MATERIALS ON THE LAW OF THE EUROPEAN UNION

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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] Ten new states joined the EU in May 2004,[6] and two more joined in 2007.[7] Croatia,

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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). A consolidated version of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) which reflects the situation after the ratification of the Treaty of Lisbon 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. The Treaty of Lisbon came into effect on December 1, 2009. See generally http://europa.eu/lisbon_treaty/index_en.htm .

[5] See http://europa.eu/abc/european_countries/index_en.htm .

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

[7] Bulgaria and Romania.

Macedonia, and Turkey are candidate countries and Montenegro, Albania,[8] Iceland (which is currently a member of the European Economic Area (EEA),[9] and which suffered serious financial troubles in 2008) have applied to join the EU.[10] Most recently, in December 2009, Serbia applied for membership.

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 ran into difficulties.[11] 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.[12] In June 2008 a referendum in Ireland rejected the Treaty of Lisbon, resulting in a negotiation of a set of guarantees to Ireland by the other Member States in respect of the Lisbon Treaty,[13] and subsequent ratification of the Treaty in a new referendum in October 2009.

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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[8] On enlargement see, e.g., Communication from the Commission to The European Parliament and the Council, Enlargement Strategy and Main Challenges 2009-2010, COM (2009) 533 (Oct. 14, 2009) at http://ec.europa.eu/enlargement/pdf/key_documents/2009/strategy_paper_2009_en.pdf .

[9] *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.

[10] *See* http://ec.europa.eu/enlargement/potential-candidates/iceland/relation/index_en.htm .

[11] 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.

[12] 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.

[13] *See* http://ec.europa.eu/ireland/lisbon_treaty/lisbon_treaty_progress/index_en.htm .

areas of national (domestic) law affected by EU rules.[14] Studying EU law 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 492,000[15] which is not much larger than the population of the city of Manchester, the third largest city in the UK.[16] 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,[17] 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 many the idea of maintaining momentum is crucial. But, as the number of Member States

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[14] An Appendix at the end of this handout (at page 72) outlines the development of the EU over time.

[15] Source: CIA World Factbook (estimating a population of 491,775 as of July 2009).

[16] Manchester has a population of somewhere around 450,000. The Greater Manchester conurbation has a population of around 2.5 million. Baton Rouge and Colorado Springs both have similar population levels. Other European cities have much larger populations: Paris has 9.5 million and London has just over 8 million.

[17] The permanent members are China, France, Russian Federation, the UK and the USA. *See* http://www.un.org/sc/members.asp .

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.[18]

As you read the decisions of the Court of Justice and General Court[19] 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 these courts 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

Schuman Declaration (May 9, 1950)[20]

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

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

[19] Before the Lisbon Treaty came into effect these courts were named the European Court of Justice (ECJ) and Court of First Instance (CFI) You may come across these terms in some of the materials you read.

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

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.

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.

The Treaty on the Functioning of the European Union (TFEU) defines the EU’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.

This is what the TFEU says about the EU’s objectives:

Preamble: Determined to lay the foundations of an ever closer union among the peoples of Europe,
Resolved to ensure the economic and social progress of their States by common action to eliminate the barriers which divide Europe,
Affirming as the essential objective of their efforts the constant improvements of the living and working conditions of their peoples,
Recognising that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition,
Anxious to strengthen the unity of their economies and to ensure their harmonious development by reducing the differences existing between the various regions and the backwardness of the less favoured regions,
Desiring to contribute, by means of a common commercial policy, to the progressive abolition of restrictions on international trade,
Intending to confirm the solidarity which binds Europe and the overseas countries and desiring to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations,
Resolved by thus pooling their resources to preserve and strengthen peace and liberty, and calling

upon the other peoples of Europe who share their ideal to join in their efforts,
Determined to promote the development of the highest possible level of knowledge for their peoples through a wide access to education and through its continuous updating ...
.

Art. 2

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.

Art. 3

1. The Union shall have exclusive competence in the following areas:
(a) customs union;
(b) the establishing of the competition rules necessary for the functioning of the internal market;
(c) monetary policy for the Member States whose currency is the euro;
(d) the conservation of marine biological resources under the common fisheries policy;
(e) common commercial policy.
2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

Art. 4

1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.
2. Shared competence between the Union and the Member States applies in the following principal areas:
(a) internal market;
(b) social policy, for the aspects defined in this Treaty;
(c) economic, social and territorial cohesion;
(d) agriculture and fisheries, excluding the conservation of marine biological resources;
(e) environment;

(f) consumer protection;
(g) transport;
(h) trans-European networks;
(i) energy;
(j) area of freedom, security and justice;
(k) common safety concerns in public health matters, for the aspects defined in this Treaty.
3. In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.
4. In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

Art. 5
1. The Member States shall coordinate their economic policies within the Union. To this end, the Council shall adopt measures, in particular broad guidelines for these policies. Specific provisions shall apply to those Member States whose currency is the euro.
2. The Union shall take measures to ensure coordination of the employment policies of the Member States, in particular by defining guidelines for these policies.
3. The Union may take initiatives to ensure coordination of Member States' social policies.

Art. 6
The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be:
(a) protection and improvement of human health;
(b) industry;
(c) culture;
(d) tourism;
(e) education, vocational training, youth and sport;
(f) civil protection;
(g) administrative cooperation

Art. 7
The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.

Art. 8
In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.

Art. 9
In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.

Art. 10

In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Art. 11
Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development.

Art. 12 (ex Article 153(2) TEC)
Consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities.

Art. 13
In formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.

Art. 14 (ex Article 16 TEC)
Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services.

Art. 15 (ex Article 255 TEC)
1. In order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible.
2. The European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act.
3. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph.
General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the European Parliament and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure. Each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents, in accordance with the regulations referred to in the second subparagraph. The Court of Justice of the European Union, the European Central Bank and the European Investment Bank shall be subject to this paragraph only when exercising their administrative tasks. The European Parliament and the Council shall ensure publication of the documents relating to the legislative procedures under the terms laid

down by the regulations referred to in the second subparagraph.

Art. 16 (ex Article 286 TEC)
1. Everyone has the right to the protection of personal data concerning them.
2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities.
The rules adopted on the basis of this Article shall be without prejudice to the specific rules laid down in Article 39 of the Treaty on European Union.

Art. 17
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 non-confessional organisations.
3. Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations.

Art. 18 (ex Article 12 TEC)
Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination.

Art. 19 (ex Article 13 TEC)
1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.
2. By way of derogation from paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt the basic principles of Union incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1..

Notes and questions:

What these provisions 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 57 below, and the Schuman Declaration, above), is that the primary objective of what is now the EU is the avoidance of war in Europe (but note the reference to a common defence policy). The **Treaty on European Union (TEU) states in Article 3**:

1. The Union's aim is to promote peace, its values and the well-being of its peoples.
2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.
3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.
It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.
It shall promote economic, social and territorial cohesion, and solidarity among Member States.
It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.
4. The Union shall establish an economic and monetary union whose currency is the euro.
5. In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.
6. The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties.

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. 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 the TFEU spells out gender equality as an objective in Article 8. 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.[21] The EU has adopted a Charter of Fundamental Rights,[22] which was not originally legally binding, but is binding since the Lisbon Treaty came into force. Article 6 of the TEU now provides that the Charter "shall have the same

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[21] 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 .

[22] Charter of Fundamental Rights of the European Union OJ No C 303/2 (Dec. 14, 2007) at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/c_303/c_30320071214en00010016.pdf .

legal value as the Treaties."[23] But even before this, the Commission signaled that it took the provisions of the Charter seriously in a 2005 Communication.[24] The TEU[25] includes a provision designed to ensure respect for 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:

Art. 7 TEU[26]
1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.
The Council shall regularly verify that the grounds on which such a determination was made continue to apply.
2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article

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[23] A protocol to the Lisbon Treaty limits the application of the Charter with respect to the UK and Poland: "The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms... In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law... To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom."

[24] 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

[25] See http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0013:0045:EN:PDF (Consolidated version).

[26] Under Art. 269 TFEU: "The Court of Justice shall have jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 of the Treaty on European Union solely at the request of the Member State concerned by a determination of the European Council or of the Council and in respect solely of the procedural stipulations contained in that Article. Such a request must be made within one month from the date of such determination. The Court shall rule within one month from the date of the request."

2, after inviting 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 the Treaties 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.
4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.
5. The voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article are laid down in Article 354 of the Treaty on the Functioning of the European Union.

This provision was 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. 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 leader of the Party.[27] It has been argued that countries in which secret prisons have been located to help the CIA could be vulnerable under these provisions.[28]

The provisions we have noticed so far spell out in very general terms what powers the EU institutions have, what powers the Member States have, and what powers are shared. 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. Article 4 of the TFEU provides that the EU institutions and the Member States share competence with respect to the internal market. More specific provisions of the Treaty provide that the EU institutions had powers with respect to approximation (harmonization) of law for the functioning of the internal market.[29] This has raised many questions of interpretation. Who should decide the answer to such a question? Should the decision be made by the institutions with legislative

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

[28] *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

[29] *See* Art. 114 (previously Art. 95) and Art. 115 (previously Art. 94) below. Art 114 provides that "The European Parliament and the Council shall ... 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."

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.[30]

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 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.[31] 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."[32]

The power to harmonize rules to achieve the common market or the internal market

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[30] 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).

[31] 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.

[32] 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

is spelled out in Articles 114 and 115 TFEU.

Art. 114
1. Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure[33] and after 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.
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 of a harmonisation measure by the European Parliament and the Council, by the Council or by the Commission, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 36, 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 of a harmonisation measure by the European Parliament and the Council, by the Council or by the Commission, 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.

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[33] Art. 289 TFEU: 1. The ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission. This procedure is defined in Article 294.
2. In the specific cases provided for by the Treaties, the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament, shall constitute a special legislative procedure. 3. Legal acts adopted by legislative procedure shall constitute legislative acts. 4. In the specific cases provided for by the Treaties, legislative acts may be adopted on the initiative of a group of Member States or of the European Parliament, on a recommendation from the European Central Bank or at the request of the Court of Justice or the European Investment Bank.

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 258 and 259, the Commission and any Member State may bring the matter directly before the Court of Justice of the European Union 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 36, provisional measures subject to a Union control procedure.

Art. 115
Without prejudice to Article 114, the Council shall, acting unanimously in accordance with a special legislative procedure 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 internal market.

The Treaty has changed over time. The original version of the Treaty did not refer to specific powers of the then European Economic Community with respect to consumer protection or the protection of the environment or health. Over time the EU legislators began to adopt measures to protect consumers and the environment (on the basis that these were necessary for the achievement of a common or internal market) and the Member States amended the Treaty to provide for additional specific objectives such as consumer protection. Consumer protection measures were originally adopted on the basis of the power to harmonize rules to create a single market based on the idea 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 169 of the TFEU states:

Art. 169 (previously Art 153)
1. In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union 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. The Union shall contribute to the attainment of the objectives referred to in paragraph 1 through:
(a) measures adopted pursuant to Article 114 in the context of the completion of the internal market;
(b) measures which support, supplement and monitor the policy pursued by the Member States.
3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall adopt the measures referred to in paragraph 2(b).

4. Measures adopted pursuant to paragraph 3 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. The Commission shall be notified of them.

Article 12 of the TFEU provides that "Consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities."

In 2005, the Parliament and the Council adopted a **Directive on unfair commercial practices**[34] under the provision which is now Art. 114 (but also referring to the earlier version of what is now Art. 169). The recitals to the directive (which explain the reasons for its adoption) contain the following statements:

2) In accordance with ... 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 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.

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[34] 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 .

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**.[35]
(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**,[36] 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**,[37] 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 impairing the consumer's ability to make an informed decision.[38]

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

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[35] 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.

[36] 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.

[37] And see TEU Art 5, page 20 below.

[38] 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.")

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.[39] And the EU has even legislated to address environmental protection through criminal law.[40]

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 TEU.

Art. 5 TEU

1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.
2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.
3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.
The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.
4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.
The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

Do you think this helps very much with the uncertainties about what the EU is permitted to legislate about under Arts 114 and 115? Generally the principle of subsidiarity has been 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

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[39] *See* TFEU Arts 191-193.

[40] *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.”)

a directive on food supplements,[41] the Court of Justice 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 [the Treaty] 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 even though subsidiarity arguably has had limited legal effect it has not been 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.[42]

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.[43] 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 it may mean that power should be exercised at the sub-national level. Within the EU's institutional structure

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[41] *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

[42] 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

[43] *Id.* at 319.

the Committee of the Regions[44] allows regional and local levels to participate in policy-making, and the Protocol on Subsidiarity and Proportionality in the Lisbon Treaty now provides that:

The Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought in accordance with the rules laid down in Article 230 of the Treaty on the Functioning of the European Union by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber thereof.
In accordance with the rules laid down in the said Article, the Committee of the Regions may also bring such actions against legislative acts for the adoption of which the Treaty on the Functioning of the European Union provides that it be consulted.

The Food Supplements Directive Case[45] is an interesting case. 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.[46] But the directive chose to regulate food supplements[47] 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 what is now Art 114 was not the correct **legal basis** for the directive, because it concerned health matters. The Court 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 [114] constitutes a misuse of powers since, under [Art. 168] the Community has no power to harmonise national legislation on human health.[48]

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[44] http://www.cor.europa.eu/pages/HomeTemplate.aspx .

[45] 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 .

[46] 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.

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

[48] Note that the Treaty of Lisbon amended the EU's powers with respect to health, adding new powers which did not previously exist. Art 168(5) TFEU now provides "The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, may also adopt incentive measures designed to protect and improve 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 [207 TFEU]
27 In that regard, it must be borne in mind that, as provided for by Article [114], the Council of the European Union, acting in accordance with the procedure referred to in Article [294 TFEU] 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 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 [114 TFEU]... 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 [114 TFEU] 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 [114 TFEU] 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 [168] 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 [114] 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 [114] authorises the Community legislature to intervene by adopting appropriate measures, in compliance 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 [114] 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

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and in particular to combat the major cross-border health scourges, measures concerning monitoring, early warning of and combating serious cross-border threats to health, and measures which have as their direct objective the protection of public health regarding tobacco and the abuse of alcohol, excluding any harmonisation of the laws and regulations of the Member States."

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 [114].
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 [207] 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 [114] 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 what is now Art 114 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. 114 as a legal basis will necessarily fail. If the measure in question has nothing to do with the internal market, Art. 114 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 what is now Art 114:

83... the measures referred to in art [114] 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 [114] 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 [114] 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 [114] 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 [114] 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.. [114]... 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.[49]

Challenges to EU measures based on the idea that the institutions chose the wrong legal basis for the measures have also arisen in the context of disputes between the different EU institutions or between different Member States. For example, 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 114 does not require unanimity (although note that Art 115 does). Art. 114 also allows the Parliament a significant role in the legislative process.

At this point it is worth noting that **Art. 352** of the EC Treaty gives the EU **implied powers** to achieve the EU's objectives:

1. If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures.

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

Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.
2. Using the procedure for monitoring the subsidiarity principle referred to in Article 5(3) of the Treaty on European Union, the Commission shall draw national Parliaments' attention to proposals based on this Article.
3. Measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation.
4. This Article cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy and any acts adopted pursuant to this Article shall respect the limits set out in Article 40, second paragraph, of the Treaty on European Union.

Note that the implied powers are exercised unanimously and after obtaining the consent of the Parliament (previously the provision merely required consultation with the Parliament). Art. 352 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 flavorings in foods,[50] arguing that it should have been adopted on the basis of what is now Art 352 rather than Art. 114. If the proper legal basis were Art. 352 the UK would have been able to block the measure. The Court decided that Art. 114 was the appropriate legal basis.[51]

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

Art. 288

To exercise the Union's competences, the institutions shall adopt **regulations, directives, decisions, recommendations and 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. A decision which specifies those to whom it is addressed shall be binding only on them.[52]
Recommendations and opinions shall have no binding force.

Traditionally, directives have been used for legal harmonization. The directive

[50] 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.

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

[52] The provision previously stated: “A decision shall be binding in its entirety upon those to whom it is addressed.”

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. 288 above connotes.

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

3. INSTITUTIONS OF THE EU[53]

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 Court of Justice and the General Court 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.[54] 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 European Council, a new role introduced by the Treaty of Lisbon, currently Herman Van Rompuy (who was the Prime Minister of Belgium);[55] the President of the Commission (José Manuel Barroso has been nominated for a second term as President of the Commission and approved by the Parliament),[56] the High Representative for Foreign Affairs and Security Policy (Catherine Ashton, who will also be a Vice President of the

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[53] 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.

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

[55] The President of the European Council is elected for a 2.5 year term by the European Council. See TEU Art. 15. The President: "(a) shall chair [the EC] and drive forward its work; (b) shall ensure the preparation and continuity of the work of the European Council in cooperation with the President of the Commission, and on the basis of the work of the General Affairs Council; (c) shall endeavour to facilitate cohesion and consensus within the European Council; (d) shall present a report to the European Parliament after each of the meetings of the European Council. The President of the European Council shall, at his level and in that capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy. The President of the European Council shall not hold a national office." *See* http://www.consilium.europa.eu/showPage.aspx?id=1812&lang=en .

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

Commission), and the President of the Parliament (Jerzy Buzek).[57]

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

Since 1979 the European Parliament has been directly elected by the citizens of the EU. Elections occur every 5 years, and the last elections took place in 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. Fewer than half of those who are entitled to vote in European Parliament elections do so.

Seats in the Parliament are allocated broadly in line with the populations of the Member States. **Art. 14 TEU** provides:

1. The European Parliament shall, jointly with the Council, exercise legislative and budgetary functions. It shall exercise functions of political control and consultation as laid down in the Treaties. It shall elect the President of the Commission.
2. The European Parliament shall be composed of representatives of the Union's citizens. They shall not exceed seven hundred and fifty in number, plus the President. Representation of citizens shall be degressively proportional, with a minimum threshold of six members per Member State. No Member State shall be allocated more than ninety-six seats.
The European Council shall adopt by unanimity, on the initiative of the European Parliament and with its consent, a decision establishing the composition of the European Parliament, respecting the principles referred to in the first subparagraph.
3. The members of the European Parliament shall be elected for a term of five years by direct universal suffrage in a free and secret ballot.
4. The European Parliament shall elect its President and its officers from among its members.

Originally the Parliament was merely a talking shop, but over time the Parliament has developed increased powers so that many legislative measures are now adopted by the Parliament and the Council together. The Parliament has exercised its powers to impede proposals the MEPs do not like.[58]

The Parliament's approval of a nominee for President of the Commission, and of

[57] *See* http://www.ep-president.eu/view/en/index.html .

[58] 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 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.[59] The Parliament is currently holding hearings with the nominees for the Commission and is scheduled to vote on the whole Commission on January 26, 2010 with a view to the Commission taking office on February 1.

The Parliament has the power to censure the Commission (but not individual Commissioners) and, if it does so, the Commission must resign.[60] In 1999, after an independent investigative committee reported that the Commission had lost control of the bureaucracy, which suffered from problems of corruption,[61] 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,[62] and it can set

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[59] *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.

[60] TFEU Art. 234: "If a motion of censure on the activities of the Commission is tabled before it, the European Parliament shall not vote thereon until at least three days after the motion has been tabled and only by open vote.
If the motion of censure is carried by a two-thirds majority of the votes cast, representing a majority of the component Members of the European Parliament, the members of the Commission shall resign as a body and the High Representative of the Union for Foreign Affairs and Security Policy shall resign from duties that he or she carries out in the Commission. They shall remain in office and continue to deal with current business until they are replaced in accordance with Article 17 of the Treaty on European Union. In this case, the term of office of the members of the Commission appointed to replace them shall expire on the date on which the term of office of the members of the Commission obliged to resign as a body would have expired."

[61] Committee of Independent Experts, First Report on Allegations regarding Fraud, Mismanagement and Nepotism in the European Commission (Mar. 15, 1999). In 2004 the Commission referred Edith Cresson's file (she was a member of the Santer Commission accused of nepotism) to the ECJ. The Court found she had failed to live up to her obligation to observe the highest standards of conduct.

[62] TFEU Art 225: "The European Parliament may, acting by a majority of its component Members, request the Commission to submit any appropriate proposal on matters on which it

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. Note that Art. 14 TEU[63] describes the MEPs as "representatives of the Union's citizens". And see also:

Art. 10 TEU
1. The functioning of the Union shall be founded on representative democracy.
2. Citizens are directly represented at Union level in the European Parliament. Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.
3. Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.
4. Political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union.

MEPs sit in political groups (each of which has its own staff) rather than with other 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, including adopting secondary legislation or "delegated acts" (which are the equivalent of regulations adopted by an administrative agency)[64] and for ensuring compliance with the Treaty.

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considers that a Union act is required for the purpose of implementing the Treaties. If the Commission does not submit a proposal, it shall inform the European Parliament of the reasons."

[63] Above at 28.

[64] Art. 290 TFEU: 1. A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act. The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power. 2. Legislative acts shall explicitly lay down the conditions to which the delegation is subject; these conditions may be as follows: (a) the European Parliament or the Council may decide to revoke the delegation; (b) the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the

Art. 17 TEU

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

The members of the Commission shall be chosen on the ground of their general competence and European commitment from persons whose independence is beyond doubt. In carrying out its responsibilities, the Commission shall be completely independent. Without prejudice to Article 18(2), the members of the Commission shall neither seek nor take instructions from any Government or other institution, body, office or entity. They shall refrain from any action incompatible with their duties or the performance of their tasks.

4. The Commission appointed between the date of entry into force of the Treaty of Lisbon and 31 October 2014, shall consist of one national of each Member State, including its President and the High Representative of the Union for Foreign Affairs and Security Policy who shall be one of its Vice- Presidents.
5. As from 1 November 2014, the Commission shall consist of a number of members, including its President and the High Representative of the Union for Foreign Affairs and Security Policy, corresponding to two thirds of the number of Member States, unless the European Council, acting unanimously, decides to alter this number.

The members of the Commission shall be chosen from among the nationals of the Member States on the basis of a system of strictly equal rotation between the Member States, reflecting the demographic and geographical range of all the Member States. This system shall be established unanimously by the European Council in accordance with Article 244 of the Treaty on the Functioning of the European Union.

6. The President of the Commission shall:

(a) lay down guidelines within which the Commission is to work;
(b) decide on the internal organisation of the Commission, ensuring that it acts consistently, efficiently and as a collegiate body;
(c) appoint Vice-Presidents, other than the High Representative of the Union for Foreign Affairs and Security Policy, from among the members of the Commission.

A member of the Commission shall resign if the President so requests. The High Representative of the Union for Foreign Affairs and Security Policy shall resign, in accordance with the procedure set out in Article 18(1), if the President so requests.

7. Taking into account the elections to the European Parliament and after having held the appropriate consultations, the European Council, acting by a qualified majority, shall propose to the

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legislative act. For the purposes of (a) and (b), the European Parliament shall act by a majority of its component members, and the Council by a qualified majority. 3. The adjective ‘delegated’ shall be inserted in the title of delegated acts.

European Parliament a candidate for President of the Commission. This candidate shall be elected by the European Parliament by a majority of its component members. If he does not obtain the required majority, the European Council, acting by a qualified majority, shall within one month propose a new candidate who shall be elected by the European Parliament following the same procedure.
The Council, by common accord with the President-elect, shall adopt the list of the other persons whom it proposes for appointment as members of the Commission. They shall be selected, on the basis of the suggestions made by Member States, in accordance with the criteria set out in paragraph 3, second subparagraph, and paragraph 5, second subparagraph.
The President, the High Representative of the Union for Foreign Affairs and Security Policy and the other members of the Commission shall be subject as a body to a vote of consent by the European Parliament. On the basis of this consent the Commission shall be appointed by the European Council, acting by a qualified majority.
8. The Commission, as a body, shall be responsible to the European Parliament. In accordance with Article 234 of the Treaty on the Functioning of the European Union, the European Parliament may vote on a motion of censure of the Commission. If such a motion is carried, the members of the Commission shall resign as a body and the High Representative of the Union for Foreign Affairs and Security Policy shall resign from the duties that he carries out in the Commission.

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 that when there were 27 Member States, the number of Commissioners would be reduced so that not all of the Member States would have their own Commissioner. The Nice Treaty provided that the Council, acting unanimously, would determine the number of Commissioners and the implementing measures for a system of rotation based on the principle of equality. However, although the Treaty of Nice (which had come into force at the time) already provided for a reduction of member State representation on the Commission, so the provision the Lisbon Treaty introduces in Art of the TEU for reduction of the number of Commissioners is not new, 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.[65] 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

[65] 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.

one national of each Member State.[66]

Commissioners serve for a (renewable) 5 year term.[67] 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. 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) and to Rocco Buttiglione. Mr Barroso, the Commission President-designate (at 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 (see Art. 17 TEU above). 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 Courts (see below page 44). 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

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[66] Brussels European Council, Presidency Conclusions, note 65 above, at p. 2.

[67] Margot Wallström, who was a Commissioner nominated by Sweden who had responsibility for the Environment and Communications portfolios at different times and was one of the Vice Presidents of the Commission, served as a Commissioner from 1999 to 2009.

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

left the Commission and took up jobs in business which attracted criticism.[69] In 1999 a Code of Conduct for Commissioners was introduced which required 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.

The Commission is a vast bureaucracy and relies on the work of its staff.[71] This fact, combined with the fact that the Commissioners meet together in private, means that the Commission is less transparent than it might be.[72] In 2002 the Commission introduced a new initiative on "Better Law-Making"[73] 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[74] by the Commission — in order to ensure that both the benefits and costs of implementing a piece of legislation are clear in advance.

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

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[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] Each Commission now promulgates its Code of Conduct. The 2004 Code of Conduct is at http://ec.europa.eu/commission_barroso/code_of_conduct/code_conduct_en.pdf. See also Governance Statement of the European Commission (May 30, 2007) at http://ec.europa.eu/atwork/synthesis/doc/governance_statement_en.pdf.

[71] On the work of the Commission see generally http://ec.europa.eu/atwork/index_en.htm .

[72] The Commission does publish agendas and minutes of its meetings at the web page cited above. And the last Commission also established a European Transparency Initiative.

[73] 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. See also http://ec.europa.eu/governance/better_regulation/index_en.htm .

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

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 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. [75]

By the end of 2008, as a result of the transnational financial crisis, there seemed to be 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

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[75] 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
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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 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.[76]

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

[76] 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.

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[77]:

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 (note that in Art 16 TEU below the Council consists of **representatives** of the Member

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77 http://www.europa.eu.int/comm/commission_barroso/president/pdf/speech_20051203_en.pdf

States):

Art. 16 TEU
1. The Council shall, jointly with the European Parliament, exercise legislative and budgetary functions. It shall carry out policy-making and coordinating functions as laid down in the Treaties.
2. The Council shall consist of a representative of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote.
3. The Council shall act by a qualified majority except where the Treaties provide otherwise.
4. As from 1 November 2014, 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.
The other arrangements governing the qualified majority are laid down in Article 238(2) of the Treaty on the Functioning of the European Union.
5. The transitional provisions relating to the definition of the qualified majority which shall be applicable until 31 October 2014 and those which shall be applicable from 1 November 2014 to 31 March 2017 are laid down in the Protocol on transitional provisions.
6. The Council shall meet in different configurations, the list of which shall be adopted in accordance with Article 236 of the Treaty on the Functioning of the European Union.
The General Affairs Council shall ensure consistency in the work of the different Council configurations. It shall prepare and ensure the follow-up to meetings of the European Council, in liaison with the President of the European Council and the Commission. The Foreign Affairs Council shall elaborate the Union's external action on the basis of strategic guidelines laid down by the European Council and ensure that the Union's action is consistent.
7. A Committee of Permanent Representatives of the Governments of the Member States shall be responsible for preparing the work of the Council.
8. The Council shall meet in public when it deliberates and votes on a draft legislative act. To this end, each Council meeting shall be divided into two parts, dealing respectively with deliberations on Union legislative acts and non-legislative activities.
9. The Presidency of Council configurations, other than that of Foreign Affairs, shall be held by Member State representatives in the Council on the basis of equal rotation, in accordance with the conditions established in accordance with Article 236 of the Treaty on the Functioning of the European Union.

For the 6 months beginning in January 2010 the Council Presidency is held by Spain. For the first 6 months of 2009 the Council Presidency was held by the Czech Republic, which has only been an EU Member State since 2004;[78] Sweden held the Presidency in the second half of 2009. 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

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

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. 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). Originally qualified majority voting involved an allocation of votes to each Member State which reflected its population, although smaller Member States had a larger number of votes in the Council than would have been justified by a strict formula reflecting population size. Each time a new Member State or States joined the EU it was necessary to renegotiate the numbers of votes the Member States were entitled to for the purposes of QMV. The Member States attempted to rationalize the system for allocating votes for a number of years, and eventually the Treaty of Nice established a formula for QMV which provided that a measure would be adopted under QMV if it was approved by a majority of countries (50% or 67%) and votes (74%) and population (62%). From November 2014 the Lisbon Treaty requires approval by 55 % of the members of the Council, being at least fifteen, and representing Member States comprising at least 65 % of the population of the Union. Between now and November 2014 the Treaty allocates a number of votes to each Member State[79] and provides that "Acts shall be adopted if there are at least 255 votes in favour representing a majority of the members where, under the Treaties, they must be adopted on a proposal from the Commission. In other cases decisions shall be adopted if there are at least 255 votes in favour representing at least two thirds of the members. A member of the European Council or the Council may request that, where an act is adopted by the

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[79] 3 votes: Malta;
4 votes: Estonia, Cyprus, Latvia, Luxembourg, Slovenia
7 votes: Denmark, Ireland, Lithuania, Slovakia, Finland
10 votes: Austria, Bulgaria, Sweden
12 votes: Belgium, Czech Republic, Greece, Hungary, Portugal
13 votes: Netherlands
14 votes: Romania
27 votes: Spain, Poland
29 votes: France, Germany, Italy, UK

European Council or the Council by a qualified majority, a check is made to ensure that the Member States comprising the qualified majority represent at least 62 % of the total population of the Union. If that proves not to be the case, the act shall not be adopted."[80]

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.[81]

COURT OF JUSTICE AND GENERAL COURT

Art. 19 TEU

1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.
2. The Court of Justice shall consist of one judge from each Member State. It shall be assisted by Advocates-General. The General Court shall include at least one judge per Member State. The Judges and the Advocates-General of the Court of Justice and the Judges of the General Court shall be chosen from persons whose independence is beyond doubt and who satisfy the conditions set out in Articles 253 and 254 of the Treaty on the Functioning of the European Union. They shall be appointed by common accord of the governments of the Member States for six years. Retiring Judges and Advocates-General may be reappointed.
3. The Court of Justice of the European Union shall, in accordance with the Treaties:
(a) rule on actions brought by a Member State, an institution or a natural or legal person;
(b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions;
(c) rule in other cases provided for in the Treaties.[82]

The Court of Justice has often invoked the language in the Treaty requiring it to ensure that "in the interpretation and application of the Treaties the law is observed" to

[80] *See* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008M/PRO/36:EN:HTML .

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

[82] And see the Statute of the Court at http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/statut_2008-09-25_17-29-58_783.pdf; and Rules of Procedure at http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/txt5_2008-09-25_17-33-27_904.pdf.

justify its decisions and an expansive view of its own role.

The Member States agree on appointments of judges to the Court of Justice and General Court. Subject to this common agreement each Member State appoints one judge to the Court of Justice and one judge to the General Court. In addition, there are 8 Advocates General who assist the Court of Justice 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).[83] One judge acts as a rapporteur for each case before the court.

The General Court (formerly the Court of First Instance) was introduced by the Single European Act to help to reduce the workload of the Court of Justice. Over time the range of cases which the General Court may hear has expanded.

The Court of Justice and the General Court may sit as a full court (in exceptional cases), in Grand Chambers or in smaller chambers. 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,[84] and that solving this problem by working increasingly through smaller chambers would risk "jeopardizing the coherence of the case law".[85] 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."[86]

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

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[83] Art 252 TFEU provides: "It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his involvement."

[84] The EC Court of Justice and the Institutional reform of the European Union (April 2000) ("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.")

[85] *Id.*

[86] *Id.*

applied uniformly in an increasingly diverse Europe.[87]

After the 2004 enlargement the Courts ensured that the Chambers would reflect a mixture of members from the old and new Member States 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.[88]

A court of 27 judges is very large.[89] 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). These courts hear most cases in panels of 3 judges.[90] 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.[91] 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.[92] 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 Court of Justice, has only

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

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

[89] The Working Party suggested that the quality of decisions of a large court might be impaired. Working Party, note 88 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.")

[90] 28 U.S.C. § 46(b).

[91] 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.")

[92] 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).

9 Justices.[93]

The comparison between the EU courts and federal courts in the US illustrates a general concern that a large judicial body may be unmanageable.[94] 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.[95] In fact Congress has considered whether to split the 9th Circuit because of its size.[96] 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,[97] 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 Court of Justice and General Court 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:

Art. 253

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, after consultation of the panel provided for in Article 255. 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 of the European Union. The Judges shall

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

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

[95] *See* Ninth Circuit Evaluation Committee, Interim Report, note 92 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)

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

[97] 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).

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 of the Council.

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 Court of Justice or General Court 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 national decisions relating to EU law.[98]

Judges can be removed during their 6 year terms only by a unanimous vote of their colleagues. The independence of the judges is reinforced by the fact that decisions of the Court of Justice and General Court (which are taken by majority)[99] 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:

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

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[98] *See* http://www.juradmin.eu/en/jurisprudence/jurisprudence_en.lasso .

[99] Under Art 27 of the Rules of Procedure: 1. The Court shall deliberate in closed session.2. Only those Judges who were present at the oral proceedings and the Assistant Rapporteur, if any, entrusted with the consideration of the case may take part in the deliberations. 3. Every Judge taking part in the deliberations shall state his opinion and the reasons for it. 4. Any Judge may require that any questions be formulated in the language of his choice and communicated in writing to the Court before being put to the vote. 5. The conclusions reached by the majority of the Judges after final discussion shall determine the decision of the Court. Votes shall be cast in reverse order to the order of precedence laid down in Article 6 of these Rules. 6. Differences of view on the substance, wording or order of questions or on the interpretation of the voting shall be settled by decision of the Court. 7. Where the deliberations of the Court concern questions of its own administration, the Advocates General shall take part and have a vote. The Registrar shall be present, unless the Court decides to the contrary. 8. Where the Court sits without the Registrar being present it shall, if necessary, instruct the most junior Judge within the meaning of Article 6 of these Rules to draw up minutes. The minutes shall be signed by that Judge and by the President.

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 justifies this lack of transparency or not? This is perhaps more noticeable as a feature of the Courts 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 Court of Justice's decisions (although not the General Court's decisions) are unreviewable..

The EU Courts 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 EU Courts. More on this later.

JURISDICTION OF THE COURT OF JUSTICE AND GENERAL COURT

The General Court has jurisdiction to hear and determine at first instance **direct actions** brought by individuals and the Member States.[100] Direct actions contrast with

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[100] The Court of Justice will hear some direct actions brought by the Member States. The General Court's website states: "The General Court has jurisdiction to hear: direct actions brought by natural or legal persons against acts of the institutions, bodies, offices or agencies of the European Union (which are addressed to them or are of direct and individual concern to them) and against regulatory acts (which concern them directly and which do not entail implementing measures) or against a failure to act on the part of those institutions, bodies, offices or agencies; for example, a case brought by a company against a Commission decision imposing a fine on that company; actions brought by the Member States against the Commission; actions brought by the Member States against the Council relating to acts adopted in the field of State aid, 'dumping' and acts by which it exercises implementing powers; actions seeking compensation for damage caused by the institutions of the European Union or their staff; actions based on contracts made by the European Union which expressly give jurisdiction to the General Court; actions relating to Community trade marks; appeals, limited to points of law, against the decisions of the European Union Civil Service Tribunal; actions brought against decisions of the Community Plant Variety Office or of the European Chemicals Agency. The rulings made by the General Court may, within two months, be subject to an appeal, limited to points of law, to the Court of Justice."

preliminary references. A direct action is where a party has standing to bring a claim before the EU Courts. A preliminary reference is where a national court or tribunal refers a question of interpretation of European Community law to the Court of Justice.

Appeals from decisions of the General Court lie to the Court of Justice. The Court of Justice hears direct actions brought by EU institutions and Member States and **preliminary references** (see below at page 52).[101] Over time the range of cases the General Court hears has expanded and the General Court may even gain jurisdiction in relation to some preliminary references.[102]

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.[103] Natural and legal persons[104] do not have the right to bring enforcement actions in the EU courts although they may complain about a Member State's actions to the Commission[105] 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. 259 TFEU to bring enforcement actions against other Member States this power is hardly ever used.

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[101] The Court of Justice's website states that it has jurisdiction with respect to references for preliminary rulings, actions for failure to fulfil obligations, actions for annulment, actions for failure to act, appeals against judgments and orders of the General Court. Under Art 268 TFEU : "The Court of Justice of the European Union shall have jurisdiction in disputes relating to compensation for damage provided for in the second and third paragraphs of Article 340."

[102] *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). Cf. Court of Justice, Information note on references from national courts for a preliminary ruling, OJ No. C 297/1 (Dec. 5, 2009) at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:297:0001:0006:EN:PDF (noting that this has not yet occurred).

[103] Enforcement actions by the Commission are under Art. 258 TFEU.

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

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

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.[106] The report published in 2008 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. [107]

Late transposition of directives was still an issue the following year.[108] 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

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[106] *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.

[107] 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.

[108] EU Commission, 26th Annual Report from the Commission on Monitoring the Application of Community Law, 4 COM(2009) 675 (Dec. 15, 2009) at http://ec.europa.eu/community_law/docs/docs_infringements/annual_report_26/com_2009_675_en.pdf.

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.[109]

It is worth noting that in some areas the EU has chosen to develop "**soft law** " instruments (such as codes of conduct, communications,[110] standards, benchmarking and guidelines),[111] 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 Court of Justice has the power to require a recalcitrant Member State to pay a fine (lump sum or penalty payment) under Art 260. This power has been used occasionally.[112] For example the Court of Justice 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.[113] Greece has been fined in respect of failures to comply with EU rules on waste disposal.[114]

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[109] *Id* at 6.

[110] *See, e.g.*, note 75 above.

[111] Recommendations and opinions are examples referred to in Art. 288 above (at p. 26).

[112] 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.

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

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

Here are the relevant Treaty provisions:

Art. 258 TFEU (ex Article 226)
If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, 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 of the European Union.

Art. 259 TFEU (ex Article 227)
A Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union.
Before a Member State brings an action against another Member State for an alleged infringement of an obligation under the Treaties, 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.

Art. 260 TFEU (ex Article 228 TEC)
1. If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court.
2. If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. 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 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 259.
3. When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, 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 finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment.

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.[115]

2. CHALLENGES TO ACTS OF THE EU INSTITUTIONS

In addition to being responsible for policing Member State compliance with Community law the Court of Justice and General Court 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. 263. Art 263 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.

Before the Treaty of Lisbon came into effect it was very difficult for natural or legal persons to challenge acts of the EU institutions. The Treaty provided that such persons only had standing to challenge acts of the institutions where the measure in question directly and individually concerned them.[116] The Court of Justice interpreted this term very narrowly (and the language of the provision seemed to imply that the sort of measure which could be challenged by a natural or legal person was one which was really the equivalent of a decision). As a general rule a person who was affected by an EU regulation because they carried on a particular type of business and the regulation affected that type of business did not have standing to challenge the regulation before the General Court (suits by natural or legal persons go to the General Court at first).[117] But at the point where

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[115] XXIst report on monitoring the application of Community Law, note 106 above, at 3.

[116] The Treaty provided: "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." An individual did have the right to sue in the General Court to enforce her right of access to documents. *See, e.g.*, Williams v European Commission (Case T-42/05) .

[117] 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 -

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. The Treaty currently contains the direct and individual concern language but it also makes clear that natural and legal persons can challenge regulatory acts, which was not spelled out before. So the standing rules have been liberalized, although it is not clear how the Courts will interpret the new standing requirement.

Where the Commission issues a **decision** that firms have breached EU law in some way those firms could challenge the Commission's decision before the General Court because they were regarded as being directly and individually concerned by the decision. Similarly, a firm which complained to the Commission that another firm was in breach of provisions of the Treaty, such as those regulating cartels or abuses 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 265. In addition to challenges to acts which the institutions have adopted the Court of Justice/General Court also deal with claims for damages against the EU's institutions. It is, however, unusual for a person to succeed in such a damages claim.

Art. 263 TFEU (ex Article 230)

The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union 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 the Treaties or of any rule of law relating to their application, or misuse of powers.

The Court shall have jurisdiction under the same conditions in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives.

Any natural or legal person may, under the conditions laid down in the first and second paragraphs, 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.

Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them.

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.

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they generally impact people and firms when they are implemented in the national legal system.

Art. 264 TFEU (ex Article 231)
If the action is well founded, the Court of Justice of the European Union shall declare the act concerned to be void.
However, the Court shall, if it considers this necessary, state which of the effects of the act which it has declared void shall be considered as definitive.

Art. 265 TFEU (ex Article 232)
Should the European Parliament, the European Council, the Council, the Commission or the European Central Bank, in infringement of the Treaties, fail to act, the Member States and the other institutions of the Union may bring an action before the Court of Justice of the European Union to have the infringement established. This Article shall apply, under the same conditions, to bodies, offices and agencies of the Union which fail to act. The action shall be admissible only if the institution, body, office or agency concerned has first been called upon to act. If, within two months of being so called upon, the institution, body, office or agency 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 that an institution, body, office or agency of the Union has failed to address to that person any act other than a recommendation or an opinion.

3. PRELIMINARY REFERENCES

Art. 267
The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
(a) the interpretation of the Treaties;
(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;
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 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.
If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

The preliminary reference procedure is the source of very many of the cases which come before the Court of Justice. It is a procedure whereby national courts and tribunals may (or must in some circumstances) refer issues of interpretation of Community law to the Court of Justice. From the perspective of the Court of Justice the preliminary reference procedure allows the Court of Justice to ensure that the Treaty is interpreted and applied uniformly throughout the EU. And the Court of Justice 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.[118] But Art. 267 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 Court of Justice and if the national courts apply Community law as the Court of Justice directs.

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

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.[119]

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 Court of Justice 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 Court of Justice.[120] Under the acte clair doctrine, a national court or tribunal may decide not to refer a question of Community law to the Court of Justice 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 Court of Justice and other national courts.[121]

The Court of Justice has been quite clear that as a matter of Community law national courts do not have the power to declare an act of the EU institutions to be void. Thus, where a regulation has been invalidated by the Court of Justice a national court

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

[119] Working Party, note 88 above, at 12

[120] *See, e.g.*, Working Party, note 88 above, at 14.

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

should not decline to make a preliminary reference in relation to a similar regulation.[122] In a 2005 decision (responding to a preliminary reference by a Dutch court) in **Gaston Schul**, the Court of Justice stated:

15 By the first question, the national court essentially asks whether the third paragraph of Article [267] 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 [267] 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 [263] and [277][123], on the one hand, and Article [267] on the other, the Treaty established a complete system of legal remedies and procedures designed to ensure review

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

[123] Art. 277 TFEU (ex Article 241 TEC): “Notwithstanding the expiry of the period laid down in Article 263.. any party may, in proceedings in which an act of general application adopted by an institution, body, office or agency of the Union is at issue, plead the grounds specified in Article 263, second paragraph, in order to invoke before the Court of Justice of the European Union the inapplicability of that act.

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.
24 It must also be emphasised that the Community Courts are in the best position to rule on the validity of Community acts. Under ... 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 ... 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 [267] 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 Court of Justice/General Court 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 Treaties:

Art. 15 TEU

1.The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof. It shall not exercise legislative functions.
2. The European Council shall consist of the Heads of State or Government of the Member States, together with its President and the President of the Commission. The High Representative of the Union for Foreign Affairs and Security Policy shall take part in its work.
3. The European Council shall meet twice every six months, convened by its President. When the agenda so requires, the members of the European Council may decide each to be assisted by a minister and, in the case of the President of the Commission, by a member of the Commission. When the situation so requires, the President shall convene a special meeting of the European Council.
4. Except where the Treaties provide otherwise, decisions of the European Council shall be taken by consensus.
5. 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 the President's term of office in accordance with the same procedure.
6. The President of the European Council: (a) shall chair it and drive forward its work; (b) shall ensure the preparation and continuity of the work of the European Council in cooperation with the President of the Commission, and on the basis of the work of the General Affairs Council; (c) shall endeavour to facilitate cohesion and consensus within the European Council; (d) shall present a report to the European Parliament after each of the meetings of the European Council.

The President of the European Council shall, at his level and in that capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy.
The President of the European Council shall not hold a national office.

4. GOVERNANCE AND THE DEMOCRATIC DEFICIT

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 suffers from a serious democratic deficit. The Council still exerts significant legislative power. Until the Lisbon Treaty national parliaments have not really been involved in any significant way in the legislative process at the EU level.[124] 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.[125] The Lisbon Treaty recognizes national parliaments:

Art. 12 TEU
National Parliaments contribute actively to the good functioning of the Union:
(a) through being informed by the institutions of the Union and having draft legislative acts of the Union forwarded to them in accordance with the Protocol on the role of national Parliaments in the European Union;
(b) by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality;
(c) by taking part, within the framework of the area of freedom, security and justice, in the evaluation mechanisms for the implementation of the Union policies in that area, in accordance with Article 70 of the Treaty on the Functioning of the European Union, and through being involved in the political monitoring of Europol and the evaluation of Eurojust's activities in accordance with Articles 88 and 85 of that Treaty;
(d) by taking part in the revision procedures of the Treaties, in accordance with Article 48 of this Treaty;
(e) by being notified of applications for accession to the Union, in accordance with Article 49 of this Treaty;
(f) by taking part in the inter-parliamentary cooperation between national Parliaments and with the European Parliament, in accordance with the Protocol on the role of national Parliaments in the

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[124] National parliaments have sometimes sought to influence the Governments of their countries with respect to proposed EU legislation, but they have not been recognized in the Treaties.

[125] Although the Treaty suggests that Member States have discretion in the form and methods they use to implement directives: "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.

European Union.

Concerns about the democratic deficit have been 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
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",[126] 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? 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

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

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 included a specific reference to the principle of primacy which was dropped when the Lisbon Treaty was drafted. It would also have changed the names of legislative acts (from regulations and directives) to laws and framework laws, and this provision was not included in the Lisbon Treaty. Many of the changes the Constitutional Treaty would have introduced did, however, survive in the Lisbon Treaty.

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. In the end this Treaty came into effect in December 2009.

As a result of the new Treaty, citizens of the EU now have the right to citizens initiatives:

Art. 11 TEU

1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.
2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.
3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.
4. Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.

The procedures and conditions required for such a citizens' initiative shall be determined in accordance with the first paragraph of Article 24 of the Treaty on the Functioning of the European Union.

5. A MULTI-LINGUAL COMMUNITY

The EU has chosen to be a multi-lingual community.[127] Under Regulation No 1 of 1958 residents of the Member States have the right to communicate with the EU institutions in their own language. As the EU's membership expands, the costs of translation and interpretation increase exponentially. The EU has 23 official languages,[128]

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[127] *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).

[128] .

and even some unofficial languages.[129]

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, 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

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[129] *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.

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.[130]

In practice the institutions rely on some languages more than on others. Major documents such as Green and White Papers[131] and final versions of proposed legislative 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 has said:

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[130] 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 .

[131] 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* http://ec.europa.eu/consumers/redress_cons/greenpaper_en.pdf .

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.[132]

In order to deal with the increased translation burden associated with enlargement, Commission departments were instructed to draft shorter documents.[133] 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.[134]

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.[135]

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

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[132] EU Commission, Translating for a Multi-Lingual Community, (April 2005).

[133] 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).")

[134] *See* http://ec.europa.eu/translation/index_en.htm .

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

of regulation, the EU aims to harmonize both private law and regulation in many different fields.

Harry Arthurs has written:

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.[136]

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, initially in a Treaty and now in a Regulation.[137] 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.[138] Another regulation addresses the question of what law applies to non-contractual obligations.[139]

In the last few years the EU has been discussing whether and how to harmonize rules of contract law.[140] For many years the EU has been working on harmonizing

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

[137] 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).

[138] 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 place 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 .

[139] 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 .

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

consumer protection rules, and this harmonization has affected national contract laws. For example, there is a directive on unfair terms in consumer contracts.[141] Other directives regulate unfair commercial practices,[142] distance selling,[143] misleading and comparative advertising,[144] and the sale of consumer goods and guarantees.[145] 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,[146] and the Unidroit Principles for International Commercial Contracts.[147] Would it be more

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[141] 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

[142] 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 .

[143] 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).

[144] *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).

[145] 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).

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

[147] 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.

sensible for the EU to focus on working through groups such as UNCITRAL[148] 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 Court of Justice'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. Sometimes the directive will allow the Member State to impose its own rules if they are stricter than the requirements of the directive.

In the US, business organization laws mix elements of state and federal regulation, and of the sort of harmonization processes that produce the UCC.[149] 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.[150]

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

acquis communautaire. 59
acte clair. 53
Art. 2. 8
Art. 258. 49
Art. 10. 9
Art. 10 TEU. 30
Art. 11. 10
Art. 11 TEU. 63

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

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

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

Art. 114. 16
Art. 115. 17
Art. 12. 10
Art. 12 TEU. 56
Art. 13. 10
Art. 14. 10
Art. 14 TEU. 28
Art. 15. 10
Art. 15 TEU. 55
Art. 16. 11
Art. 16 TEU. 38
Art. 169. 17
Art. 17. 11
Art. 17 TEU. 31
Art. 18. 11
Art. 19. 11
Art. 19 TEU. 40
Art. 253. 43
Art. 259. 49
Art. 260. 49
Art. 263. 51
Art. 264. 52
Art. 265. 52
Art. 267. 52
Art. 288. 26
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Art. 352. 25
Art. 4. 8
Art. 5. 9
Art. 5 TEU. 20
Art. 6. 9
Art. 7. 9
Art. 7 TEU. 13
Art. 8. 9
Art. 9. 9
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democratic deficit. 56
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implied powers. 25
intergovernmental. 37

legal basis.. . . . . 22, 25
legal certainty. 19, 54
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positive integration. 15
preliminary reference. 52
preliminary references. 46
proportionality. 19, 23
qualified majority.. 39
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rule of law. 50
soft law. 48
subsidiarity. 19, 21, 59
supranational. 37
supremacy. 53
teleological. 7
transparency. 34, 40, 45, 59, 60

APPENDIX: DEVELOPMENT OF THE EU

Enlargements - Widening the EU

1958	1973	1981	1986	1995[151]	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		**Potential Candidates**
Netherlands					Lithuania		Albania
					Malta		Bosnia
					Poland		Montenegro
					Slovakia		Iceland
					Slovenia		Kosovo
							Serbia

[151] 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 →	**1986** →	**1992** →	**1997** →	**2001** →	**2004** →	**2007**
Treaty of Rome (In force 1958)	**Single European Act** (In force 1987)	**Maastricht Treaty** (In force 1993) (TEU)	**Amsterdam Treaty** (In force 1999)	**Nice Treaty** (In force 2003)	**Constitutional Treaty** (Not ratified)	**Lisbon Treaty ratified 2009**
	-Single internal Market -QMV	-European Union -3 pillars: EC; Foreign Affairs; Justice & Home Affairs -more QMV -Citizenship of EU -Social protocol	-EMU -human rights, democracy etc -closer co-op -area of freedom security & justice to EC pillar -subsidiarity & proportionality -CFSP extended	-enlargement - more QMV		
		Danish no Opt-out re EMU		Irish no		

1999
Commission
resigns

2004
Barroso withdraws
Proposed Commission
because of Pmt
opposition

WIDENING AND DEEPENING

	1973	1981		1995		
Benelux	Denmark	Greece	Portugal	Austria	Cyprus	Bulgaria
France	Eire		Spain	Finland	Czech Republic	Romania
Germany	UK			Sweden	Estonia	
Italy					Hungary	
					Latvia	
					Lithuania	
					Malta	
					Poland	
					Slovenia	
					Slovakia	

1957 →	**1986** →	**1992** →	**1997** →	**2001** →	**2004** →	**2007**
Treaty of Rome	**Single European Act**	**Maastricht Treaty**	**Amsterdam Treaty**	**Nice Treaty**	**Constitutional Treaty**	**Lisbon Treaty ratified 2009**
(In force 1958)	(In force 1987)	(In force 1993) (TEU)	(In force 1999)	(In force 2003)	(Not ratified)	
	-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			