Union envisages concluding with a non-member State or an international organization. The request may be submitted by a member state or by a European institution (Parliament, Council or Commission).

The General Court deals mainly with direct actions:

- actions brought by natural or legal persons against acts of the institutions, bodies, offices or agencies of the EU (which are addressed to them or are of direct and individual concern to them) "action for annulment"
- actions brought by natural or legal persons against a failure to act on the part of the institutions, bodies, offices or agencies of the EU "actions for failure to act"
- actions brought by the member states against the Commission or the Council relating to acts adopted in the field of e.g. State aid, trade protection measures;
- actions seeking compensation for damage caused by the institutions or the bodies, offices or agencies of the European Union or their staff "actions for damages"
- disputes between the EU and its staff "cases of the civil service"
- actions relating to intellectual property
- actions based on contracts made by the European Union which expressly give jurisdiction to the General Court "arbitration"
- appeals, limited to points of law, against the decisions of the former Civil Service Tribunal.

Main types of the cases of the Court of Justice of the EU

Preliminary rulings

The national courts may, and sometimes must, refer to the Court of Justice and ask it to clarify a point concerning the interpretation of the EU law, so that they

may ascertain, for example, whether their national legislation complies with that law. A reference for a preliminary ruling may also seek the review of the validity of an act of the EU law.

The function of this proceeding is to ensure the effective and uniform application of European Union legislation and to prevent divergent interpretations. The national court stays (suspends) the proceedings before it and asks the Court of Justice to clarify a point concerning the interpretation of the EU law, which gives a ruling on the interpretation or the validity of the provisions in question. When the matter has been clarified by the decision of the Court of Justice, the national court is then in a position to settle the dispute before it.

The reply of the Court of Justice is not merely an opinion, but takes the form of a judgment or reasoned order. But it is not the Court of Justice, who decides the case itself. The national court to which it is addressed is, in deciding the dispute before it, bound by the interpretation given. The Court's judgment likewise binds other national courts before which the same problem is raised.

The importance of the preliminary rulings is that some of the main principles of EU law were defined by the Court in these cases. Although there is no strict rule of precedent, the practice of *jurisprudence constant* means that the Court usually relies on its own case law; the case law reversal is rare.

The so-called *Urgent Preliminary Ruling Procedure* ('PPU') enables the Court to give its rulings quickly in very urgent cases by reducing the time-limits as far as possible and giving such cases absolute priority. In cases calling for a response within a very short time (e.g. in relation to asylum, border control, child abduction and so forth), this PPU may be used.

Infringement proceedings

These actions enable the Court of Justice to determine whether a member state has fulfilled its obligations under the European Union law. The action may be brought by the Commission – as, in practice, is usually the case – or by a member state. In the first stage of the procedure, the Commission sends the member state a letter of formal notice inviting it to submit its observations within two months. This exchange of views is not normally publicised. Where the observations submitted by the member state fail to persuade the Commission to change its point of view or where the member state fails to respond to the request, the Commission may issue a reasoned opinion, allowing the member state an additional two-month period within which to comply. At this stage the Commission issues a press release informing the EU's citizens of the purpose of the procedure.

If that procedure does not result in the member state terminating the failure, the second stage could begin by the Commission; an action for infringement of EU law may be brought before the Court of Justice. If the Court finds that an obligation has not been fulfilled, the State must bring the failure to an end without delay. If,

after a further action is brought by the Commission, the Court of Justice finds that the member state concerned has not complied with its judgment, it may impose on it a fixed or periodic financial penalty. Finally, when the member state does not comply with the judgment finding that it has failed to fulfil its obligations, a second action, known as an action for *twofold failure* to fulfil obligations, may result in the Court imposing a financial penalty on it – pecuniary penalty.[123]

Actions for annulment

By an action for annulment, the applicant seeks the annulment of a measure (in particular a regulation, directive or decision) adopted by an institution, body, office or agency of the European Union. The Court of Justice has exclusive jurisdiction over actions brought by a member state against the European Parliament and/or against the Council (apart from Council measures in respect of State aid, dumping and implementing powers) or brought by one European Union institution against another.

The General Court has jurisdiction, at first instance, in all other actions of this type and particularly in actions brought by individuals (natural or legal persons; against an act addressed to them or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them).The result of this process is finding the invalidity of a measure, which is legally binding for all national courts of the member states. If the Court accepts the action, it declares the act to be void.[124]

Actions for failure to act

These actions enable the lawfulness of the failure of the institutions, bodies, offices or agencies of the European Union to act to be reviewed. This allows parties to challenge omissions by EU institutions where these are under a duty to act. Such an action may be brought only after the institution concerned has been called on to act. Where the failure to act is held to be unlawful, it is for the institution concerned to put an end to the failure by appropriate measures within two months.[125]

The jurisdiction to hear actions for failure to act is shared between the Court of Justice and the General Court according to the same criteria as for actions for annulment. E.g. the Commission is not under duty to institute infringement

[123] E.g. Case C584/14 European Commission v. Hellenic Republic: The judgement of the Court ordered the Hellenic Republic to pay the European Commission, into the 'European Union own resources' account, a penalty payment of EUR 30 000 for each day of delay in adopting the measures necessary to comply with the judgment of 10 September 2009 in Commission v Greece and ordered the Hellenic Republic to pay the European Commission a lump sum of EUR 10 million (lump sum – average amount), ECLI:EU:C:2016:636.

[124] Chalmers et al. 2014, 464.

[125] Chalmers et al. 2014, 424.

proceedings against a member state which violates the EU law. But, according to the case law of the General Court, is under an obligation to act upon a complaint regarding the violation of competition rules.

Actions for damages

The action for damages is one of the actions, which may be brought before the Court of Justice of the European Union. It enables individuals or member states who have suffered damage to obtain compensation on behalf of the institution or the bodies, offices or agencies of the European Union, or their staff that caused it.[126] So the purpose of the action for damages to enable compensation to be obtained for damage for which the Union is responsible. There are two types of actions:

- actions implicating the contractual liability of the EU where the latter is party to a contract;
- actions implicating the non-contractual liability of the EU due to damage caused by Union bodies or servants in the performance of their duties.

Contractual liability of the EU: the bodies and agents of the EU are able to conclude contracts, which give rise to liability on the part of the EU. However, the CJEU does not always have jurisdiction in disputes arising from these contracts. An action for damages can be brought before the CJEU, only if an arbitration clause provides so. In other words, the contract, to which the Union is a contractual party, must contain a clause providing the jurisdiction of the CJEU in the event of a dispute. In the absence of such a clause, the national courts will have jurisdiction in disputes arising from the contract.

Non-contractual liability of the EU: the EU must compensate for damage for which it is responsible. Such damage may, for example, be caused by a servant of the EU in the performance of their duties. It may also result from the legislative activities of the European institutions, such as the adoption of a regulation. The non-contractual liability of the European Union complies with uniform rules which have been developed by the case-law of the CJEU. Actions may be brought by individuals or member states who have suffered damage and wish to obtain compensation. The deadline for acting is five years from the date on which the damage occurred. The Court of Justice shall recognise the liability of the EU when three conditions are met:

- the claimant has suffered damage;
- the institutions of the EU or their agents have acted illegally under EU law;
- there is a direct causal link between the damage suffered by the claimant and the illegal act of the institutions of the EU or their agents.

[126] Chalmers et al. 2014, 989.

An action for damages before the Court of Justice of the EU may be brought only where the liability of the Union is implicated. Individuals may also render member states liable in the case of damage caused by EU law being poorly applied. However, actions taken against member states must be brought before the national courts.

The General Court shall have jurisdiction to hear and determine at first instance actions brought by individuals. The Court of Justice shall have jurisdiction to hear and determine actions brought by the member states. It may also hear appeals brought against judgments given by the General Court at first instance. In the latter case, the Court of Justice shall rule only on questions of law and shall not re-examine the facts. The Court of Justice and the General Court may also rule on actions implicating the contractual liability of the Union. These actions are brought in accordance with the conditions provided for by the contracts to which the Union is a party.[127]

Actions brought by officials

This process covers the disputes between the EU and its staff. The Civil Service Tribunal had jurisdiction to hear and determine at first instance European civil service disputes, which represented around 150 cases a year for a staff of approximately 40 000 individuals in all the institutions, bodies, offices and agencies of the European Union. Since 1 September 2016, the General Court has the jurisdiction to decide these cases. This kind of disputes concerned not only issues relating to employment relations as such (career development, recruitment, disciplinary measures, etc.), but also the rules on social security benefits (sickness, retirement, accidents at work, family allowances, etc.). It also had jurisdiction over disputes concerning particular staff, notably the staff of the Eurojust,[128] Europol,[129] the European Central Bank and the European External Action Service.[130]

Appeals

Appeals (on points of law only) may be brought before the Court of Justice against judgments and orders of the General Court. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings permits so, the Court of Justice may itself decide the case. Otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.[131]

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[127] Craig – De Búrca 2015, 263.

[128] European Union's Judicial Cooperation Unit.

[129] European Union Agency for Law Enforcement Cooperation.

[130] Kapsis 2013, 176-178.

[131] Chalmers et al. 2014, 161-162.

The Court of Justice in the legal order of the European Union

For the purpose of European construction, the member states (now 28) concluded treaties establishing first the European Communities, and then the European Union, with institutions which adopt legal rules in specific areas.

Through its case-law, the Court of Justice has identified an obligation on administrations and national courts to apply EU law in full within their sphere of competence and to protect the rights conferred on citizens by that law (direct application of EU law), and to disapply any conflicting national provision, whether prior or subsequent to the EU provision (primacy of EU law over national law).

The Court has also recognised the principle of the liability of member states for breaching the EU law which, first, plays an important part in consolidating the protection of the rights conferred on individuals by EU provisions and, secondly, may contribute to more diligent application of EU provisions by member states. Infringements committed by member states are thus likely to give rise to obligations to pay compensation, which may, in some cases, have serious repercussions on their public funds. Moreover, any breach of the EU law by a member state may be brought before the Court. When a judgment finding such an infringement is not complied with, the Court can order payment of a periodic penalty and/or a fixed sum. However, if measures transposing a directive are not notified to the Commission, it may propose that the Court impose a pecuniary penalty on a member state, once the initial judgment establishing a failure to fulfil obligations has been delivered.[132]

The development of its case-law illustrates the Court's contribution to creating a legal environment for citizens by protecting the rights, which the European Union legislation confers on them in various areas of their daily life.

Fundamental principles established by case-law

In its case-law (starting with *Van Gend& Loos*[133] in 1963), the Court introduced the principle of the *direct effect* of Community law in the member states, which now enables European citizens to rely directly on rules of European Union law before their national courts.

In 1964, the *Costa*[134] judgment established the *primacy* of Community law over domestic law, basing it on the specific nature of the Community legal order, which is to be uniformly applied in all the member states.

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[132] Official website of the CJEU.

[133] Judgement of the Court, NV Algemene Transport- en Expeditie Onderneming van Gend& Loos v. Netherlands Inland Revenue Administration, Case 26-62, 5 February 1963. ECLI:EU:C:1963:1.

[134] Judgment of the Court, Flaminio Costa v E.N.E.L., Case 6-64, 15 July 1964. ECLI:EU:C:1964:66.

In 1991, in *Francovich*[135] judgement the Court developed another fundamental concept, the *liability* of a member state to individuals for damage caused to them by a breach of Community law by that State. Since 1991, European citizens have therefore been able to bring an action for damages against a State which infringes a Community rule.

Of the thousands of judgments given by the Court, the majority, particularly preliminary rulings, clearly *have important consequences for the daily life of European Union citizens*.

By holding that respect for *fundamental rights* is an integral part of the general principles of law it safeguards, the Court has made a considerable contribution to improving the standards of protection of those rights. In this respect, it looks to the constitutional traditions common to the member states and to international treaties on the protection of human rights, on which the member states have collaborated or which they have signed, in particular the European Convention on Human Rights. Following the entry into force of the Treaty of Lisbon, the Court will be able to apply and interpret the Charter of Fundamental Rights of the European Union of 7 December 2000, which is recognised under the Treaty of Lisbon as having the same legal value as the Treaties.[136]

Summary

1. The Court of Justice of the EU is a judicial body composed of national judges appointed by the common accord of member state governments.
2. The CJEU interprets EU law to make sure it is applied in the same way in all EU countries, and is entitled – among others – to settle legal disputes between national governments and EU institutions.
3. CJEU has no general power to settle any disputes in the EU, despite there are exact case types with regulated parties and well defined procedures.
4. Individuals (natural and legal persons) can take action against action or inaction by an EU institution or its staff in the Court, in one of two ways: indirectly through national courts (which may decide to refer the case to the Court of Justice) or directly before the General Court – if a decision by an EU institution has affected her/him directly and individually.

[135] Judgment of the Court, Andrea Francovich and Danila Bonifaci and others v Italian Republic, Joined cases C-6/90 and C-9/90, 19 November 1991. ECLI:EU:C:1991:428.

[136] More information on fundamental rights and the Charter of Fundamental Rights of the European Union can be found in Chapter 2 and 4.

7. EU citizenship (Imola Schiffner)

Learning goals

After reading this chapter, you will be able to:

1. Determine the meaning of the European Union citizenship.
2. Identify the main characteristics of EU citizenship.
3. Identify the main EU citizenship rights and determine their core elements.

The introduction of a European form of citizenship with precisely defined rights and duties was considered as long ago as in the 1960s. The preparatory works began in the mid-1970s, and by 1993 the EU citizenship was introduced with the *Treaty on European Union* (*TEU*), adopted in Maastricht in 1992.

The main goal of the EU is to strengthen the protection of the rights and interests of the nationals of its member states through the introduction of a citizenship of the Union according to the TEU. *Article 20* of the TEU declares EU citizenship (Textbox 7.1) and *Articles 22 to 24* of the TEU contain the main provisions on EU citizenship.

Like national citizenship, EU citizenship refers to a relationship between the citizen and the European Union which is defined by rights, duties and political participation.

Textbox 7.1 Article 20 of the Treaty on European Union

> Every person holding the nationality of a member state shall be a citizen of the Union.
>
> Citizenship of the Union shall be additional to and not replace national citizenship.

Any person who holds the nationality of an EU country is *automatically* also an EU citizen.

With the creating of the EU citizenship the aim was to increase people's sense of identification with the EU and to foster European public opinion, a European political consciousness and a sense of European *identity*. This is intended to bridge the gap between the increasing impact that EU action is having on EU citizens, and the fact that the enjoyment of rights, the fulfilment of duties and participation in democratic processes.

Citizenship of the Union is not a classical nationality. *Nationality* and *citizenship* are two terms that are sometimes used interchangeably. But they differ in many aspects.

First of all nationality can be applied to the country where an individual was born and means a legal relationship between the state and the individual. Nationality is a part of the state sovereignty; it is the right of each state to determine who its nationals are. Nationality affords the state jurisdiction over the person and affords the person the protection of the state. *Citizenship is a legal status*, which means that an individual is a part of a community with rights and duties.

Characteristic of the EU citizenship

The cornerstone of the citizenship is the so called *principle of non-discrimination*. The importance of this principle is recognised in the Treaty of Lisbon (*Treaty on the Functioning of the European Union, TFEU*), where the new Part Two headed "Non-Discrimination and Citizenship of the Union" (Textbox 7.2). The obligation of equal treatment is extended between the nationals of the other member states, and the citizens of the Union and their family members as well.

Textbox 7.2 Article 18 of the Treaty on the Functioning of the European Union

> Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

EU citizenship is a so-called *fundamental status*. The European Court of Justice stated in his decision of *Grzelczyk* that "Union citizenship is destined to be the fundamental status of nationals of the member states, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for."[137]

This declaration makes it clear that EU citizenship moved away from a political declaration, and now is a *legal status* with *fundamental rights*, which is applicable not only in relation of the European institutions, but the member states, too.

EU citizenship is *derivative* of member state nationality: EU citizenship flows from national citizenship, because it is based on member state nationality and *EU citizenship cannot exist without member state nationality*. Citizenship of the Union is complementary, but does not replace the national citizenship itself.

As mentioned above, nationality is defined according to the national laws of the state. It is for each EU country to lay down the conditions for the acquisition and loss of nationality of that country.

[137] Judgment of the Court of 20 September 2001. Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve. ECLI:EU:C:2001:458.

So, EU citizenship is *additional* to and does not replace national citizenship. It means there is no autonomous EU citizenship. Nationality of a member state not only provides access to enjoyment of the rights conferred by EU law; it also makes someone a citizen of the EU. European Union ensures *only rights* for citizens, so a national of the member state has his/her own national rights and plus rights from the EU citizenship.

EU citizenship is also *subsidiary*: the treaty regulation of the citizenship is so-called background regulation, used only at lack of other special regulation in the Treaty.

EU citizens' rights and freedoms

EU law creates a number of *individual rights directly enforceable* in the courts, both *horizontally* (between individuals) and *vertically* (between the individual and the member state).

With the exception of electoral rights, the substance of EU citizenship achieved to date is to a considerable extent simply a *systematisation of existing rights* (particularly as regards freedom of movement, the right of residence and the right of petition), which are now enshrined in primary law on the basis of a political idea (Textbox 7.3).

Textbox 7.3 Article 20 (2) of the Treaty on the Functioning of the European Union

Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:

(a) the right to move and reside freely within the territory of the member states;
(b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their member state of residence, under the same conditions as nationals of that State;
(c) the right to enjoy, in the territory of a third country in which the member state of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any member state on the same conditions as the nationals of that State;
(d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

The Treaty on the Functioning of the European Union entails the right:
- to *non-discrimination* on the basis of nationality when the Treaty applies
- to *move and reside* freely within the EU
- to *vote* for and stand as a candidate in European Parliament and municipal elections
- to be *protected* by the diplomatic and consular authorities of any other EU country
- to *petition* the European Parliament and complain to the European Ombudsman
- to *contact and receive a response* from any EU institution in one of the EU's official languages
- to *access* European Parliament, European Commission and Council documents under certain conditions.

Political rights of the EU citizens

The citizens may vote in European elections. They have a right to vote and stand in elections to the European Parliament, in any EU member state (Article 22 TFEU).

EU citizens can vote in municipal elections. They have a right to vote and stand in local elections in a member state other than their own, under the same conditions as the nationals of that state (Article 22 TFEU).

It is also a right to access European government documents. It creates a right to access to European Parliament, Council, and Commission documents (Article 15 TFEU).

The EU citizens have a right to petition the European Parliament by sending a written request. They also can refer to the European Ombudsman, in order to bring to his attention any cases of poor administration by the EU institutions and bodies, with the exception of the legal bodies (Article 24 TFEU).

The citizen's language rights give the right to apply to the EU institutions in one of the official languages and to receive a reply in that same language (Article 24 TFEU).

Right of free movement of persons

EU citizens have the right to move freely and live in another EU country, subject to any conditions set out in the EU's treaties. This free movement of people is one of the EU's *fundamental principles*.

Right to free movement and residence means a right of free movement and residence throughout the EU and the right to work in any position (including national civil services with the exception of those posts in the public sector that involve the exercise of powers conferred by public law and the safeguard of general interests of the member state or local authorities (Article 21 TFEU) for which however there is no one single definition);

The free movement right is regulated in details in the Directive 2004/38 (so called citizen's Directive). This Directive lays down the conditions for the right of free movement and residence (both temporary and permanent) for EU citizens and their family members. It sets out also the limits to those rights on grounds of public policy, public security or public health and clarifies the status of people who are employed, self-employed, students or not working for payment.

The most important provisions relating of the free movement of persons

EU citizens with a valid identity card or passport may enter another EU country, as may their family members, whether EU citizens or not, without requiring an exit or entry visa. EU citizens could live in another EU country for *up to 3 months* without any conditions or formalities.

EU citizens may live in another EU country for *longer than 3 months* subject to certain conditions, depending on their status in the host country. Those who are employed or self-employed do not need to meet any other conditions. Students and other people not working for payment, such as those in retirement, must have sufficient resources for themselves and their family, so as not to be a burden on the host country's social assistance system, and comprehensive sickness insurance cover. They have to register with the relevant authorities if living in the country longer than 3 months. Their family members, if not EU nationals, required to obtain a residence card valid for 5 years.

The EU citizens are entitled to *permanent residence* if they have lived legally in another EU member state for a continuous period of 5 years. This also applies to family members.

The citizens have the right to be *treated on an equal footing* with nationals of the host country. However, host authorities are not obliged to grant benefits to EU citizens not working for payment during the first 3 months of their stay. The family members may, under certain conditions, retain the right to live in the country concerned if the EU citizen dies or leaves the country.

Rights abroad; consular protection

EU citizens have a right to protection by the diplomatic or consular authorities of other member states in a non-EU member state, if there are no diplomatic or consular authorities from the citizen's own state. This is due to the fact that not all member states maintain embassies in every country in the world (14 countries have only one embassy from the EU member states).

When an EU citizen seeks such help, he/she must produce a passport or identity card as proof of nationality. If these documents have been stolen or lost, the embassy may accept any other proof.

Diplomatic and consular representations giving protection have to treat a person seeking help as if he/she were a national of the EU country they represent.

The protection offered by embassies/consulates of other EU countries includes:

– assistance in cases of death;
– assistance in cases of serious accident or illness;
– assistance in cases of arrest or detention;
– assistance to victims of violent crime;
– the relief and repatriation of distressed Union citizens.

Summary

1. EU citizenship means that all nationals of member states are citizens of the European Union.
2. Union citizenship is a fundamental status with the help the non-discrimination principle.
3. EU citizenship contains political rights not only for EU citizens, but for their family members as well.
4. The cornerstone of the EU citizenship is the free movement and residence right of persons.

8. The rules governing the internal market (Anita Pelle)

Learning goals

After reading this chapter you will be able to:

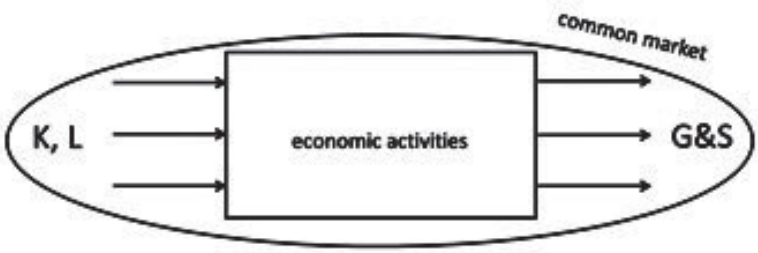
1. Understand how the free movement of goods, persons, services and capital has been shaping the evolution of the internal market throughout the decades of European integration.
2. Navigate among the rules governing the four freedoms.
3. Interpret the use of the main tools of the internal market that make it function smoothly in its every-day operation.

In this chapter, we first review the historical evolution of the internal market over the decades of European integration. Then we give a first insight into the regulation of the four freedoms considered as the basic building blocks of the EU. Last but not least, we introduce the main tools of the internal market: the SOLVIT, the CCC and the TARIC, the Single Market Scoreboard, and the EU Pilot initiative.

Historical evolution of the internal market

What we today know as the European Union was launched as a common market in 1957, of which the forerunner was the coal and steel cooperation as of 1951. The *common market* is a level of economic integration where not only the *outputs of production* (i.e. goods and services) but also its *inputs* (i.e. labour and capital) can move freely (Figure 8.1). We call these the four freedoms.

Figure 8.1 The common market

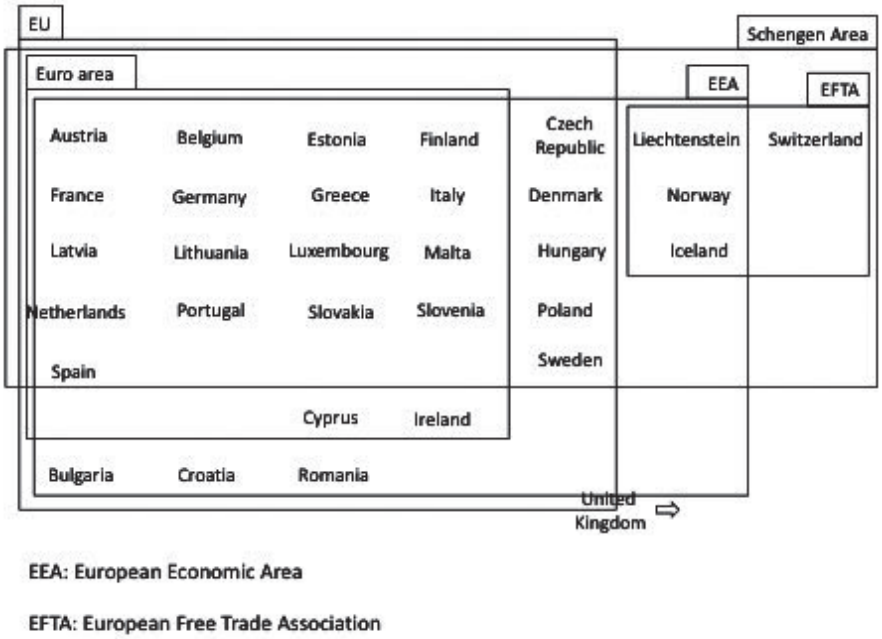


Source: own edition

Then, in the 1980s, with the Delors Commission entering office, the *single market agenda* was launched which was strongly connected to the single currency project. Accordingly, on 1 January 1993, the single market was established and then, *in 1999, the euro was introduced* as the common currency of at that time 11 member states. In 2017 the Eurozone consists of 19 members.

Within the internal market context, the *Schengen Area* is perhaps the best known achievement. It covers border control issues, but the Schengen Visa is also part of it. Interestingly, the Schengen Area also contains non-EU members but EFTA-members as well as Iceland, Norway, Switzerland and Liechtenstein have joined the Schengen Agreement. Also, in 1994, the *European Economic Area* (*EEA*) agreement was concluded between the EU and Liechtenstein, Norway and Iceland. Based on this agreement, these latter three countries also adhere to the internal market rules of the EU, including the four freedoms (Figure 8.2).

Figure 8.2 Europe in 2017



Source: EB 2017, p.7

The common market of the EEC

As mentioned in the introductory chapters of this book, the European Economic Community (EEC) was established by the Treaty of Rome signed on 25 March 1957 by the six founding countries. The already at-that-time targeted level of

economic integration was the common market. In particular, Article 1 of the Treaty of Rome declares the establishment of the EEC, Article 2 explains what objectives the common market is to serve, and Article 3 lists the tasks and policies to be launched accordingly (Textbox 8.1).

Textbox 8.1: Articles 1-3 of the Treaty of Rome establishing the European Economic Community

ARTICLE 1

By this Treaty, the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN ECONOMIC COMMUNITY.

ARTICLE 2

The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of member states, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.

ARTICLE 3

For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein

(a) the elimination, as between member states, of customs duties and of quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect;
(b) the establishment of a common customs tariff and of a common commercial policy towards third countries;
(c) the abolition, as between member states, of obstacles to freedom of movement for persons, services and capital;
(d) the adoption of a common policy in the sphere of agriculture;
(e) the adoption of a common policy in the sphere of transport;
(f) the institution of a system ensuring that competition in the common market is not distorted;
(g) the application of procedures by which the economic policies of member states can he co-ordinated and disequilibria in their balances of payments remedied;
(h) the approximation of the laws of member states to the extent required for the proper functioning of the common market;
(i) the creation of a European Social Fund in order to improve employment opportunities for workers and to contribute to the raising of their standard of living;
(j) the establishment of a European Investment Bank to facilitate the economic expansion of the Community by opening up fresh resources;

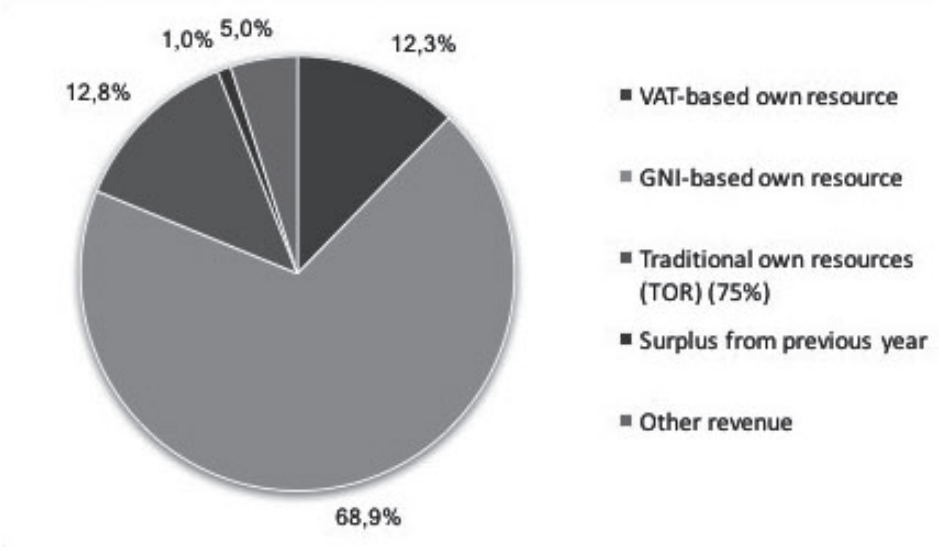
(k) the association of the overseas countries and territories in order to increase trade and to promote jointly economic and social development.

Then, under Part Two (Foundations of the Community), the four freedoms are discussed in detail:

– Title I: Free movement of goods
– Title III: Free movement of persons, services and capital

The free movement of goods was to be realised in the form of a *customs union*. In a customs union, goods imported from third countries into anywhere within the customs union are subject to a *common customs tariff*. The European Union's customs union has one specificity: all customs are paid into the common budget of the EU, only a 25% is held back by the country where the customs procedure is taking place. This way, customs are historically the oldest source of revenue for common budget. Nevertheless, by 2015, customs revenues (referred to in the EU budget as *Traditional own resources, TOR*) have been reduced down to 12.8% of the common budget and the so-called GNI-based revenues that the member states pay after the size of their economies provide the vast majority of the revenue side (Figure 8.3).

Figure 8.3 Revenues of the EU budget, 2015



Source: http://ec.europa.eu/budget/figures/interactive/index_en.cfm

There are several reasons for this proportionate reduction. First and foremost, global customs levels have largely decreased since the 1950s. Second, many of the main trading partners of the original EEC have gradually become members of the Community.

Monetary developments in parallel with common market developments

With the launch of the common market, the intra-EEC trade in goods took a great momentum. In the first 10-12 years of European integration, internal trade doubled every three years. Obviously, this called for *monetary cooperation* among the participating member states as traders needed the convertibility and smooth operation of the monetary aspects of trade. Cooperation in the monetary field started in 1964. The first, informal institution of such cooperation was the *Committee of the Governors*[138] that can be regarded as the forerunner to the current Governing Board of the European Central Bank. The Governors' meetings were held at the Bank for International Settlements (BIS) in Basel.

Then, the first idea of a monetary union was expressed officially in 1969, at The Hague Summit. Based on the decision made there, a plan was drafted in 1970 by a Committee led by Pierre Werner. The *Werner Plan* imagined the introduction of the single currency in three stages and in a roughly 10-year-long time frame.

Due to the oil price shocks of 1971 and 1973 and the long-continued recession that followed them across the EEC all across the 1970s, the Werner Plan was not realised to the full. Nevertheless, some partial objectives were successfully reached:

- In 1972, the so-called '*snake in the tunnel*' was introduced. The expression covers the gradual narrowing of the exchange rate bands among the EEC currencies.
- In 1973, the *European Monetary Cooperation Fund* (*EMCF*) was established in order to guarantee the smooth operation of the exchange rate system.
- Then, in 1979, the *European Monetary System* (*EMS*) was launched. It consisted of the EMCF, a newly introduced basked currency, the *European Currency Unit* (*ECU*), and an ECU-centred *exchange rate mechanism* (*ERM*).

With the launch of the ESM, the road to the successful introduction of a common currency was paved.

[138] Full name: Committee of the Governors of the Central Banks of the member states of the European Economic Community.

The single market and the single currency agendas

For Jacques Delors (President of European Commission 1985-1995), single market and single currency as the two projects of European integration were strongly connected: he was convinced that a completed single market is using a single currency and not many different currencies. During the Delors presidency, the major steps towards the realisation of these ideas were taken.

In 1986, as the first amendment to the Treaty of Rome, the *Single European Act* was adopted. Its major aim was to remove the remaining barriers to the completion of the single market. These barriers were found to be of three types:

- *Physical barriers*: internal border controls for goods and persons were hindering the free movement so the plan was to abolish these.
- *Technical barriers*: the lack of harmonised European rules regarding the health, safety and other requirement towards products to be put in circulation in the single market were also sensed as an obstacle to be eliminates.
- *Financial and administrative type barriers*: the conditions of setting up a business in the various member states were to be harmonised, just as some degree of harmonisation in taxation was envisaged.

The Single European Market was realised almost to the full by 31 December 1992 so, from 1 January 1993, '*Europe without borders*' was established.

In parallel, the Delors Commission set up a Committee, also chaired by Jacques Delors in order to draw up the plans for the introduction of the single currency. The so-called *Delors Plan* was introduced in 1989 and imagined the establishing of the *monetary union* by 1999. Then, in the 1991 Maastricht *Treaty on European Union* signed in 1992 and entering into force in 1993 elevated this commitment to the level of primary EU law. The *convergence period* started in 1994 and *the single currency, the euro* was introduced in 11 of the at that time 15 member states.

The Schengen Agreement

Schengen is a small village in Luxembourg, on its triple border with German and France. The first, original agreement on the abolition of internal border controls was signed there on 14 June 1985. A second one amending the first one was signed in 1990. The original signatories were: Belgium, France, West Germany, the Netherlands, and Luxembourg. Thus, it was a regional cooperation at first.

The *Schengen Agreement* became part of EU law by the *Treaty of Amsterdam* in 1997. The Schengen Area has undergone gradual expansion throughout the years (Table 8.1) and is expected to enlarge further (Table 8.2).

*Table 8.1 Members of the Schengen Area**

Country	Signature of the Schengen Agreement	Date of first implementation
Belgium	14 June 1985	26 March 1995
France		
Germany (before 1990: West Germany)		
Luxembourg		
Netherlands		
Italy	27 November 1990	26 October 1997
Portugal	25 June 1991	26 March 1995
Spain		
Greece	6 November 1992	1 January 2000
Denmark	19 December 1996	25 March 2001
Finland		
Iceland		
Norway		
Sweden		
Czech Republic	16 April 2003	21 December 2007
Estonia		
Hungary		
Latvia		
Lithuania		
Malta		
Poland		
Slovakia		
Slovenia		
Switzerland	26 October 2004	12 December 2008
Liechtenstein	28 February 2008	19 December 2011

**Monaco, San Marino and the Vatican City are not official members of the Schengen Area but have open borders with the area.*

Source: Schengen Visa Info website[139]

[139] www.schengenvisainfo.com

The two guiding principles of the Schengen Agreement are the following: firstly, there are *no internal border controls* (so free border-crossing along the internal borders) while, at the same time, *external borders are strengthened*. The two principles together ensure the smooth operation of the Schengen Area: entry into area is strictly controlled and then, once inside, internal movement is literally borderless.

*Table 8.2 Prospective members of the Schengen Area**

Country	Signature of the Schengen Agreement	Obstacle to accession
Cyprus	16 April 2003	The Cyprus dispute
Bulgaria	25 April 2005	Lack of consensus by the Council of the European Union for Justice and Home Affairs that accession criteria have been met
Romania		
Croatia	9 December 2011	European migrant crisis

**The following countries and territories have by-law opt-out rights from the obligation of joining the Schengen Area: the United Kingdom and Ireland (both of which maintain a Common Travel Area with the British Crown Dependencies of Jersey, Guernsey and the Isle of Man); and Gibraltar (which is part of UK but outside both the Schengen Area and the Common Travel Area).*

Source: Schengen Visa Info website

For citizens from countries that are not members of the Schengen Area, it is necessary to obtain a *Schengen Visa* in order to be able to enter one or more countries of the Schengen Area. As there are no internal border controls within the Schengen Area, the Schengen Visa, once obtained and as long as it is valid, enables its holders to travel across the Schengen Area freely.

The four freedoms

The four freedoms were declared in 1957 in the Treaty of Rome as one of the means to be realised in order to achieve the goals set forth by the signatory parties. Nevertheless, the four freedoms have undergone substantial development throughout the decades of European integration. In the following we shortly review these developments.

Free movement of goods

The free movement of goods is ensured from two sides: inside, the circulation of goods cannot be impeded. For goods coming from outside the EU (i.e. imports from third countries), there are common customs tariffs and common customs procedures. The *customs union* was achieved by 1 July 1968 and since then, upon each enlargement to the EEC/EU, the acceding country became a full member of the customs union upon accession.

In the first decades of European integration, *customs procedures* were not yet harmonised. A breakthrough in this respect came about with the launch of the single market in 1993 when the *Single Administrative Document* (*SAD*) was introduced. Since then, all importation into the EU is documented in this harmonised form.

As regards the circulation of goods within the common market, the following guiding principles apply:

- *Mutual recognition*: If any good is accepted as apt for intra-EU circulation by the public authorities of any member state, the authorities of all other member states and the EU respect that on a mutual basis.
- *Harmonisation*: The principle of mutual recognition has fostered the harmonisation of the national rules on traded goods. Over time, the respective legal and technical requirements have become more and more similar to one another.
- *Common standards*: In fact, since 1984, EEC/EU level rules have been developed regarding the health, safety and other (e.g. environmental, work safety) requirements that products intended to be traded within the EEC/EU should meet. The most commonly known European standard in relation to products is the CE marking (Figure 8.4)

In order to ensure the smooth operation of the internal market in terms of mutual recognition, harmonisation of rules and the setting-up of common standards, the *European Committee for Standardisation* (*CEN*)[140] was established. The CEN brings together the national standardisation bodies of the single market.[141]

[140] http://www.cen.eu/cen/pages/default.aspx

[141] As mentioned above, the EEA member countries are also applying the single market rules and, as regards the free movement of goods, the candidate countries – currently Macedonia, Serbia and Turkey – do so as well. Accordingly, the CEN consists of the respective organizations from 34 European countries applying the single market legislation. Members of the CEN are listed on its website: https://standards.cen.eu/dyn/www/f?p=CENWEB:5

Figure 8.4 The CE marking

Source: The European Single Market website[142]

We can state that, by the 21st century, the free movement of goods is almost natural across the EU. Nevertheless, as new products are constantly developed (e.g. smart phones, tablets and other smart mobile devices as plausible recent examples), the CEN and its member organizations are constantly working to keep the rules up-to-date.

Free movement of persons

It is perhaps the free movement of persons that has undergone the most changes throughout the decades. In particular, the category has gradually been extended. According to the Treaty of Rome, the free movement of *employees* was ensured. As a next step, *employees' families* were also allowed to move freely across the member states. Later, with the broadening of the interpretation of employment in another member state, *people seeking employment* and *people after termination of employment* in another member states were provided rights to stay in the other country for a certain period of time.

With integration proceeding further, the concept started to include higher education students[143] and old-age pensioners. An important category included in the free movement of persons is that of the so-called *professionals* (e.g. doctors, architects, pharmacists). Similarly to professionals, *artists* have enjoyed the free movement within the EEC/EU.

The free movement of persons with the aim of working in another EU member state (either as employee or as self-employed), the guiding principle is mutual

[142] https://ec.europa.eu/growth/single-market/ce-marking_en

[143] For children under 18, the rules governing the status of family members apply.

recognition, already introduced under the free movement of goods above. For persons, the principle evidently refers to the *mutual recognition of qualifications*, including *degree obtained* and *experience gained* in one or more EU member states outside the one where the person is about to work.

The Treaty of Maastricht signed in 1992 has brought about a substantial change in the free movement of persons. With the introduction of *EU citizenship* (introduced in Chapter 7), it has become the *very fundamental right of EU citizens to work and reside in another EU member state*. Nevertheless, if stay in another member state is longer than 3 months, the EU citizen is required to *register* at the local/national authorities. In certain cases, (s)he may be requested by the local/national authorities to give evidence on income that is sufficient for him/her to reside there. Even so, an EU citizen may only be deported from another EU member state (of which (s)he is not a citizen) on grounds of public policy or public security, only if (s)he is proven to represent a serious threat.

It is important to mention that the 'persons' under EU law refer to *legal persons* as well. Accordingly, EU citizens have the freedom to *establish enterprises* in any EU member state, to *acquire ownership in businesses* across the EU, and *participate in stock markets* across the EU both as seller and buyer of stocks.

Free movement of services

Just like the other three freedoms, the freedom of services has gone through considerable evolvement since the beginning of European integration. The occurred changes have always rooted from the sector itself.

According to Article 3 (c) of the Treaty of Rome, the member states committed themselves to "t*he abolition, as between member states, of obstacles to freedom of movement for persons, services and capital*".[144] Then, Title III of the Treaty on "*Free movement of persons, services and capital*" specifies the contents of this commitment in its Chapter 3 (Services) comprising Articles 59-63 (Textbox 8.2). The text talks about progressive abolition of restrictions in a transitional period – which was justifiable, given the historical setting.

[144] The free movement of goods is found under Article 3 (a).

Textbox 8.2 Articles 59-63 of the Treaty of Rome

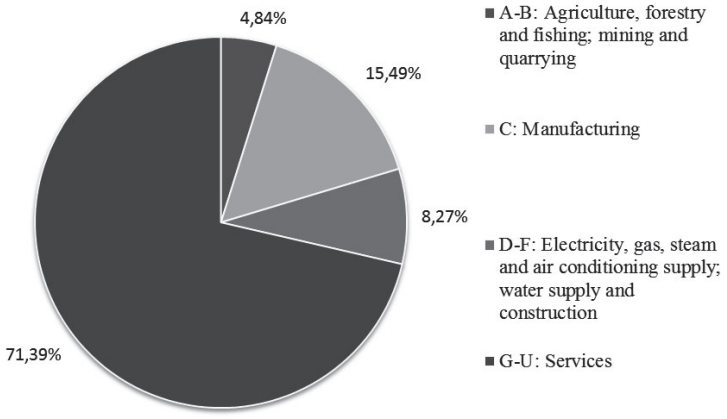
Article 59
Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be progressively abolished during the transitional period in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended. The Council may, acting unanimously on a proposal from the Commission, extend the provisions of this Chapter to nationals of a third country who provide services and who are established within the Community.
Article 60
Services shall be considered to be "services" within the meaning of this Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons. "Services" shall in particular include: (a) activities of an industrial character; (b) activities of a commercial character; (c) activities of craftsmen; (d) activities of the professions. Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals.
Article 61
1. Freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport. 2. The liberalisation of banking and insurance services connected with movements of capital shall be effected in step with the progressive liberalisation of movement of capital.
Article 62
Save as otherwise provided in this Treaty, Member States shall not introduce any new restrictions on the freedom to provide services which have in fact been attained at the date of the entry into force of this Treaty.

Article 63

1. Before the end of the first stage, the Council shall, acting unanimously on a proposal from the Commission and after consulting the Economic and Social Committee and the Assembly [European Parliament], draw up a general programme for the abolition of existing restrictions on freedom to provide services within the Community. The Commission shall submit its proposal to the Council during the first two years of the first stage.
The programme shall set out the general conditions under which and the stages by which each type of service is to be liberalised.
2. In order to implement this general programme or, in the absence of such programme, in order to achieve a stage in the liberalisation of a specific service, the Council shall, on a proposal from the Commission and after consulting the Economic and Social Committee and the Assembly [European Parliament], issue directives acting unanimously until the end of the first stage and by a qualified majority thereafter.
3. As regards the proposals and decisions referred to in paragraphs 1 and 2, priority shall as a general rule be given to those services which directly affect production costs or the liberalisation of which helps to promote trade in goods.

Following the entering into force of the Treaty of Rome, the most obvious economic change in this respect was the *development of the services sector* itself (Orio 1987). By the 1990s, the services sector accounted for as much as 65-70% of EU member states' GDPs (Papp 2003). Regarding employment and job creation, the share of the services sector is even larger (Figure 8.5).

Figure 8.5 Share of sectors (expressed by NACE codes) in employment in the EU28 (2015)



Source: own calculation based on Eurostat data

In parallel to the rapid expansion of the services sector, *technological development* has provided ever larger room for the internationalisation of services (Miozzo & Soete 2001), mostly taking the following forms: *foreign direct investments* (establishing service providing facilities in other member states), *cross-border services* (especially in the financial services sector and online sales), and *transnational mergers and acquisitions* (mainly in the energy sectors upon liberalisation) (OECD 2006, Kacsirek 2007).

Within the single market framework, it has been ever easier for service-provider businesses to internationalise. With the intensification of intra-EU trade, service providers have *often followed their industrial clients* in support of their cross-border activities (Molle 2001). As for technology-driven developments, the *birth and growth of the information and communication (ICT) sector* from the 1990s onwards is of the greatest importance. First, ICT has become a new, dynamically expanding services sector in itself. At the same time, ICT has fundamentally revolutionised full sectors – it is enough to think about financial services going electronic, or retail going online.

The two basic principles in relation to the free movement of *financial services* in the EU are: single passport and home country control. Financial services are economic activities that are subject to permit: you can only provide such services if you dispose of the necessary permits from the supervisory authorities. Even if the rules to establish and operate financial service provider companies are defined at the member states' level in the EU, the principle of *single passport* implies that, if a company has a permit in one of the member states, that permit enables them to provide their services in the other EU member states, provided they register at the supervisory authorities of the respective member states. The principle of *home country control* on the other hand says that those activities of the company taking place in other EU member states are supervised by the very authority issuing the permit. Obviously, the proper implementation of these principles calls for the intensive and active cooperation among the member states' supervisory authorities.

The need for more *harmonisation of rules and activities* was recognised at the end of the 1990s and in 1999 the *Financial Services Action Plan* (*FSAP*) was adopted (EC 1999). The Action Plan envisaged measures to be undertaken in the 1999-2004 period in three strategic areas: *wholesale* (interbank) financial services, *retail* (bank – client) financial services, and *supervision*. Several further areas of strategic importance were added to these three main intervention areas: *collective investment in financial companies*, *distance selling of financial services* (online or e-banking), and *electronic money*.

According to the FSAP, the following areas were calling for action:

- there were still considerable barriers to raising capital on an EU-wide basis;
- securities and derivatives markets were still too much segmented across national borders;
- a single set of financial statements for listed companies was to be established;

– a secure and transparent European business environment for financial services was considered as needed;
– an adequate European framework for asset managers to support them in the EU-level optimisation of portfolios was seen as missing.

The *Single Euro Payments Area* (*SEPA*) aims at ensuring fast and cheap money transfers in the Eurozone/EU.[145] It regulates credit transfers, direct debit payments, and card payments executed in euro across the Eurozone and the EU. The guiding principle of the SEPA is that cross-border electronic payments in euro should be as easy as domestic payment.

Free movement of capital

In the single market, capital has had to be able to move freely in order to guarantee the smooth operation of the market. However, it was not very simple in the early times: *full and unlimited convertibility of currencies* had to be reached, and *payment systems* had to be connected (in this respect, for current realities, see the passage on the SEPA above). The Bank of International Settlements (BIS) also referred to as 'the central bank of central banks', and the Committee of Governors (both introduced in the beginning of this chapter) played a great role in the beginning.

The European Monetary Institute, (EMI) that existed between 1994 and 1998 was responsible for the establishment the ECB and the Eurosystem. Since 1999, the ECB has been responsible for the *market infrastructure and payments* in the EU and the Eurozone in order to ensure and secure capital movements in the EU. Obviously, the free movement of financial services and capital are closely linked to each other.

The most recent topic on the agenda of the European Commission is the *capital markets union*. In September 2015, and Action Plan was adopted to create an EU market for capital where investors and businesses seeking investment can easily and effectively meet.

Main tools of the internal market

In order to guarantee the every-day smooth operation of the internal market, certain tools are implemented. We hereby review these shortly.

SOLVIT

SOLVIT is a *problem-solving and dispute-settling instrument* of the internal market. SOLVIT can help when EU rights of citizens and businesses are breached by public

[145] The SEPA covers Norway, Switzerland, Liechtenstein, Monaco and San Marino as well.

authorities in another EU country. So, it is a service available to *EU citizens and businesses* only, and limited to cases where complaint regards *public authorities of EU member states* other than the one of which the citizen is national and the business has its headquarter.

SOLVIT cannot help if:

- a company is having problems with another company;
- it is a consumer-related problem (in such cases, consumer protection authorities shall act);
- parties are seeking compensation for damages;
- the case has already been taken to court (due to its informal nature, SOLVIT cannot run in parallel with formal or legal proceedings).

The most *typical issues for persons* are: problems with the recognition of professional qualifications in another EU member state; limits to access to education in another EU member state; the failure to guarantee social benefits to nationals of other EU member states.

The most *frequent issues for businesses* are: obstacles to intra-EU trade elevated by public authorities or difficulties in providing cross-border services across the EU.

CCC and TARIC

The single market agenda set the deadline of 1 January 1993 to complete the single market according to the Single European Act. One element of this single regulatory framework has been the *Community Customs Code* (*CCC*), a secondary legal source containing all the provisions on importing into the EU internal market from third countries. Since its entry into force in 1993, numerous amendments have been added, evidently, as new products, new traders and new rules of international trade are evolving. Accordingly, the Community Customs Code is today an extensive document, full of technicalities regarding the terms of trade between EU and third countries.

If any company is importing into the EU from wherever in the world, import has to be declared and customs duties have to be calculated and paid in the course of the *unified customs procedure*. Within this procedure, there is a *Single Administrative Document* (*SAD*) that is used by all parties in all importation and customs procedures. For the movement of non-EU goods within the EU, the rule determining the *country of origin* of the product is where the *last substantial transformation* has been carried out to the product.

Because the CCC is a very complicated and long document while many traders are only active in relation to a narrow range of products (e.g. clothing, vehicle, food, minerals, etc.), the European Commission has developed a tool to help traders in importing into the EU: the TARIC.

The *TARIC* is a *multilingual database* in which all measures relating to EU customs tariff, commercial and agricultural legislation are integrated.

TARIC contains:

– tariff measures;
– agricultural measures;
– trade defence instruments (antidumping and countervailing duties);
– prohibitions and restrictions to import and export;
– surveillance of movement of goods.

On the other hand, TARIC does not contain:

– national levies (e.g. value added tax) that have to paid after imported goods in the member states of the EU.

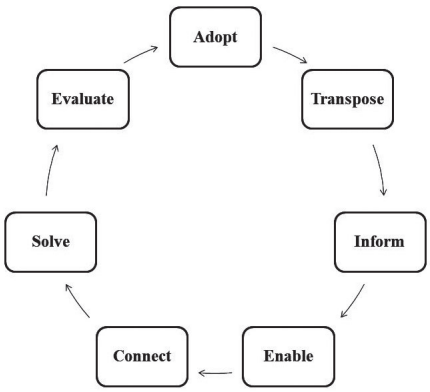
TARIC is updated real-time, is available online and has an advanced search engine making its use really easy for traders.

Single Market Scoreboard

In fact, the single market is based on a large body of EU law that member states are obliged to transpose in their national legal systems and enforce them. This process needs effective governance and effective implementation (Figure 8.5). The Single Market Scoreboard gives an overview of the practical management of the single market. It shows performance

– by the governance cycle;
– by member states;
– by governance tool;
– by policy area.

Figure 8.5 The Single Market governance cycle



Source: http://ec.europa.eu/internal_market/scoreboard/governance_cycle/index_en.htm

Performance by member state is assessed twice a year and country reports are released in May and November of each year. *Country reports* contain information on:

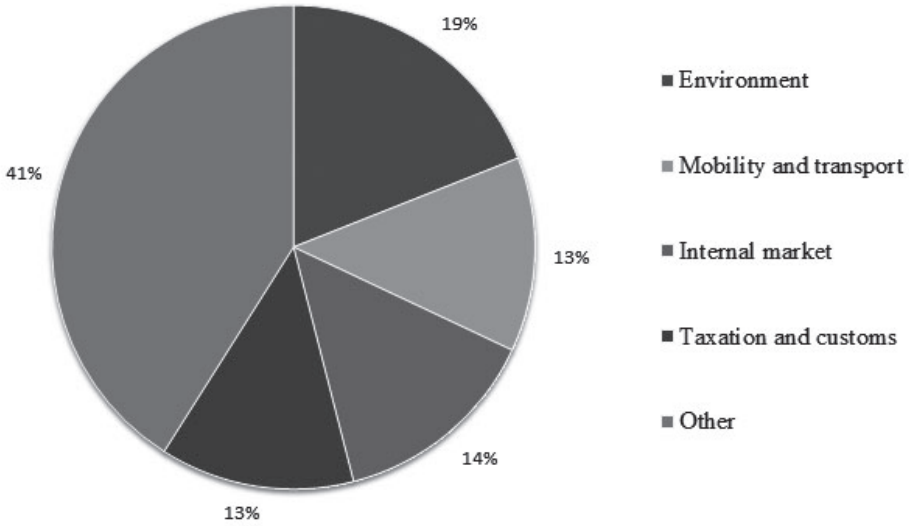
- how the member state has performed in the *transposition of EU internal market law* into the national legal system (how large is the transposition deficit, how many directives are overdue, what is the average delay and how large is compliance deficit);
- the *infringement cases* (new, ongoing, closed, problematic sectors, average case duration, compliance with Court rulings);
- participation in the *EU Pilot* (see more on the initiative below);
- the country's performance in the *EU internal market information systems and tools*: the Internal Market Information System, the EURES (the European Job Mobility Portal), the Your Europe information system, SOLVIT, and the Technical Regulation Information System;
- and the compliance of the country's public procurement practices with the EU internal market rules (e.g. participation of businesses from other EU member states in national public procurement tenders).

EU Pilot

The *EU Pilot* project was introduced by the Commission with a number of volunteer member states in 2008. EU Pilot is an *online platform* which member states and Commission's services use to *communicate and clarify the factual and legal background of problems arising in relation to the conformity of national law with EU law or the correct application of EU law*.

As a general rule, EU Pilot is used as a first step to try to resolve problems so that, if possible, formal infringement proceedings are avoided. Currently all 28 member states are participating in EU Pilot. The working methods of EU Pilot are adjusted to the SOLVIT Recommendations.

Figure 8.6 EU Pilot investigations: main policy areas (2016)



Source: EU Pilot Website

The *priority areas* of EU Pilot currently are:
- services (in general);
- financial (intermediation) services (in particular);
- transport;
- the Digital Single Market strategy and implementation;
- and energy production and consumption.

The target in these areas is to reach *0% transposition and conformity deficit* in all EU member states and *not-longer-than 18 months average duration of infringement procedures*.

Since its launch in 2008, the EU Pilot has been very efficient in improving transposition of EU internal market law in the member states and conformity to this law.

Summary

1. Already in the Treaty of Rome signed in 1957, the four freedoms constituting the common market were guaranteed: goods, persons, services and capital can move freely across the EEC/EU.
2. The EEC/EU has since 1968 formed a customs union which means that intra-EEC/EU trade is free of duties and customs while import into the EEC/EU is subject to common customs that form part of the common budget (up to 75%).

3. The single market and the single currency agendas were developed in parallel and the euro was introduced in 1999. In 2017, the Eurozone consists of 19 member states out of the EU 28 member states.
4. The Schengen Agreement lays down the rules on the abolition in internal border control and the strengthening of external border control. The Schengen Agreement became part of EU law by the Treaty of Amsterdam in 1997. For citizens from countries that are not members of the Schengen Area, it is necessary to obtain a Schengen Visa in order to be able to enter one or more countries of the Schengen Area.
5. The principles guiding the free movement of goods are: mutual recognition, harmonisation and common standards. The CE marking is the best known European standard. The free movement of persons was gradually extended and completed by the EU citizenship in the Treaty on European Union in 1992. Services are becoming ever more part of the European economy and their free movement across the EU is fostered not only by EU law but also technological development, especially with the spreading of the information and communication technologies (ICT). As for capital, the establishment of the capital markets union is the main priority.
6. The main tools of the internal market are: SOLVIT (a problem-solving and dispute-settling instrument), CCC (Community Customs Code) and TARIC (the online up-to-date searchable customs database), the Single Market Scoreboard and the EU Pilot.

9. EU competition regulation (Anita Pelle)

Learning goals

After reading this chapter you will be able to:

1. Define the objects, subjects and scope of European competition regulation.
2. Define the institutions and principles of competition regulation.
3. Explain the rules on undertakings (restrictive agreements, dominant position, concentration) and on state aid in European competition regulation.
4. Identify the objective, the process and the so-far achievements of liberalisation in the internal market.

The European Economic Community (EEC) was established by the Treaty of Rome signed on 25 March, 1957. The Community has, from the beginning, operated a competition regulation scheme which has substantially remained unchanged since the beginning though secondary regulation, case law and the general competition policy concept has in fact developed greatly in the course of the decades.

Legal sources, institutions, principles of competition regulation

The Treaty of Rome already considers competition as a tool – and not the sole one. The objectives of the creation of the Community are laid down in Article 2 and then, Article 3 lists the activities resulting in the achievement of these objectives in 11 points, of which the sixth in the row is about the setup of a competition regulation scheme (Textbox 9.1).

Textbox 9.1 Excerpts from Article 3 of the Treaty of Rome

> [T]he activities of the Community shall include, as provided by this Treaty and in accordance with the timetable set out therein:
> (…)
> (f) the institution of a system ensuring that competition in the common market is not distorted
> (…)

The Treaty of Rome lays down the Community regulation on competition under Part Three (Policy of the Community), Title One (Common Rules), Chapter One (Rules on Competition). These have remained practically unchanged since then; only the ‘common’ market has been first changed to ‘single’ and then ‘internal’

market. In the Treaty on the Functioning of the European Union (TFEU), currently Title VII (Common rules on competition, taxation and approximation of laws), Chapter 1 (Rules on competition), Section 1 (Rules applying to undertakings, Articles 101-106) and Section 2 (Aids granted by states, Articles 107-109) lay down the provisions on competition regulation.

Regulation of mergers and acquisitions had not been adopted before the first Merger Regulation of 1989 (EC 4046/89) and has remained part of secondary EC/EU law. The Merger Regulation has been renewed only once since its first adoption, after a 10-year-long consultation and drafting process. The new Regulation (No 139/2004) is applied as of 1 May 2004 (which is the date of the so-far biggest-scale enlargement of the EU and the application of the 1/2003 regulation to be discussed below.

Accordingly, the four (traditional) areas of regulation are: restrictive agreements; abuse of dominant position; control of concentration; and state aid (Textboxes 9.2-9.5).

Textbox 9.2 Article 101 of TFEU containing provisions on restrictive agreements

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
   (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
   (b) limit or control production, markets, technical development, or investment;
   (c) share markets or sources of supply;
   (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
   (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,

(a) any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Textbox 9.3 Article 102 of TFEU containing provisions on dominant position

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Textbox 9.4 Excerpts from Council Regulation (EC) No 139/2004 on the control of concentration between undertakings (EC Merger Regulation)

Article 1. Scope

2. A concentration has a Community dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5000 million; and

(b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

1. Concentrations within the scope of this Regulation shall be appraised in accordance with the objectives of this Regulation and the following provisions with a view to establishing whether or not they are compatible with the common market.

Article 2. Appraisal of concentrations

In making this appraisal, the Commission shall take into account:

(a) the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or without the Community;

(b) the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

2. A concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market.

3. A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.

4. To the extent that the creation of a joint venture constituting a concentration pursuant to Article 3 has as its object or effect the coordination of the competitive behaviour of undertakings that remain independent, such coordination shall be appraised in accordance with the criteria of Article 81(1) and (3) of the Treaty, with a view to establishing whether or not the operation is compatible with the common market.

5. In making this appraisal, the Commission shall take into account in particular:

– whether two or more parent companies retain, to a significant extent, activities in the same market as the joint venture or in a market which is downstream or upstream from that of the joint venture or in a neighbouring market closely related to this market,

– whether the coordination which is the direct consequence of the creation of the joint venture affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products or services in question.

Article 3. Definition of concentration

1. A concentration shall be deemed to arise where a change of control on a lasting basis results from:
   (a) the merger of two or more previously independent undertakings or parts of undertakings, or
   (b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.

Article 4. Prior notification of concentrations and pre-notification referral at the request of the notifying parties

1. Concentrations with a Community dimension defined in this Regulation shall be notified to the Commission prior to their implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest.

Textbox 9.5 Article 107 of TFEU containing provisions on state aid

1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.
2. The following shall be compatible with the internal market:
   (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;
   (b) aid to make good the damage caused by natural disasters or exceptional occurrences;
   (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.
3. The following may be considered to be compatible with the internal market:
   (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation;

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State
(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;
(d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;
(e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.

As for the *objects* of common competition policy, it only applies to *behaviours* restricting competition in the common/single/internal market of the EEC/EU. European competition policy does not cover indecent market behaviours of consumer protection. Undertakings and states can be the *subjects* of common competition regulation.

Regarding the scope of European competition regulation, it is defined along the following categories:

– *Sectoral scope*: as a thumb rule, European competition regulation applies to all sectors of the economy. Exceptions are listed in the Treaty: agriculture, coal and steel industry, transportation, and other so-called regulated markets (e.g. media and other public services like post or telecommunication, financial services including banks and insurance companies).
– *Territorial scope*: investigation concentrates on whether the restrictive practice was carried out in the territory of the internal market or if its impact is identifiable in the internal market (irrespective of where the headquarters of the company are situated, see principle of extraterritoriality below).
– *Timely scope*: retrospectivity is acknowledged in European competition regulation.

Institution(s) responsible for implementation

The European Union does not have a separate competition authority. Instead, the European Commission, more precisely its Directorate General Competition acts as competition authority of the EU. Nevertheless, the Commission and the national competition authorities together form the European Competition Network (ECN) and national competition authorities are also entitled to apply the common competition rules regarding restrictive agreements and abuse of dominant position (Textbox 9.6).

Textbox 9.6 Excerpts from Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82[146] of the Treaty

Whereas:
(…) (15) The Commission and the competition authorities of the Member States should form together a network of public authorities applying the Community competition rules in close cooperation. For that purpose it is necessary to set up arrangements for information and consultation. Further modalities for the cooperation within the network will be laid down and revised by the Commission, in close cooperation with the Member States.
(…)
Article 5
Powers of the competition authorities of the Member States
The competition authorities of the Member States shall have the power to apply Articles 81 and 82 of the Treaty in individual cases. For this purpose, acting on their own initiative or on a complaint, they may take the following decisions:
- requiring that an infringement be brought to an end,
- ordering interim measures,
- accepting commitments,
- imposing fines, periodic penalty payments or any other penalty provided for in their national law.

Where on the basis of the information in their possession the conditions for prohibition are not met they may likewise decide that there are no grounds for action on their part.

Principles of EU competition law

There are a few principles regarding EU competition law. They are the following:
- *Objective or impact*: Either is enough for behaviour to be subject of EU competition law
- *Extraterritoriality*: Regarding undertakings, the principle of extraterritoriality is applied: it is not the location of the undertaking what counts but whether its behaviour has an impact on the internal market or not.
- *Interstate commerce clause*: At least 2 EU member states are affected
- *Prohibition and exemptions*: Restrictive agreements, state aid

[146] Before the Lisbon Treaty entered into force, the respective Articles containing the provisions on restrictive agreements and abuse of dominant position were Articles 81 and 82. Since the entry into force of the Lisbon Treaty, these have become Articles 101 and 102.

Rules applying to undertakings

Of the four areas of European competition regulation, three refer to the behaviour of undertakings.

Restrictive agreements

As regards *restrictive agreements*, they can take various forms. The most common are: fixing prices; setting conditions for contracting; fixing upper limits to quantities of production (e.g. OPEC); division of the (geographical) market. Paragraph (1) of the relevant article (*Article 101 of TFEU*, see Textbox 9.2) introduces a *general prohibition* on such agreements and identifies a number of these (exemplificatory list). The "prevention, restriction or distortion of competition" is to be interpreted in a wide sense. The regulation covers *both horizontal and vertical agreements*.

The steps of investigation are the following:

1. The primary condition is whether the trade in the common/single/internal market is affected (interstate commerce clause). Already the possibility of such effects justifies investigation.
2. Are undertakings identifiable?
3. Is there collusion or agreement?
4. Does the agreement have a restrictive objective? Or a restrictive impact? This is also the order of investigation: if objective is proved, proving impact is not necessary. Regarding objectives, the intentions of the parties are what matter.

In order to prove restrictive impact, the market has to be analysed. Potential impact already justifies examination. The following steps are taken in the course of the analysis:

- identification of relevant product;
- identification of relevant (geographical) market;
- identification of barriers to entry to the relevant market;
- situation of colluding parties;
- examination of the market: whether there are similar restrictions etc.

Article 101 Paragraph (2) declares *voidness* of such behaviours unless they are exempt from prohibition.

Then, the legal basis for *exemptions* from prohibitions on restrictive agreements is encompassed in Article 101 Paragraph (3). This passage defines *four conjunctive conditions* which may lead to exemption from prohibition. Of these four conditions, two are formulated in a positive way (efficiency and consumer's benefit) and the other two in a negative way (no disproportional restriction, competition is not eliminated).

The theoretical justification of exemptions is rather complicated. The main starting point of it is that there may be objectives of companies that serve public interests at the same time. The public interest has to be proved, which is not very simple in many of the cases. Eventually, the regulation is filled with content through case law. Agreements exempt from prohibition have to be *controlled continuously*: the fact of exemption does not allow actors to do whatever they wish to do.

The European Commission as competition authority operates a *leniency policy*, in the framework of which it is possible for undertakings participating in restrictive agreements to cooperate with the competition authority by providing information on the agreement (*whistle-blowing*). The first such reporter company may enjoy *complete immunity from or reduction of fines* to be imposed for the restrictive behaviour. Further cooperating companies may enjoy partial reduction of fines.

Abuse of dominant position

The second large regulation area is the *abuse of dominant market position* (Textbox 9.3). Law declares an *absolute prohibition*; there are *no exemptions*. On the other hand, it is important to note that it is not market dominance what is prohibited but the *abuse* of it.

We can only decide whether a company enjoys a dominant position in a market if we are able to define the borders of the *relevant market*. This way, investigation of dominant position cases always has to start with the definition of the relevant market. The concept refers to the set of products (and geographical areas) that appear as competitors to one another.

The next issue in investigating abuse of dominant position is the *level of dominance* in the relevant market. In fact, market power is a company's ability to elevate its prices above the marginal cost. In real markets, practically all actors dispose of some market power. The prior indicator *of market power* is *market share* in the relevant market (expressed in percentages). In the practice of the European Court, this threshold is around 25 per cent (also manifested in the merger control regulation). However, it is not defined explicitly. Outside absolute market share, other factors also have an impact on a company's market power: relative situation of competitors (their number and size); the difficulty and probability of entry to the market, the strength of barriers to entry; the equalising power of buyers; access to essential inputs (which may even appear as a barrier to entry); applied technology and its accessibility.

The *order of the steps of investigation in dominant position cases* thus obviously differs from that of restrictive agreements:

1. The relevant market is defined.
2. Dominant position is identified through qualitative market analysis. (If there is no dominant position, the investigation is over.)
3. Has the dominant position been abused? (If not, the investigation is over.)

4. Does the behaviour have an impact in the common (single/internal) market?

As mentioned above, there is no exemption from prohibition in this field. Instead, there is *justifiability* but *under very strict conditions* and in very few of the cases. The only market situation where dominant position may be "abused" is the *market of public services*. However, also here, conditions are strict.

Control of concentrations

The third large regulation area within the regulation of undertakings is the *control of concentrations*. Economic theory acknowledges the birth and seizure of companies as a natural phenomenon. Companies may seize by merging as well, resulting in a new company larger than any of its predecessors and possessing a larger market share than any of the merging companies before the merger. Since the adoption of the 2004 Merger Regulation (Textbox 9.4) the term *concentration* is used instead of the earlier term mergers and acquisitions, often referred to with the abbreviation M&A. Acquisition refers to the cases where one company is taken over by another one; merger implies a more balanced deal. However, concentration includes more subtle ways of gaining control in a competitor company, e.g. through intertwined ownership or decisive voting rights of certain owners in corporate boards.

The rules on concentration in the EU are the following:

- Mergers and acquisitions and other forms of proposed market concentrations, if exceeding the so-called Community dimension, are *subject to approval*.
- *Approval must precede the realisation* of the proposed merger or acquisition or other form of market concentration.
- To this end, the *European Commission must be notified* of the proposed concentration *in advance*.
- *Community dimension* is defined by *three conjunctive conditions*: turnover on the European internal market; global turnover; except if at least two-thirds of European turnover is restricted to one single member state. (In this case, the proposed concentration is the subject to that country's national competition regulation.)
- The *approval procedure* may end with three possible outcomes:
  1. The Commission *approves* of the proposed concentration.
  2. The Commission *does not approve* of the proposed concentration.
  3. The Commission *conditionally approves* of the proposed concentration.

Concentrations that the European Commission had not been notified of *may be ex-post examined* and even *declared void*.

In the course of the approval procedure, the European Commission examines the proposed concentration and its market circumstances. As the main question

is whether a company abusing its dominant position is likely to be formed, the investigation shows strong similarities to that of abuse of dominant position.

The *reform* of the regulation and the *new regulation* adopted in 2004 were attempts to react to the latest challenges which were mainly the increase in the number of member states and the increase in the number of notifications.

Accordingly, the greatest *achievements of the reform*, incorporated in the new regulation (EC 139/2004) can be summarised as follows. The new regulation:

- *refines the concept of concentration* (which is a broad extension of the earlier term of mergers and acquisitions as explained above);
- *shortens deadlines* in the procedure;
- *simplifies communication*, involving national competition authorities;
- *makes schedules* of procedures *more flexible*;
- *amplifies the rights of the Commission*;
- *increases the degree of fines* imposable in infringement cases.

To sum up, the regulation of undertakings in European competition policy is a refined system ensuring the constant surveillance and maintenance of the competition in the internal market of the EU.

Compliance with EU competition regulation

According to the legal principle, not being aware of the relevant legislation does not exempt any actor from the consequences of breaching law. Therefore, on behalf of corporations operating in the EU internal market, it is sensible to strive for compliance. The term *compliance* refers to companies meeting the requirements set by law in a proactive way. It includes their being aware of the risks of infringing regulation but also developing a compliance strategy tailored to the firm's needs.

The main benefits of compliance are the following: it helps avoid the potentially high costs of non-compliance; it can enhance a company's reputation among its business partners and customers; and last but not least, compliance with EU competition rules in fact brings efficiency in the firm's operations which can then be a competitive advantage in the market. The European Commission provides assistance to companies in developing their compliance with EU competition regulation (EU 2012).

Rules applying to state aid

State aid is a very special area of European competition policy (Textbox 9.5). In fact, the EU operates the only competition regulation scheme in the world that refers to state aid as well. The reason for this special situation is that European competition regulation covers a common market of states, so it is a *supranational*

competition regulation scheme. State aid may distort interstate commerce, may influence decisions on locations of economic activities, and may appear as market-sharing behaviours in the internal market of the EU.

As for the *states as subjects of competition regulation*, it can apply to their highest legislative forums, their governments, ministries, governmental organisations, municipalities or state-owned companies.

In the respective legal provisions, *state aid, as a thumb rule, is prohibited* in the EU. However, *there are cases in which state aid is compatible* with the internal market (exemptions). Thus we can state that the EU acknowledges the existence of state aid, and justifies these, in certain cases.

The Commission operates a monitoring system for the surveillance of state aid, and keeps a State Aid Register.

Special area of application of the competition rules: market liberalisation

Since 2000s, a new (5th) area of EU competition regulation has evolved, i.e. the liberalisation in EU markets. Liberalisation covers the process of introducing and/or enhancing competition in previously monopolised markets. The legal basis for market liberalisation is the same as that of competition regulation (Textbox 9.1). The process applies a sectoral approach and strives for gradual introduction of competition.

The assignment of *sectoral investigations* was delegated to the Competition Directorate General of the European Commission. Accordingly, the Commission named the *services sectors that were to be examined: electric power and gas supply; financial services; broadcasting and media services; postal services; telecommunications; professional services* (*legal, accounting and real estate*).

In the *telecommunication sector*, the greatest regulatory success has so far been, outside the introduction of real competition, the maximisation of *roaming prices* introduced by an EU regulation in the summer of 2007, and then their gradual and complete abolition by June 2017.

The opening up of the market of *postal services* was carried out with similar results and by now a pan-European postal services sector has developed. Regarding the liberalisation of the *transport sector*, the greatest benefit has been the development of the so-called *low-cost airlines*, eventually bringing about a considerable fall in the prices of traditional airlines as well. The results of the examination of *energy markets* have so far been ambivalent; the reason is that energy is a highly special product with special features and of strategic importance.

The development of regulation usually follows this scenario:

– *Singular legal cases* draw the attention to discrepancies in the functioning of markets.

– This is followed by a thorough *sectoral inspection*, accompanied by *consultations* with professional and social organisations, with publicly available results.
– Based on the conclusions of the consultations, the Commission outlines *proposals* for the development of *regulation*.

To sum up, liberalisation and creating competition is a process in the European Union, far from its end. One reason for its incompleteness is that the constant changes of markets and the constant development of integration constantly set up new challenges for the regulator.

Summary

1. Competition regulation has existed in the European Communities/Union since the Treaty of Rome.
2. Objects of common competition regulation are behaviours; subjects can be undertakings or states and their bodies. Sectoral, territorial and timely scope of regulation is interpreted.
3. The European Commission acts as competition authority; in cooperation with national competition authorities they form the European Competition Network.
4. Principles of EU competition law are: objective or impact; extraterritoriality; interstate commerce clause; prohibition and exemptions.
5. Restrictive agreements are, as a thumb rule, prohibited in the internal market. Under certain conditions, there are exemptions from the prohibition.
6. Abuse of dominant position is prohibited in the internal market.
7. Concentration of undertakings is controlled in the internal market. Outcome of investigation can be that the proposed concentration is 1) approved, 2) not approved, 3) conditionally approved.
8. State aid is, as a thumb rule, incompatible with the internal market. There are certain cases though that are compatible (exemptions).

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European Anti-Fraud Office OLAF Website: http://ec.europa.eu/anti-fraud/

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SOLVIT Website: http://ec.europa.eu/solvit

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European Commission, DG Competition Website: http://ec.europa.eu/competition/index_en.html

European Commission, DG Competition, European Competition Network Website: http://ec.europa.eu/competition/ecn/index_en.html

European Commission, DG Competition, Leniency Website: http://ec.europa.eu/competition/cartels/leniency/leniency.html

State Aid Register: http://ec.europa.eu/competition/state_aid/register/

European Commission, DG Competition, Liberalisation Website: http://ec.europa.eu/competition/general/liberalisation_en.html

Further useful Websites

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Office for Harmonisation in the Internal Market OHIM: https://europa.eu/european-union/about-eu/agencies/ohim_en

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