MATERIALS ON THE LAW OF THE EUROPEAN UNION

Spring 2009: PART 1

Caroline Bradley[1]:

INTRODUCTION TO THE EU[2]

> "...globalization forces us to revisit long-standing assumptions about how to regulate economic and social behaviour. Statutes passed by national legislatures don't take us very far when it comes to regulating global markets for money, natural resources, intellectual property or labour. But so far there is no global political process, no global legislature, no global regulatory regimes."[3]

This handout outlines some important features of the EU and of European Community law. We will study some of these features in more detail later in the course. The handout also begins to introduce some of the EU's peculiar terminology. Do ask questions if you feel you need clarification.

1. GENERAL INTRODUCTION

The European Union is an ambitious project to join together increasing numbers of European states in a Treaty-based relationship that becomes deeper over time: a process of widening and deepening.[4] From an original community of 6 Member States the European Union has developed over half a century into a Union of 27 Member States.[5]

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[2] The footnotes in this document are intended for clarification and as citations to the sources of some of the material. You are not required to read the materials cited in the footnotes.

[3] Harry Arthurs, *The Spider, the Bee, the Snail and the Camel: Legal Knowledge, Practise, Culture, Institutions and Power in a Changing World*, at p 12 (2005). CLPE Research Paper No. 1 http://ssrn.com/abstract=829944

[4] The Treaties have been amended many times over the years to make changes in the institutional arrangements and to introduce new Member States (accession treaties). Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community are at OJ No. C 321 E/1 (Dec. 29, 2006), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:321E:0001:0331:EN:pdf. A consolidated version of the Treaty on European Union and the Treaty on the Functioning of the European Union (which reflects the situation which will exist if the Treaty of Lisbon is ratified) is available at OJ No C115 (May 9, 2008) at http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2008:115:SOM:EN:HTML.

[5] For a readable introduction to the EU (published in 2003 so not too up to date) *see* http://europa.eu.int/comm/publications/booklets/eu_glance/22/en.pdf . And see http://europa.eu/abc/european_countries/index_en.htm .

Ten new states joined the EU in May 2004,[6] and two more joined in 2007.[7] Croatia, Macedonia and Turkey have applied for membership. Iceland, which is currently a member of the European Economic Area (EEA),[8] and which suffered serious financial troubles in 2008, has expressed some interest in joining the EU.[9]

As the entity now known as the EU has grown to include larger numbers of Member States its institutional (or constitutional?) structures have required adaptation. Institutional arrangements which worked for a grouping of 6 Member States could not work for a Union of 27 (the current number of Member States) or more. Over the years, as the EU has expanded, the Member States have agreed changes to the Treaties. The most recent attempt to amend the treaties has, however, run into difficulties.[10] After referenda in France and the Netherlands did not approve a draft Constitutional Treaty, in June 2005 the European Council announced that there would be a period of reflection and discussion about the Treaty. This led to the development of a revised treaty, called the Treaty of Lisbon.[11] In June 2008 a referendum in Ireland rejected the Treaty of Lisbon.

The EU is in a state of flux. This condition is not new: since its formation what is now the EU has changed dramatically in terms of its membership and in terms of the

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[6] Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia.

[7] Bulgaria and Romania.

[8] *See* http://www.efta.int/content/legal-texts/eea. The EEA is a collaboration of the EU and EFTA countries. EFTA was originally established in 1960 and its founding members were Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the UK. Iceland joined in 1970.

[9] *See* Iceland 'could apply to EU soon' at http://news.bbc.co.uk/2/hi/europe/7778195.stm

[10] In order to amend the EU's treaties all of the Member States must agree to the amendment by treaty, and they must all ratify the new treaty. The Member States use different procedures to ratify treaties. Some use a referendum procedure whereby the citizens of the Member State vote on whether to accept the treaty or not. Other Member States ratify a new treaty using legislative procedures.

[11] See Official Journal C 306/1 (Dec. 17, 2007) *available at* http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:EN:HTML . For more information you could look at http://europa.eu/lisbon_treaty/index_en.htm.

areas of national (domestic) law affected by EU rules.[12] Studying EU law[13] is a little like studying all of US federal law (it would be impossible to cover all of the law of the EU in one semester).. The EU has policies on issues from agriculture and fisheries to economic and monetary matters, labor and employment law, consumer protection, banking, food safety, human rights and the environment. In some ways the EU looks quite like a federal state like the US. As the US has federal rules about food and drugs and labor law and consumer protection the EU has created harmonized rules about these topics (though the content of the rules is not the same as in the US). In some ways EU rules constrain the EU Member States more than US federal rules constrain the states in the US. In particular the European Court of Justice insists that EU rules are binding on the Member States and breach of EU rules may result in financial liability on the part of the Member States which contrasts with some of the US Supreme Court's states rights decisions. The Member States have not agreed that they have created or are creating a federal state. However, in some ways this course is an exercise in comparative federalisms.

The EU is a regional organization rather than a federal state however, and we will learn about some of the issues that arise in supranational organizations more generally. The EU is an example of an international organizational structure with complex and different rules for how its various institutions function. The Member States have often needed to negotiate about how they should reach decisions. Should each Member State have an equal impact on decision-making, or should the differences in the sizes of the populations be taken into account? Note that Luxembourg has a population of about 486,000[14] which is not much larger than the population of the city of Manchester, the third largest city in the UK.[15] Whereas the United Nations General Assembly works on the principle of one vote per member State and the Security Council gives special voting rights (a veto) to its permanent members, the EU attempts to take account of both nationhood and population in its voting processes. Being a state counts for something, but larger states have greater voting power.

The EU enterprise is conceived of as an ongoing and developing process and for

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[12] An Appendix at the end of this handout (at page 79) outlines the development of the EU over time.

[13] The EU currently combines 3 separate pillars: The European Community pillar (the original communities which have law-making powers under the EC Treaty); Justice and Home Affairs; and Foreign Affairs. The EC pillar produces law unlike the others so it is strictly correct (although rather confusing) to refer to EC rather than EU law, although the term EU law is often used. The Lisbon Treaty would do away with the 3 pillar structure.

[14] Source: CIA World Factbook 2008.

[15] Manchester has a population of somewhere around 450,000. The Greater Manchester conurbation has a population of around 2.5 million.

many the idea of maintaining momentum is crucial. But, as the number of Member States increases it becomes harder to achieve agreement on how to move forward. And different Member States have different views about how EU policies should be defined. For example, Poland, one of the Member States which joined the EU in 2004, has more conservative social views than the older Member States and this has caused some disruption in the EU institutions.[16]

As you read the decisions of the European Court of Justice (ECJ) and Court of First Instance (CFI) and the other materials in this course you will notice a number of differences from US legal materials you have studied so far. Judgments of the ECJ and CFI are constructed very differently from those you are used to reading - there is much less detailed factual information in the judgments than we tend to see in judgments of common law courts, and the terminology is different. It will likely take some time for you to be able to read these new materials easily.

When you have learned to read the materials with ease you will have developed a skill that will be useful to you in future - even though you will be reading the materials in English it is a bit like learning a foreign language. In general, an ability to read texts carefully is often useful for lawyers, so being required to slow down to read these texts should help to develop this ability. Learning to think across legal jurisdictions is useful for being able to deal with international treaties and clients whose expectations about law derive from a different legal context. And studying comparative law also encourages us to reflect on what we take for granted about our own legal system.

2. OBJECTIVES OF THE EC/EU

The EC Treaty defines the EC's objectives. The Treaty is an agreement between the Member States which defines the relationships between the Member States; between the Member States and the EU's Institutions; and between the Institutions. The Member States have given up some of their sovereignty in joining the EU. In particular, the Treaty gives the EU institutions power to make some decisions which are binding even on Member States which do not agree to them.

The EU, and its institutions do not have the power to act outside the scope of the powers granted to them under the Treaty. But it may not always be clear how the Treaty should be interpreted. The Court of Justice/Court of First Instance have the jurisdiction to interpret the Treaty. In doing so, they adopt a **teleological** approach to interpretation, which means that they interpret Community law in light of its objectives.

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[16] *See, e.g.*, Graham Bowley, Conservative Poland Roils European Union, N.Y. Times, 18 (Dec. 4, 2005).

This is what the EC Treaty says about the EC's objectives:

Article 2 (ex Article 2)
The Community shall have as its task, by establishing a **common market**[17] and an **economic and monetary union**[18] and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

Article 3 (ex Article 3)
1. 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 prohibition, as between Member States, of customs duties and quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect;
(b) a common commercial policy;
(c) an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital;
(d) measures concerning the entry and movement of persons as provided for in Title IV;
(e) a common policy in the sphere of agriculture and fisheries;
(f) a common policy in the sphere of transport;
(g) a system ensuring that competition in the internal market is not distorted;
(h) the approximation of the laws of Member States to the extent required for the functioning of the common market;
(i) the promotion of coordination between employment policies of the Member States with a view to enhancing their effectiveness by developing a coordinated strategy for employment;
(j) a policy in the social sphere comprising a European Social Fund;
(k) the strengthening of economic and social cohesion;
(l) a policy in the sphere of the environment;
(m) the strengthening of the competitiveness of Community industry;
(n) the promotion of research and technological development;
(o) encouragement for the establishment and development of trans-European networks;
(p) a contribution to the attainment of a high level of health protection;
(q) a contribution to education and training of quality and to the flowering of the cultures of the Member States;
(r) a policy in the sphere of development cooperation;

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[17] A common market is a customs union (no tariffs when good flow between member states and a common external tariff) plus free movement of factors of production: goods, workers, services and capital.

[18] The EU's economic and monetary union involves common economic policies and a single currency (the euro is currently in circulation in 16 of the Member States). *See* http://www.ecb.int/euro/intro/html/map.en.html . Slovakia joined the euro area at the beginning of 2009. *See* http://www.ecb.int/press/pr/date/2009/html/pr090101.en.html .

(s) the association of the overseas countries and territories in order to increase trade and promote jointly economic and social development;
(t) a contribution to the strengthening of consumer protection;
(u) measures in the spheres of energy, civil protection and tourism.
2. In all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women.

Notes and questions:

What Arts 2 and 3 do not state, and what is noticeably absent from many of the public debates about the EU and its future (although see the Laeken Declaration, at page 46 below, and the Schuman Declaration in Appendix I at p. 77), is that the primary objective of what is now the EU is the avoidance of war in Europe. In the first half of the 20th century Europe suffered from two devastating wars, and political leaders in Europe (and in the US) were determined to avoid war in the future.

The objectives in Article 2 may conflict with each other. Policies which would maximize competitiveness might not be conducive to a high level of environmental protection or social cohesion. As a practical matter the EU's institutions need to balance different priorities. At different times different weights may be attached to different objectives.

Note that Art. 3(2) spells out gender equality as an objective. Equal pay for men and women has been required by the Treaty since the beginning (although women are still not in fact paid as much as men in the EU). Other aspects of non-discrimination law have been introduced more recently. And over the years the EU has developed the idea of fundamental rights - partly through case law, and through acknowledgment of the European Convention on Human Rights.[19] The EU has adopted a Charter of Fundamental Rights, which is not currently legally binding.[20] The Commission signaled that it takes the provisions of the Charter seriously in a 2005 Communication.[21] The EU Treaty (this is a separate Treaty from the EC Treaty)[22] includes a provision designed to ensure respect for

[19] The European Convention is a product of the Council of Europe, which is a separate organization from the EU. All of the EU Member States are Members of the Council of Europe. *See* http://www.coe.int

[20] *See* http://europa.eu.int/comm/justice_home/unit/charte/index_en.html

[21] Communication from the Commission - Compliance with the Charter of Fundamental Rights in Commission legislative proposals - Methodology for systematic and rigorous monitoring, COM (2005) 0172, (Apr. 27, 2005) *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0172:FIN:EN:PDF

[22] See the Europa treaties page at http://eur-lex.europa.eu/en/treaties/index.htm .

human rights and the rule of law, and Member States which do not comply with this provision risk being deprived of their voting rights in the EU:

EU Treaty, Art. 6
1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.
2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.
3. The Union shall respect the national identities of its Member States.
4. The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.

EU Treaty, Art 7
1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the Commission, the Council, acting by a majority of four-fifths of its members after obtaining the assent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of principles mentioned in Article 6(1), and address appropriate recommendations to that State. Before making such a determination, the Council shall hear the Member State in question and, acting in accordance with the same procedure, may call on independent persons to submit within a reasonable time limit a report on the situation in the Member State in question. The Council shall regularly verify that the grounds on which such a determination was made continue to apply.
2. The Council, meeting in the composition of the Heads of State or Government and acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the assent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of principles mentioned in Article 6(1), after inviting the government of the Member State in question to submit its observations.
3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of this Treaty to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons. The obligations of the Member State in question under this Treaty shall in any case continue to be binding on that State.....

These provisions were introduced in the Maastricht Treaty in anticipation of enlarging the EU to include new Member States which were in the process of transitioning to democracy.[23] When Jorg Haider's right wing Freedom Party won a significant proportion of the votes in elections in Austria in 2000 and joined a coalition government the EU invoked these provisions and imposed sanctions on Austria. Haider then resigned as

[23] Art. 7 was amended by the Treaty of Nice, http://eur-lex.europa.eu/en/treaties/dat/12001C/pdf/12001C_EN.pdf.

leader of the Party.[24] Countries in which secret prisons have been located to help the CIA could be vulnerable under these provisions.[25]

Article 3 of the EC Treaty identifies some objectives of the EC and other provisions of the Treaty spell out in more detail what powers the EC's institutions have to adopt rules to achieve the different objectives. **Art 3(1)(h) is very important.** Many legislative measures are based on this provision and the more specific Treaty provisions which implement it.[26] But the language is very vague: how much approximation (harmonization) of law is required for the functioning of the common market? Who decides? Should the decision be made by the institutions with legislative power or by the institution with judicial power? Should the answer to this question be the same in a federal state as in a regional organization? Similar issues arise in the US. Congress has the power to regulate interstate commerce under art. I of the US Constitution but disputes do arise about whether Congress' attempted exercises of this power are legitimate.[27]

Why would drafters of a Treaty or a constitution choose to include vague language in spelling out the powers of different institutions?

Harmonization to achieve the common market (or internal market) involves two aspects: **positive integration**, which means the development of EU level rules which apply throughout the EU (like the commerce clause of the US Constitution) and **negative integration** which means that national rules which interfere with the fundamental freedoms may be invalid (like the dormant commerce clause). The EU is unusual among regional and international organizations because it has significant powers to adopt measures of positive integration, and because the measures it adopts are binding on the Member States.

The World Trade Organisation (WTO) in contrast tends to rely on negative integration rather than positive integration. Within the EU the Member States may be prohibited from applying rules about how food must be produced in order to be sold in their

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[24] *See, e.g.*, http://news.bbc.co.uk/1/hi/world/europe/628521.stm

[25] *And see also, e.g.*, Popular Turkish Novelist on Trial for Speaking of Armenian Genocide, NY Times, A8 (Dec. 16, 2005) (suggesting that the then impending trial of Orhan Pamuk in Turkey for insulting Turkishness raised questions about whether Turkey was eligible to join the EU). The charge against Pamuk was later dropped. See http://www.washingtonpost.com/wp-dyn/content/article/2007/10/29/AR2007102902295.html

[26] *See* EC Treaty Arts 94 (at page 10 below) and 95 (at page 10 below).

[27] Contrast *Gonzales* v *Raich*, 125 S. Ct. 2195 (2005) (the federal Controlled Substances Act is a valid exercise of the commerce power) with *Lopez*, 514 U.S. 549 (1995) (the Gun-Free School Zones Act of 1990 was invalid).

territory to foods produced in other Member States, but in order to make the Member States happier about going along with this the EU can adopt its own rules about food which can protect consumers from dangerous ingredients or can ensure that consumers know what they are buying.[28] A 2008 regulation states: "The free movement of safe and wholesome food is an essential aspect of the internal market and contributes significantly to the health and well-being of citizens, and to their social and economic interests."[29]

The power to harmonize rules to achieve the common market or the internal market is spelled out in Articles 94 and 95 of the EC Treaty. These provisions illustrate how the Treaty works. Arts. 2 and 3 set out the general objectives, and other provisions of the Treaty spell out more detail about the legislative procedures which must be used and about any limits on what the EU can do (for now do not worry about the details, especially in Art. 95).

Article 94 (ex Article 100)
The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, issue Directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market.

Article 95 (ex Article 100a)
1. By way of derogation from Article 94 and save where otherwise provided in this Treaty, the following provisions shall apply for the achievement of the objectives set out in Article 14.[30] The Council shall, acting in accordance with the procedure referred to in Article 251[31] and after

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[28] One EU directive regulates chocolate. *See* Directive 2000/36/EC of the European Parliament and of the Council of 23 June 2000 relating to cocoa and chocolate products intended for human consumption, OJ L 197/19 (Aug. 3, 2000) *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:197:0019:0025:EN:PDF. This directive is designed to ensure that consumers know what they are buying.

[29] Regulation (EC) No 1331/2008 of the European Parliament and of the Council of 16 December 2008 establishing a common authorisation procedure for food additives, food enzymes and food flavourings, OJ No. L 354/1 (Dec. 31, 2008) *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:354:0001:0006:EN:PDF

[30] Article 14 sets out the objective of attaining an internal market: "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured." This is not really different from the "common market" referred to in Art. 2. But the internal market idea was introduced by the Single European Act as a way of revitalising the European project after a period of "eurosclerosis".

[31] The Art. 251 procedure involves the Council approving the measure by "qualified majority" and the European Parliament also approving the measure. This procedure is known as co-decision.

consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.
2. Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.[32]
3. The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective.
4. If, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 30, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.
5. Moreover, without prejudice to paragraph 4, if, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them.
6. The Commission shall, within six months of the notifications as referred to in paragraphs 4 and 5, approve or reject the national provisions involved after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they shall constitute an obstacle to the functioning of the internal market.
In the absence of a decision by the Commission within this period the national provisions referred to in paragraphs 4 and 5 shall be deemed to have been approved.
When justified by the complexity of the matter and in the absence of danger for human health, the Commission may notify the Member State concerned that the period referred to in this paragraph may be extended for a further period of up to six months.
7. When, pursuant to paragraph 6, a Member State is authorised to maintain or introduce national provisions derogating from a harmonisation measure, the Commission shall immediately examine whether to propose an adaptation to that measure.
8. When a Member State raises a specific problem on public health in a field which has been the subject of prior harmonisation measures, it shall bring it to the attention of the Commission which shall immediately examine whether to propose appropriate measures to the Council.
9. By way of derogation from the procedure laid down in Articles 226 and 227, the Commission and any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in this Article.
10. The harmonisation measures referred to above shall, in appropriate cases, include a safeguard clause authorising the Member States to take, for one or more of the non-economic reasons referred to in Article 30, provisional measures subject to a Community control procedure.

Article 3 has changed over time. The original version of Art. 3 did not refer to consumer protection or the protection of the environment or health. Over time the EU

[32] Provisions on these matters must be adopted by unanimity in the Council and the Parliament has a more limited role.

legislators began to adopt measures to protect consumers and the environment and the Member States amended to Treaty to provide for additional specific objectives such as consumer protection. Before the Treaty was amended, consumer protection measures were adopted on the basis of the power to harmonize rules to create a single market. The idea was that consumers would be more likely to transact across national borders if they were confident of the level of protection they would receive under law. This is still the approach to consumer protection. Article 153 of the EC Treaty states:

Article 153
1. In order to promote the interests of consumers and to ensure a high level of consumer protection, the Community shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.
2. Consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities.
3. The Community shall contribute to the attainment of the objectives referred to in paragraph 1 through:
(a) measures adopted pursuant to Article 95 in the context of the completion of the internal market;
(b) measures which support, supplement and monitor the policy pursued by the Member States.
4. The Council, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, shall adopt the measures referred to in paragraph 3(b).
5. Measures adopted pursuant to paragraph 4 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. The Commission shall be notified of them.

In 2005, the Parliament and the Council adopted a **Directive on unfair commercial practices** [33] under Art 95 (but also referring to Art 153). The recitals to the directive (which explain the reasons for its adoption) contain the following statements:

2) In accordance with Article 14(2) of the Treaty, the internal market comprises an area without internal frontiers in which the free movement of goods and services and freedom of establishment are ensured. The development of fair commercial practices within the area without internal frontiers is vital for the promotion of the development of crossborder activities.
(3) The laws of the Member States relating to unfair commercial practices show marked differences which can generate appreciable distortions of competition and obstacles to the smooth functioning of the internal market. In the field of advertising, Council Directive 84/450/EEC of 10 September 1984 concerning misleading and comparative advertising..establishes minimum criteria

[33] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive) OJ No. L 149/22 (Jun. 11, 2005) *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:149:0022:0039:EN:PDF .

for harmonising legislation on misleading advertising, but does not prevent the Member States from retaining or adopting measures which provide more extensive protection for consumers. As a result, Member States' provisions on misleading advertising diverge significantly.
(4) These disparities cause uncertainty as to which national rules apply to unfair commercial practices harming consumers' economic interests and create many barriers affecting business and consumers. These barriers increase the cost to business of exercising internal market freedoms, in particular when businesses wish to engage in cross border marketing, advertising campaigns and sales promotions. Such barriers also make consumers uncertain of their rights and undermine their confidence in the internal market.
(5) In the absence of uniform rules at Community level, obstacles to the free movement of services and goods across borders or the freedom of establishment could be justified in the light of the case-law of the Court of Justice of the European Communities as long as they seek to protect recognised public interest objectives and are proportionate to those objectives. In view of the Community's objectives, as set out in the provisions of the Treaty and in secondary Community law relating to freedom of movement, and in accordance with the Commission's policy on commercial communications as indicated in the Communication from the Commission entitled 'The follow-up to the Green Paper on Commercial Communications in the Internal Market', such obstacles should be eliminated.
These obstacles can only be eliminated by establishing uniform rules at Community level which establish a high level of consumer protection and by clarifying certain legal concepts at Community level to the extent necessary for the proper functioning of the internal market and to meet the requirement of **legal certainty**.[34]
(6) This Directive therefore approximates the laws of the Member States on unfair commercial practices, including unfair advertising, which directly harm consumers' economic interests and thereby indirectly harm the economic interests of legitimate competitors. In line with the principle of **proportionality**,[35] this Directive protects consumers from the consequences of such unfair commercial practices where they are material but recognises that in some cases the impact on consumers may be negligible. It neither covers nor affects the national laws on unfair commercial practices which harm only competitors' economic interests or which relate to a transaction between traders; **taking full account of the principle of subsidiarity**,[36] Member States will continue to be able to regulate such practices, in conformity with Community law, if they choose to do so. Nor does this Directive cover or affect the provisions of Directive 84/450/EEC on advertising which misleads business but which is not misleading for consumers and on comparative advertising. Further, this Directive does not affect accepted advertising and marketing practices, such as legitimate product placement, brand differentiation or the offering of incentives which may legitimately affect consumers' perceptions of products and influence their behaviour without

[34] Legal certainty is a principle of community law. It is a rather amorphous principle but is related to ideas in US law such as the doctrine that criminal laws can be void for vagueness.

[35] Proportionality is another principle of community law. Where institutions or Member States have powers to act they must often act in the least restrictive or burdensome manner possible, and must not go beyond what is necessary to achieve their objective.

[36] And see Art 5, page 14 below.

impairing the consumer's ability to make an informed decision.[37]

The common market rationale which justified EU level consumer protection rules was also invoked in the past to justify environmental protection rules. Businesses subject to different levels of environmental requirements are subject to different competitive conditions - harmonizing the rules creates more of a single market. But are harmonized rules necessary? If some Member States have more relaxed rules there may be an incentive for businesses to move to take advantage of the preferential conditions. But this would tend to lead to a decrease in levels of environmental protection. So the EU now has powers to legislate for environmental protection without needing to justify the measures using the common/single market basis.[38] And the EU has even legislated to address environmental protection through criminal law.[39]

The potential for very expansive reading of the internal market harmonization power led to the development of the principle of subsidiarity expressed in Art. 5 of the Treaty.

Article 5 (ex Article 3b)
The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.
In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed

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[37] Note that the rationale for the US Federal Trade Commission is similar. *See*, *e.g.*, http://www.ftc.gov/bcp/edu/pubs/consumer/general/gen03.shtm ("The FTC deals with issues that touch the economic lives of most Americans. In fact, the agency has a long tradition of maintaining a competitive marketplace for both consumers and businesses. When the FTC was created in 1914, its purpose was to prevent unfair methods of competition in commerce as part of the battle to "bust the trusts." Over the years, Congress passed additional laws giving the agency greater authority to police anticompetitive practices.
In 1938, Congress passed the Wheeler-Lea Amendment, which included a broad prohibition against "unfair and deceptive acts or practices." Since then, the Commission also has been directed to administer a wide variety of other consumer protection laws, including the Telemarketing Sales Rule, the Pay-Per-Call Rule and the Equal Credit Opportunity Act.")

[38] *See* EC Treaty Arts 174-6.

[39] *See, e.g.*, Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, OJ No. L 328/28 (Dec.6, 2008) *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:328:0028:0037:EN:PDF ("Experience has shown that the existing systems of penalties have not been sufficient to achieve complete compliance with the laws for the protection of the environment. Such compliance can and should be strengthened by the availability of criminal penalties, which demonstrate a social disapproval of a qualitatively different nature compared to administrative penalties or a compensation mechanism under civil law.")

action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.
Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

Do you think this helps very much with the uncertainties about what the EU is permitted to legislate about under Arts 94 and 95? Generally the principle of subsidiarity is important during negotiations about proposed legislation rather than as a way of challenging measures which are adopted. For example, in a case involving a challenge to a directive on food supplements,[40] the European Court of Justice (ECJ) said :

104 In deciding whether Articles 3, 4(1) and 15(b) of Directive 2002/46 comply with the principle of subsidiarity, it is necessary to consider whether the objective pursued by those provisions could be better achieved by the Community.
105 In that regard, it must be stated that the prohibition, under those provisions, on marketing food supplements which do not comply with Directive 2002/46, supplemented by the obligation of the Member States under Article 15(a) of the Directive to permit trade in food supplements complying with the Directive (see, by analogy, British American Tobacco (Investments) and Imperial Tobacco, paragraph 126), has the objective of removing barriers resulting from differences between the national rules on vitamins, minerals and vitamin or mineral substances authorised or prohibited in the manufacture of food supplements, whilst ensuring, in accordance with Article 95(3) EC, a high level of human-health protection.
106 To leave Member States the task of regulating trade in food supplements which do not comply with Directive 2002/46 would perpetuate the uncoordinated development of national rules and, consequently, obstacles to trade between Member States and distortions of competition so far as those products are concerned.
107 It follows that the objective pursued by Articles 3, 4(1) and 15(b) of Directive 2002/46 cannot be satisfactorily achieved by action taken by the Member States alone and requires action to be taken by the Community. Consequently, that objective could be best achieved at Community level.
108 It follows from the foregoing that Articles 3, 4(1) and 15(b) of Directive 2002/46 are not invalid by reason of an infringement of the principle of subsidiarity.

But the limited legal effect of subsidiarity does not mean it is unimportant. Nick Barber writes:

> Though its legal effects may be slight, its symbolic significance is enormous: it is a declaration of the vision of Europe shared by the authors of the Treaty and enshrined in that document.[41]

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[40] *R (on the application of Alliance for Natural Health and another)* v *Secretary of State for Health* (Case C-154/04) [2005] All ER (D) 128

[41] N W Barber, *The Limited Modesty of Subsidiarity*, 11 EUR. L. J. 308, 308 (2005). Barber explores the relationship between subsidiarity as an EU doctrine and subsidiarity as a doctrine of Catholic theology

He also argues that subsidiarity should be seen not just as an allocative principle for deciding which of existing institutions should have the power to regulate certain activities but also as a creative principle, requiring the creation of appropriate institutions where none exist.[42] Application of the principle of subsidiarity may mean at some times that power should be exercised at the supra-national level, but at other times (not addressed as such in Art. 5 of the Treaty) it may mean that power should be exercised at the sub-national level.

The Food Supplements Directive Case [43] is an interesting case (and we will come back to it later and in more detail). The rationale for the directive was that different Member States regulated food supplements differently and that differences in the rules could impede the internal market.[44] But the directive chose to regulate food supplements[45] by identifying a (limited) "positive list" of food supplements which could be used. The Alliance for Natural Health, a trade association, argued that the directive was invalid on a number of grounds. Part of the challenge involved an argument that Art 95 was not the correct **legal basis** for the directive, because it concerned health matters. The ECJ did not have a lot of time for this argument:

25 The claimants...submit that the prohibition arising from those provisions of Directive 2002/46 does not contribute to improving the conditions for the establishment and functioning of the internal market. On the assumption that the reason for the prohibition lies in public-health considerations, reliance on Article 95 EC constitutes a misuse of powers since, under Article 152(4)(c) EC, the Community has no power to harmonise national legislation on human health.
26 The claimants...claim, first, that Articles 3, 4(1) and 15(b) of Directive 2002/46 are contrary to the principle of the free movement of goods within the Community, a principle with which the Community legislature must comply when exercising its powers under Article 95 EC... Second, the provisions entail direct and immediate restrictions on trade with third countries and should thus have been adopted on the basis of Article 133 EC.
27 In that regard, it must be borne in mind that, as provided for by Article 95(1) EC, the Council of the European Union, acting in accordance with the procedure referred to in Article 251 EC and after consulting the European Economic and Social Committee, is to adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member

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[42] *Id.* at 319.

[43] The case involved a challenge to Directive 2002/46/EC of the European Parliament and of the Council of 10 June 2002 on the approximation of the laws of the Member States relating to food supplements, OJ No L 183/51 (Jul. 12, 2002) *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:183:0051:0057:EN:PDF .

[44] This fact illustrates that without harmonization it is possible for Member States to set up some barriers to the free movement of goods through their own national rules without contravening the Treaty.

[45] This directive applies to vitamins and minerals and not to other additives.

States which have as their object the establishment and functioning of the internal market.
28 By virtue of the Court's case-law, while a mere finding of disparities between national rules is not sufficient to justify having recourse to Article 95 EC... it is, however, otherwise where there are differences between the laws, regulations or administrative provisions of the Member States which are such as to obstruct the fundamental freedoms and thus have a direct effect on the functioning of the internal market...
29 It also follows from the Court's case-law that, although recourse to Article 95 EC as a legal basis is possible if the aim is to prevent the emergence of future obstacles to trade resulting from multifarious development of national laws, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them...
30 The Court has also held that, provided that the conditions for recourse to Article 95 EC as a legal basis are fulfilled, the Community legislature cannot be prevented from relying on that legal basis on the ground that public health protection is a decisive factor in the choices to be made...
31 It must be noted in that regard that the first subparagraph of Article 152(1) EC provides that a high level of human health protection is to be ensured in the definition and implementation of all Community policies and activities, and that Article 95(3) EC explicitly requires that, in achieving harmonisation, a high level of protection of human health should be guaranteed...
32 It follows from the foregoing that when there are obstacles to trade, or it is likely that such obstacles will emerge in the future, because the Member States have taken, or are about to take, divergent measures with respect to a product or a class of products, which bring about different levels of protection and thereby prevent the product or products concerned from moving freely within the Community, Article 95 EC authorises the Community legislature to intervene by adopting appropriate measures, in compliance with Article 95(3) EC and with the legal principles mentioned in the Treaty or identified in the case-law, in particular the principle of proportionality...
33 Depending on the circumstances, those appropriate measures may consist in requiring all the Member States to authorise the marketing of the product or products concerned, subjecting such an obligation of authorisation to certain conditions, or even provisionally or definitively prohibiting the marketing of a product or products...
34 It is in the light of those principles that it is necessary to ascertain whether the conditions for recourse to Article 95 EC as legal basis were satisfied in the case of the provisions to which the national court's question refers.
35 According to the second recital to Directive 2002/46, food supplements were regulated, before the Directive was adopted, by differing national rules liable to impede their free movement and thus have a direct impact on the functioning of the internal market.
36 As the European Parliament and the Council have noted in their written observations, those statements are borne out by the fact that prior to the adoption of Directive 2002/46 a number of cases were brought before the Court which related to situations in which traders had encountered obstacles when marketing in a Member State other than their State of establishment food supplements lawfully marketed in the latter State.
37 Furthermore, at point 1 of the Explanatory Memorandum to the proposal for a Directive of the European Parliament and of the Council on the approximation of the laws of the Member States relating to food supplements (COM(2000) 222 final, presented by the Commission on 10 May 2000 (OJ 2000 C 311 E, p. 207)), it is stated, as the Greek Government, the Council and the Commission have pointed out in their written observations, that before that proposal was presented the Commission services had received 'a substantial number of complaints from economic operators' on account of the differences between national rules which 'the application of the principle of mutual recognition did not succeed in overcoming'.
38 In those circumstances action on the part of the Community legislature on the basis of Article

95 EC was justified in relation to food supplements.
39 It follows from the foregoing that Articles 3, 4(1) and 15(b) of Directive 2002/46, which give rise to a prohibition, with effect from 1 August 2005 at the latest, on marketing food supplements which do not comply with the Directive, could be adopted on the basis of Article 95 EC.
40 In view of the cases cited at paragraphs 30 and 31 of this judgment, the fact that human health considerations played a part in the formulation of the provisions concerned cannot invalidate the foregoing assessment.
41 As regards the argument of the claimants in Case C-155/04 that Articles 3, 4(1) and 15(b) of Directive 2002/46 should be based on Article 133 EC, it must be stated that the fact that those provisions may incidentally affect international trade in food supplements does not make it possible validly to challenge the fact that the primary objective of those provisions is to further the removal of differences between national rules which may affect the functioning of the internal market in that area...
42 Consequently, Article 95 EC constitutes the only appropriate legal basis for Articles 3, 4(1) and 15(b) of Directive 2002/46.

The claimants here were trying to argue that there was no power to adopt the Food Supplements Directive under Art 95 because there was a separate provision in the Treaty dealing with health (which would not allow the adoption of this directive anyway). This wasn't a very good argument given past practice (and they had others we will look at later). That does not mean that challenges to Art.95 as a legal basis necessarily fail. If the measure in question has nothing to do with the internal market, Art. 95 is not an appropriate legal basis. In the **Tobacco Advertising Case**, the Court said that a directive on Tobacco Advertising which was designed to stop tobacco products being sold would not be validly adopted under Art 95:

83... the measures referred to in art [95] of the Treaty are intended to improve the conditions for the establishment and functioning of the internal market. To construe that article as meaning that it vests in the Community legislature a general power to regulate the internal market would not only be contrary to the express wording of the provisions cited above but would also be incompatible with the principle embodied in.. the EC Treaty...that the powers of the Community are limited to those specifically conferred on it.
84. Moreover, a measure adopted on the basis of art [95] of the Treaty must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market. If a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result therefrom were sufficient to justify the choice of art [95] as a legal basis, judicial review of compliance with the proper legal basis might be rendered nugatory. The court would then be prevented from discharging the function entrusted to it.. of ensuring that the law is observed in the interpretation and application of the Treaty.
85. So, in considering whether art [95] was the proper legal basis, the court must verify whether the measure whose validity is at issue in fact pursues the objectives stated by the Community legislature...
98. In principle...a Directive prohibiting the advertising of tobacco products in periodicals, magazines and newspapers could be adopted on the basis of art [95] of the Treaty with a view to ensuring the free movement of press products...
99. However, for numerous types of advertising of tobacco products, the prohibition under... the

Directive cannot be justified by the need to eliminate obstacles to the free movement of advertising media or the freedom to provide services in the field of advertising. That applies, in particular, to the prohibition of advertising on posters, parasols, ashtrays and other articles used in hotels, restaurants and cafes, and the prohibition of advertising spots in cinemas, prohibitions which in no way help to facilitate trade in the products concerned.
100. Admittedly, a measure adopted on the basis of art.. [95]... of the Treaty may incorporate provisions which do not contribute to the elimination of obstacles to the exercise of the fundamental freedoms, provided that they are necessary to ensure that certain prohibitions imposed in pursuit of that purpose are not circumvented. It is, however, quite clear that the prohibitions mentioned in the previous paragraph do not fall into that category.
101. Moreover, the Directive does not ensure free movement of products which are in conformity with its provisions.[46]

Challenges to EU measures based on the idea that the institutions chose the wrong legal basis for the measures also arise in the context of disputes between the different EU institutions or between different Member States. Some Treaty provisions give the Parliament more power than others. Treaty provisions requiring unanimity in the Council may be preferred as a legal basis by Member States which oppose a particular proposal (because they can block the measure's adoption). Art 95 does not require unanimity. Art. 95 also allows the Parliament a significant role in the legislative process.

At this point it is worth noting that **Art. 308** of the EC Treaty gives the EU **implied powers** to achieve the objectives in Arts 2 and 3:

If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

Note that the implied powers are exercised unanimously and in consultation with the Parliament. Art. 308 cannot be used if another more specific provision of the Treaty could be used as the legal basis for the legislation in question. The UK challenged a regulation on smoke flavourings in foods,[47] arguing that it should have been adopted on the basis of Art. 308 rather than Art. 95. If the proper legal basis were Art. 308 the UK would have been able to block the measure. The ECJ decided that Art. 95 was the appropriate legal basis.[48]

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[46] *Germany* v *European Parliament* [2000] All ER (EC) 769 (ECJ).

[47] The regulation is Regulation (EC) No 2065/2003 of the European Parliament and of the Council of 10 November 2003 on smoke flavourings used or intended for use in or on foods, OJ No L 309/1 (Nov. 26, 2003) at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:309:0001:0008:EN:PDF.

[48] *UK* v *European Parliament and Council*, Case C-66/04 at http://www.bailii.org/eu/cases/EUECJ/2005/C6604.html

At this point it is worth noting that the EC Treaty identifies the types of measure the EU institutions may adopt as follows (emphasis added):

Article 249
In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make **regulations** and issue **directives**, take **decisions**, make **recommendations** or deliver **opinions**.
A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
A Directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.
A decision shall be binding in its entirety upon those to whom it is addressed.
Recommendations and opinions shall have no binding force.

Traditionally, directives have been used for legal harmonization. The directive operates as an instruction to Member States to change their domestic law to conform to the provisions of a directive (this process is referred to as "implementation" of a directive). More recently, the EU institutions have been using regulations more frequently as instruments of harmonization. Not only do regulations not require implementation in the Member States, the Member States have no power to introduce implementing mechanisms for a regulation - this is what the directly applicable language in Art. 249 above connotes.

In the next section we will briefly examine the different institutions of the EU.

3. INSTITUTIONS OF THE EU[49]

We commonly divide governmental functions into legislative, executive and judicial functions, so it is appropriate to consider how these functions are distributed among the EU's institutions. The ECJ and the CFI have the judicial power; much of the executive power is held by the Commission, and the legislative power is shared by the Council and the Parliament.[50] The EU has no real permanent equivalent of a Head of State or Government. The important figures who perform analogous roles are the President of the Council, a role which falls to the Foreign Minister of each Member State in turn for a period

[49] This section does not discuss the Court of Auditors, the European Ombudsman or the European Data Protection Supervisor or advisory bodies, financial institutions and agencies. Information about these other institutions can be found on the Europa website.

[50] Although the Parliament has greater powers in some areas than in others.

of 6 months at a time, the President of the Commission (currently José Manuel Barroso),[51] the High Representative of the Common Foreign and Security Policy (Javier Solana)[52] and the President of the Parliament (Hans-Gert Pöttering).[53] The President of the Commission and the High Representative tend to be most visible.

As the EU is a supranational entity it is also appropriate to think about the extent to which its institutions are truly supranational rather than intergovernmental. This is in part because it is the EU's supranational elements that distinguish it from other regional and international organizations.

EUROPEAN PARLIAMENT[54]

Since 1979 the European Parliament has been directly elected by the citizens of the EU. Elections occur every 5 years,[55] and the last elections took place in 2004. The next elections will take place in June 2009. Although citizens have the right to vote to elect their representatives to the European Parliament (even if they are living in a Member State different from that of their nationality) many voters do not choose to exercise this right. Just over 44% of the electorate voted in the last European Parliament elections.

Seats in the Parliament are allocated broadly in line with the populations of the Member States.

Originally the Parliament was merely a talking shop, but over time the Parliament has developed increased powers. Many legislative measures are now adopted through co-decision by the Parliament and the Council together. And the Parliament has exercised its powers to impede proposals the MEPs do not like.[56]

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[51] *See* http://ec.europa.eu/commission_barroso/president/index_en.htm

[52] *See* http://www.consilium.europa.eu/cms3_applications/applications/solana/index.asp?cmsid=246&lang=EN.

[53] *See* http://www.europarl.europa.eu/president/defaulten.htm .

[54] The Statute of the European Parliament is here: Decision of the European Parliament of 28 September 2005 adopting the Statute for Members of the European Parliament, OJ. No. L 262/1 (Oct. 7, 2005) at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:262:0001:0010:EN:PDF .

[55] EC Treaty, Art. 190.

[56] One example was the Parliament's opposition to a proposed software patents Directive in 2005. See http://news.bbc.co.uk/2/hi/technology/4685731.stm

The Parliament's approval of a nominee for President of the Commission, and of the proposed commissioners is necessary before the Commission can take office. In 2004, the Parliament objected to a proposed Commission including Rocco Buttiglione (who had been nominated by Silvio Berlusconi) because of his views on women and homosexuality. Barroso withdrew the proposed slate of Commissioners in response to the Parliament's objections: with some other changes, Buttiglione withdrew, and Berlusconi nominated Franco Frattini in his place.[57]

The Parliament has the power to censure the Commission (but not individual Commissioners) and, if it does so, the Commission must resign.[58] In 1999, after an independent investigative committee reported that the Commission had lost control of the bureaucracy, which suffered from problems of corruption,[59] the Commission (the Santer Commission) resigned before the Parliament could exercise its power to censure the Commission.

The Parliament has the power to decide whether or not to approve the Budget, and has the power to request the Commission to propose legislative measures,[60] and it can set up committees of inquiry and entertain petitions from EU citizens. The European Ombudsman is appointed by the Parliament to investigate complaints of maladministration.

The European Parliament is a supranational rather than intergovernmental body - directly elected by the people to represent the people at the EU level:

Article 189 (as amended by the Treaty of Nice)
The European Parliament, which shall consist of representatives of the peoples of the States brought together in the Community, shall exercise the powers conferred upon it by this Treaty....

MEPs sit in political groups (each of which has its own staff) rather than with other

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[57] *See* MEPs approve revamped Commission, at http://news.bbc.co.uk/2/hi/europe/4021499.stm . The Parliament had also objected to the nomination of Neelie Kroes as Competition Commissioner because of her links to industry, but she was not replaced. Antonio Tajani replaced Franco Frattini as the Italian Commissioner in 2008.

[58] EC Treaty, Art. 201.

[59] Committee of Independent Experts, First Report on Allegations regarding Fraud, Mismanagement and Nepotism in the European Commission (Mar. 15, 1999) *available at* http://europa.eu.int/comm/anti_fraud/reports/sages/1_en.pdf. In 2004 the Commission referred Edith Cresson's file (she was a member of the Santer Commission accused of nepotism) to the ECJ. See http://news.bbc.co.uk/2/hi/europe/3908049.stm

[60] EC Treaty, Art. 192.

MEPs from the same Member State (although some MEPs are not attached to any group).

EUROPEAN COMMISSION

The Commission is responsible for putting forward proposed legislation and participating in the legislative process, for implementing legislation and for ensuring compliance with the Treaty.[61]

Each Member State currently appoints one Commissioner, so there are currently 27 Commissioners. The idea that a Commission of nearly 30 members might be unmanageable was one of the concerns which led to recent attempts to rewrite the Treaties. As an interim solution, the **Treaty of Nice** provided (in Article 4 of the first Protocol):

1. On 1 January 2005 and with effect from when the first Commission following that date takes up its duties, Article 213(1) of the Treaty establishing the European Community and Article 126(1) of the Treaty establishing the European Atomic Energy Community shall be replaced by the following:
1. The Members of the Commission shall be chosen on the grounds of their general competence and their independence shall be beyond doubt.
The Commission shall include one national of each of the Member States. The number of Members of the Commission may be altered by the Council, acting unanimously.
2. When the Union consists of 27 Member States, Article 213(1) of the Treaty establishing the European Community... shall be replaced by the following:
.1. The Members of the Commission shall be chosen on the grounds of their general competence and their independence shall be beyond doubt.
The number of Members of the Commission shall be less than the number of Member States. The Members of the Commission shall be chosen according to a rotation system based on the principle of equality, the implementing arrangements for which shall be adopted by the Council, acting unanimously.
The number of Members of the Commission shall be set by the Council, acting unanimously.
This amendment shall apply as from the date on which the first Commission following the date of accession of the twenty-seventh Member State of the Union takes up its duties.
3. The Council, acting unanimously after signing the treaty of accession of the twenty-seventh Member State of the Union, shall adopt:
- the number of Members of the Commission;
- the implementing arrangements for a rotation system based on the principle of equality containing all the criteria and rules necessary for determining the composition of successive colleges automatically on the basis of the following principles:

(a) Member States shall be treated on a strictly equal footing as regards determination of the sequence of, and the time spent by, their nationals as Members of the Commission; consequently, the difference between the total number of terms of office held by nationals of any given pair of Member States may never be more than one;
(b) subject to point (a), each successive college shall be so composed as to reflect

[61] On enforcement actions see art 226, below at page 39.

satisfactorily the demographic and geographical range of all the Member States of the Union.

4. Any State which accedes to the Union shall be entitled, at the time of its accession, to have one of its nationals as a Member of the Commission until paragraph 2 applies.

Although the Treaty of Nice, which has been ratified and is in effect, thus already provided for a reduction of member State representation on the Commission, potential loss of consistent representation on the Commission was one of the concerns which seemed to lead to the Irish no vote in the 2008 referendum.[62] The European Council recognized this concern in December 2008:

On the composition of the Commission, the European Council recalls that the Treaties currently in force require that the number of Commissioners be reduced in 2009. The European Council agrees that provided the Treaty of Lisbon enters into force, a decision will be taken, in accordance with the necessary legal procedures, to the effect that the Commission shall continue to include one national of each Member State.[63]

Commissioners serve for a (renewable) 5 year term.[64] Under the Treaty, the Member States must agree in the Council on a nominee to be President of the Commission who will take office if the Parliament approves the nomination.[65] After the President of the Commission is approved the President works with the Member States in the Council to draw up a list of proposed Commissioners who will be appointed if the Parliament approves the list. In 2004 Members of the Parliament expressed reservations about some of the nominees to the Commission, in particular to Neelie Kroes (the Dutch nominee, who subsequently became the Commissioner responsible for competition policy)[66] and to Rocco Buttiglione. Mr Barroso, the Commission President-designate (at

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[62] Although this was not set out as a factor in the Statement of the Concerns of the Irish People on the Treaty of Lisbon as set out by the Taoiseach in Annex 1 to the Brussels European Council, Presidency Conclusions, 12 (Dec. 11-12, 2008) *available at* http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/104692.pdf It is thought to have been a factor in the vote. See http://www.euractiv.com/en/future-eu/eu-summit-gives-irish-demands-lisbon-treaty/article-178004.

[63] Brussels European Council, Presidency Conclusions, note 62 above, at p. 2.

[64] Margot Wallström, the Swedish Environment Commissioner and one of the Vice Presidents of the Commission, has been a Commissioner since 1999. http://europa.eu.int/comm/commission_barroso/wallstrom/pdf/cv_wallstrom_en.pdf

[65] EC Treaty Art. 214.

[66] *See* http://europa.eu.int/comm/commission_barroso/kroes/index_en.html Some people suggested that Ms Kroes was too close to industry.

that point in November 2004) withdrew his proposed Commission from consideration by the Parliament after MEPs expressed reservations about whether Mr Buttiglione would fully support the principle of non-discrimination.

The Treaty states that the Commissioners must be independent of the Member States which appoint them.[67] However, the Commissioners are nominated by the Member States, and, if they have an interest in their appointments being renewed they may have an incentive to act in (or not against) their own Member State's interests. And the actions of the Commissioners are more visible than the actions of the Judges of the ECJ/CFI (see below page 35). The Member States also clearly have views about which portfolios they would like their Commissioner to have. Some portfolios are regarded as being more desirable than others (e.g. internal market, competition). On the other hand, the people who become Commissioners may have an incentive to demonstrate their independence from their own Member State if they have ambitions for future work in international organizations. For example, Pascal Lamy is currently Director General of the WTO (World Trade Organization) and was previously an EU Commissioner for trade.[68]

Because much of what the Commissioners do has an impact on businesses, commentators sometimes suggest that the Commissioners are not sufficiently independent of business interests. Commentators sometimes suggest, for example, that UNICE (the Union of Industrial and Employers Confederations of Europe) and ERT (the European Roundtable of Industrialists) and the American Chambers of Commerce have significant influence on the development of EU policy. At the end of the 1990s two Commissioners left the Commission and took up jobs in business which attracted criticism.[69] In 1999 a Code of Conduct for Commissioners was introduced which requires a cooling-off period of one year between a Commissioner's leaving office and taking up any position which would involve that person's areas of responsibility as a Commissioner.[70] Reform of the Commission - its staff as well as the commissioners - was a priority for a period of time.[71]

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[67] See the Treaty of Nice provisions above: "The Members of the Commission shall be chosen on the grounds of their general competence and their independence shall be beyond doubt."

[68] http://www.wto.org/english/thewto_e/dg_e/pl_e.htm

[69] In 1999, Martin Bangemann who had been the Commissioner responsible for Telecommunications since 1992 announced that he was moving to Telefonica and Leon Brittan announced that he was to become a Vice Chairman of Warburg Dillon Read.

[70] *See e.g.*, http://europa.eu.int/comm/commission_barroso/president/pdf/conduct_en.pdf#search='code%20of%20Conduct,%20commissioners'.

[71] *See* http://europa.eu.int/comm/reform/2002/chapter05_en.htm

The Commission is a vast bureaucracy and relies on the work of its staff.[72] This fact, combined with the fact that the Commissioners meet together in private, means that the Commission is less transparent than it might be.[73] In 2002 the Commission introduced a new initiative on "Better Law-Making"[74] which involved three main components:

> 1. simplifying and improving the regulatory environment — in order to improve access to EU law;
> 2. promoting a culture of dialogue and participation — in order for everyone concerned, even the smallest voices, to be heard during the lawmaking process;
> 3. systematising impact assessment[75] by the Commission — in order to ensure that both the benefits and costs of implementing a piece of legislation are clear in advance.[76]

In January 2008 the Commission published a review of Better Regulation which began:

This Commission has given the highest priority to simplifying and improving the regulatory environment in Europe. This is part of its wider objective of delivering results to citizens and businesses. The Better Regulation Agenda, adopted in 2005, aims both to ensure that all new initiatives are of high quality, and to modernise and simplify the existing stock of legislation. In doing so, it is helping to stimulate entrepreneurship and innovation, to realise the full potential of the single market, and thereby promote growth and job creation. Better regulation is therefore a key element of the Lisbon Growth and Employment Strategy. The Better Regulation agenda also helps the EU to respond to globalisation, and to shape global regulation rather than to be shaped by it.
The Commission is making improvements at various stages of the policy cycle. Better regulation does not mean deregulation or holding back new European rules when they are needed. But policy and regulatory proposals are now systemically assessed, and a wide range of options - regulatory and non-regulatory - are examined for each initiative. The quality of

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[72] On the work of the Commission see generally http://europa.eu.int/comm/atwork/index_en.htm

[73] The Commission does publish agendas and minutes of its meetings. See http://europa.eu.int/comm/atwork/collegemeetings/index_en.htm. See also information about the European Transparency Initiative at http://ec.europa.eu/commission_barroso/kallas/transparency_en.htm.

[74] Communication from the Commission, European Governance: Better LawMaking, COM (2002) 275 final (Jun. 5, 2002) *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0275:FIN:EN:PDF.

[75] Impact assessment involves measuring the costs and benefits of regulatory proposals.

[76] http://www.europa.eu.int/comm/atwork/basicfacts/index_en.htm#lawmaking

these assessments is overseen by an independent Impact Assessment Board. Existing laws are being simplified and codified, and a concerted effort is being made to reduce the administrative costs of EU laws. Pending proposals are being screened and withdrawn if they are no longer relevant or consistent with Commission priorities. In partnership with the Member States, a more effective approach is being developed to handle difficulties in implementing and ensuring conformity with Community law.
The Better Regulation Agenda is already bringing concrete benefits for businesses and consumers. But the full benefits will only be obtained if all European Institutions and Member States work together. [77]

By the end of 2008, as a result of the transnational financial crisis, there was something of a retreat from some of the implications of Better Regulation (that less regulation was necessarily better). Here's an excerpt from a speech by the Internal Market Commissioner, Charlie McCreevy, in December 2008:

A mere six months ago, I was being barracked by people in the City of London for MiFID. I was being barracked on Credit Ratings Agencies and told that I was overreacting. I was being barracked on securitisation.

Well the orchestra has quietened down. Half of them have been sacked and the other half have seen their (financial) instruments broken.

I was being told that the industry could handle it, that they knew the risks, that the effects of subprime had almost finished working their way through the system. The people who told me this started out as PLC's but in their scale of denial about the crisis they have been much more like NMG's – Not Me, Gov!

I was being told that I did not understand markets, that the European Commission and national regulators and supervisors should just get out of the way and let markets do their thing. I was told that we needed to catch up with where markets were and stop being pedestrian or else we would be passed by.

Turning the situation around

And you will be passed – but by events and by regulation - unless you get serious about the extent of the change. What we need now is a bit of candour and humility from the financial services industry.

I would like to live in a world of light-touch regulation, where the regulator shouts "Play on!" as much as possible. But frankly, even the most relaxed referee has to intervene when you have a situation where not only are the players fouling each other on the pitch, but they are having a go at the crowd as well!

So how are we going to get out of this mess? We need to act in five ways:

Transparency and Disclosure. The industry has to act to disclose what they have and where

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[77] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Second Strategic Review of Better Regulation In the European Union, COM (2008) 32 final (Jan. 30, 2008) at http://ec.europa.eu/governance/better_regulation/documents/com_2008_0032_en.pdf .

> they have it. We need accounting standards that give us a true picture and not just when the economy is working well. And we need a global accounting standard setter with 21st century standards of governance.
> Regulation of risk management and prudential oversight. The EU needs to adopt the revised Capital Requirements Directive that I proposed in October and it needs to do so fast. We need Solvency II adopted and we need it fast. And we need a roadmap on how the risks from credit derivatives can be mitigated and we need it fast.
> Incentives. Perverse incentives stemming from executive compensation schemes should go and they should go now. My proposals on securitization need to be adopted and they need to be adopted now. Conflicts of interest within rating agencies need to be tackled and they need to be tackled now.
> Oversight and Crisis Management. We have got to move towards much better oversight to detect and prevent crises or imbalances in future. It is why President Barroso set up a High Level Group on cross-border supervision under Jacques de Larosière to produce recommendations by March next year. And we need better crisis management mechanisms.
> International Cooperation. And finally, we need much, much greater international cooperation. The G20 Summit took an important step forward, but we have to go much further and translate this into change on the ground. ... We need to cooperate whenever and wherever with our third country partners. For this reason, I was very glad to see that on accounting standards, we completed the move to dropping reconciliation, we agreed on equivalence for certain third countries and I welcome the courageous moves of the SEC on moving to IFRS for US issuers.
>
> When these proposals are safely adopted, I will then come forward with a paper setting out a clear, collected and reflected vision for the years ahead, looking at how to reform our system to prevent future problems and crises in whichever shape.
> Mr Chairman, Ladies and Gentlemen, we are in a dire situation, caused by mistakes and hubris in every part of the system. And this situation is hurting our pensioners, our firms, and our families. Things will never be the same again and we have to recognise that.[78]

The Commission, with its powers of initiation of policy and enforcement, as a body which is not directly involved in national politics, takes responsibility for pushing forward the European project in ways that the Council does not.

Consider this extract from a **Speech of José Manuel Barroso**, the President of the Commission[79]:

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[78] Charlie McCreevy, European Commissioner for Internal Market and Services Financial Market Controversies and the Outlook for next Year, ICAEW (Institute of Chartered Accountants in England and Wales) - Debate on Financial Markets, (Dec. 4, 2008) at http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/676&format=HTML&aged=0&language=EN&guiLanguage=en.

[79] http://www.europa.eu.int/comm/commission_barroso/president/pdf/speech_20051203_en.pdf

Building Europe is not something you start today and can deem concluded in any fixed length of time. Integrating Europe is a never-ending process; a historical task that calls into question the whole basis of what we mean by polis — citizenship, legitimacy, representation.
I am saying these things with a sense of urgency, because the European Union is at a crossroads. Europe needs to reform. The drivers for reform are well known: internally, we have 20 million unemployed and that is unacceptable from a social point of view. Externally, we see the extraordinary dynamism of the emerging economies. Equally, the double 'no' to the European Constitution and failure to agree on new financial perspectives have shaken people's faith in the European project. The rising tide of euroscepticism, even in traditionally supportive Member States, means that a growing number of our citizens now see the European Union as part of the problem, not part of the solution.
These are all difficult issues to deal with, and inevitably the debate is, and will continue to be, controversial. But these issues will not go away if we ignore them. They will simply get worse. The status quo is not an option.
So what lessons can we draw from this? When I think of these developments from a distance — and in present company the exercise is somewhat easier — I am reminded of one striking imbalance in the process of integration of our continent. In the past fifty years or so, Europe may have won the minds of its citizens, but it still needs to win their hearts.
We must bring Europe closer to the people and show that it really brings tangible advantages to their lives. We must make sure that the increasing diversity of the enlarged - and still enlarging - Union is seen as part of the richness of Europe, not as a risk or a threat. We must move from a multicultural society to an intercultural society.
All this is more easily said than done. It requires a fundamental change in our perceptions, convictions and actions. We must gradually develop a multi-layered sense of identity. We should come to recognise that we are at the same time citizens of our towns, our regions, our countries, and finally citizens of the European Union.
In this context, culture and the arts are a necessity, not a luxury, for Europe's process of integration. Culture — in its broadest possible meaning — will help us to counter the growing imbalance between the rational and the emotional sides of European affairs. This imbalance is itself a reason for concern, because it fuels a sense of indifference and distance towards Europe among our peoples. Let me abandon for a second the sense of prudence that my role as President of the Commission requires: I would like to state that the European project is not sustainable in the long run unless we redress the imbalance.

COUNCIL OF THE EU

The Council of the EU is an intergovernmental rather than a supranational body:

Article 203
The Council shall consist of a **representative of each Member State** at ministerial level, authorised to commit the government of that Member State.
The office of President shall be held in turn by each Member State in the Council for a term of six months in the order decided by the Council acting unanimously.

For the 6 months beginning in January 2009 the Council Presidency is held by the

Czech Republic, which has only been an EU Member State since 2004.[80] The Czech presidency's work program states:

In the highly changeable world of the 21st century, it is becoming clear that the European Union's success depends upon it having the ability to flexibly respond to current problems, and to take full advantage of its economic, cultural and human potential. With this in mind, from the very outset of its preparations, the Czech Republic chose 'Europe without Barriers' as the symbolic motto of its Presidency: a Europe without internal economic, cultural and value barriers for individuals, entrepreneurs and economic entities; a Europe open to the world, but not defenceless against illegal activities and attacks. In the light of the present developments – the conclusions of the November G-20 Summit and the conclusions of the December 2008 European Council – this motto takes on a topical significance. In the present efforts to stabilise the EU's economies, excessive regulation and an increased level of protectionism must be avoided, above all. The European Union must not give up its strategic goals in favour of short-term stabilisation measures.[81]

The immediate past president of the council, the current president and the forthcoming president decide together on the Council's agenda over time. When the Council meets its composition is determined by the subject matter of its meetings. For example, if the Council is to consider agricultural policy it is composed of agriculture ministers from the Member States; if it is to consider consumer affairs it will be composed of the consumer affairs ministers from the Member States. The Council thus contrasts with the other institutions which have a fixed composition over a definite period of time. The Council has an inherently shifting composition and the vagaries of national politics including elections and changes in the composition of governments apart from elections may lead to additional changes in the Council's composition. But the Council has a staff and the High Representative of the CFSP is also the Secretary General of the Council. A Committee of Permanent Representatives (Coreper II) and a Committee of Deputy Permanent Representatives (Coreper I) and their working groups prepare the work of the Council.

Originally the Council was the EU's legislator (although it was required to consult with the Parliament). Now the Council commonly shares the legislative power with the Parliament. The Parliament is a supranational body, but the Council is intergovernmental in nature, and its members represent the Governments of which they form part.

The Council may delegate powers to the Commission.

When the Council exercises legislative powers it may act unanimously or by **qualified majority** (depending on the relevant provision of the Treaty). For the purposes of

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[80] *See* http://www.eu2009.cz/en/ .

[81] Work Programme of the Czech Presidency, Europe without Barriers 1 January-30 June 2009, *available at* http://www.eu2009.cz/scripts/file.php?id=6226&down=yes .

qualified majority voting (QMV) each Member State is currently entitled to a number of votes which, in broad terms, reflects that State's population.[82] For a measure to be adopted under QMV under the Treaty of Nice it must be approved by a majority of countries (50% or 67%) and votes (74%) and population (62%). Qualified majority voting means that Member States are sometimes bound by legislative measures they have not agreed to.

Commentators concerned about a lack of transparency in the EU have often focused on the Council.[83]

EUROPEAN COURT OF JUSTICE AND COURT OF FIRST INSTANCE

Article 220 of the EC Treaty states:

The Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed.

The ECJ has often invoked this provision of the Treaty to justify its decisions and an expansive view of its own role.

The Member States agree on appointments of judges to the ECJ and CFI. Subject to this common agreement each Member State appoints one judge to the European Court of Justice (ECJ) and one judge to the Court of First Instance (CFI). In addition, there are 8 Advocates General who assist the ECJ in its work by writing preliminary opinions on the cases (unless the Court decides a particular case does not require an Advocate General's opinion). One judge acts as a rapporteur for each case before the court.

The CFI was introduced by the Single European Act to help to reduce the workload of the ECJ. Over time the range of cases which the CFI may hear has expanded.

The Court of Justice and the Court of First Instance may sit as a full court (in

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[82] Under the Treaty of Lisbon, from November 1, 2014, a double majority system will replace QMV. The double majority system will require approval by 55% of the Member States (15 out of 27) representing 65% of the population of the Union. A blocking minority must comprise at least four member States. If the blocking minority is less than four states, the qualified majority will be deemed to be reached even if the population percentage is not met.

[83] On transparency and the Council *see, e.g.*, http://www.consilium.europa.eu/cms3_fo/showPage.asp?id=305&lang=en

exceptional cases), in Grand Chambers or in smaller chambers.[84] This arrangement gives the courts flexibility in managing resources, but it raises some questions. In 2000 the Court cautioned that a significant increase in the number of judges on the court risked transforming the court from a judicial to a deliberative body,[85] and that solving this problem by working increasingly through smaller chambers would risk "jeopardizing the coherence of the case law".[86] The Court said: "The advantages gained in limiting the number of judges have to be weighed against those of having all of the national legal systems represented."[87]

The Commission also recognized this potential conflict:

In an enlarged Union it will be necessary to safeguard the effectiveness of the Community's judicial system and the consistency of its case-law, factors which are essential if Community law is to be applied uniformly in an increasingly diverse Europe.[88]

The Chambers since October 2004 reflect a mixture of members from the old and new Member States[89] as a way of trying to ensure consistency. A Working Party on the EU courts recommended that Chambers should reflect a balance between the main legal systems of the EU.[90]

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[84] *See* Statute of the Court of Justice (Mar. 2008) *available at* http://curia.eu.int/en/instit/txtdocfr/txtsenvigueur/statut.pdf; Rules of Procedure of the Court of Justice (Sept. 1, 2008) *available at* http://curia.eu.int/en/instit/txtdocfr/txtsenvigueur/txt5.pdf

[85] The EC Court of Justice and the Institutional reform of the European Union (April 2000) *available at* http://curia.eu.int/en/instit/txtdocfr/autrestxts/rod.pdf ("From the point of view of enlargement there is the question of the number of members of the Court, in other words whether one can maintain the current practice of fixing the number of judges according to the number of Member States. Without taking a position on this rather delicate political problem, the Court has drawn attention to the risk inherent in a large increase in the number of judges which could entail the Court being transformed from a judicial collegiate body to something like a deliberative assembly.")

[86] *Id.*

[87] *Id.*

[88] EU Commission, *Additional contribution to the IGC on Reform of the Community Courts*, COM (2000) 109, 2 (Mar. 1, 2000).

[89] *See* http://curia.europa.eu/en/instit/presentationfr/index_cje.htm ; http://curia.europa.eu/en/instit/presentationfr/index_cje.htm

[90] *Report by the Working Party on the Future of the European Communities' Court System,* 48 (Jan. 2000).

A court of 27 judges is very large.[91] As a simple comparison Federal Appeals Courts in the United States may have over 20 judges (including judges who have taken senior status and hear fewer cases).[92] These courts hear most cases in panels of 3 judges.[93] Where the appeal courts hear cases en banc the panel will only include judges of senior status if they were members of the original panel that heard the case.[94] The 9th Circuit, which is the largest court of appeals, has special rules for en banc hearings which limit the number of members of the panel to 11 judges.[95] The US Supreme Court, which has the responsibility for establishing what federal law is in cases where the federal appeals courts' views diverge, and is thus functionally comparable to the ECJ, has only 9 Justices.[96]

The comparison between the EU courts and federal courts in the US illustrates a

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[91] The Working Party suggested that the quality of decisions of a large court might be impaired. Working Party, note 90 above, at 46 ("If the quality of the Court's rulings is to be maintained, there must necessarily be a strict limit on the number of Judges attending plenary sessions.")

[92] There are 21 judges on the 2nd Circuit Court of Appeals, although nine of those have senior status. See http://www.ca2.uscourts.gov/JudgesMain.htm. There are 48 judges on the 9th Circuit Court of Appeals, and 21 have senior status. See http://www.ca9.uscourts.gov/content/view_seniority_list.php?pk_id=0000000035.

[93] 28 U.S.C. § 46(b).

[94] 28 U.S.C. § 46(c)("A court in banc shall consist of all circuit judges in regular active service, or such number of judges as may be prescribed in accordance with section 6 of Public Law 95-486 (92 Stat. 1633), except that any senior circuit judge of the circuit shall be eligible (1) to participate, at his election and upon designation and assignment pursuant to section 294(c) of this title and the rules of the circuit, as a member of an in banc court reviewing a decision of a panel of which such judge was a member, or (2) to continue to participate in the decision of a case or controversy that was heard or reheard by the court in banc at a time when such judge was in regular
active service.")

[95] 11 judges sit on 9th Circuit en banc panels. FRAP 35, 9th Circuit Rule 35-3 ("The en banc court, for each case or group of related cases taken en banc, shall consist of the Chief Judge of this circuit and 10 additional judges to be drawn by lot from the active judges of the Court. In the absence of the Chief Judge, an 11th active judge shall be drawn by lot, and the most senior active judge on the panel shall preside.") *Cf.* Ninth Circuit Evaluation Committee, Interim Report (March 2000) (discussing appropriate size of en banc panels).

[96] En banc panels may be useful to increase consistency within and between circuits.

general concern that a large judicial body may be unmanageable.[97] In addition to the issue of whether the full court can work effectively, the 9th Circuit has focused on the question whether very large numbers of small panels produce more inconsistencies between panels than was the case in smaller Circuits.[98] In fact Congress has considered whether to split the 9th Circuit because of its size.[99] This solution to the problem of a large Circuit is feasible in the US, in a system with multiple levels of federal courts and multiple federal appeal courts,[100] but would be less feasible in the EU without a radical change in the structure of the EU court system.

Judges and Advocates General of the ECJ and CFI should have the sort of credentials that would justify their holding the highest judicial office in their country of origin and they are not representatives of the states which appoint them:

Article 223
The Judges and Advocates-General of the Court of Justice shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence; they shall be appointed by common accord of the governments of the Member States for a term of six years.
Every three years there shall be a partial replacement of the Judges and Advocates- General, in accordance with the conditions laid down in the Statute of the Court of Justice. The Judges shall elect the President of the Court of Justice from among their number for a term of three years. He may be re-elected.
Retiring Judges and Advocates-General may be reappointed.
The Court of Justice shall appoint its Registrar and lay down the rules governing his service.
The Court of Justice shall establish its Rules of Procedure. Those Rules shall require the approval

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[97] The US' federal court system shares with the EU's court system a history of adjusting over time to the addition of new territories.

[98] *See* Ninth Circuit Evaluation Committee, Interim Report, note 95 above, at 8-9 ("While there is no objective evidence that Ninth Circuit decisions are subject to greater inconsistency than those in other circuits, there is a perception that a circuit as large as the Ninth cannot avoid inconsistencies with so many panels issuing so many opinions. Responding to this perception, the Committee has focused its efforts on strengthening the court's ability to recognize potential or perceived conflicts early and address them directly and immediately.") *Cf*. Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. CHI. L. REV 541 (1989) (suggesting that there was not as much inconsistency in the 9th Circuit's decisions as other commentators had argued)

[99] *See*, *e.g.*, Ninth Circuit Judgeship and Reorganization Act of 2005, H. R. 211, 109th Congress, 1st Session.

[100] The federal appeals courts were introduced in the US at the end of the 19th century to address the Supreme Court's workload problems. *See*, *e.g.*, Eric J Gribbin, *California Split: a Plan to Divide the Ninth Circuit*, 47 DUKE L. J 351, 351 (1997).

of the Council, acting by a qualified majority.[101]

The judges tend to have a wide range of experience. They may be law professors, or lawyers with administrative, diplomatic or political experience. They also obviously come from different states and have different training and experience in different legal systems. When judges or Advocates General who leave the ECJ or CFI return to their home countries and become judges in the national legal systems they are likely to have an impact on how Community law is seen within the national legal systems. The Court's website provides access to links to resources on the national legal institutions.[102]

Judges can be removed during their 6 year terms only by a unanimous vote of their colleagues.[103] The independence of the judges is reinforced by the fact that decisions of the ECJ and CFI (which are taken by majority)[104] are anonymous. Judges are required to maintain the secrecy of the proceedings of the Court. See, for example, Article 3 of the Rules of Procedure:[105]

1. Before taking up his duties, a Judge shall at the first public sitting of the Court which he attends after his appointment take the following oath:
"I swear that I will perform my duties impartially and conscientiously; I swear that I will preserve the secrecy of the deliberations of the Court".

2. Immediately after taking the oath, a Judge shall sign a declaration by which he solemnly undertakes that, both during and after his term of office, he will respect the obligations arising therefrom, and in particular the duty to behave with integrity and discretion as regards the acceptance, after he has ceased to hold office, of certain appointments and benefits.

As a result of these rules a Member State does not know whether its own judge was involved in a decision in which it was criticized. Of course this practice of secrecy and anonymity also means that lawyers who appear before a small group of judges in one of the Court's chambers do not have much of an idea about whether those judges are likely to be receptive to their arguments. This is quite different from the position of a lawyer appearing before justices of the US Supreme Court or judges on any of the Federal Appeals Courts. Do you think the interest in maintaining the independence of the judges

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[101] *See also* the Code of Conduct of the Court of Justice, OJ No. C233/1 (Sept. 22, 2007) *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:223:0001:0002:EN:PDF

[102] *See* http://curia.europa.eu/en/coopju/apercu_reflets/lang/index.htm

[103] *See* Art. 6 of the Statute of the Court, note 84 above.

[104] Under Art 27 of the Rules of Procedure (see note 84 above).

[105] And see Arts. 2, 4 and 10 of the Statute of the Court, note 84 above.

justifies this lack of transparency or not? This is perhaps more noticeable as a feature of the ECJ/CFI than it used to be as transparency has become more of an issue in the other EU institutions. Not only are the Courts' decisions opaque, but they are, as we will see later, very far-reaching and, as a practical matter, the ECJ's decisions (although not the CFI's decisions) are unreviewable..

The ECJ and the CFI have jurisdiction over different types of case. The EU court system is different from the US Federal Courts in that there is no equivalent of the US Federal District Courts in the EU. The courts that sit and hear cases in the different Member States are the equivalent of state and local courts in the US. But these domestic courts also function as Community courts. It is not possible for cases to be appealed from national courts to the CFI/ECJ. More on this later.

JURISDICTION OF THE ECJ/CFI

The Court of First Instance has jurisdiction to hear and determine at first instance **direct actions** brought by individuals and the Member States.[106] Direct actions contrast with **preliminary references**. A direct action is where a party has standing to bring a claim before the ECJ/CFI. A preliminary reference is where a national court or tribunal refers a question of interpretation of European Community law to the ECJ.

Appeals from decisions of the CFI lie to the ECJ. The ECJ hears direct actions brought by EU institutions and Member States and **preliminary references** (see below at page 42). Over time the range of cases the CFI hears has expanded and the CFI is now even gaining jurisdiction in relation to some preliminary references.[107]

1. ENFORCEMENT ACTIONS AGAINST MEMBER STATES

One mechanism for ensuring that the **Member States** comply with their Treaty obligations is the **enforcement action**. The Commission and the Member States have standing to bring enforcement proceedings against a Member State which is in breach of its Treaty obligations. Natural and legal persons[108] do not have the right to bring enforcement actions in the EU courts although they may complain about a Member State's

[106] The ECJ will hear some direct actions brought by the Member States.

[107] *See, e.g.*, Council Decision of 3 October 2005 amending the Protocol on the Statute of the Court of Justice, in order to lay down the conditions and limits for the review by the Court of Justice of decisions given by the Court of First Instance, OJ No. L266/60 (Oct. 11, 2005).

[108] The term "natural and legal persons" refers to individuals and firms.

actions to the Commission[109] and/or to another Member State. If a natural or legal person wishes to sue a Member State for breach of Community law they must do so in a national court.

Although Member States have standing under Art. 227 to bring enforcement actions against other Member States this power is hardly ever used.

The problem of non-compliance by Member States with their Treaty obligations is significant. Over the last 25 years the Commission has produced annual reports monitoring Member State compliance with Community law.[110] The latest of these reports states:

As guardian of the Treaty, the Commission has the authority and responsibility to ensure respect for Community law, verifying that Member States respect Treaty rules and Community legislation. The rules of the EC Treaty, 10 000 regulations and over 1 700 directives in force for 27 Member States - make up a substantial body of law. Issues and challenges in the application of Community law are inevitably many and varied...
The infringement process plays an essential role in guaranteeing the correct application of Community law. Around 70% of complaints can be closed before a letter of formal notice is sent; around 85% before the reasoned opinion; and as many as 93% before a ruling from the Court.

Comparing 1999-2002 with 1999-2006, the average time taken to process infringements, from opening the file to sending the letter of referral to the Court of Justice under Article 226 of the EC Treaty, fell from around 28 months to 23. The average time taken to process proceedings for failure to notify national measures transposing directives remained at around 15 months. The average time taken on cases based on complaints and own-initiative actions fell from around 39 months to 35 months. In 2007, a second referral to the Court under Article 228 of the Treaty was made in seven cases, compared with ten in 2006.

At the end of 2007, the Commission was handling over 3400 complaints and infringement files. The total number of files increased by 5.9% from 2006, with a 32.3% increase in proceedings for failure to notify transposition measures. Complaints accounted for 35.9 % of the total, or two thirds of all cases on issues other than late transposition, an 8.7% decrease from 2006. The number of new own initiative cases decreased by 9.4%. In January 2007 an average of 99,07 % of required notifications of measures transposing all adopted directives had been received, rising to 99,46 % by the end of the year. This compared with 98,93%, rising to 99,06% in 2006. However, for directives with a transposition deadline in 2007, 64.55% of notifications were late. [111]

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[109] There is a standard complaint form available at http://ec.europa.eu/community_law/your_rights/your_rights_forms_en.htm .

[110] *See, e.g.*, EU Commission, XXIst report on monitoring the application of Community law, COM(2004) 839 (Dec. 30, 2004) *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004DC0839:EN:HTML.

[111] EU Commission, 25th Annual Report from the Commission on Monitoring the Application of Community Law, 2-3, COM(2008) 777/4 (Nov. 2008) *available at* http://ec.europa.eu/community_law/infringements/pdf/25_annual_report_en.pdf.

In recent years the Commission has been trying to avoid the need for enforcement proceedings using many different techniques, including making it simpler for the Member States to comply with their obligations. For example, in order to reduce the need for transposition or implementation by the Member States the Commission advocates the use of regulations where possible:

Regulations will be proposed wherever appropriate for technical implementing measures. For example, regulations have been adopted for roaming tariffs, proposed for cosmetics and construction products and are being considered for animal health, biocides and textiles. In the motor vehicle sector, framework rules are now implemented through Commission regulations. Regulations are used to implement directives for the regulated professions and to implement technical standards on eco-design for energy-using products. Regulations have been adopted on chemicals harmonisation through REACH and proposed to strengthen mutual recognition in the free movement of goods.[112]

It is worth noting that in some areas the EU has chosen to develop "**soft law** " instruments (such as codes of conduct, communications,[113] standards, benchmarking and guidelines),[114] rather than legally binding rules, to implement EU policy. Soft law does not involve the same issues of compliance as hard law.

In order to encourage the Member States to take their obligations more seriously the ECJ has the power to require a recalcitrant Member State to pay a fine (lump sum or penalty payment) under Art 228. This power has been used occasionally.[115] For example the ECJ imposed the requirement to pay a penalty payment on France in respect of its failure to comply with Community rules on the conservation of fishery resources.[116] Greece has been fined in respect of failures to comply with EU rules on waste disposal.[117]

Here are the relevant Treaty provisions:

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[112] *Id* at 6.

[113] *See, e.g.*, note 77 above.

[114] Recommendations and opinions are examples referred to in Art 249 above (at p.20).

[115] In December 2005 the Commission explained that it would calculate the penalty payments it asked the ECJ to impose by reference to a basic amount adjusted by the seriousness and duration of the breach and the Member State's ability to pay and the number of votes it is entitled to exercise in the Council.

[116] *Commission* v *France* (Case C-304/02) [2005] All ER (D) 122 at http://www.bailii.org/eu/cases/EUECJ/2005/C30402.html .

[117] *Commission* v *Greece* (Case C-387/97) [2000] ECR I-5047 http://www.bailii.org/eu/cases/EUECJ/2000/C38797.html .

Article 226
If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.
If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.

Article 227
A Member State which considers that another Member State has failed to fulfil an obligation under this Treaty may bring the matter before the Court of Justice.
Before a Member State brings an action against another Member State for an alleged infringement of an obligation under this Treaty, it shall bring the matter before the Commission.
The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing.
If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court of Justice.

Article 228
1. If the Court of Justice finds that a Member State has failed to fulfil an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice.
2. If the Commission considers that the Member State concerned has not taken such measures it shall, after giving that State the opportunity to submit its observations, issue a reasoned opinion specifying the points on which the Member State concerned has not complied with the judgment of the Court of Justice.
If the Member State concerned fails to take the necessary measures to comply with the Court's judgment within the time limit laid down by the Commission, the latter may bring the case before the Court of Justice. In so doing it shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.
If the Court of Justice finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.
This procedure shall be without prejudice to Article 227.

This is how the Commission has described its enforcement activities:

The primary objective of infringement proceedings, particularly in the pre-litigation stage, is to encourage the Member States to comply voluntarily with Community law as quickly as possible. At all stages of the pre-litigation stage the Commission seeks to promote contact between its departments and the national administrations. Furthermore, the Commission has aimed to boost cooperation with the Member States by means of complementary or alternative methods to resolve

problems.
The undertaking of monitoring the application of Community law is vital in terms of the **rule of law** generally, but it also helps to make the principle of a Community based on the rule of law a tangible reality for Europe's citizens and economic operators. The numerous complaints received by the citizens of the Member States constitute a vital means of detecting infringements of Community law. The Commission has reinforced the instruments and facilities both for registering complaints and for dealing with them more quickly. Accordingly, a form is available on-line. In addition to this, the Secretariat General of the Commission is developing a new Internet-based tool to facilitate the filing of a complaint.[118]

2. CHALLENGES TO ACTS OF THE EU INSTITUTIONS

In addition to being responsible for policing Member State compliance with Community law the ECJ and CFI also ensure that the EU institutions comply with their obligations under Community law. So, if a Member State or one of the institutions considers that an institution has breached its obligations under the Treaty it can challenge an act that results from that breach under Art. 230. Art 230 is the provision which is invoked in the legal basis cases where a Member State or an institution (for example the Parliament or the Commission) argues that the wrong legal basis was chosen for a legislative measure.

In a very limited range of circumstances natural or legal persons can invoke Art 230. The language of Art. 230 refers to "direct and individual concern".[119] This term is interpreted very narrowly. As a general rule a person who is affected by an EU regulation because they carry on a particular type of business and the regulation affects that type of business would not have standing to challenge the regulation before the CFI (suits by natural or legal persons under Art. 230 go to the CFI at first).[120] But at the point where a national or EU authority sought to enforce the regulation against an individual or firm that individual or firm would have the right to challenge the enforcement action and also the regulation on which it was based (see Art 241 below at page 42 (providing for indirect challenges after the 2 month limitation period has expired)).

Where the Commission issues a decision that firms have established a cartel in violation of the Treaty (Art 81) those firms can challenge the Commission's decision before the CFI because they are directly and individually concerned by the decision. Similarly, a

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[118] XXIst report on monitoring the application of Community Law, note 110 above, at 3.

[119] We will read more about this term later. An individual does have the right to sue in the CFI to enforce her right of access to documents. *See, e.g.*, Williams v European Commission (Case T-42/05) .

[120] Directives (which we'll look at later) suffer from the problem that (if they are properly implemented within the period for implementation) they don't directly concern people/firms - they generally impact people and firms when they are implemented in the national legal system.

firm which complained to the Commission that another firm was in violation of Art. 81 (cartels) or 82 (abuse of a dominant position) would have the right to challenge the Commission's decision.

The Treaty also provides for a mechanism whereby the institutions can be required to act under Art 232. A person who would have the right to have the act addressed to them has standing to invoke Art. 232 (this would be unusual).

In addition to challenges to acts which the institutions have adopted the ECJ/CFI also deal with claims for damages against the EU's institutions under Arts. 235 and 288 below). The language of Art. 288 would be capable of being read quite broadly. It is, however, unusual for a person to succeed in a damages claim under Art 288.

Article 230
The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties.
It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.
The Court of Justice shall have jurisdiction under the same conditions in actions brought by the Court of Auditors and by the ECB for the purpose of protecting their prerogatives.
Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.
The proceedings provided for in this article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

Article 232
Should the European Parliament, the Council or the Commission, in infringement of this Treaty, fail to act, the Member States and the other institutions of the Community may bring an action before the Court of Justice to have the infringement established.
The action shall be admissible only if the institution concerned has first been called upon to act. If, within two months of being so called upon, the institution concerned has not defined its position, the action may be brought within a further period of two months.
Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court of Justice that an institution of the Community has failed to address to that person any act other than a recommendation or an opinion.
The Court of Justice shall have jurisdiction, under the same conditions, in actions or proceedings brought by the ECB in the areas falling within the latter's field of competence

and in actions or proceedings brought against the latter.

Article 241
Notwithstanding the expiry of the period laid down in the fifth paragraph of Article 230, any party may, in proceedings in which a regulation adopted jointly by the European Parliament and the Council, or a regulation of the Council, of the Commission, or of the ECB is at issue, plead the grounds specified in the second paragraph of Article 230 in order to invoke before the Court of Justice the inapplicability of that regulation.

Article 235
The Court of Justice shall have jurisdiction in disputes relating to compensation for damage provided for in the second paragraph of Article 288.

Article 288
The contractual liability of the Community shall be governed by the law applicable to the contract in question.
In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.
The preceding paragraph shall apply under the same conditions to damage caused by the ECB or by its servants in the performance of their duties.
The personal liability of its servants towards the Community shall be governed by the provisions laid down in their Staff Regulations or in the Conditions of employment applicable to them.

3. PRELIMINARY REFERENCES

Article 234
The Court of Justice shall have jurisdiction to give preliminary rulings concerning:
(a) the interpretation of this Treaty;
(b) the validity and interpretation of acts of the institutions of the Community and of the ECB;
(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.
Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.
Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

The preliminary reference procedure is the source of very many of the cases which come before the ECJ. It is a procedure whereby national courts and tribunals may (or must

in some circumstances) refer issues of interpretation of Community law to the ECJ. From the perspective of the ECJ the preliminary reference procedure allows the ECJ to ensure that the Treaty is interpreted and applied uniformly throughout the EU. And the ECJ has consistently stated that Community law has the characteristic of supremacy - it takes precedence over and pre-empts national law to the extent of any conflict.[121] But Art. 234 can only achieve the objective of ensuring the uniform interpretation and application of Community law if the courts and tribunals in the Member States co-operate and actually make references to the ECJ and if the national courts apply Community law as the ECJ directs.

When the preliminary reference procedure works well, it works as a conversation between the national court and the ECJ:

> Through the direct dialogue which it has made possible between each national court and the Court of Justice, as the supreme judicial body in the Community, through the authority and certainty of the answers it thereby gives to the questions raised and through the simplicity of its operation, the current system of preliminary rulings has proved to be the most effective means of securing the uniform application of Community law throughout the Union, thereby forming the keystone of the Community's legal order.[122]

And some commentators have suggested that Community law empowers national courts and tribunals by giving them the power to invalidate national rules because of their incompatibility with Community law even where those courts would not normally have such powers as a matter of domestic law. This empowerment may encourage the national courts to be more willing to co-operate with the ECJ than they would otherwise be.

As the national courts become more familiar with the requirements of and interpretation of Community law it is sometimes argued that they should be able to be more active in applying Community law themselves without referring questions to the ECJ.[123] Under the acte clair doctrine, a national court or tribunal may decide not to refer a question of Community law to the ECJ if it believes that the proper interpretation is clear. But the court should also be convinced that the interpretation would be equally clear to the ECJ and other national courts.[124]

The ECJ has been quite clear that as a matter of Community law national courts do

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[121] The Treaty does not spell out this doctrine of supremacy but the ECJ has said it is inherent in the Treaty.

[122] Working Party, note 90 above, at 12

[123] *See, e.g.*, Working Party, note 90 above, at 14.

[124] CILFIT Case (Case 283/81) [1982] ECR 3415

not have the power to declare an act of the EU institutions to be void. Thus, where a regulation has been invalidated by the ECJ a national court should not decline to make a preliminary reference in relation to a similar regulation.[125] In a 2005 decision (responding to a preliminary reference by a Dutch court) in **Gaston Schul**, the ECJ stated:

15 By the first question, the national court essentially asks whether the third paragraph of Article 234 EC requires a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law to seek a ruling from the Court of Justice on a question relating to the validity of the provisions of a regulation even where the Court has already declared invalid analogous provisions of another comparable regulation.
16 With regard to questions of interpretation, it is clear from the judgment in Case 283/81 Cilfit and Others [1982] ECR 3415, paragraph 21, that a court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of Community law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, unless it has established that the question raised is irrelevant or that the Community provision in question has already been interpreted by the Court or that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt..
17 However, it is clear...that national courts have no jurisdiction themselves to determine that acts of Community institutions are invalid.
18 The rule that national courts may not themselves determine that Community acts are invalid may have to be qualified in certain circumstances in the case of proceedings relating to an application for interim measures...
19 Nevertheless, the interpretation adopted in the Cilfit judgment, referring to questions of interpretation, cannot be extended to questions relating to the validity of Community acts.
20 Firstly, even in cases which at first sight are similar, careful examination may show that a provision whose validity is in question is not comparable to a provision which has already been declared invalid because, for instance, it has a different legal or factual context, as the case may be.
21 The main purpose of the jurisdiction conferred on the Court by Article 234 EC is to ensure that Community law is applied uniformly by national courts. That requirement of uniformity is particularly vital where the validity of a Community act is in question. Differences between courts of the Member States as to the validity of Community acts would be liable to jeopardise the essential unity of the Community legal order and undermine the fundamental requirement of legal certainty...
22 The possibility of a national court ruling on the invalidity of a Community act is likewise incompatible with the necessary coherence of the system of judicial protection instituted by the EC Treaty. It is important to note in that regard that references for a preliminary ruling on validity constitute, on the same basis as actions for annulment, a means of reviewing the legality of Community acts. By Articles 230 EC and 241 EC, on the one hand, and Article 234 EC, on the other, the Treaty established a complete system of legal remedies and procedures designed to ensure review of the legality of acts of the institutions and has entrusted such review to the Community Courts...
23 Reducing the length of the proceedings cannot serve as justification for undermining the sole jurisdiction of the Community Courts to rule on the validity of Community law.

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[125] Gaston Schul (Case C-461/03) http://www.bailii.org/eu/cases/EUECJ/2005/C46103.html

24 It must also be emphasised that the Community Courts are in the best position to rule on the validity of Community acts. Under Article 23 of the Statute of the Court of Justice, Community institutions whose acts are challenged are entitled to participate in the proceedings in order to defend the validity of the acts in question. Furthermore, under the second paragraph of Article 24 of that Statute, the Court may require Community institutions which are not participating in the proceedings to supply any information which it considers necessary for the purposes of the case before it...
25 It follows from all the foregoing considerations that the answer to the first question must be that the third paragraph of Article 234 EC requires a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law to seek a ruling from the Court of Justice on a question relating to the validity of the provisions of a regulation even where the Court has already declared invalid analogous provisions of another comparable regulation.

We will have many further opportunities to consider the ECJ/CFI and their role in the development and application of Community law later in the semester.

EUROPEAN COUNCIL

The Member States developed the practice of meeting together regularly to discuss their common interests in summit meetings outside the constraints of the Treaty. This practice persists, but the European Council's role is now recognized in the EU Treaty:

EU Treaty, Art. 4
The European Council shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof.
The European Council shall bring together the Heads of State or Government of the Member States and the President of the Commission. They shall be assisted by the Ministers for Foreign Affairs of the Member States and by a Member of the Commission.
The European Council shall meet at least twice a year, under the chairmanship of the Head of State or Government of the Member State which holds the Presidency of the Council.
The European Council shall submit to the European Parliament a report after each of its meetings and a yearly written report on the progress achieved by the Union.

4. GOVERNANCE, THE DEMOCRATIC DEFICIT AND THE CONSTITUTIONAL TREATY

Despite the direct election of the European Parliament and the increasingly significant role of the Parliament in European law-making many commentators have argued that the EU still suffers from a serious democratic deficit. The Council still exerts significant legislative power and the national parliaments have not been directly involved in the legislative process at the EU level. And where national legislatures are involved in incorporating EU rules into the domestic legal systems they often don't have much

discretion about how they do this.[126]

Concerns about the democratic deficit are particularly significant given that citizens of the EU Member States are less likely to vote in elections for the EU Parliament than in elections for national parliaments. For the last few years members of the EU Commission have expressed concern that European citizens feel distanced from the EU institutions. Similar concerns were reflected in a declaration by the European Council in the Laeken Declaration in 2001. The entire declaration is set out below.

LAEKEN DECLARATION ON THE FUTURE OF THE EUROPEAN UNION

I. EUROPE AT A CROSSROADS

For centuries, peoples and states have taken up arms and waged war to win control of the European continent. The debilitating effects of two bloody wars and the weakening of Europe's position in the world brought a growing realisation that only peace and concerted action could make the dream of a strong, unified Europe come true. In order to banish once and for all the demons of the past, a start was made with a coal and steel community. Other economic activities, such as agriculture, were subsequently added in. A genuine single market was eventually established for goods, persons, services and capital, and a single currency was added in 1999. On 1 January 2002 the euro is to become a day-to-day reality for 300 million European citizens.

The European Union has thus gradually come into being. In the beginning, it was more of an economic and technical collaboration. Twenty years ago, with the first direct elections to the European Parliament, the Community's democratic legitimacy, which until then had lain with the Council alone, was considerably strengthened. Over the last ten years, construction of a political union has begun and cooperation been established on social policy, employment, asylum, immigration, police, justice, foreign policy and a common security and defence policy.

The European Union is a success story. For over half a century now, Europe has been at peace. Along with North America and Japan, the Union forms one of the three most prosperous parts of the world. As a result of mutual solidarity and fair distribution of the benefits of economic development, moreover, the standard of living in the Union's weaker regions has increased enormously and they have made good much of the disadvantage they were at.

Fifty years on, however, the Union stands at a crossroads, a defining moment in its existence. The unification of Europe is near. The Union is about to expand to bring in more than ten new Member States, predominantly Central and Eastern European, thereby finally closing one of the darkest chapters in European history: the Second World War and the ensuing artificial division of Europe. At long last, Europe is on its way to becoming one big family, without bloodshed, a real transformation clearly calling for a different approach from fifty years ago, when six countries first took the lead.

The democratic challenge facing Europe

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[126] Although the Treaty suggests that Member States have discretion in the form and methods they use to implement directives (see Art. 249 (here and above at page 20) : “A Directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods) in fact Directives are often drafted to limit the discretion of the Member States in relation to implementation.

At the same time, the Union faces twin challenges, one within and the other beyond its borders. Within the Union, the European institutions must be brought closer to its citizens. Citizens undoubtedly support the Union's broad aims, but they do not always see a connection between those goals and the Union's everyday action. They want the European institutions to be less unwieldy and rigid and, above all, more efficient and open. Many also feel that the Union should involve itself more with their particular concerns, instead of intervening, in every detail, in matters by their nature better left to Member States' and regions' elected representatives. This is even perceived by some as a threat to their identity. More importantly, however, they feel that deals are all too often cut out of their sight and they want better democratic scrutiny.

Europe's new role in a globalised world

Beyond its borders, in turn, the European Union is confronted with a fast-changing, globalised world. Following the fall of the Berlin Wall, it looked briefly as though we would for a long while be living in a stable world order, free from conflict, founded upon human rights. Just a few years later, however, there is no such certainty. The eleventh of September has brought a rude awakening. The opposing forces have not gone away: religious fanaticism, ethnic nationalism, racism and terrorism are on the increase, and regional conflicts, poverty and underdevelopment still provide a constant seedbed for them.

What is Europe's role in this changed world? Does Europe not, now that is finally unified, have a leading role to play in a new world order, that of a power able both to play a stabilising role worldwide and to point the way ahead for many countries and peoples? Europe as the continent of humane values, the Magna Carta, the Bill of Rights, the French Revolution and the fall of the Berlin Wall; the continent of liberty, solidarity and above all diversity, meaning respect for others' languages, cultures and traditions. The European Union's one boundary is democracy and human rights. The Union is open only to countries which uphold basic values such as free elections, respect for minorities and respect for the rule of law.

Now that the Cold War is over and we are living in a globalised, yet also highly fragmented world, Europe needs to shoulder its responsibilities in the governance of globalisation. The role it has to play is that of a power resolutely doing battle against all violence, all terror and all fanaticism, but which also does not turn a blind eye to the world's heartrending injustices. In short, a power wanting to change the course of world affairs in such a way as to benefit not just the rich countries but also the poorest. A power seeking to set globalisation within a moral framework, in other words to anchor it in solidarity and sustainable development.

The expectations of Europe's citizens

The image of a democratic and globally engaged Europe admirably matches citizens' wishes. There have been frequent public calls for a greater EU role in justice and security, action against cross-border crime, control of migration flows and reception of asylum seekers and refugees from far-flung war zones. Citizens also want results in the fields of employment and combating poverty and social exclusion, as well as in the field of economic and social cohesion. They want a common approach on environmental pollution, climate change and food safety, in short, all transnational issues which they instinctively sense can only be tackled by working together. Just as they also want to see Europe more involved in foreign affairs, security and defence, in other words, greater and better coordinated action to deal with trouble spots in and around Europe and in the rest of the world.

At the same time, citizens also feel that the Union is behaving too bureaucratically in numerous other areas. In coordinating the economic, financial and fiscal environment, the basic issue should continue to be proper operation of the internal market and the single currency, without this

jeopardising Member States' individuality. National and regional differences frequently stem from history or tradition. They can be enriching. In other words, what citizens understand by "good governance" is opening up fresh opportunities, not imposing further red tape. What they expect is more results, better responses to practical issues and not a European superstate or European institutions inveigling their way into every nook and cranny of life.
In short, citizens are calling for a clear, open, effective, democratically controlled Community approach, developing a Europe which points the way ahead for the world. An approach that provides concrete results in terms of more jobs, better quality of life, less crime, decent education and better health care. There can be no doubt that this will require Europe to undergo renewal and reform.

II. CHALLENGES AND REFORMS IN A RENEWED UNION
The Union needs to become more democratic, more transparent and more efficient. It also has to resolve three basic challenges: how to bring citizens, and primarily the young, closer to the European design and the European institutions, how to organise politics and the European political area in an enlarged Union and how to develop the Union into a stabilising factor and a model in the new, multipolar world. In order to address them a number of specific questions need to be put.

A better division and definition of competence in the European Union
Citizens often hold expectations of the European Union that are not always fulfilled. And vice versa - they sometimes have the impression that the Union takes on too much in areas where its involvement is not always essential. Thus the important thing is to clarify, simplify and adjust the division of competence between the Union and the Member States in the light of the new challenges facing the Union. This can lead both to restoring tasks to the Member States and to assigning new missions to the Union, or to the extension of existing powers, while constantly bearing in mind the equality of the Member States and their mutual solidarity.
A first series of questions that needs to be put concerns how the division of competence can be made more transparent. Can we thus make a clearer distinction between three types of competence: the exclusive competence of the Union, the competence of the Member States and the shared competence of the Union and the Member States? At what level is competence exercised in the most efficient way? How is the principle of subsidiarity to be applied here? And should we not make it clear that any powers not assigned by the Treaties to the Union fall within the exclusive sphere of competence of the Member States? And what would be the consequences of this?
The next series of questions should aim, within this new framework and while respecting the "acquis communautaire",[127] to determine whether there needs to be any reorganisation of competence. How can citizens' expectations be taken as a guide here? What missions would this produce for the Union? And, vice versa, what tasks could better be left to the Member States? What amendments should be made to the Treaty on the various policies? How, for example, should a more coherent common foreign policy and defence policy be developed? Should the Petersberg tasks be updated? Do we want to adopt a more integrated approach to police and criminal law cooperation? How can economic-policy coordination be stepped up? How can we intensify cooperation in the field of social inclusion, the environment, health and food safety? But then, should not the day-to-day administration and implementation of the Union's policy be left more emphatically to the Member States and, where their constitutions so provide, to the regions?

[127] The acquis is the accumulated body of Community law.

Should they not be provided with guarantees that their spheres of competence will not be affected? Lastly, there is the question of how to ensure that a redefined division of competence does not lead to a creeping expansion of the competence of the Union or to encroachment upon the exclusive areas of competence of the Member States and, where there is provision for this, regions. How are we to ensure at the same time that the European dynamic does not come to a halt? In the future as well the Union must continue to be able to react to fresh challenges and developments and must be able to explore new policy areas. Should Articles 95 and 308 of the Treaty be reviewed for this purpose in the light of the "acquis jurisprudentiel"?

Simplification of the Union's instruments
Who does what is not the only important question; the nature of the Union's action and what instruments it should use are equally important. Successive amendments to the Treaty have on each occasion resulted in a proliferation of instruments, and Directives have gradually evolved towards more and more detailed legislation. The key question is therefore whether the Union's various instruments should not be better defined and whether their number should not be reduced. In other words, should a distinction be introduced between legislative and executive measures? Should the number of legislative instruments be reduced: directly applicable rules, framework legislation and non-enforceable instruments (opinions, recommendations, open coordination)? Is it or is it not desirable to have more frequent recourse to framework legislation, which affords the Member States more room for manoeuvre in achieving policy objectives? For which areas of competence are open coordination and mutual recognition the most appropriate instruments? Is the principle of proportionality to remain the point of departure?

More democracy, transparency and efficiency in the European Union
The European Union derives its legitimacy from the democratic values it projects, the aims it pursues and the powers and instruments it possesses. However, the European project also derives its legitimacy from democratic, transparent and efficient institutions. The national parliaments also contribute towards the legitimacy of the European project. The declaration on the future of the Union, annexed to the Treaty of Nice, stressed the need to examine their role in European integration. More generally, the question arises as to what initiatives we can take to develop a European public area.
The first question is thus how we can increase the democratic legitimacy and transparency of the present institutions, a question which is valid for the three institutions.
How can the authority and efficiency of the European Commission be enhanced? How should the President of the Commission be appointed: by the European Council, by the European Parliament or should he be directly elected by the citizens? Should the role of the European Parliament be strengthened? Should we extend the right of co-decision or not? Should the way in which we elect the members of the European Parliament be reviewed? Should a European electoral constituency be created, or should constituencies continue to be determined nationally? Can the two systems be combined? Should the role of the Council be strengthened? Should the Council act in the same manner in its legislative and its executive capacities? With a view to greater transparency, should the meetings of the Council, at least in its legislative capacity, be public? Should citizens have more access to Council documents? How, finally, should the balance and reciprocal control between the institutions be ensured?
A second question, which also relates to democratic legitimacy, involves the role of national parliaments. Should they be represented in a new institution, alongside the Council and the European Parliament? Should they have a role in areas of European action in which the European Parliament has no competence? Should they focus on the division of competence between Union

and Member States, for example through preliminary checking of compliance with the principle of subsidiarity?
The third question concerns how we can improve the efficiency of decision-making and the workings of the institutions in a Union of some thirty Member States. How could the Union set its objectives and priorities more effectively and ensure better implementation? Is there a need for more decisions by a qualified majority? How is the co-decision procedure between the Council and the European Parliament to be simplified and speeded up? What of the six-monthly rotation of the Presidency of the Union? What is the future role of the European Parliament? What of the future role and structure of the various Council formations? How should the coherence of European foreign policy be enhanced? How is synergy between the High Representative and the competent Commissioner to be reinforced? Should the external representation of the Union in international fora be extended further?

Towards a Constitution for European citizens
The European Union currently has four Treaties. The objectives, powers and policy instruments of the Union are currently spread across those Treaties. If we are to have greater transparency, simplification is essential.
Four sets of questions arise in this connection. The first concerns simplifying the existing Treaties without changing their content. Should the distinction between the Union and the Communities be reviewed? What of the division into three pillars?
Questions then arise as to the possible reorganisation of the Treaties. Should a distinction be made between a basic Treaty and the other Treaty provisions? Should this distinction involve separating the texts? Could this lead to a distinction between the amendment and ratification procedures for the basic Treaty and for the other Treaty provisions?
Thought would also have to be given to whether the Charter of Fundamental Rights should be included in the basic Treaty and to whether the European Community should accede to the European Convention on Human Rights.
The question ultimately arises as to whether this simplification and reorganisation might not lead in the long run to the adoption of a constitutional text in the Union. What might the basic features of such a constitution be? The values which the Union cherishes, the fundamental rights and obligations of its citizens, the relationship between Member States in the Union?

III. CONVENING OF A CONVENTION ON THE FUTURE OF EUROPE
In order to pave the way for the next Intergovernmental Conference as broadly and openly as possible, the European Council has decided to convene a Convention composed of the main parties involved in the debate on the future of the Union. In the light of the foregoing, it will be the task of that Convention to consider the key issues arising for the Union's future development and try to identify the various possible responses.
The European Council has appointed Mr V. Giscard d'Estaing as Chairman of the Convention and Mr G. Amato and Mr J.L. Dehaene as Vice-Chairmen.

Composition
In addition to its Chairman and Vice-Chairmen, the Convention will be composed of
15 representatives of the Heads of State or Government of the Member States (one from each Member State), 30 members of national parliaments (two from each Member State), 16 members of the European Parliament and two Commission representatives. The accession candidate countries will be fully involved in the Convention's proceedings. They will be represented in the same way as the current Member States (one government representative and two national

parliament members) and will be able to take part in the proceedings without, however, being able to prevent any consensus which may emerge among the Member States. The members of the Convention may only be replaced by alternate members if they are not present. The alternate members will be designated in the same way as full members.
The Praesidium of the Convention will be composed of the Convention Chairman and Vice-Chairmen and nine members drawn from the Convention (the representatives of all the governments holding the Council Presidency during the Convention, two national parliament representatives, two European Parliament representatives and two Commission representatives). Three representatives of the Economic and Social Committee with three representatives of the European social partners; from the Committee of the Regions: six representatives (to be appointed by the Committee of the Regions from the regions, cities and regions with legislative powers), and the European Ombudsman will be invited to attend as observers. The Presidents of the Court of Justice and of the Court of Auditors may be invited by the Praesidium to address the Convention.

Length of proceedings
The Convention will hold its inaugural meeting on 1 March 2002, when it will appoint its Praesidium and adopt its rules of procedure. Proceedings will be completed after a year, that is to say in time for the Chairman of the Convention to present its outcome to the European Council.

Working methods
The Chairman will pave the way for the opening of the Convention's proceedings by drawing conclusions from the public debate. The Praesidium will serve to lend impetus and will provide the Convention with an initial working basis.
The Praesidium may consult Commission officials and experts of its choice on any technical aspect which it sees fit to look into. It may set up ad hoc working parties.
The Council will be kept informed of the progress of the Convention's proceedings. The Convention Chairman will give an oral progress report at each European Council meeting, thus enabling Heads of State or Government to give their views at the same time.
The Convention will meet in Brussels. The Convention's discussions and all official documents will be in the public domain. The Convention will work in the Union's eleven working languages.

Final document
The Convention will consider the various issues. It will draw up a final document which may comprise either different options, indicating the degree of support which they received, or recommendations if consensus is achieved.
Together with the outcome of national debates on the future of the Union, the final document will provide a starting point for discussions in the Intergovernmental Conference, which will take the ultimate decisions.

Forum
In order for the debate to be broadly based and involve all citizens, a Forum will be opened for organisations representing civil society (the social partners, the business world, non-governmental organisations, academia, etc.). It will take the form of a structured network of organisations receiving regular information on the Convention's proceedings. Their contributions will serve as input into the debate. Such organisations may be heard or consulted on specific topics in accordance with arrangements to be established by the Praesidium.

Secretariat

The Praesidium will be assisted by a Convention Secretariat, to be provided by the General Secretariat of the Council, which may incorporate Commission and European Parliament experts.

The process outlined in the Laeken Declaration took place. The Convention began meeting in 2002 and worked through to the middle of 2003, producing a draft Treaty which provided the basis for discussions in the Intergovernmental conference which took place from 2003-4. The Intergovernmental Conference produced a Constitutional Treaty, which was never ratified.

THE CONSTITUTIONAL TREATY

The Constitutional Treaty would have made the following changes to the EU:

- inclusion of the Charter of Fundamental Rights as a legally binding statement of rights
- specific reference to the principle of primacy
- provision for voluntary withdrawal by a Member State
- change in name of legislative acts (from regulations and directives) to laws and framework laws (confusingly, the term regulation is retained to refer to instruments which implement legislative acts (regulations in the US))[128]
- ending of the pillar idea (though retention of distinctions as to whether the EU has power to make binding legislation in different fields)
- recognition of the principle of participatory democracy:[129]
- recognition of the role of the social partners[130] and churches[131]

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[128] Art I-33. This has been dropped from the Lisbon Treaty.

[129] Art. I-46: "The functioning of the Union shall be founded on representative democracy."

[130] The "social partners " are employers, employees and consumers. As a formal matter within the EU legislative process the European Economic and Social Committee (http://www.esc.eu.int/index_en.asp) ensures that the views of the social partners are reflected in legislation. More recently other less formal processes have been developed to take account of the views of stakeholders in the EU.

[131] Religion was controversial in the negotiations leading up to the signing of the Treaty - many people argued that the Constitution should recognize God. Instead the drafters settled for a weaker reference to culture in the statement about the EU's objectives: "It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced." Art. I-3. The Treaty of Lisbon provides in Article 16 C: "1. The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States. 2. The Union equally respects the status under national law of philosophical and nonconfessional organisations. 3. Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and

- any natural or legal person may institute proceedings against "a regulatory act which is of direct concern to him or her and does not entail implementing measures" - intended to liberalize the standing requirements
- representation in the Parliament “shall be degressively proportional, with a minimum threshold of six members per Member State. No Member State shall be allocated more than ninety-six seats”[132]
- The European Council shall elect its President, by a qualified majority, for a term of two and a half years, renewable once. In the event of an impediment or serious misconduct, the European Council can end his or her term of office in accordance with the same procedure (in contrast to the current rotating Presidency)[133]
- a move to qualified majority voting in the Council as the norm (simplified legislative procedures - codecision)[134]
- a change in the definition of qualified majority in the Council[135]
- after an initial period, a change in the number of Commissioners to two thirds of the number of Member States[136]
- Union Minister for Foreign Affairs (one of the Vice Presidents of the Commission) (High Representative + external relations Commissioner) (to make EU foreign policy more coherent)
- Courts: change in terminology - ECJ, General Court and specialized courts

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regular dialogue with these churches and organisations.”

[132] Art. I-20

[133] Art. I-22

[134]Art. I-23

[135] Art. I-25 1. A qualified majority shall be defined as at least 55 % of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65 % of the population of the Union.
A blocking minority must include at least four Council members, failing which the qualified majority shall be deemed attained.
2. By way of derogation from paragraph 1, when the Council does not act on a proposal from the Commission or from the Union Minister for Foreign Affairs, the qualified majority shall be defined as at least 72 % of the members of the Council, representing Member States comprising at least 65 % of the population of the Union.
3. Paragraphs 1 and 2 shall apply to the European Council when it is acting by a qualified majority.
4. Within the European Council, its President and the President of the Commission shall not take part in the vote.

[136] Art. I-26

- transparency and right of access to documents as a constitutional principle[137]
- protection of personal data as a constitutional principle[138]
- protocol on the role of national parliaments

Although in many ways the Constitutional Treaty would really just have made existing rules concrete (eg primacy) there were some significant changes. For example, the idea that not every State would be able to appoint a Commissioner. Why do you think the EU would make such a change? What are the advantages and disadvantages of this idea?

After the failure to ratify the Constitutional Treaty, the Member States held a new Intergovernmental Conference and agreed a new Treaty, the Treaty of Lisbon, which was signed in December 2007 and which was intended to come into effect at the beginning of 2009.

THE TREATY OF LISBON

The Treaty of Lisbon formally abandons the idea of a "Constitution" for Europe and does not explicitly state the primacy of EU law, although these changes are largely cosmetic. The EU treaties have always had constitutional implications for the Member States and function as the constitutional documents for the EU institutions. And, whether or not the treaty explicitly states that EU law has the characteristic of primacy or supremacy, in fact it does.[139] In addition the idea of renaming the EU's legal instruments has been dropped, so regulations and directives will continue to be used.

However, the Lisbon Treaty does make some of the changes to the EU's institutional structures which were included in the Constitutional Treaty. For example, the Treaty provides for an elected president of the European Council and strengthens the

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[137] Art. I-50

[138] Art. I-51

[139] *See, e.g.*,The Law Society, A Guide to the Treaty of Lisbon, European Union Insight, 10 (Jan. 2008) *available at* http://www.lawsociety.org.uk/documents/downloads/guide_to_treaty_of_lisbon.pdf ("It is often said that EU-sourced laws take precedence over domestic laws. This means that once an EU-sourced law is applicable in the UK, it would be contrary to the EU treaties for the UK to keep or pass any laws that contradicted the EU-sourced law. The primacy of European law is not new. This well-established principle has applied in the EU since the Court of Justice developed it in the 1960s, before the UK joined the EU. While the Constitutional Treaty re-stated this principle in the text, the Treaty of Lisbon does not explicitly refer to it, but rather includes this in a declaration. However, this was a political move, and it is clear that the case law of the Court of Justice and the primacy of European law remain cornerstone principles.")

position of the High Representative of the Union for foreign affairs. The Charter of Fundamental Rights of the European Union will become binding law within the EU. More measures will be able to be adopted through co-decision, increasing the significance of the Parliament[140] (and the increased role for national parliaments in the EU's processes is also carried forward).[141] At the same time, QMV becomes standard for the adoption of new measures, and from 2014, the QMV is to be based on a double majority of Member States and people. A double majority will involves the approval of 55% of the Member States representing at least 65% of the EU's population.

The Treaty also provides for Citizens' Initiatives, so that a million EU citizens from a number of Member States will be able to ask the Commission to introduce new policy proposals. The Treaty defines the competences of the EU.[142] Art 2B provides that the EU has exclusive competence in relation to the customs union, the establishing of the competition rules necessary for the functioning of the internal market, monetary policy for the Member States whose currency is the euro; the conservation of marine biological resources under the common fisheries policy, and the common commercial policy. In addition, the EU has "exclusive competence for the conclusion of an international

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[140] The Treaty reduces the number of MEPs.

[141] The Law Society states "the adoption of EU legislation will be subject to prior scrutiny by national parliaments, which will be given the opportunity to challenge proposed legislation if it does not conform to the principle of subsidiarity." *Id.* at 24.

[142] *See, e.g.*, Art 2A: "1. When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts. 2. When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence. 3. The Member States shall coordinate their economic and employment policies within arrangements as determined by this Treaty, which the Union shall have competence to provide. 4. The Union shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy, including the progressive framing of a common defence policy. 5. In certain areas and under the conditions laid down in the Treaties, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas. Legally binding acts of the Union adopted on the basis of the provisions of the Treaties relating to these areas shall not entail harmonisation of Member States' laws or regulations. 6. The scope of and arrangements for exercising the Union's competences shall be determined by the provisions of the Treaties relating to each area."
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agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope." Other matters, such as the internal market, are matters of shared competence between the EU and the Member States.

The Treaty renames the courts: the ECJ becomes the Court of Justice of the EU and the CFI becomes the General Court. The Treaty of Lisbon also follows the Constitutional Treaty in liberalizing standing to challenge acts of the EU institutions. The Lisbon Treaty provides: "Any natural or legal person may ... institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures."

The Treaty of Lisbon does provide for a reduction in the number of Commissioners, although, as we have seen, this aspect of the Treaty is under review as a result of the negative Irish referendum vote.[143]

5. A MULTI-LINGUAL COMMUNITY

The EU has chosen to be a multi-lingual community.[144] Under Regulation No 1 of 1958 residents of the Member States have the right to communicate with the EU institutions in their own language. Leonard Orban is the Commissioner responsible for Multilingualism.[145] The Statute of the European Parliament (see note 54) addresses the issue of languages as follows:

Article 7
1. Parliament's documents shall be translated into all the official languages.
2. Speeches shall be interpreted simultaneously into all the other official languages.
3. Parliament shall lay down the conditions for the implementation of this Article.

As the EU's membership expands, the costs of translation and interpretation

[143] *See* text at note 63.

[144] *See, e.g.*, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, A New Framework Strategy for Multilingualism, COM (2005) 596 (Nov. 22, 2005).

[145] http://ec.europa.eu/commission_barroso/orban/index_en.htm .

increase exponentially. The EU has 23 official languages,[146] and even some unofficial languages.[147]

But the EU often characterizes multilingualism as a strength, rather than as just a cost of the EU:

Needless to say, language diversity entails constraints; it weighs on the running of the European Institutions and has its cost in terms of money and time. This cost could even become prohibitive if we wanted to give dozens of languages the rightful place which their speakers could legitimately wish for.

Against this background, there is therefore a strong temptation to tolerate a de facto situation in which a single language, English, would be dominant in the work of the European Institutions, in which two or three other languages would more or less manage to hold their own for a little longer, while the vast majority of our languages would have but a symbolic status and would hardly ever be used in joint meetings.

A turn of events of this kind is not desirable. It would be damaging to the economic and strategic interests of our continent and all our citizens irrespective of their mother tongue. It would also be contrary to the whole ethos of the European project, in more ways than one :

I – Respect for our linguistic diversity is not only to take due account of a cultural reality stemming from history. It is the very basis of the European ideal as it emerged from the ashes of the conflicts which marred the 19th century and the first half of the 20th. While most of the European nations have been built on the platform of their language of identity, the European Union can only build on a platform of linguistic diversity. This, from our point of view, is particularly comforting. A common sense of belonging based on linguistic and cultural diversity is a powerful antidote against the various types of fanaticism towards which all too often the assertion of identity has slipped in Europe and elsewhere, in previous years as today.

Born of the will of its diverse peoples who have freely chosen to unite, the European Union has neither the intention nor the ability to obliterate their diversity. On the contrary, its mission historically is to preserve, harmonise, strike a balance and get the best out of this diversity, and we think that it is up to the task. We even believe that it can offer the whole of humanity a model for an identity based on diversity.

II – Europe is today pondering its identity and how to define what that entails, keeping an open mind vis-à-vis itself and the rest of the world. Our belief is that the way to address this delicate issue in the most constructive, the most dispassionate and the healthiest way is by reflecting upon its own linguistic diversity. Europe's identity is neither a blank page nor a pre-written and pre-printed page. It is a page which is in the process of being written. There is a common artistic, intellectual, material and moral heritage of untold richness, with few equivalents in the history of humanity, constructed by generation after generation and which deserves to be cherished,

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[146] http://europa.eu.int/abc/european_countries/languages/index_en.htm . In 2007, Irish became the 21st official language.

[147] *See, e.g.*, Council Conclusion of 13 June 2005 on the official use of additional languages within the Council and possibly other Institutions and bodies of the European Union, O.J. No. C 148/1, (Jun. 18, 2005). Catalan, Basque and Galician have a special status since 2006.

acknowledged and shared. Each and every European, wherever he or she may live, wherever he or she may come from, must be able to access this heritage and recognise it as his and hers, without any arrogance but with a legitimate sense of pride.

Our heritage is not, however, a closed catalogue. Every generation has a duty to enhance it in all areas without exception according to every person's sensitivity and as a function of the various influences which today come from all four corners of the earth.

Those entering Europe – and this could include people as diverse as immigrants, citizens of the new Member States, and young Europeans from all countries as they begin to discover life – must be constantly encouraged in this dual path, i.e. the desire to gain acquaintance with the common heritage and the desire to make their own contribution, too.

III – While it is indispensable for Europe to encourage the diversity of cultural expression, it is equally essential for it to assert the universality of essential values. These are two aspects of a single credo without which the European project would lose its meaning. What constitutes the raison d'être of the European project as embarked upon in the aftermath of the Second World War is the adherence to certain values. These values have often been formulated by European thinkers, but have to a large extent also been the result of a healthy reaction to bloody and disgraceful chapters in the history of Europe itself.

The European Union came into being against the devastation of war, against totalitarian ventures, against raciscm and anti-Semitism. The first steps in the construction of Europe also coincided with the end of the colonial era and heralded a change in the nature of relations between Europe and the rest of the world.

It is never easy to accurately or exhaustively pinpoint those values to which everyone should adhere if they are to be welcomed fully into the European fold. However, this lack of precision, which stems from legitimate intellectual caution, does not mean we have to resign ourselves to relativism when it comes to fundamental values.

Upholding the dignity of human beings, men, women and children, sticking up for one's physical and moral integrity, halting the deterioration of our natural environment, rejecting all forms of humiliation and unjustified discrimination on the grounds of colour, religion, language, ethnic origin, gender, age, disability, etc. — are values on which there must be no compromise in the name of any specific cultural feature.

In a word, the European ideal is founded on two inseparable conditions: the universality of shared moral values and the diversity of cultural expression; in particular, linguistic diversity for historical reasons is a major component as well as being — as we will try to illustrate — a wonderful tool at the service of integration and harmonisation.[148]

In practice the institutions rely on some languages more than on others. Major documents such as Green and White Papers[149] and final versions of proposed legislative

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[148] A Rewarding Challenge : How the Multiplicity of Languages Could Strengthen Europe, Proposals from the Group of Intellectuals for Intercultural Dialogue set up at the initiative of the European Commission, Brussels 2008, *available at* http://ec.europa.eu/education/policies/lang/doc/maalouf/report_en.pdf .

[149] Green and White Papers are documents published before the Commission puts forward legislative proposals. A Green Paper is a more preliminary document than a White Paper. For example there is a recent Green Paper on Consumer Collective Redress, COM(2008) 794 (Nov. 27, 2008) *available at*

measures are translated into all of the official languages, but other documents may only be produced in the working languages (English, French, German). The Translation Service says:

> Equal status for the official languages does not mean that all texts are translated into all the official languages. A letter to an individual or an internal memo, for example, will be sent in only one language, which may or may not involve translation. A committee may decide to work in a limited number of languages until it produces a proposal for wider discussion; this must then be made available in all the official languages. In the interests of cost -effectiveness, the Commission conducts its internal business in English, French and German, going fully multilingual only when it communicates with the other EU institutions, the Member States and the public.[150]

In order to deal with the increased translation burden associated with enlargement, Commission departments were instructed to draft shorter documents.[151] The Commission has argued that shorter documents involve the added benefit of enhancing communication with citizens. The translation staff also uses technology to help with the burden of translation work:

> To perform its tasks, the DG for Translation has a wide variety of language resources at its disposal:
> terminology in many different forms (multilingual libraries, general Internet access, etc.). At desktop level, terminology searches are mainly performed via IATE (interinstitutional terminology database) and Quest (one-stop access to a series of general-interest terminology databases);
> processing of sentence fragments by TMan, an internal subsentence-level replacement tool;
> translation memories held centrally by Euramis, thus enabling genuine data sharing;
> texts as such to be retrieved from the DGT's internal archiving system (called Vista) or from any other source;
> machine translation, which, at the European Commission, is used not only as a browsing tool but also as a genuine translation aid, and can thus be regarded as a

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http://ec.europa.eu/consumers/redress_cons/greenpaper_en.pdf .

[150] EU Commission, Translating for a Multi-Lingual Community, (April 2005) *available at* http://europa.eu.int/comm/dgs/translation/bookshelf/brochure_en.pdf

[151] EU Commission, Translation in the Commission: where do we stand eight months after the enlargement?, Memo/05/10 (Jan. 13, 2005) ("Following the latest round of accessions, Commission departments were instructed to produce shorter documents, with a standard length of not more than 15 pages for communications and explanatory texts (the pre-accession average was 37 pages).")

fully fledged language resource.[152]

In the early days, French was probably the most significant language within the EU. Increasingly, however, the main second language in the Member States of the EU is English rather than French. As a practical matter meetings in the EU are now often accomplished in English.

6. LEGAL PLURALISM IN THE EU

The term "legal pluralism" traditionally referred to the idea that informal customary law might operate alongside formal state law. But the law that applies in the Member States of the EU also illustrates legal pluralism: legal rights and obligations may derive from local custom, from state statutes, from EU rules, or from international treaties or international customary law. Boaventura de Sousa Santos uses the term "interlegality" to describe the intersecting legalities at the local, national and global levels.[153]

The Member States which have joined together in the EU have different legal traditions. Common law and civil law traditions come together to form a mixed legal system in the EU. This is one of the most interesting features of the EU for lawyers. Whereas there are other international fora for the negotiation of harmonized rules of private law, or of regulation, the EU aims to harmonize both private law and regulation in many different fields.

Harry Arthurs says:

> at the level of legal theory, globalization pits Maitland against Twining, spider people against camel people. Spider people claim that, in a global age, law too must be global, and that pending some means for making it so, domestic law must be built upon a platform of universally accepted legal norms including human rights, an independent judiciary, the rule of law, respect for property and free markets. Camel people, on the other hand, do not see domestic law as global law waiting to happen. In fact, they emphasize the power and persistence of local politics, local culture, local societies and local law.[154]

The EU's approach looks like a spider approach. The EU is consistently aiming to make the law in the different Member States more similar in all sorts of ways. The Member States have harmonized their rules of conflicts of laws which establish which courts (i.e. the courts in which Member State) have jurisdiction in relation to particular disputes,

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[152] http://europa.eu.int/comm/dgs/translation/bookshelf/tools_and_workflow_en.pdf

[153] Boaventura de Sousa Santos, TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION, AND EMANCIPATION, 85 (2002).

[154] *Op. Cit.* note 3 above at 12.

initially in a Treaty and now in a Regulation.[155] EU rules identify what law governs the obligations of parties to a contract and, in most cases, these rules support the principle that business people can choose what law governs their contracts.[156] Another regulatioon (also replacing an earlier Convention) addresses the question of what law applies to non-contractual obligations.[157]

In the last few years the EU has been discussing whether and how to harmonize rules of contract law.[158] For many years the EU has been working on harmonizing consumer protection rules, and this harmonization has affected national contract laws. For example, there is a directive on unfair terms in consumer contracts.[159] Other directives regulate unfair commercial practices,[160] distance selling,[161] misleading and comparative

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[155] Council Regulation (CE) No 44/2001 of 22.12.2000, OJ L 12/1 (Jan. 16, 2001) (previously the Brussels Convention on Jurisdiction and the Enforcement of Judgements. The regulation is often referred to as the Brussels I Regulation).

[156] Regulation No 593/2008 of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I), OJ No. 177/6 (Jul. 4, 2008) *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:0016:EN:PDF. The original proposal for a regulation to take the placve of an earlier treaty was in COM(2005) 650 final (Dec. 15, 2005). The UK opted into this regulation in 2008: http://register.consilium.europa.eu/pdf/en/08/st12/st12143.en08.pdf .

[157] Regulation No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) , OJ, No. L 199/40 (Jul. 31, 2007) *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:199:0040:0049:EN:PDF .

[158] *See, e.g.*, http://ec.europa.eu/consumers/rights/contract_law_en.htm ; http://ec.europa.eu/internal_market/contractlaw/links_en.htm .

[159] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ No. L 95/29 (Apr. 21, 1993) *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0013:EN:HTML

[160] Directive 2005/29/EC on Unfair Commercial Practices OJ No. L 149/22 (Jun. 11, 2005) *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:149:0022:0039:EN:PDF. *See also* http://ec.europa.eu/consumers/rights/index_en.htm .

[161] Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ L 144/19 (Jun. 4,.1997); Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, OJ L 271/16 (Oct. 9, 2002).

advertising,[162] and the sale of consumer goods and guarantees.[163] But there is not as yet a comprehensive code of EU contract law. Some people argue that EU harmonization of contract law as a whole would facilitate the internal market. Those who argue against formal harmonization often argue that contracting parties are able to choose what legal rules should apply to their contracts.

Do you think that a body such as the EU needs a common contract law? Does the US have a common contract law? Does this tell us anything useful about legal harmonization? Are the solutions the US has adopted necessarily appropriate for other regions?

It is worth noting at this point that there are international initiatives for harmonizing contract law, such as the United Nations Convention on the International Sale of Goods,[164] and the Unidroit Principles for International Commercial Contracts.[165] Would it be more sensible for the EU to focus on working through groups such as UNCITRAL[166] and Unidroit? These groups develop international treaties which are implemented within the legal systems of states which become parties to the treaties. The use of the Treaty mechanism contrasts with the EU's ability to legislate. Where the EU legislates by regulation the EU's rules apply automatically within the legal systems of the Member States without any need for implementing action in the Member States. And the ECJ's power to interpret the regulation helps to ensure a greater degree of uniform application of the regulation than is the case with most international treaties. The situation where the EU uses directives to harmonize law in the EU is more complex. Directives sometimes (but not always) give the Member States some discretion in how they implement the EU's rules within their national legal systems.[167] Sometimes the directive will allow the Member State to impose its own rules if they are stricter than the requirements of the directive.

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[162] *See, e.g.*, Directive 97/55/EC of European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising, OJ L 290/18 (Oct. 23,1997).

[163] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171/12 (Jul. 7, 1999).

[164] *See, e.g.*, http://www.cisg.law.pace.edu/ .

[165] http://www.unidroit.org/english/principles/contracts/main.htm. Unidroit is an intergovernmental organization originally established under the League of Nations to work on unifying private law.

[166] UNICTRAL is the United Nations Commission on International Trade Law. *See* http://www.uncitral.org/uncitral/en/index.html

[167] *See* Art. 249, above at page 20.

In the US, business organization laws mix elements of state and federal regulation, and of the sort of harmonization processes that produce the UCC.[168] Many commentators think that it is useful for the states to compete in producing business organization laws. But at the same time, some matters, such as issues relating to securities which involve interstate commerce, are dealt with by federal rules. In contrast, in Canada securities law was traditionally a matter for the provinces. However, the provinces have recently begun to work together to develop uniform national rules for the regulation of securities. There is an International Organization of Securities Commissions (IOSCO) which works on harmonizing securities regulation at the international level.[169]

What about family law? Property law? Criminal law? Labor law?

7. CORE CONCEPTS OF COMMUNITY LAW

SUPREMACY OF COMMUNITY LAW

In many cases, and over a period of many years, the ECJ has emphasized that European Community law takes precedence over the laws of the Member States. In order to underline the significance of supremacy the ECJ often invokes Art. 10 of the EC Treaty:

Article 10
Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.
They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.

In ***Costa* v *ENEL*** (Case 6/64) an Italian citizen argued that Italy's nationalization of the electricity industry contravened Community law. Costa is an important case on the doctrine of **Direct Effect** as well as an important early statement of the doctrine of **Supremacy**.

The ECJ stated:

> By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.
>
> By creating a community of unlimited duration, having its own institutions, its own

[168] NCCUSL develops uniform acts in the business organization field, and the ABA has developed a model business corporation statute.

[169] http://www.iosco.org/ .

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

The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the states, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The executive force of Community law cannot vary from one state to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty...

The obligations undertaken under the Treaty establishing the Community would not be unconditional, but merely contingent, if they could be called in question by subsequent legislative acts of the signatories. Wherever the Treaty grants the states the right to act unilaterally, it does this by clear and precise provisions... Applications, by member states for authority to derogate from the Treaty are subject to a special authorization procedure... which would lose their purpose if the Member States could renounce their obligations by means of an ordinary law.

The precedence of community law is confirmed by article [249], whereby a regulation 'shall be binding ' and 'directly applicable in all member states '. This provision, which is subject to no reservation, would be quite meaningless if a state could unilaterally nullify its effects by means of a legislative measure which could prevail over community law.

It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.

The transfer by the states from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the community cannot prevail. Consequently article [234] is to be applied regardless of any domestic law, whenever questions relating to the interpretation of the Treaty arise.

The supremacy principle is important in the development of Community law. Supremacy means that the Member States must not take any action domestically which would interfere with the application of Community law. And, although **Costa** only discusses the way in which Community law limits the Member States' ability to introduce new rules which conflict with the Treaty, in fact all national rules which are inconsistent with the Treaty should be regarded as invalid. The national courts are required to give effect to Community law even where this might involve invalidating conflicting rules of national law, and even when these conflicting national rules have been in force for centuries.

But this does not necessarily mean that national courts accept this principle of supremacy without question. At different points different national courts have suggested that where Community law and the domestic constitutional rules conflict domestic constitutional rules should prevail. The German Constitutional Court effectively carried out a discussion with the ECJ over a number of years on this issue (in the ***Solange*** cases).

Ultimately the German court accepted that protections of fundamental rights in Community law were adequate so that the German courts would not need to insist that the German Constitution should prevail. More recently similar issues have arisen in Poland where the Polish Constitutional Tribunal has suggested that it is not inclined to accept the supremacy of Community law:

> The accession of Poland to the European Union did not undermine the supremacy of the Constitution over the whole legal order within the field of sovereignty of the Republic of Poland. The norms of the Constitution, being the supreme act which is an expression of the Nation's will, would not lose their binding force or change their content by the mere fact of an irreconcilable inconsistency between these norms and any Community provision. In such a situation, the autonomous decision as regards the appropriate manner of resolving that inconsistency, including the expediency of a revision of the Constitution, belongs to the Polish constitutional legislator.[170]

And this same Tribunal held that the European Arrest warrant conflicted with the Polish Constitution[171]:

Article 607t § 1 of the Code of Penal Procedure, within the scope allowing the surrender of a Polish citizen to a member state of the European Union on the basis of the European Arrest Warrant, is incompatible with Article 55 Paragraph 1 of the Constitution.
5. The judgment of the Constitutional Tribunal establishing the unconstitutionality of Article 607t § 1 of the Code of Penal Procedure causes the elimination of any binding force of that provision. In the present case under consideration, however, this direct effect of the judgment is not tantamount to assuring the conformity of the legal status with the Constitution and is not sufficient for this purpose. This objective can only be achieved through the intervention of the legislator. Notwithstanding, taking into the account Article 9 of the Constitution, which states that „The Republic of Poland shall observe international law binding it", and given the obligations implied by membership of Poland in the European Union, it is indispensable to change the law in force in such manner, as to enable not only full implementation of the Council Framework Decision 2002/ 584/ JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, but also such as to assure its conformity with the Constitution. In order to enable the accomplishment of this task, therefore, one cannot rule out the appropriate amendment of Article 55 Paragraph 1 of the Constitution, so as to provide that this provision would foresee the exception from the prohibition of extradition of Polish citizens allowing for their surrender on the basis of the EAW to other Member States of the European Union. In the case of amendment of the Constitution, the bringing of national law to conformity with the requirements of the Union will also require the restitution by the legislator of the provisions concerning the EAW, which as a result of the judgment of the Constitutional Tribunal shall have been eliminated from the legal order.
5.1. Considering that the time limit for the enactment of the above indicated Framework Decision

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[170] *Poland's Membership in the European Union*, Judgment of 11th May 2005, K 18/04 *available at* http://www.trybunal.gov.pl/eng/summaries/documents/K_18_04_GB.pdf

[171] The German Constitutional Court has also had difficulties with the European Arrest warrant. *See, e.g.*, http://eulaw.typepad.com/eulawblog/2005/09/european_arrest.html

has lapsed on 31 December 2003 and that with regard to Poland the obligation to implement it exists since the date of its accession to EU membership, i.e. from 1 May 2004, the Tribunal has deemed it necessary to consider the possibility of deferral of the cancelling of the binding force of Article 607t § 1 of the Code of Penal Procedure...over the period of deferral of entry into force of the present judgment the Polish state shall fulfil the obligation of implementing the Framework Decision. [172]

PROPORTIONALITY, LEGAL CERTAINTY, SUBSIDIARITY

Here is an example of the Commission invoking these principles to justify the proposed Rome I Regulation (see above at note 156):

The objective of the proposal – the adoption of uniform rules on the law applicable to contractual obligations to make judicial decisions more easily foreseeable – cannot be adequately attained by the Member States, who cannot lay down uniform Community rules, and can therefore, by reason of its effects throughout the Community, be better achieved at Community level, the Community can take measures, in accordance with the subsidiarity principle set out in Article 5 of the Treaty. And the measures respect the proportionality principle set out in that Article, by increasing certainty in the law without requiring harmonisation of the substantive rules of domestic law.
Point 6 of the Protocol on the application of the principles of subsidiarity and proportionality provides that "Other things being equal, Directives should be preferred to regulations..". For this proposal, however, the Regulation would seem to be preferable as its provisions lay down uniform rules on the applicable law that are detailed, precise and unconditional and require no measures for their transposal into domestic law. If the Member States enjoyed some room for manoeuvre in transposing, the uncertainty as to the law which the aim is to abolish would be restored.[173]

Here the Commission suggests that some of the fundamental principles of EU law may come into conflict. Emphasizing subsidiarity ("Other things being equal, Directives should be preferred to regulations) might lead to a choice of the directive as the appropriate legal form of a measure, whereas emphasizing legal certainty might lead to the choice of the form of a regulation. How do you think this sort of conflict should be reconciled? Should the conflict be reconciled through a political process or by the courts?

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[172] Judgment dated 27 April 2005, File reference No P 1/05, at http://www.trybunal.gov.pl/eng/summaries/summaries_assets/documents/P_1_05_full_GB.pdf

[173] http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2005/com2005_0650en01.pdf at para 3.2.

THE EFFECT OF COMMUNITY LAW WITHIN NATIONAL LEGAL SYSTEMS

DIRECT APPLICABILITY AND DIRECT EFFECT

Article 249 of the Treaty (above at page 20) states that regulations are directly applicable. When the institutions adopt a regulation it becomes part of the law that applies within the national legal systems without the need for any action by the Member States to implement it. The regulation would be a direct source of legal rights and obligations. The regulation specifies when it is to come into force.

Art. 249 does not say anything about the effect of other measures which the EU institutions may adopt except to distinguish between those measures which are binding (regulations, directives, decisions) and those which are not binding (recommendations and opinions).

The ECJ's decisions establish that some rules of Community law set out in the Treaty itself also create rights and obligations for individuals. Provisions which have this characteristic are **directly effective** or produce direct effects.[174] ***Defrenne* v *Sabena*,** Case 43/75, established that the Treaty's provision on equal pay, which is now found in Article 141, gave rise to rights which individuals could enforce before national courts and also gave rise to obligations which bound private firms (or non-state entities). The wording of Art 141 does not spell out in any detail why this should be the case:

Art. 141
1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.
2. For the purpose of this article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.
Equal pay without discrimination based on sex means:
(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;
(b) that pay for work at time rates shall be the same for the same job.

Note that the language of Art. 141 suggests that the member States have the obligation to ensure equal pay for equal work, not that employers have the obligation not to discriminate between employees on the basis of gender when deciding on employees' salaries.

Gabrielle Defrenne was an air hostess who claimed that she had been discriminated against in violation of what is now Art. 141 because male workers for the airline doing the

[174] This is the doctrine of direct effect.

same work were paid more than she had been. Here is what the ECJ said:

Defrenne v Sabena

7 The question of the direct effect of Article [141] must be considered in the light of the nature of the principle of equal pay, the aim of this provision and its place in the scheme of the Treaty.
8 Article [141] pursues a double aim.
9 First, in the light of the different stages of the development of social legislation in the various Member States, the aim of Article [141] is to avoid a situation in which undertakings established in states which have actually implemented the principle of equal pay suffer a competitive disadvantage in intra-community competition as compared with undertakings established in states which have not yet eliminated discrimination against women workers as regards pay.
10 Secondly, this provision forms part of the social objectives of the community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples, as is emphasized by the preamble to the Treaty.
11 This aim is accentuated by the insertion of Article [141] into the body of a chapter devoted to social policy whose preliminary provision... marks ' the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonization while the improvement is being maintained '.
12 This double aim, which is at once economic and social, shows that the principle of equal pay forms part of the foundations of the community...
18 For the purposes of the implementation of these provisions a distinction must be drawn within the whole area of application of Article [141] between, first, direct and overt discrimination which may be identified solely with the aid of the criteria based on equal work and equal pay referred to by the article in question and, secondly, indirect and disguised discrimination which can only be identified by reference to more explicit implementing provisions of a community or national character.
19 It is impossible not to recognize that the complete implementation of the aim pursued by Article [141], by means of the elimination of all discrimination, direct or indirect, between men and women workers, not only as regards individual undertakings but also entire branches of industry and even of the economic system as a whole, may in certain cases involve the elaboration of criteria whose implementation necessitates the taking of appropriate measures at community and national level.
20 This view is all the more essential in the light of the fact that the community measures on this question... implement Article [141] from the point of view of extending the narrow criterion of ' equal work ', in accordance in particular with the provisions of Convention no 100 on Equal Pay concluded by the International Labour Organization in 1951, article 2 of which establishes the principle of equal pay for work ' of equal value '.
21 Among the forms of direct discrimination which may be identified solely by reference to the criteria laid down by Article [141] must be included in particular those which have their origin in legislative provisions or in collective labour agreements and which may be detected on the basis of a purely legal analysis of the situation.
22 This applies even more in cases where men and women receive unequal pay for equal work carried out in the same establishment or service, whether public or private.
23 As is shown by the very findings of the judgment making the reference, in such a situation the court is in a position to establish all the facts which enable it to decide whether a woman worker is receiving lower pay than a male worker performing the same tasks.
24 In such situation, at least, Article [141] is directly applicable and may thus give rise to individual

rights which the courts must protect.
25 Furthermore, as regards equal work, as a general rule, the national legislative provisions adopted for the implementation of the principle of equal pay as a rule merely reproduce the substance of the terms of Article [141] as regards the direct forms of discrimination.
26 Belgian legislation provides a particularly apposite illustration of this point, since Article 14 of Royal Decree no 40 of 24 October 1967 on the employment of women merely sets out the right of any female worker to institute proceedings before the relevant court for the application of the principle of equal pay set out in article [141] and simply refers to that article.
27 The terms of Article [141] cannot be relied on to invalidate this conclusion.
28 First of all, it is impossible to put forward an argument against its direct effect based on the use in this article of the word ' principle ', since, in the language of the Treaty, this term is specifically used in order to indicate the fundamental nature of certain provisions, as is shown, for example, by the heading of the first part of the Treaty which is devoted to 'principles '...
29 If this concept were to be attenuated to the point of reducing it to the level of a vague declaration, the very foundations of the community and the coherence of its external relations would be indirectly affected.
30 It is also impossible to put forward arguments based on the fact that Article [141] only refers expressly to 'Member States '.
31 Indeed, as the Court has already found in other contexts, the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in the performance of the duties thus laid down.
32 The very wording of Article [141] shows that it imposes on states a duty to bring about a specific result to be mandatorily achieved within a fixed period.
33 The effectiveness of this provision cannot be affected by the fact that the duty imposed by the Treaty has not been discharged by certain Member States and that the joint institutions have not reacted sufficiently energetically against this failure to act.
34 To accept the contrary view would be to risk raising the violation of the right to the status of a principle of interpretation, a position the adoption of which would not be consistent with the task assigned to the court by Article [220] of the Treaty.
35 Finally, in its reference to 'Member States', Article [141] is alluding to those states in the exercise of all those of their functions which may usefully contribute to the implementation of the principle of equal pay.
36 Thus, contrary to the statements made in the course of the proceedings this provision is far from merely referring the matter to the powers of the national legislative authorities.
37 Therefore, the reference to 'Member States ' in Article [141] cannot be interpreted as excluding the intervention of the courts in direct application of the Treaty.
38 Furthermore it is not possible to sustain any objection that the application by national courts of the principle of equal pay would amount to modifying independent agreements concluded privately or in the sphere of industrial relations such as individual contracts and collective labour agreements.
39 In fact, since Article [141] is mandatory in nature, the prohibition on discrimination between men and women applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals.
40 The reply to the first question must therefore be that the principle of equal pay contained in Article [141] may be relied upon before the national courts and that these courts have a duty to ensure the protection of the rights which this provision vests in individuals, in particular as regards those types of discrimination arising directly from legislative provisions or collective labour

agreements, as well as in cases in which men and women receive unequal pay for equal work which is carried out in the same establishment or service, whether private or public.

Notes

Because the Court concluded that Art. 141 created rights that individuals could enforce not just against the Member States but also against non-state employers the ECJ decided that its decision should not have retrospective effect. Only employees who had already initiated proceedings in respect of past periods could rely on Art. 141.

The ECJ uses a teleological approach to interpret the Treaty in order to achieve the Treaty's objectives, rather than relying on the wording of the Treaty. In the early cases on direct effect the doctrine is justified by the ECJ on the basis of the need to ensure that Community law is effective (effectiveness). Is the Court overstepping its role here? Should the Court have investigated whether the State parties to the Treaty intended Art. 141 to operate as the Court says it does?

In many of the cases on direct effect the ECJ says that in order for a measure to produce direct effects it must:
✦ be precise
✦ be unconditional or if it is subject to conditions, those conditions must be subject to judicial control
✦ have no need for implementation by the Member States (or the Member States have no discretion as to implementation).

Thus very many provisions of Community law can produce direct effects.

Like Art. 141, directives are addressed to the Member States and impose obligations on the Member States. And Art. 249 does not seem to suggest by its wording that directives would constitute a source of rights that individuals could enforce in national courts (note the contrasting descriptions of regulations and directives in Art. 249). However, directives are the type of instrument which has traditionally been used for internal market measures and harmonization measures generally. The consumer protection measures referred to above at page 61 are designed to improve the position of consumers by giving rights to the consumers: rights not to have unfair contract terms imposed on them; rights to cancel contracts under certain circumstances. The ECJ has held that directives can produce direct effects subject to two limitations that do not apply to Treaty provisions (or to regulations):

✦ **Directives only produce direct effects after the date for implementation** must have passed (*Pubblico Ministero* v *Ratt*i, Case 148/78)

> When Directives are adopted they specify a date by which they must be implemented - they do not produce direct effects before that date, although the Member States may be constrained in their freedom to introduce

provisions which would conflict with the Directive during the implementation period.

✦ **Directives do not produce direct effects as against non-state entities** (directives do not produce horizontal direct effects (*Marshall* v *Southampton and South-West Hampshire Area Health Authority,* Case 152/84))

The diagram below illustrates this terminology. Directives can produce vertical direct effects - a consumer could invoke provisions of the unfair contract terms directive against the state or a state entity if she entered into a consumer contract with the state or state entity. However, as directives do not produce horizontal direct effects a consumer cannot invoke provisions of the unfair contract terms directive against a non-state entity.

MEMBER STATE

↑

CONSUMER → **NON-STATE ENTITY**

In ***Foster* v *British Gas***, Case C-188/89, the ECJ defined a state entity (an emanation of the State) as "A body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the state, for providing a public service under the control of the state and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals is included in any event among the bodies against which the provisions of a Directive capable of having direct effect may be relied upon."

In **Marshall v Southampton and South-West Hampshire Area Health Authority**, Ms. Marshall tried to invoke provisions of the Equal Treatment Directive against her employer, a health authority which was part of the UK's National Health Service (NHS) (the UK Court which referred questions of interpretation of European Community law to the ECJ decided that the health authority was an emanation of the state).. Ms Marshall claimed that when she was required to retire at age 60 whereas men were allowed to work until they were 65 she was discriminated against in contravention of the directive.

Here is an excerpt from the ECJ's judgment:

41 In support of that view, the appellant points out that Directives are capable of conferring

rights on individuals which may be relied upon directly before the courts of the Member States; national courts are obliged by virtue of the binding nature of a Directive, in conjunction with Article [10] of the EEC treaty, to give effect to the provisions of Directives where possible, in particular when construing or applying relevant provisions of national law (Judgment of 10 April 1984 in Case 14/83 von Colson and Kamann V Land Nordrhein-Westfalen.... Where there is any inconsistency between national law and community law which cannot be removed by means of such a construction, the appellant submits that a national court is obliged to declare that the provision of national law which is inconsistent with the Directive is inapplicable.
42 The Commission is of the opinion that the provisions of Article 5 (1) of Directive No 76/207 are sufficiently clear and unconditional to be relied upon before a national court. they may therefore be set up against section 6(4) of the Sex Discrimination Act, which, according to the decisions of the Court of Appeal, has been extended to the question of compulsory retirement and has therefore become ineffective to prevent dismissals based upon the difference in retirement ages for men and for women.
43 The respondent and the United Kingdom propose, conversely, that the second question should be answered in the negative. they admit that a Directive may, in certain specific circumstances, have direct effect as against a member state in so far as the latter may not rely on its failure to perform its obligations under the Directive. however, they maintain that a Directive can never impose obligations directly on individuals and that it can only have direct effect against a member state qua public authority and not against a member state qua employer. as an employer a state is no different from a private employer. it would not therefore be proper to put persons employed by the state in a better position than those who are employed by a private employer.
44 With regard to the legal position of the respondent ' s employees the United Kingdom states that they are in the same position as the employees of a private employer. Although according to United Kingdom constitutional law the health authorities, created by the National Health Service Act 1977, as amended by the Health Services Act 1980 and other legislation, are crown bodies and their employees are crown servants, nevertheless the administration of the national health service by the health authorities is regarded as being separate from the government ' s central administration and its employees are not regarded as civil servants.
45 Finally, both the respondent and the United Kingdom take the view that the provisions of Directive No 76/207 are neither unconditional nor sufficiently clear and precise to give rise to direct effect. The Directive provides for a number of possible exceptions, the details of which are to be laid down by the Member States. Furthermore, the wording of article 5 is quite imprecise and requires the adoption of measures for its implementation.
46 It is necessary to recall that, according to a long line of decisions of the court... wherever the provisions of a Directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against the state where that state fails to implement the Directive in national law by the end of the period prescribed or where it fails to implement the Directive correctly.
47 that view is based on the consideration that it would be incompatible with the binding nature which Article [249] confers on the Directive to hold as a matter of principle that the

obligation imposed thereby cannot be relied on by those concerned. from that the court deduced that a member state which has not adopted the implementing measures required by the Directive within the prescribed period may not plead, as against individuals, its own failure to perform the obligations which the Directive entails.
48 With regard to the argument that a Directive may not be relied upon against an individual, it must be emphasized that according to article [249] of the..Treaty the binding nature of a Directive, which constitutes the basis for the possibility of relying on the Directive before a national court, exists only in relation to ' each member state to which it is addressed '. It follows that a Directive may not of itself impose obligations on an individual and that a provision of a Directive may not be relied upon as such against such a person. it must therefore be examined whether, in this case, the respondent must be regarded as having acted as an individual.
49 In that respect it must be pointed out that where a person involved in legal proceedings is able to rely on a Directive as against the state he may do so regardless of the capacity in which the latter is acting, whether employer or public authority. In either case it is necessary to prevent the state from taking advantage of its own failure to comply with community law.
50 It is for the national court to apply those considerations to the circumstances of each case; the Court of Appeal has, however, stated in the order for reference that the respondent, Southampton and South West Hampshire Area Health Authority .., is a public authority.
51 The argument submitted by the United Kingdom that the possibility of relying on provisions of the Directive against the respondent qua organ of the state would give rise to an arbitrary and unfair distinction between the rights of state employees and those of private employees does not justify any other conclusion. Such a distinction may easily be avoided if the member state concerned has correctly implemented the Directive in national law.
52 Finally, with regard to the question whether the provision contained in article 5(1) of Directive No 76/207, which implements the principle of equality of treatment set out in article 2(1) of the Directive, may be considered, as far as its contents are concerned, to be unconditional and sufficiently precise to be relied upon by an individual as against the state, it must be stated that the provision, taken by itself, prohibits any discrimination on grounds of sex with regard to working conditions, including the conditions governing dismissal, in a general manner and in unequivocal terms. The provision is therefore sufficiently precise to be relied on by an individual and to be applied by the national courts.
53 It is necessary to consider next whether the prohibition of discrimination laid down by the Directive may be regarded as unconditional, in the light of the exceptions contained therein and of the fact that according to article 5(2) thereof the member states are to take the measures necessary to ensure the application of the principle of equality of treatment in the context of national law.
54 With regard, in the first place, to the reservation contained in article 1(2) of Directive no 76/207 concerning the application of the principle of equality of treatment in matters of social security, it must be observed that, although the reservation limits the scope of the Directive ratione materiae, it does not lay down any condition on the application of that

principle in its field of operation and in particular in relation to article 5 of the Directive. similarly, the exceptions to Directive no 76/207 provided for in article 2 thereof are not relevant to this case.
55 It follows that article 5 of Directive No 76/207 does not confer on the Member States the right to limit the application of the principle of equality of treatment in its field of operation or to subject it to conditions and that that provision is sufficiently precise and unconditional to be capable of being relied upon by an individual before a national court in order to avoid the application of any national provision which does not conform to article 5(1).

Notes

This case illustrates how the Court applies the test for direct effect (paras 52 and 53).

The rationale for direct effect here is an estoppel rationale (see para. 49). Allowing Ms Marshall to enforce her rights under the directive against a state entity prevents the Member State from taking advantage of its own wrong.

The UK argued that there would be a problem if employees of state entities could enforce rights under the directive and employees of non-state entities could not. The ECJ dismisses this argument on the basis that the UK could easily solve this problem (see para 51). But should we worry about this?

There is another doctrine of Community law, sometimes called the doctrine of **indirect effects**, or the interpretative obligation of the national courts, which helps people who would like to bring claims based on directives against non-state entities. The ECJ has said in a number of cases that national courts are required to interpret national law in accordance with Community law as far as they can. In some cases the national courts are required to use this power/obligation of interpretation to disapply provisions of national law which are inconsistent with Community law.

There are other ways in which Community law mitigates some of the negative effects of the rule that directives do not produce horizontal directs, and we will look at these later.

APPENDIX I: SCHUMAN DECLARATION (May 9, 1950)[175]

World peace cannot be safeguarded without the making of creative efforts proportionate to the dangers which threaten it. The contribution which an organized and living Europe can bring to civilization is indispensable to the maintenance of peaceful relations. In taking upon herself for more than 20 years the role of champion of a united Europe, France has always had as her essential aim the service of peace. A united Europe was not achieved and we had war.

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. The pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development as a first step in the federation of Europe, and will change the destinies of those regions which have long been devoted to the manufacture of munitions of war, of which they have been the most constant victims.

The solidarity in production thus established will make it plain that any war between France and Germany becomes not merely unthinkable, but materially impossible. The setting up of this powerful productive unit, open to all countries willing to take part and bound ultimately to provide all the member countries with the basic elements of industrial production on the same terms, will lay a true foundation for their economic unification.

This production will be offered to the world as a whole without distinction or exception, with the aim of contributing to raising living standards and to promoting peaceful achievements. With increased resources Europe will be able to pursue the achievement of one of its essential tasks, namely, the development of the African continent. 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 realization of the first concrete foundation of a European federation indispensable to the preservation of peace.

To promote the realization of the objectives defined, the French Government is ready to open negotiations on the following bases.

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[175] http://europa.eu/abc/symbols/9-may/decl_en.htm . Robert Schuman was the French Foreign Minister at the time.

The task with which this common High Authority will be charged will be that of securing in the shortest possible time the modernization of production and the improvement of its quality; the supply of coal and steel on identical terms to the French and German markets, as well as to the markets of other member countries; the development in common of exports to other countries; the equalization and improvement of the living conditions of workers in these industries.

To achieve these objectives, starting from the very different conditions in which the production of member countries is at present situated, it is proposed that certain transitional measures should be instituted, such as the application of a production and investment plan, the establishment of compensating machinery for equating prices, and the creation of a restructuring fund to facilitate the rationalization of production. The movement of coal and steel between member countries will immediately be freed from all customs duty, and will not be affected by differential transport rates. Conditions will gradually be created which will spontaneously provide for the more rational distribution of production at the highest level of productivity.

In contrast to international cartels, which tend to impose restrictive practices on distribution and the exploitation of national markets, and to maintain high profits, the organization will ensure the fusion of markets and the expansion of production.

The essential principles and undertakings defined above will be the subject of a treaty signed between the States and submitted for the ratification of their parliaments. The negotiations required to settle details of applications will be undertaken with the help of an arbitrator appointed by common agreement. He will be entrusted with the task of seeing that the agreements reached conform with the principles laid down, and, in the event of a deadlock, he will decide what solution is to be adopted.

The common High Authority entrusted with the management of the scheme will be composed of independent persons appointed by the governments, giving equal representation. A chairman will be chosen by common agreement between the governments. The Authority's decisions will be enforceable in France, Germany and other member countries. Appropriate measures will be provided for means of appeal against the decisions of the Authority.

A representative of the United Nations will be accredited to the Authority, and will be instructed to make a public report to the United Nations twice yearly, giving an account of the working of the new organization, particularly as concerns the safeguarding of its objectives.

The institution of the High Authority will in no way prejudge the methods of ownership of enterprises. In the exercise of its functions, the common High Authority will take into account the powers conferred upon the International Ruhr Authority and the obligations of all kinds imposed upon Germany, so long as these remain in force.

APPENDIX II: DEVELOPMENT OF THE EU
Enlargements - Widening the EU

1958	**1973**	**1981**	**1986**	**1995**[176]	**2004**	**2007**	**Candidates**
Belgium	Denmark	Greece	Portugal	Austria	Cyprus	Bulgaria	Croatia
France	Ireland		Spain	Finland	Czech Republic	Romania	Macedonia
Germany	UK			Sweden	Estonia		Turkey
Italy					Hungary		
Luxembourg					Latvia		
Netherlands					Lithuania		
					Malta		
					Poland		
					Slovakia		
					Slovenia		

[176] Norway signed the accession Treaty but did not ratify it.

Deepening the EU

1979
1st direct elections to E. Pmt.

1992
EEA agt

1999
euro launched

2001
Laeken dec.

2002
euro coins circulate

1957 → **Treaty of Rome**
(In force 1958)

1986 → **Single European Act**
(In force 1987)

-Single internal Market
-QMV

1992 → **Maastricht Treaty**
(In force 1993)
(TEU)

-European Union
-3 pillars: EC; Foreign Affairs; Justice & Home Affairs
-more QMV
-Citizenship of EU
-Social protocol

Danish no
Opt-out re EMU

1997 → **Amsterdam Treaty**
(In force 1999)

-EMU
-human rights, democracy etc
-closer co-op
-area of freedom security & justice to EC pillar
-subsidiarity & proportionality
-CFSP extended

2001 → **Nice Treaty**
(In force 2003)

-enlargement
- more QMV

Irish no

2004 → **Constitutional Treaty**
(Not ratified)

2007 **Lisbon Treaty**

1999
Commission resigns

2004
Barroso withdraws Proposed Commission because of Pmt opposition

WIDENING AND DEEPENING

	Denmark					Cyprus	
	Eire	Portugal	Austria			Czech Republic	
	UK	Spain	Finland			Estonia	
	Greece		Sweden			Hungary	
						Latvia	
						Lithuania	
Benelux						Malta	
France						Poland	
Germany						Slovenia	Bulgaria
Italy						Slovakia	Romania
1973	**1981**		**1995**				
1957 →		**1986** →	**1992** →	**1997** →	**2001** →	**2004** →	**2007**
Treaty of Rome		**Single European Act**	**Maastricht Treaty**	**Amsterdam Treaty**	**Nice Treaty**	**Constitutional Treaty**	**Lisbon Treaty**
(In force 1958)		(In force 1987)	(In force 1993)	(In force 1999)	(In force 2003)	(Not ratified)	
			(TEU)				
		-Single internal Market	-European Union	-EMU	-enlargement		
		-QMV	-3 pillars: EC; Foreign Affairs; Justice & Home Affairs	-human rights, democracy etc	- more QMV		
			-more QMV	-closer co-op			
			-Citizenship of EU	-area of freedom security & justice to EC pillar			
			-Social protocol	-subsidiarity & proportionality			
				-CFSP extended			