# MATERIALS ON THE LAW OF THE EUROPEAN UNION

## Spring 2016: PART 1

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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]

At the beginning of 2016 the world faces some significant transnational policy issues including climate change,[4] transnational migration,[5] cross-border terrorism,[6] and financial stability.[7] It can be difficult for states to agree on solutions to these types of problem even in the context of international treaty arrangements.[8] The EU links a number of countries together with shared institutions that have the power to make binding decisions, some by means of majority vote (rather than the unanimous agreement of the states) about many issues. But the issues identified above are difficult even for the EU with its established institutions to address.

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

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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] *See, e.g.*, http://unfccc.int/meetings/paris_nov_2015/meeting/8926.php.

[5] *See, e.g.*, http://www.un.org/en/development/desa/population/migration/index.shtml.

[6] *See, e.g.*, http://www.un.org/en/terrorism/ .

[7] *See, e.g.*, http://www.financialstabilityboard.org/.

[8] The citations in footnotes 4,5 and 6 are to United Nations programs, and the Financial Stability Board is another international organization. The Financial Stability Board (FSB) was based on the Financial Stability Forum (FSF) which was created by The G7 (Canada, France, Germany, Italy, Japan, UK, USA (plus the EU)) to address the Asian Financial Crisis in 1999. The G20 (Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, South Korea, Mexico, Russia, Saudi Arabia, South Africa, Turkey, UK, USA, EU) was responsible for the development of the FSF into the FSB in the context of the global financial crisis.

## 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.[9] From an original community of 6 Member States the European Union has developed over more than half a century into a Union of 28 Member States.[10] Ten new states joined the EU in May 2004,[11] two more in 2007,[12] and Croatia became the 28th member of the EU on 1 July 2013. Albania, Montenegro, Serbia, Macedonia and Turkey are candidate countries. Bosnia and Herzegovina and Kosovo under UNSC Resolution 1244/99 have been promised the prospect of EU membership as and when they are ready, and are known as potential candidates.[13] Iceland (a member of the European Economic Area (EEA),[14] and which suffered serious financial troubles in 2008) indicated in 2009 that it was interested in joining the EU, but announced in 2015 that it would remain outside the EU.[15]

Notice how different the Member States of the EU are.[16] Luxembourg (an original Member State) has a population of about 550,000 people. But, as the following table illustrates, Luxembourg is very wealthy given its small population. Luxembourg is a financial center (the finance sector is responsible for about a third of the country's GDP). With a population 14 times the size of Luxembourg's, Bulgaria has a smaller GDP.

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[9] 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) is available at http://data.consilium.europa.eu/doc/document/ST-6655-2008-REV-8/en/pdf.

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

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

[12] Bulgaria and Romania.

[13] On enlargement see generally http://ec.europa.eu/enlargement/index_en.htm .

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

[15] *See, e.g.,* Iceland drops EU membership bid: 'interests better served outside' union (Mar. 12, 2015) at http://www.theguardian.com/world/2015/mar/12/iceland-drops-european-union-membership-bid.

[16] *See, e.g.*, http://europa.eu/about-eu/countries/member-countries/index_en.htm.

**Table 1: EU Member States: Populations[17] and GDP[18] 2014 numbers**

| | | | | |
|---|---|---|---|---|
| Malta | 2004 | 425 384 | $9.643 billion | euro |
| Luxembourg | 1958 | 549 680 | $60.13 billion | euro |
| Cyprus | 2004 | 858 000 | $23.23 billion | euro |
| | | | | |
| Estonia | 2004 | 1 315 819 | $25.90 billion | euro |
| Latvia | 2004 | 2 001 468 | $31.92 billion | euor |
| Slovenia | 2004 | 2 061 085 | $49.42 billion | euro |
| Lithuania | 2004 | 2 943 472 | $48.17 billion | euro |
| | | | | |
| Croatia | 2013 | 4 246 700 | $57.22 billion | |
| Ireland | 1973 | 4 604 029 | $245.9 billion | euro |
| Slovakia | 2004 | 5 415 949 | $99.79 billion | euro |
| Finland | 1995 | 5 451 270 | $270.7 billion | euro |
| Denmark | 1973 | 5 627 235 | $342 billion | |
| | | | | |
| Bulgaria | 2007 | 7 245 677 | $55.73 billion | |
| Austria | 1995 | 8 507 786 | $436.3 billion | euro |
| Sweden | 1995 | 9 644 864 | $570.6 billion | |
| Hungary | 2004 | 9 879 000 | $137.1 billion | |
| | | | | |
| Portugal | 1986 | 10 427 301 | $229.6 billion | euro |
| Czech Rep. | 2004 | 10 512 419 | $205.5 billion | |
| Greece | 1981 | 10 992 589 | $237.6 billion | euro |
| Belgium | 1958 | 11 203 992 | $533.4 billion | euro |
| | | | | |
| Netherlands | 1958 | 16 829 289 | $869.5 billion | euro |
| Romania | 2007 | 19 942 642 | $199 billion | |
| | | | | |
| Poland | 2004 | 38 495 659 | $548 billion | |
| | | | | |
| Spain | 1986 | 46 507 760 | $1.404 trillion | euro |
| | | | | |
| Italy | 1958 | 60 782 668 | $2.144 trillion | euro |
| UK | 1973 | 64 308 261 | $2.942 trillion | |
| France | 1958 | 65 856 609 | $2.829 trillion | euro |
| Germany | 1958 | 80 780 000 | $3.853 trillion | euro |

[17] Source: http://europa.eu/about-eu/countries/member-countries/index_en.htm

[18] In current US$. Source: http://data.worldbank.org/region/EUU

International organizations have different arrangements for decision-making. The fact of being a sovereign state, however big or small, carries some weight. For example in the General Assembly of the United Nations each of the 193 Member States has one vote.[19] In contrast, in the Security Council, which has only 15 members, there are five permanent members with veto power (China, France, Russian Federation, UK and USA) and ten non-permanent members, elected by the General Assembly for a two-year term.[20] The IMF has 188 members and its governance has reflected economic power. In recent years the IMF has been reforming its governance to reflect changing realities of the international economic system.[21] But critics argue that the changes are less significant than the IMF likes to suggest.[22] Statehood counts for something, but economic power counts for a lot.

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 28 (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. 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. The procedures for amendment are clearly complicated — the negotiations over the text of treaty changes take time and referenda may not in fact approve the new treaty. In 2005 after referenda in France and the Netherlands failed to ot approve a draft Constitutional Treaty, the European Council announced that there would be a period of reflection and discussion about the Treaty. After the period of reflection a revised treaty, called the Treaty of Lisbon, was published.[23] But in June 2008 a referendum in Ireland rejected the Treaty of Lisbon, resulting in a negotiation of a set of

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[19] *See* http://www.un.org/en/ga/about/index.shtml.

[20] *See* http://www.un.org/en/sc/.

[21] *See, e.g.*, Independent Evaluation Office of the IMF, Governance of the IMF: An Evaluation (2008) at http://www.ieo-imf.org/ieo/pages/CompletedEvaluation110.aspx; How the IMF Makes Decisions (Sept. 2015) at http://www.imf.org/external/np/exr/facts/govern.htm .

[22] *See, e.g.*, Jakob Vestergaard & Robert H Wade, *Still in the Woods: Gridlock in the IMF and the World Bank Puts Multilateralism at Risk*, 6:1 GLOBAL POLICY 1 (2015).

[23] 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 .

guarantees to Ireland by the other Member States in respect of the Lisbon Treaty,[24] and subsequent ratification of the Treaty in a new referendum in October 2009. The Irish Protocol states that:

> Nothing in the Treaty of Lisbon attributing legal status to the Charter of Fundamental Rights of the European Union, or in the provisions of that Treaty in the area of Freedom, Security and Justice affects in any way the scope and applicability of the protection of the right to life in Article 40.3.1, 40.3.2 and 40.3.3, the protection of the family in Article 41 and the protection of the rights in respect of education in Articles 42 and 44.2.4 and 44.2.5 provided by the Constitution of Ireland.

In addition it provides that the Treaty makes no change to the EU's competence relating to taxation, and it contains provisions relating to EU security and defence policy which recognize Ireland's neutrality. Ireland is not the only Member State which has negotiated special treatment in the context of the EU. For example, Denmark has opted out of some EU home affairs legislation,[25] and the UK and Ireland both have a right to choose whether to opt in to justice and home affairs measures. In 2014 the EU adopted a Directive on criminal sanctions for market abuse (insider trading and market manipulation): Denmark is not subject to the Directive, the UK chose not to opt in, so is also not subject to the Directive, but Ireland did choose to opt in.[26]

As you can see from Table 1 above[27] not all of the EU Member States have the euro as their currency. The EU developed a common currency for the EU as a way of bringing the countries together — already in 1962 the Marjolin Memorandum suggested the idea of economic and monetary union.[28] The euro was actually launched at the beginning of 1999, although physical euro coins and notes did not go into circulation until

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[24] Protocol on the concerns of the Irish people on the Treaty of Lisbon, OJ No 60/131 (Mar. 2, 2013) at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOL_2013_060_R_0129_01&from=EN.

[25] *See, e.g.*, Denmark Votes No on Adopting EU Rules (Dec 54, 2015) at http://www.bbc.com/news/world-europe-35002158 .

[26] Directive 2014/57/EU on Criminal Sanctions for Market Abuse, OJ No. 173/179 (Jun. 12, 2104) Recitals 29-31.

[27] *See* page 4.

[28] *See, e.g.*, Hanspeter K. Scheller, THE EUROPEAN CENTRAL BANK, HISTORY, ROLE AND FUNCTIONS, 15 (2nd. Ed. 2006) available at https://www.ecb.europa.eu/pub/pdf/other/ecbhistoryrolefunctions2006en.pdf.

January 2002.[29] Outside the EU Monaco, San Marino, the Vatican City State and Andorra have adopted the euro as their official currency, and it is the de facto currency in Kosovo and Montenegro.[30]

The global financial crisis led to a European sovereign debt crisis which required the EU to rethink the rules applicable to the eurozone.[31]

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 areas of national (domestic) law affected by EU rules. 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.[32] 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? The population of Luxembourg is smaller than the population of some European cities. Whereas the United Nations General Assembly works on the principle of one vote per member State and the Security Council gives

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[29] *See, e.g.*, https://www.ecb.europa.eu/euro/intro/html/index.en.html .

[30] *See* http://ec.europa.eu/economy_finance/euro/world/outside_euro_area/index_en.htm.

[31] *See, e.g.*, The Five Presidents' Report "Completing Europe's Economic and Monetary Union", Jun. 22, 2015.

[32] *See, e.g.*, Alden v. Maine, 527 U.S. 706 (1999).

special voting rights (a veto) to its permanent members,[33] the EU attempts to take account of both nationhood and population in its voting processes.

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 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.

As you read the decisions of the Court of Justice and General Court[34] 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)[35]

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.

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

[34] 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.

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

Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity. The coming together of the nations of Europe requires the elimination of the age-old opposition of France and Germany. Any action taken must in the first place concern these two countries.

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

It proposes that Franco-German production of coal and steel as a whole be placed under a common High Authority, within the framework of an organization open to the participation of the other countries of Europe. The pooling of coal and steel production should immediately provide for the setting up of common foundations for economic development as a first step in the federation of Europe, and will change the destinies of those regions which have long been devoted to the manufacture of munitions of war, of which they have been the most constant victims.

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

This production will be offered to the world as a whole without distinction or exception, with the aim of contributing to raising living standards and to promoting peaceful achievements. With increased resources Europe will be able to pursue the achievement of one of its essential tasks, namely, the development of the African continent. In this way, there will be realised simply and speedily that fusion of interest which is indispensable to the establishment of a common economic system; it may be the leaven from which may grow a wider and deeper community between countries long opposed to one another by sanguinary divisions.

By pooling basic production and by instituting a new High Authority, whose decisions will bind France, Germany and other member countries, this proposal will lead to the realization of the first concrete foundation of a European federation indispensable to the preservation of peace.

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

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.[36] 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/General Court 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:

**Art. 1**

1. This Treaty organises the functioning of the Union and determines the areas of, delimitation of, and arrangements for exercising its competences.
2. This Treaty and the Treaty on European Union constitute the Treaties on which the Union is founded. These two Treaties, which have the same legal value, shall be referred to as 'the Treaties'.

[36] There are three basic documents we are concerned with: the Treaty on the European Union, the Treaty on the Functioning of the European Union, and the Charter of Fundamental Rights of the European Union: http://eur-lex.europa.eu/collection/eu-law/treaties-force.html?locale=en

**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;[37]
(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;

[37] Art. 26 TFEU describes the internal market as “an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.”

(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:

Read these Treaty provisions carefully. The TFEU is similar to a constitution. Is there anything about these provisions which surprises you?

The Treaties which form the basis for the EU have changed over time, so the

drafting of these provisions is quite different in some respects from the statement of objectives of the original European Economic Community. Over time the Member States have agreed that the EU should co-ordinate more and more of their domestic policy areas, and the Treaty language has changed to reflect this. Originally the Treaty did not give the European institutions the express power to co-ordinate consumer law and environmental law, but as you can see in Arts. 11 and 12 the Treaty now provides that consumer protection and environmental protection are to be taken into account in developing policy in other areas. A focus on gender equality has been a characteristic of the Treaties since 1957, but the broader non–discrimination provision in Art. 10 above is much more recent. This means that although the courts are sometimes faced with interpreting provisions of the Treaties which have not changed in some time, other Treaty provisions have changed significantly.

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 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.

As noted above, 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.[38] The EU has adopted a Charter of Fundamental Rights which was not originally legally binding, but is binding since the Lisbon Treaty came into force. Article 6 of the TEU provides that the Charter "shall have the same legal value as the Treaties." But even before this, the Commission signaled that it took the provisions of the Charter seriously in a 2005 Communication.[39] The Lisbon Treaty provides for the EU to accede to the European Convention on Human Rights and the EU and the Council of Europe negotiated the EU's accession.[40] However, in December 2014 the Court of Justice held that the draft accession agreement, which proposed to treat the EU as a Member State of the Council of Europe, was not compatible with the EU Treaties.[41]

The TEU 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**[42]

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[38] The European Convention on Human Rights 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 .

[39] 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

[40] *See, e.g.*, http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/default_en.asp.

[41] Opinion 2/13 of the Court, Dec. 18, 2014 (excerpted in this document.

[42] 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."

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.[43] 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 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.[44] In 2014, The Commission published a Communication on the Rule of Law,[45] which stated:

The different constitutions and judicial systems of the EU Member States are, in principle, well designed and equipped to protect citizens against any threat to the rule of law. However, recent

[43] Art. 2 of the TEU states: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

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

[45] EU Commission Communication, A New EU Framework to Strengthen the Rule of Law, COM(2014) 158 final (Mar, 19, 2014).

events in some Member States have demonstrated that a lack of respect for the rule of law and, as a consequence, also for the fundamental values which the rule of law aims to protect, can become a matter of serious concern. During these events, there has been a clear request from the public at large for the EU, and notably for the Commission, to take action. Results have been achieved. However, the Commission and the EU had to find ad hoc solutions since current EU mechanisms and procedures have not always been appropriate in ensuring an effective and timely response to threats to the rule of law.

The Commission is the guardian of the Treaties and has the responsibility of ensuring the respect of the values on which the EU is founded and of protecting the general interest of the Union. It must therefore play an active role in this respect.. In September 2012, in his annual State of the Union speech to the European Parliament, President Barroso said: "We need a better developed set of instruments, not just the alternative between the 'soft power' of political persuasion and the 'nuclear option' of Article 7 TEU...

Within the EU, the rule of law is of particular importance. Compliance with the rule of law is not only a prerequisite for the protection of all fundamental values listed in Article 2 TEU. It is also a prerequisite for upholding all rights and obligations deriving from the Treaties and from international law. The confidence of all EU citizens and national authorities in the legal systems of all other Member States is vital for the functioning of the whole EU as "an area of freedom, security and justice without internal frontiers". Today, a judgment in civil and commercial matters of a national court must be automatically recognised and enforced in another Member State and a European Arrest Warrant against an alleged criminal issued in one Member State must be executed as such in another Member State. Those are clear examples of why all Member States need to be concerned if the rule of law principle is not fully respected in one Member State....

The purpose of the Framework is to enable the Commission to find a solution with the Member State concerned in order to prevent the emerging of a systemic threat to the rule of law in that Member State that could develop into a "clear risk of a serious breach" within the meaning of Article 7 TEU, which would require the mechanisms provided for in that Article to be launched...

The Framework will be activated in situations where the authorities of a Member State are taking measures or are tolerating situations which are likely to systematically and adversely affect the integrity, stability or the proper functioning of the institutions and the safeguard mechanisms established at national level to secure the rule of law.

The new EU Rule of Law Framework is not designed to be triggered by individual breaches of fundamental rights or by a miscarriage of justice. These cases can and should be dealt with by the national judicial systems, and in the context of the control mechanisms established under the European Convention on Human Rights to which all EU Member States are parties.

The main purpose of the Framework is to address threats to the rule of law ... which are of a systemic nature. The political, institutional and/or legal order of a Member State as such, its constitutional structure, separation of powers, the independence or impartiality of the judiciary, or its system of judicial review including constitutional justice where it exists, must be threatened – for example as a result of the adoption of new measures or of widespread practices of public authorities and the lack of domestic redress. The Framework will be activated when national "rule of law safeguards" do not seem capable of effectively addressing those threats.

The Framework would not prevent the Commission from using its powers under Article 258 TFEU in situations falling within the scope of EU law. Nor would it prevent the mechanisms set out in Article 7 TEU being activated directly, should a sudden deterioration in a Member State require a stronger reaction from the EU.

..The Framework as a three stage process

Where there are clear indications of a systemic threat to the rule of law in a Member State, the

Commission will initiate a structured exchange with that Member State. The process is based on the following principles:
- focusing on finding a solution through a dialogue with the Member State concerned;
- ensuring an objective and thorough assessment of the situation at stake;
- respecting the principle of equal treatment of Member States;
- indicating swift and concrete actions which could be taken to address the systemic threat and to avoid the use of Article 7 TEU mechanisms.
The process is composed, as a rule, of three stages: a Commission assessment, a Commission recommendation and a follow-up to the recommendation..

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 EU'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.[46] This has raised many questions of interpretation. Who should decide how to interpret the Treaty language? Should the decision be made by the institutions with legislative power or by the institution with judicial power? Should the answer to this question be the same in a federal state as in a regional organization? Similar issues arise in the US. Congress has the power to regulate interstate commerce under Art. I of the US Constitution but disputes do arise about whether Congress' attempted exercises of this power are legitimate.[47]

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.

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[46] *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."

[47] 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).

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.[48] 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."[49]

The power to harmonize rules to achieve the common market or the internal market 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.[50] The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure[51] 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

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[48] 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). This directive is designed to ensure that consumers know what they are buying.

[49] Regulation No 1331/2008 establishing a common authorisation procedure for food additives, food enzymes and food flavourings, OJ No. L 354/1 (Dec. 31, 2008).

[50] Art 26 TFEU: "The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties. 2. **The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.** 3. The Council, on a proposal from the Commission, shall determine the guidelines and conditions necessary to ensure balanced progress in all the sectors concerned." (Emphasis added).

[51] 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.

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.
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.

Art 114 is clearly a very complicated provision. Art 115 looks much simpler. Both provisions seem to allow for the adoption of directives to approximate (a word which means much the same as harmonize) the laws of the Member States which directly affect the internal market. Some of these approximation directives may be adopted by a majority vote, whereas others require unanimity. Art 114(2) suggests that the following types of rules fall under Art 115 and the unanimity requirement: "fiscal provisions .. those relating to the free movement of persons .. those relating to the rights and interests of employed persons." Thus as well as the Treaty including ambiguities about when the EU has the power to act with respect to the internal market and when the Member States do (see the discussion of shared competences under TFEU Art. 4 above at page 19) the Treaty also seems to include some ambiguity about what procedure should be used to adopt internal market measures.

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 (based on the argument 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 on the theory 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.

As noted above, **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**[52] 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.
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**.[53]
(6) This Directive therefore approximates the laws of the Member States on unfair commercial

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[52] Directive 2005/29/EC 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). In 2013 the Commission noted that the directive had not been as effective as it would like. See http://ec.europa.eu/consumers/consumer_rights/unfair-trade/unfair-practices/index_en.htm.

[53] 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.

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**,[54] 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**,[55] 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.

The common market rationale which justifies EU level consumer protection rules was also invoked in the past to justify environmental protection rules. Businesses subject to different levels of environmental requirements are subject to different competitive conditions - harmonizing the rules creates more of a single market. But are harmonized rules necessary? If some Member States have more relaxed rules there may be an incentive for businesses to move to take advantage of the preferential conditions. But this would tend to lead to a decrease in levels of environmental protection. So the EU now has powers to legislate for environmental protection without needing to justify the measures using the common/single market basis.[56] And the EU has even legislated to address environmental protection through criminal law.[57]

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.

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[54] 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.

[55] And see TEU Art 5, page 25 below.

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

[57] *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)("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.")

**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 a directive on food supplements,[58] the Court of Justice said :

104 In deciding whether [the] Directive ... compl[ies] with the principle of subsidiarity, it is necessary to consider whether the objective .. 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 [the] Directive ... supplemented by the obligation of the Member States ... to permit trade in food supplements complying with the Directive... 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 [the] Directive .. 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 [the] Directive .. 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.

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[58] *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.

But subsidiarity 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.[59]

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 the Committee of the Regions[60] allows regional and local levels to participate in policy-making, and the Protocol on Subsidiarity and Proportionality in the Lisbon Treaty 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 Lisbon Treaty gave national parliaments in the Member States new powers to invoke subsidiarity during negotiations about proposed EU measures. Article 6 of the Lisbon Protocol on Subsidiarity and Proportionality[61] provides:

Any national Parliament or any chamber of a national Parliament may, within eight weeks from the date of transmission of a draft legislative act, in the official languages of the Union, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers.

National parliaments have invoked subsidiarity to challenge proposals for EU legislation. Two proposals generated a significant number of challenges based on subsidiarity: first with respect to the Monti II-proposal (dealing with freedoms for businesses to operate across borders (rights of establishment and services)) where the Commission responded by withdrawing the proposal, and second with respect to a proposal for a Council

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[59] 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

[60] http://cor.europa.eu/en/Pages/home.aspx.

[61] *See* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0201:0328:EN:PDF.

Regulation on the European Public Prosecutor's Office which the Commission declined to withdraw.[62]

An excerpt from the judgment in **The Food Supplements Directive Case**[63] follows. The case deals with a challenge to the directive. The expressed rationale for the directive was that different Member States regulated food supplements differently and that differences in the rules could impede the internal market.[64] But the directive chose to regulate food supplements[65] 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.[66]
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 [114]... Second, the provisions entail direct and immediate restrictions on trade with third countries and should thus

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[62] *See, e.g.*, http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/subsidiarity_en.htm.

[63] 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 .

[64] 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.

[65] The directive applies to vitamins and minerals and not to other additives.

[66] 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 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."

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 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 ...relating to food supplements ... 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 the Court's past practice. 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[67]:

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

[67] Prevention of the use of tobacco is an element of EU health policy: http://ec.europa.eu/health/tobacco/introduction/index_en.htm . A Tobacco Products Directive adopted in 2014 is subject to a number of challenges. See http://www.tobaccotactics.org/index.php/TPD:_Legal_Challenges .

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.[68]

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 Art. 115 does). Art. 114 also allows the Parliament a significant role in the legislative process.

Ireland and Slovakia challenged the EU's data retention directive, adopted after terrorist attacks in Madrid and London to require telecommunication service providers to keep traffic and location data, on the basis that it was not appropriately based on Article 114 as an internal market measure but was really about police and judicial cooperation in criminal matters. The Court of Justice said:

Directive 2006/24 .. regulates operations which are independent of the implementation of any police and judicial cooperation in criminal matters. It harmonises neither the issue of access to data by the competent national law-enforcement authorities nor that relating to the use and exchange of those data between those authorities. Those matters ... have been excluded from the provisions of that directive... the substantive content of Directive 2006/24 is directed essentially at the activities of service providers in the relevant sector of the internal market... In light of that substantive

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

content, Directive 2006/24 relates predominantly to the functioning of the internal market. [69]

Subsequently the Court of Justice decided that the data retention directive was invalid because it was incompatible with Articles 7 and 8 of the EU Charter of Fundamental Rights (the right to privacy and to the protection of personal data).[70]

**Art. 352** of the EC Treaty gives the EU **implied powers**:

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. 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.

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,[71] 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.[72]

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[69] *Ireland* v *European Parliament and Council of the European Union* Case C-301/06, ECLI:EU:C:2009:68.

[70] *Digital Rights Ireland* v *Minister for Communications, Marine and Natural Resources*, Joined Cases C-293/12 and C-594/12, ECLI:EU:C:2014:238.

[71] 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.

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

The TFEU 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.[73]
Recommendations and opinions shall have no binding force.

Traditionally, directives were used for legal harmonization. The directive operates as an instruction to Member States to change their domestic law to conform to the provisions of a directive (this process is referred to as "implementation" of a directive). More recently, the EU institutions have been using regulations more frequently as instruments of harmonization. Not only do regulations not require implementation in the Member States, the Member States are not supposed 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[74]

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.[75] 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 role introduced by the Treaty of Lisbon, currently Donald Tusk;[76] the President of the Commission, currently Jean-Claude Juncker, the High

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

[74] 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.

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

[76] 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

Representative for Foreign Affairs and Security Policy, currently Federica Mogherini, who is also a Vice President of the Commission, and the President of the Parliament, currently Martin Schulz.

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 2014. 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 (turnout for the 2014 elections was 43%).

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 legislative measures are now generally adopted

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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."

by the Parliament and the Council together. The Parliament has exercised its powers to impede proposals the MEPs do not like.[77]

The Parliament's approval of a nominee for President of the Commission, and of the proposed commissioners is necessary before the Commission can take office. In 2004, the Parliament objected to a proposed Commission including Rocco Buttiglione (who had been nominated by Silvio Berlusconi) because of his views on women and homosexuality. Barroso withdrew the proposed slate of Commissioners in response to the Parliament's objections: with some other changes, Buttiglione withdrew, and Berlusconi nominated Franco Frattini in his place.[78]

The Parliament has the power to censure the Commission (but not individual Commissioners) and, if it does so, the Commission must resign.[79] In 1999, after an independent investigative committee reported that the Commission had lost control of the bureaucracy, which suffered from problems of corruption,[80] the Commission (the Santer Commission) resigned before the Parliament could exercise its power of censure.

The Parliament has the power to decide whether or not to approve the Budget, and

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[77] 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 .

[78] *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.

[79] 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."

[80] 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.

has the power to request the Commission to propose legislative measures,[81] and it can set up committees of inquiry and entertain petitions from EU citizens. The European Ombudsman, currently Emily O'Reilly, is appointed by the Parliament to investigate complaints of maladministration.[82] The Ombudsman has an impact on how European agencies exercise their functions. The Ombudsman responds to complaints and also has the power to begin inquiries on her own initiative. Many of the complaints the Ombudsman deals with relate to issues of transparency, and the Ombudsman's decisions have led to disclosures by the EU institutions. In particular the Ombudsman began own-initiative inquiries into the negotiation of the TTIP :

Brussels is fast becoming the second most important lobbying hub in the world, after Washington. So, not surprisingly, the Ombudsman's work in 2014 increasingly focused on transparency in lobbying activities.
In this context, the Ombudsman opened three strategic investigations on her own initiative, two of them in connection with the ongoing negotiations on the Transatlantic Trade and Investment Partnership (TTIP). The European Commission is negotiating the agreement on behalf of the Union, on a mandate granted by the Council of the EU. If concluded, the EU-US agreement will create the largest free trade area in history. TTIP will shape future rules and standards in areas such as food safety, cars, chemicals, pharmaceuticals, energy, the environment, and the workplace.
In July, the Ombudsman began investigating the refusal by the Council of the EU to release the directives that the EU is using to negotiate the TTIP. She also started inquiring into the steps that the Commission was taking to ensure transparent and public participation in TTIP negotiations. Earlier, the Ombudsman had put forward, to the European Commission, measures it could take to enable timely public access to TTIP documents, and details of meetings with stakeholders. There were concerns over refusal to disclose documents, unauthorised disclosure of documents, delays, and certain stakeholders apparently receiving privileged access to TTIP documents.
In October, the Council published the directives in question. Shortly after, the Commission announced its plans to increase transparency in lobbying, promising to grant broader access to other TTIP documents. The Ombudsman welcomed these steps and announced proposals on how to further enhance the transparency of the TTIP negotiations.
The third investigation concerns the composition and transparency of hundreds of expert groups, on whose advice the Commission relies to draft legislation and policy, covering areas ranging from tax and banking services, to road safety and pharmaceuticals. The Ombudsman first carried out a public consultation to identify how balanced the representation of relevant areas of expertise and interest is in different groups, whether the appointment of members "in a personal capacity" is

[81] 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 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."

[82] *See* http://www.ombudsman.europa.eu/home.faces.

problematic, and whether the groups work as transparently as possible.[83]

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[84] 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)[85] and for ensuring compliance with the Treaty.

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[83] European Ombudsman Annual Report 2014 pp. 8-9.

[84] Above at 33.

[85] 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 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.

## 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 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 28 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, 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.[86] The European Council recognized this concern in December 2008:

On the composition of the Commission, the European Council recalls that the Treaties currently in force require that the number of Commissioners be reduced in 2009. The European Council agrees that provided the Treaty of Lisbon enters into force, a decision will be taken, in accordance with the necessary legal procedures, to the effect that the Commission shall continue to include one national of each Member State.[87]

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[86] 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.

[87] Brussels European Council, Presidency Conclusions, note 86 above, at p. 2.

Commissioners serve for a (renewable) 5 year term.[88] 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 67). 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 was an EU Commissioner who then became Director General of the WTO (World Trade Organization).[89]

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 Business Europe (which used to be called UNICE (the Union of Industrial and Employers Confederations of Europe)), ERT (the European Roundtable of Industrialists) and the American Chambers of Commerce have significant influence on the development of EU policy. At the end of the 1990s two Commissioners left the Commission and took up jobs in business, which attracted criticism.[90] In 1999 a Code of Conduct for Commissioners was

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[88] 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.

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

[90] In 1999, Martin Bangemann who had been the Commissioner responsible for Telecommunications since 1992 announced that he was moving to Telefonica and Leon Brittan

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.[91] Commissioners declare their interests.[92] Reform of the Commission, focusing on the staff as well as on the commissioners, was a priority for a period of time.

The Commission is a vast bureaucracy and relies on the work of its staff.[93] This fact, combined with the fact that the Commissioners meet together in private, means that the Commission is less transparent than it might be.[94] Transparency is important because it is often referred to as a key objective of government,[95] and a lack of transparency is linked to the idea that the EU suffers from a democratic deficit. The concern with a democratic deficit in the EU is similar to concerns about the development of policy at the supranational level more generally.[96] Policies to promote transparency are becoming more pervasive and more extensive around the world,[97] including in the EU. In 2002 the Commission introduced an initiative on "Better Law-Making"[98] which involved three main components:

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announced that he was to become a Vice Chairman of Warburg Dillon Read.

[91] Each Commission now promulgates its Code of Conduct. *See, e.g.*,http://ec.europa.eu/transparency/regdoc/rep/3/2011/EN/3-2011-2904-EN-F1-1.Pdf.

[92] *See* http://ec.europa.eu/transparency/ethics-for-commissioners/index_en.htm .

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

[94] The Commission does publish agendas and minutes of its meetings. *See* http://ec.europa.eu/transparency/regdoc/index.cfm?fuseaction=gridyear. And the EU has been working on a European Transparency Initiative for the last few years. *See* http://ec.europa.eu/transparency/index_en.htm .

[95] *See, e.g.*, Memorandum for the Heads of Executive Departments and Agencies, Transparency and Open Government, 74 Fed. Reg. 4685 (Jan. 26, 2009); Memorandum for the Heads of Executive Departments and Agencies, Open Government Directive (Dec. 8, 2009) at http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf.

[96] *See, e.g.*, B. Kingsbury, N. Krisch, and R. B. Stewart, *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROB. 15, 16 (2005) (noting "an accountability deficit in the growing exercise of transnational regulatory power.")

[97] *See, e.g.*, Jeannine E. Relly & Meghna Sabharwal, *Perceptions of Transparency of Government Policymaking: a Cross-national Study*, 26 GOVERNMENT INFORMATION QUARTERLY148 (2009).

[98] Communication from the Commission, European Governance: Better LawMaking, COM (2002) 275 final (Jun. 5, 2002).

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[99] 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 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. [100]

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 (then) 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

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

[100] 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).

was being barracked on Credit Ratings Agencies and told that I was overreacting. I was being barracked on securitisation.

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

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

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

Turning the situation around

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

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

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

> Transparency and Disclosure. The industry has to act to disclose what they have and where 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.[101]

In October 2010 the Commission published a new Communication on Smart Regulation in the European Union.[102] In this Communication the Commission stated:

The better regulation agenda has already led to a significant change in how the Commission makes policy and proposes to regulate. Stakeholder consultations and impact assessments are now essential parts of the policy making process. They have increased transparency and accountability, and promoted evidence-based policy making. This system is considered to be good practice within the EU and is supporting decision-making within the EU institutions..The Commission has simplified much existing legislation and has made significant progress in reducing administrative burdens.
The Commission believes that it is now time to step up a gear. Better regulation must become smart regulation and be further embedded in the Commission's working culture. The President of the Commission has taken direct responsibility for smart regulation and this Communication outlines what it will mean in practice. It draws on a number of inputs including a recent resolution from the European Parliament on Better Law-making.. a public consultation.. the European Court of Auditors' report on Impact Assessment in the EU institutions.. and the reports of the Impact Assessment Board (IAB).. On this basis, the Commission has identified a number of key messages.
First, smart regulation is about the whole policy cycle - from the design of a piece of legislation, to implementation, enforcement, evaluation and revision. We must build on the strengths of the impact assessment system for new legislation. But we must match this investment with similar efforts to manage and implement the body of existing legislation to ensure that it delivers the intended benefits. This requires a greater awareness by all actors of the fact that implementing existing legislation properly and amending it in the light of experience is as important as the new legislation we put on the table.
Second, smart regulation must remain a shared responsibility of the European institutions and of Member States. These actors have made varied progress, and the Commission will continue to work with them to ensure that the agenda is actively pursued by all. This must be accompanied by a greater recognition that smart regulation is not an end in itself. It must be an integral part of our collective efforts in all policy areas.
Third, the views of those most affected by regulation have a key role to play in smart regulation. The Commission has made great strides in opening its policy making to stakeholders. This can also be taken a step further and the Commission will lengthen the period for its consultations, and

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[101] 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).

[102] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Smart Regulation in the European Union, COM(2010) 543 (Oct. 8, 2010).

carry out a review of its consultation processes to see how to strengthen the voice of citizens and stakeholders further. This will help to put into practice the provisions of the Lisbon Treaty on participatory democracy..[103]

Better Regulation is still on the agenda: the EU institutions announced they had reached terms of a deal on Better Regulation in December 2015.[104] A letter from 27 ministers from 19 EU member states to Frans Timmermans in November 2015 asked the Commission to go further and introduce EU reduction targets for regulation to reduce burdens on business.[105]

At the beginning of 2012 the Commission announced that it would extend consultations from 8 to twelve weeks.[106]

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

Consider this extract from a **Speech of José Manuel Barroso**, then President of the Commission in January 2012:

Europe is not just about the markets. We are always speaking today, because of the crisis, about the financial markets, but Europe is about culture, Europe is about values, Europe is also about civilization – civilization that has great moments, also darker moments to be honest, but Europe is about culture. That is why I am so pleased to be here in a place of culture like this – the National Museum that as you said, Director, it comes from the ideas of the Enlightenment, one of the greatest moments of the European history and civilizations. We should not be afraid of the word "civilization".
This exhibition reminds us of how over centuries Europeans have helped shape the interconnected world in which we now live.
In times of peace the European continent has been the forerunner in promoting ties of openness, trade, and exchange around the globe.
But Europe has also engaged with the world in less fortunate ways, in times of conflict, destruction, and bloodshed. In the middle of the 19th century a British scholar, Sir Henry Maine, wrote that "war appears to be as old as mankind but peace is a recent invention." Indeed it is and a fragile one too.

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[103] *Id.* at 2-3.

[104] *See* http://ec.europa.eu/smart-regulation/index_en.htm.

[105] *See* https://www.gov.uk/government/publications/eu-better-regulation-joint-letter-to-the-european-commission .

[106] EU Commission Press Release, Have a bigger say in European policy-making: Commission extends public consultations to 12 weeks and creates new 'alert service' (Jan 3, 2012). See also http://ec.europa.eu/yourvoice/index_en.htm.

But since 1945 we in Europe have set aside war amongst ourselves, and have instead concentrated on trade, common interests, shared values, democracy, rule of law, freedom.
We owe so much to the clear vision and steady determination of post-war European leaders. Great leaders with a great vision, a vision that was about peace, about values, but it was a pragmatic vision of building this process through concrete interconnection, interdependence in terms of interests. They have created also very important institutions to serve the overall European interest and a community of law in which all Member States have equal rights and responsibilities. They proved that pooling efforts and working together is not a threat to nations' sovereign choices, to nations' identities but it is the only way in which European countries can exercise influence in an increasingly globalised world defending our values of freedom and solidarity.
The benefits of sixty years of European integration are clear. We are the largest trading block in the world and being an economic giant brings unparalleled advantages in terms of economies of scale.
Our single market gives European companies a domestic marketplace that is second to none, with some 500 million consumers and a spirit of fair competition that inspires dynamism and innovation. Moreover, as this exhibition recalls, Europe can count on a wealth of skills, many forms of creativity, traditions of openness, and stable, strong and tolerant societies.
If we are to overcome the present economic crisis, we need to unleash this potential in Europe, the potential of entrepreneurship, the potential of the Single Market, our trade relationships with international partners and of course the inherent skills and talents of European people. Denmark, an open trading nation with a strong national identity, shows that to be open and to have a strong identity is no contradiction at all. Denmark is a good beacon in these troubled times.
Around us the world is changing fast, and Europe has both to cooperate and to compete with big economic and geo-political entities – old and new. Faced with this changing reality and global challenges from climate change to the fight against poverty, our best hope is to remain united and determined to move forward together.
It is only by renewing our commitment to the European ideas and context that we will free up the growth we so badly need – by deepening the Single Market in goods and services and taking it digital, by promoting new technologies and sustainable resource use for instance for green growth, by working together to tackle the employment challenge, especially the problems among young people.
With the Danish Presidency, the European Commission will be working hard this year to build on Europe's strengths to create a new growth dynamic in Europe - sustainable growth, fair growth and green growth.
As this exhibition shows, we Europeans should indeed remain confident that we have what it takes to continue to do well in the world.[107]

Compare this with **Jean-Claude Juncker's State of the Union 2015: Time for Honesty, Unity and Solidarity**, a speech he gave in September 2015:

I am the first President of the Commission whose nomination and election is the direct result of the outcome of the European Parliament elections in May 2014.

[107] José Manuel Durão Barroso President of the European Commission Opening of 'Europe meets the world' exhibition 'Europe meets the world' Copenhagen, 12 January 2012 at http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/12/7&format=HTML&aged=0&language=EN&guiLanguage=en.

Having campaigned as a lead candidate, as Spitzenkandidat, in the run up to the elections, I had the opportunity to be a more political President.
This political role is foreseen by the Treaties, by means of which the Member States made the Commission the promoter of the general interest of the Union. But the crisis years have diminished this understanding.
This is why I said last September before this House that I wanted to lead a political Commission. A very political Commission.
I said this not because I believe we can and should politicise everything.
I said it because I believe the immense challenges Europe is currently facing – both internally and externally – leave us no choice but to address them from a very political perspective, in a very political manner and having the political consequences of our decisions very much in mind.
Recent events have confirmed the urgent need for such a political approach in the European Union.
This is not the time for business as usual.
This is not the time for ticking off lists or checking whether this or that sectorial initiative has found its way into the State of the Union speech.
This is not the time to count how many times the word social, economic or sustainable appears in the State of the Union speech.
Instead, it is time for honesty.
It is time to speak frankly about the big issues facing the European Union.
Because our European Union is not in a good state.
There is not enough Europe in this Union.
And there is not enough Union in this Union.
We have to change this. And we have to change this now.

The Refugee Crisis: The Imperative to Act as a Union
Whatever work programmes or legislative agendas say: The first priority today is and must be addressing the refugee crisis.
Since the beginning of the year, nearly 500,000 people have made their way to Europe. The vast majority of them are fleeing from war in Syria, the terror of the Islamic State in Libya or dictatorship in Eritrea. The most affected Member States are Greece, with over 213,000 refugees, Hungary, with over 145,000, and Italy, with over 115,000.
The numbers are impressive. For some they are frightening.
But now is not the time to take fright. It is time for bold, determined and concerted action by the European Union, by its institutions and by all its Member States.
This is first of all a matter of humanity and of human dignity. And for Europe it is also a matter of historical fairness.
We Europeans should remember well that Europe is a continent where nearly everyone has at one time been a refugee. Our common history is marked by millions of Europeans fleeing from religious or political persecution, from war, dictatorship, or oppression.
Huguenots fleeing from France in the 17th century.
Jews, Sinti, Roma and many others fleeing from Germany during the Nazi horror of the 1930s and 1940s.
Spanish republicans fleeing to refugee camps in southern France at the end of the 1930s after their defeat in the Civil War.
Hungarian revolutionaries fleeing to Austria after their uprising against communist rule was oppressed by Soviet tanks in 1956.

Czech and Slovak citizens seeking exile in other European countries after the oppression of the Prague Spring in 1968.
Hundreds and thousands were forced to flee from their homes after the Yugoslav wars.
Have we forgotten that there is a reason there are more McDonalds living in the U.S. than there are in Scotland? That there is a reason the number of O'Neills and Murphys in the U.S. exceeds by far those living in Ireland?
Have we forgotten that 20 million people of Polish ancestry live outside Poland, as a result of political and economic emigration after the many border shifts, forced expulsions and resettlements during Poland's often painful history?
Have we really forgotten that after the devastation of the Second World War, 60 million people were refugees in Europe? That as a result of this terrible European experience, a global protection regime – the 1951 Geneva Convention on the status of refugees – was established to grant refuge to those who jumped the walls in Europe to escape from war and totalitarian oppression?
We Europeans should know and should never forget why giving refuge and complying with the fundamental right to asylum is so important.
I have said in the past that we are too seldom proud of our European heritage and our European project.
Yet, in spite of our fragility, our self-perceived weaknesses, today it is Europe that is sought as a place of refuge and exile.
It is Europe today that represents a beacon of hope, a haven of stability in the eyes of women and men in the Middle East and in Africa.
That is something to be proud of and not something to fear.
Europe today, in spite of many differences amongst its Member States, is by far the wealthiest and most stable continent in the world.
We have the means to help those fleeing from war, terror and oppression.
I know that many now will want to say that this is all very well, but Europe cannot take everybody.
It is true that Europe cannot house all the misery of the world. But let us be honest and put things into perspective.
There is certainly an important and unprecedented number of refugees coming to Europe at the moment. However, they still represent just 0.11% of the total EU population. In Lebanon, refugees represent 25% of the population. And this in a country where people have only one fifth of the wealth we enjoy in the European Union.
Let us also be clear and honest with our often worried citizens: as long as there is war in Syria and terror in Libya, the refugee crisis will not simply go away.
We can build walls, we can build fences. But imagine for a second it were you, your child in your arms, the world you knew torn apart around you. There is no price you would not pay, there is no wall you would not climb, no sea you would not sail, no border you would not cross if it is war or the barbarism of the so-called Islamic State that you are fleeing.
So it is high time to act to manage the refugee crisis. There is no alternative to this.
There has been a lot finger pointing in the past weeks. Member States have accused each other of not doing enough or of doing the wrong thing. And more often than not fingers have been pointed from national capitals towards Brussels.
We could all be angry about this blame-game. But I wonder who that would serve. Being angry does not help anyone. And the attempt of blaming others is often just a sign that politicians are overwhelmed by unexpected events.
Instead, we should rather recall what has been agreed that can help in the current situation. It is time to look at what is on the table and move swiftly forwards.

We are not starting anew. Since the early 2000s, the Commission has persistently tabled legislation after legislation, to build a Common European Asylum System. And the Parliament and the Council have enacted this legislation, piece by piece. The last piece of legislation entered into force just in July 2015.

Across Europe we now have common standards for the way we receive asylum seekers, in respect of their dignity, for the way we process their asylum applications, and we have common criteria which our independent justice systems use to determine whether someone is entitled to international protection.

But these standards need to be implemented and respected in practice. And this is clearly not yet the case, we can see this every day on television. Before the summer, the Commission had to start a first series of 32 infringement proceedings to remind Member States of what they had previously agreed to do. And a second series will follow in the days to come. European laws must be applied by all Member States – this must be self-evident in a Union based on the rule of law.

Common asylum standards are important, but not enough to cope with the current refugee crisis. The Commission, the Parliament and the Council said this in spring. The Commission tabled a comprehensive European Agenda on Migration in May. And it would be dishonest to say that nothing has happened since then.

We tripled our presence at sea. Over 122,000 lives have been saved since then. Every life lost is one too many, but many more have been rescued that would have been lost otherwise – an increase of 250%. 29 Member States and Schengen Associated countries are participating in the joint operations coordinated by Frontex in Italy, Greece and Hungary. 102 guest officers from 20 countries; 31 ships; 3 helicopters; 4 fixed wing aircrafts; 8 patrol cars, 6 thermo-vision vehicles and 4 transport vehicles – that is a first measure of European solidarity in action, even though more will have to be done.

We have redoubled our efforts to tackle smugglers and dismantle human trafficker groups. Cheap ships are now harder to come by, leading to less people putting their lives in peril in rickety, unseaworthy boats. As a result, the Central Mediterranean route has stabilised at around 115,000 arriving during the month of August, the same as last year. We now need to achieve a similar stabilisation of the Balkans route, which has clearly been neglected by all policy-makers.

The European Union is also the number one donor in the global efforts to alleviate the Syrian refugee crisis. Around €4 billion have been mobilised by the European Commission and Member States in humanitarian, development, economic and stabilisation assistance to Syrians in their country and to refugees and their host communities in neighbouring Lebanon, Jordan, Iraq, Turkey and Egypt. Indeed just today we launched two new projects to provide schooling and food security to 240,000 Syrian refugees in Turkey.

We have collectively committed to resettling over 22,000 people from outside of Europe over the next year, showing solidarity with our neighbours. Of course, this remains very modest in comparison to the Herculean efforts undertaken by Turkey, Jordan and Lebanon, who are hosting over 4 million Syrian refugees. I am encouraged that some Member States are showing their willingness to significantly step up our European resettlement efforts. This will allow us very soon to come forward with a structured system to pool European resettlement efforts more systematically.

Where Europe has clearly under-delivered, is on common solidarity with regard to the refugees who have arrived on our territory.

To me, it is clear that the Member States where most refugees first arrive – at the moment, these are Italy, Greece and Hungary – cannot be left alone to cope with this challenge.

This is why the Commission already proposed an emergency mechanism in May, to relocate initially 40,000 people seeking international protection from Italy and Greece.

And this is why today we are proposing a second emergency mechanism to relocate a further 120,000 from Italy, Greece and Hungary.
This requires a strong effort in European solidarity. Before the summer, we did not receive the backing from Member States I had hoped for. But I see that the mood is turning. And I believe it is high time for this.
I call on Member States to adopt the Commission proposals on the emergency relocation of altogether 160,000 refugees at the Extraordinary Council of Interior Ministers on 14 September.
We now need immediate action. We cannot leave Italy, Greece and Hungary to fare alone. Just as we would not leave any other EU Member State alone. For if it is Syria and Libya people are fleeing from today, it could just as easily be Ukraine tomorrow.
Europe has made the mistake in the past of distinguishing between Jews, Christians, Muslims. There is no religion, no belief, no philosophy when it comes to refugees.
Do not underestimate the urgency. Do not underestimate our imperative to act. Winter is approaching – think of the families sleeping in parks and railway stations in Budapest, in tents in Traiskirchen, or on shores in Kos. What we will become of them on cold, winter nights?
Of course, relocation alone will not solve the issue. It is true that we also need to separate better those who are in clear need of international protection and are therefore very likely to apply for asylum successfully; and those who are leaving their country for other reasons which do not fall under the right of asylum. This is why today the Commission is proposing a common EU list of safe countries of origin. This list will enable Member States to fast track asylum procedures for nationals of countries that are presumed safe to live in. This presumption of safety must in our view certainly apply to all countries which the European Council unanimously decided meet the basic Copenhagen criteria for EU membership – notably as regards democracy, the rule of law, and fundamental rights. It should also apply to the other potential candidate countries on the Western Balkans, in view of their progress made towards candidate status.
I am of course aware that the list of safe countries is only a procedural simplification. It cannot take away the fundamental right of asylum for asylum seekers from Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Kosovo, Montenegro, Serbia, and Turkey. But it allows national authorities to focus on those refugees which are much more likely to be granted asylum, notably those from Syria. And this focus is very much needed in the current situation.
I also believe that beyond the immediate action needed to address current emergencies, it is time we prepare a more fundamental change in the way we deal with asylum applications – and notably the Dublin system that requires that asylum applications be dealt with by the first country of entry.
We need more Europe in our asylum policy. We need more Union in our refugee policy.
A true European refugee and asylum policy requires solidarity to be permanently anchored in our policy approach and our rules. This is why, today, the Commission is also proposing a permanent relocation mechanism, which will allow us to deal with crisis situations more swiftly in the future.
A common refugee and asylum policy requires further approximation of asylum policies after refugee status is granted. Member States need to take a second look at their support, integration and inclusion policies. The Commission is ready to look into how EU Funds can support these efforts. And I am strongly in favour of allowing asylum seekers to work and earn their own money whilst their applications are being processed.
A united refugee and asylum policy also requires stronger joint efforts to secure our external borders. Fortunately, we have given up border controls between the Member States of the Schengen area, to guarantee free movement of people, a unique symbol of European integration. But the other side of the coin to free movement is that we must work together more closely to manage our external borders. This is what our citizens expect. The Commission said it back in May, and I said it during my election campaign: We need to strengthen Frontex significantly and

develop it into a fully operational European border and coast guard system. It is certainly feasible. But it will cost money. The Commission believes this is money well invested. This is why we will propose ambitious steps towards a European Border and Coast Guard before the end of the year.
A truly united, European migration policy also means that we need to look into opening legal channels for migration. Let us be clear: this will not help in addressing the current refugee crisis. But if there are more, safe and controlled roads opened to Europe, we can manage migration better and make the illegal work of human traffickers less attractive. Let us not forget, we are an ageing continent in demographic decline. We will be needing talent. Over time, migration must change from a problem to be tackled to a well-managed resource. To this end, the Commission will come forward with a well-designed legal migration package in early 2016.
A lasting solution will only come if we address the root causes, the reasons why we are currently facing this important refugee crisis. Our European foreign policy must be more assertive. We can no longer afford to be ignorant or disunited with regard to war or instability right in our neighbourhood.
In Libya, the EU and our Member States need to do more to engage with regional partners to make sure a Government of National Accord is in place soon. We should be prepared to help, with all EU instruments available, such a government to deliver security and services to the population as soon as it is in place. Our EU development and humanitarian support will have to be immediate and comprehensive.
I would also like to point out that we are entering the fifth year of the Syrian crisis with no end in sight. So far, the international community has failed the Syrian people. Europe has failed the Syrian people.
Today I call for a European diplomatic offensive to address the crises in Syria and in Libya. We need a stronger Europe when it comes to foreign policy. And I am very glad that Federica Mogherini, our determined High Representative, has prepared the ground for such an initiative with her diplomatic success in the Iran nuclear talks. And that she stands ready to work closely together with our Member States towards peace and stability in Syria and Libya.
To facilitate Federica's work, today the Commission is proposing to establish an emergency Trust Fund, starting with €1.8 billion from our common EU financial means to address the crises in the Sahel and Lake Chad regions, the Horn of Africa, and the North of Africa. We want to help create lasting stability, for instance by creating employment opportunities in local communities, and thereby address the root causes of destabilisation, forced displacement and illegal migration. I expect all EU Member States to pitch in and match our ambitions.
I do not want to create any illusions that the refugee crisis will be over any time soon. It will not. But pushing back boats from piers, setting fire to refugee camps, or turning a blind eye to poor and helpless people: that is not Europe.
Europe is the baker in Kos who gives away his bread to hungry and weary souls. Europe is the students in Munich and in Passau who bring clothes for the new arrivals at the train station. Europe is the policeman in Austria who welcomes exhausted refugees upon crossing the border. This is the Europe I want to live in.
The crisis is stark and the journey is still long. I am counting on you, in this House, and on all Member States to show European courage going forward, in line with our common values and our history.

A new start for Greece, for the euro area and for the European economy
Mr President, Honourable Members,
I said I want to talk about the big issues today. This is why this State of the Union speech needs to address the situation in Greece, as well as the broader lessons from the fifth year of Greek crisis

the impact of which continues to be felt in the Eurozone and in the European economy and society as a whole.
Since the start of the year, the talks on Greece have tested all our patience. A lot of time and a lot of trust was lost. Bridges were burnt. Words were said that cannot easily be taken back.
We saw political posturing, bickering and insults carelessly bandied about.
Too often, we saw people thinking they can impose their views without a wayward thought for another's point of view.
We saw democracies in the Eurozone being played against each other. The recovery and creation of jobs witnessed last year in Greece vanished during these months.
Collectively, we looked into the abyss.
And it was once more only when we were at the brink that we were able to see the bigger picture and to live up to our responsibilities.
In the end, a deal was reached, commitments were adhered to and implemented. Trust has started to be regained, even though it remains very fragile.
I am not proud of every aspect of the results achieved. However, I am proud of the teams in the European Commission who worked day and night until late in August, relentlessly, to bridge the gap between far-flung positions and to bring about solutions in the interest of Europe and of the Greek people.
I know that not everybody was happy with what the Commission did.
Many Greek politicians were not happy that we insisted on reforms in Greece, notably as regards the unsustainable pension system and the unfair tax regime.
Many other European politicians could not understand why the Commission continued to negotiate. Some could not understand why we did not simply leave all the talks to the technicians of the International Monetary Fund. Why we sometimes also spoke about the social side of programme commitments and amended those to take account of the effects on the most vulnerable in society. Or that I personally dared to say again and again that the euro, and membership in the euro, is meant to be irreversible.
Mr President, Honourable Members,
The Commission’s mandate in negotiations with a programme country such as Greece has a very clear basis: it is the Treaty on European Union which calls on the Commission to promote the common interest of the Union and to uphold the law. The same law includes the Treaty clause, agreed by all Member States, that qualifies membership in the euro as irrevocable.
As long as Member States have not amended the Treaties, I believe the Commission and all other EU institutions have a clear mandate and duty to do everything possible to preserve the integrity of the euro area.
The Commission has also been explicitly entrusted by the European Stability Mechanism (ESM) Treaty, ratified by all euro area Member States, with conducting programme negotiations with a Member State. We have to do this in liaison with the European Central Bank and, where possible, together with the International Monetary Fund. But we have a clear mandate to do so.
Where the Treaties talk about the Commission, I read this as meaning the Commission as an institution that is politically led by the President and the College of Commissioners. This is why I did not leave the talks with Greece to the Commission bureaucracy alone, in spite of their great expertise and the hard work they are doing. But I spoke personally to our experts regularly, often several times per day, to orient them or to adjust their work. I also ensured that every week, the situation of the negotiations in Greece was discussed at length and very politically in the meetings of the College.
Because it is not a technical question whether you increase VAT not only on restaurants, but also on processed food. It is a political and social question.

It is not a technical question, but a deeply political question, whether you increase VAT on medicines in a country where 30% of the population is no longer covered by the public health system as a result of the crisis. Or whether you cut military expenditure instead – in a country that continues to have one of the highest military expenditures in the EU.
It is certainly not a technical question whether you reduce the pensions of the poorest in society or the minimum wage; or if you instead levy a tax on Greek ship owners.
Of course, the figures in what is now the third Greek programme had to add up in the end. But we managed to do this with social fairness in mind. I read the Troika report of the European Parliament very thoroughly. I hope you can see that we have drawn the lessons from this, that we have made, for the first time, a social impact assessment of the programme. Even though I admit frankly that the Commission also had to compromise sometimes in these negotiations.
What matters to me, is that, in the end, a compromise was found which could be agreed by all 19 euro area Member States, including Greece.
After weeks of talks, small progress, repeated setbacks, many crisis moments, and often a good dose of drama, we managed to sign a new Stability Support Programme for Greece on 19 August. Now that the new programme is in place, I want it to be a new start, for Greece and for the euro area as a whole.
Let us be very honest: We are only at the beginning of a new, long journey.
For Greece, the key now is to implement the deal which was agreed. There has to be broad political ownership for this.
I had the leaders of all the mainstream Greek political groups in my office before the final agreement was concluded. They all promised to support this agreement, and they gave first proof of their commitment when they voted for the new programme and for the first three waves of reforms in the Hellenic Parliament. I expect them to stand by their word and deliver on the agreement – whoever governs. Broad support and timely delivery of the reforms is what Greece needs, so that confidence can return both among the Greek people and to the Greek economy.
The programme is one thing, but it is not enough to put Greece on a path of sustainable growth. The Commission will stand by Greece to make sure the reforms take shape. And we will assist Greece in developing a growth strategy which is Greek owned and Greek led.
From the modernisation of the public administration and the independence of the tax authority, the Commission will provide tailor-made technical assistance, together with the help of European and international partners. This will be the main task of the new Structural Reform Support Service I established in July.
On 15 July, the Commission also put forward a proposal to limit national co-financing in Greece and to frontload funding for investment projects short of liquidity: a €35 billion package for growth. This is urgent for recovery after months of financial squeeze. This is money that will reach the Greek real economy, for businesses and authorities to invest and recruit.
The Commission worked day-in, day-out to put this on the table. National Parliaments met several times throughout the month of August. I therefore hope that the European Parliament will also play its part, in line with previous commitments. Our programme for growth in Greece has been on the table of this House for two months. If adopted, it will still take several weeks until the first euro will reach the real economy of Greece.
I call on you to follow the example of the Council, which will agree on this growth programme by the end of this month. The European Parliament should be at least as fast as the Council on this.
I said I wanted the new programme to be a new start not just for Greece but for the euro area as a whole, because there are important lessons we need to draw from the crisis that has haunted us for far too long.

The economic and social situation speaks for itself: over 23 million people are still unemployed today in the European Union, with more than half without a job for a year or more. In the euro area alone, more than 17.5 million people are without a job. Our recovery is hampered by global uncertainties. Government debt in the EU has reached more than 88% of GDP on average, and stands at almost 93% in the euro area.
The crisis is not over. It has just been put on pause.
This is not to say that nothing is happening. Unemployment figures are improving, GDP is rising at its highest rate for years, and the financing conditions of households and companies have recovered significantly. And several Member States once severely affected – like Latvia, Ireland, Spain and Portugal – which received European financial assistance are now steadily growing and consolidating their economies.
This is progress but recovery is too slow, too fragile and too dependent on our external partners. More fundamentally, the crisis has left us with very wide differences across the euro area and the EU as a whole. It has damaged our growth potential. It has added to the long-term trend of rising inequalities. All this has fuelled doubts about social progress, the value of change and the merits of belonging together.
What we need is to recreate a process of convergence, both between Member States and within societies, with productivity, job creation and social fairness at its core.

We need more Union in our Europe.
For the European Union, and for my Commission in particular, this means two things: first, investing in Europe's sources of jobs and growth, notably in our Single Market; and secondly, completing our Economic and Monetary Union to creating the conditions for a lasting recovery. We are acting on both fronts.
Together with you and the Member States, we brought to life the €315 billion Investment Plan for Europe, with a new European Fund for Strategic Investments (EFSI).
Less than a year after I announced this plan, we are now at a point where some of the first projects are just taking off:
40,000 households all over France will get a lower energy bill and 6,000 jobs will be created, thanks to Investment Fund-financed improved energy efficiency in buildings.
In health clinics in Barcelona, better treatment will be available to patients through new plasma derived therapies, funded by the Investment Fund.
In Limerick and other locations in Ireland, families will have improved access to primary healthcare and social services through fourteen new primary care centres. This is just the beginning, with many more projects like these to follow.
At the same time as we deploy our Investment Plan, we are upgrading our Single Market to create more opportunities for people and business in all 28 Member States. Thanks to Commission projects such as the Digital Single Market, Capital Markets Union and the Energy Union, we are reducing obstacles to activities cross-border and using the scale of our continent to stimulate innovation, connecting talents and offering a wider choice of products and services.
But we will fail in our efforts to prosper if we do not learn a hard lesson: we have not yet convinced the people of Europe and the world that our Union is not just here to survive, but can also thrive and prosper.
Let us not fool ourselves: our collective inability to provide a swift and clear answer to the Greek crisis over the last months weakened us all. It damaged the trust in our single currency and the EU’s reputation in the world.
No wind favours he who has no destined port – we need to know where we are headed.

This is the essence of the report I presented in June with the other Presidents of the European institutions on the completion of our Economic and Monetary Union.
It was self-evident for me to include President Schulz in this important work. After all, the Parliament is the heart of democracy at EU level, just as national Parliaments are the heart of democracy at national level. The European Parliament is and must remain the Parliament of the euro area. And the European Parliament, in its role as co-legislator, will be in charge of deciding on the new initiatives the Commission will propose in the months to come to deepen our Economic and Monetary Union. I am therefore glad that for the first time, we have written not a 'Four Presidents' Report', but a 'Five Presidents' Report'.
Despite months of late-night discussions to find an agreement for Greece, we wrote this report in May and June to set out the course for a stronger future. The Five Presidents of the leading EU institutions have agreed a roadmap that should allow us to stabilise and consolidate the euro area by early 2017; and then, on the basis of a renewed convergence of our economies, to achieve more fundamental reform and move where we can from crisis resilience to new growth perspectives.
As we had expected, the Five Presidents' Report has triggered a lively debate across Europe. Some say we need a government of the euro. Others say we need more discipline and respect of the rules. I agree with both: we need collective responsibility, a greater sense of the common good and full respect and implementation of what is collectively agreed. But I do not agree this should mean the multiplication of institutions or putting the euro on auto pilot, as if new institutions or magic rules could deliver more or better.
You cannot run a single currency on the basis of rules and statistics alone. It needs constant political assessment, as the basis of new economic, fiscal and social policy choices.
The Five Presidents' Report includes a full agenda of work for the years to come, and I want us to move swiftly on all fronts – economic, financial, fiscal and political Union. Some efforts will have to be focused on the euro area, while others should be open to all 28 Member States, in view of their close interaction with our Single Market.
Allow me to highlight five domains where the Commission will present ambitious proposals swiftly and where we will be expecting progress already this autumn.
First: the Five Presidents agreed that we need a common system to ensure that citizens' bank savings are always protected up to a limit of €100,000 per person and account. This is the missing part of our Banking Union.
Today, such protection schemes exist, but they are all national. What we need is a more European system, disconnected from government purses so that citizens can be absolutely sure that their savings are safe.
We all saw what happened in Greece during the summer: Citizens were – understandably – taking out their savings since they had little trust and confidence in the financial capability of the State to support its banking system. This must change.
A more common deposit guarantee system is urgently needed, and the Commission will present a legislative proposal on the first steps towards this before the end of the year.
I am of course fully aware there is no consensus on this yet. But I also know that many of you are as convinced as I am of the need to move ahead. I say to those who are more sceptical: the Commission is fully aware that there are differences in the starting positions of Member States. Some have developed and well-financed their national systems of deposit insurance. Others are still building up such systems. We need to take these differences into account. This is why the Five Presidents' Report advocates not full mutualisation, but a new approach by means of a reinsurance system. We will present further details on this in the weeks to come.

Second: we need a stronger representation of the euro on the global scene. How is it possible that the euro area, which has the second largest currency in the world, can still not speak with one voice on economic matters in international financial institutions?
Imagine yourselves in the daily work of the International Monetary Fund for a moment. We know well how important the IMF is. Still, instead of speaking with one voice as the euro area, Belgium and Luxembourg have to agree their voting position with Armenia and Israel; and Spain sits in a joint constituency with Latin American countries.
How can it be that we – Europeans – are jointly major shareholders of global institutions such as the IMF and the World Bank and still end up acting as a minority?
How can it be that a strategically important new Infrastructure Investment Bank is created in Asia, and European governments, instead of coordinating their efforts, engage in a race who is first to become a member?
We need to grow up and put our common interests ahead of our national ones. For me, the President of the Eurogroup should be the natural spokesperson for the euro area in international financial institutions such as the IMF.
Third: we need a more effective and more democratic system of economic and fiscal surveillance. I want this Parliament, national Parliaments, as well as social partners at all levels, to be key actors in the process. I also want the interest of the euro area as a whole to be better reflected upfront in EU and national policies: the interest of the whole is not just the sum of its parts. This will be reflected in our proposals to streamline and strengthen the European Semester of economic policy coordination further.
In the future, I no longer want our recommendations for the economic orientation of the euro area as a whole to be empty words. I want them to provide real orientation, notably on the fiscal stance of the euro area.
Fourth: we need to enhance fairness in our taxation policies. This requires greater transparency and equity, for citizens and companies. We presented an Action Plan in June, the gist of which is the following: the country where a company generates its profits must also be the country of taxation.
One step towards this goal is our work on a Common Consolidated Corporate Tax Base. This simplification will make tax avoidance more difficult.
We are also working hard with the Council to conclude an agreement on the automatic exchange of information on tax rulings by the end of the year.
At the same time, we expect our investigations into the different national schemes to yield results very soon.
And we are fighting hard to get Member States to adopt the modalities of a Financial Transaction Tax by the end of the year.
We need more Europe, we need more Union, and we need more fairness in our taxation policy.
Fifth: We have to step up the work for a fair and truly pan-European labour market. Fairness in this context means promoting and safeguarding the free movement of citizens as a fundamental right of our Union, while avoiding cases of abuses and risks of social dumping.
Labour mobility is welcome and needed to make the euro area and the single market prosper. But labour mobility should be based on clear rules and principles. The key principle should be that we ensure the same pay for the same job at the same place.
As part of these efforts, I will want to develop a European pillar of social rights, which takes account of the changing realities of Europe's societies and the world of work. And which can serve as a compass for the renewed convergence within the euro area.
This European pillar of social rights should complement what we have already jointly achieved when it comes to the protection of workers in the EU. I will expect social partners to play a central

role in this process. I believe we do well to start with this initiative within the euro area, while allowing other EU Member States to join in if they want to do so.
As said in the Five Presidents' Report, we will also need to look ahead at more fundamental steps with regard to the euro area. The Commission will present a White Paper on this in spring 2017. Yes, we will need to set up a Euro Area Treasury over time, which is accountable at European level. And I believe it should be built on the European Stability Mechanism we created during the crisis, which has, with a potential credit volume of €500 billion, a firepower that is as important as the one of the IMF. The ESM should progressively assume a broader macroeconomic stabilisation function to better deal with shocks that cannot be managed at the national level alone. We will prepare the ground for this to happen in the second half of this mandate.
The European Union is a dynamic project. A project to serve its people. There are no winners or losers. We all get back more than we put in. It is one, comprehensive project. This is also a message for our partners in the United Kingdom, which I have very much in my mind when thinking about the big political challenges of the months to come.

A fair deal for Britain
Since I took office, things have become clearer as regards the United Kingdom: before the end of 2017, there will be a referendum on whether Britain remains in the Union or not. This will of course be a decision for voters in the United Kingdom. But it would not be honest nor realistic to say that this decision will not be of strategic importance for the Union as a whole.
I have always said that I want the UK to stay in the European Union. And that I want to work together with the British government on a fair deal for Britain.
The British are asking fundamental questions to and of the EU. Whether the EU delivers prosperity for its citizens. Whether the action of the EU concentrates on areas where it can deliver results. Whether the EU is open to the rest of the world.
These are questions to which the EU has answers, and not just for the sake of the UK. All 28 EU Member States want the EU to be modern and focused for the benefit of all its citizens. We all agree that the EU must adapt and change in view of the major challenges and crisis we are facing at the moment.
This is why we are completing the Single Market, slashing red tape, improving the investment climate for small businesses.
This is why we are creating a Digital Single Market – to make it such that your location in the EU makes no difference to the price you pay when you book a car online. We are modernising the EU's copyright rules – to increase people's access to cultural content online while ensuring that authors get a fair remuneration. And just two months ago, the EU agreed to abolish roaming charges as of summer 2017, a move many tourists and travellers, notably from Britain, have been calling for, for years.
This is why we are negotiating trade agreements with leading nations such as the Transatlantic Trade and Investment Partnership. This is why we are opening markets and breaking down barriers for businesses and workers in all 28 EU Member States.
It is my very personal commitment to improve the way in which the Union works with national Parliaments. I have inscribed a duty to interact more closely with national Parliaments in the mission letters of all Members of my Commission. I am convinced that strengthening our relationship with national Parliaments will bring the Union closer to the people that it serves. This is an ambition that I know Prime Minister David Cameron also shares. I am confident that we will be able to find a common answer.
Over a year ago, when I campaigned to become President of the Commission, I made a vow that, as President, I would seek a fair deal for Britain. A deal that is fair for Britain. And that is also fair

for the 27 other Member States.
I want to ensure we preserve the integrity of all four freedoms of the Single Market and at the same time find ways to allow the further integration of the Eurozone to strengthen the Economic and Monetary Union.
To be fair to the UK, part of this deal will be to recognise the reality that not all Member States participate in all areas of EU policy. Special Protocols define the position of the UK, for instance in relation to the euro and to Justice and Home Affairs. To be fair to the other Member States, the UK's choices must not prevent them from further integration where they see fit.
I will seek a fair deal for Britain. I will do this for one reason and one reason alone: because I believe that the EU is better with Britain in it and that Britain is better within the EU.
In key areas, we can achieve much more by acting collectively, than we could each on our own. This is in particular the case for the tremendous foreign policy challenges Europe is currently facing and which I will address in the next part of this speech.

United alongside Ukraine
Europe is a small part of the world. If we have something to offer, it is our knowledge and leadership.
Around a century ago, one in five of the world's population were in Europe; today that figure is one in nine; in another century it will be one in twenty-five.
I believe we can, and should, play our part on the world stage; not for our own vanity, but because we have something to offer. We can show the world the strength that comes from uniting and the strategic interest in acting together. There has never been a more urgent and compelling time to do so.
We have more than 40 active conflicts in the world at the moment. While these conflicts rage, whilst families are broken and homes reduced to rubble, I cannot come to you, almost 60 years after the birth of the European Union and pitch you peace. For the world is not at peace.
If we want to promote a more peaceful world, we will need more Europe and more Union in our foreign policy. This is most urgent towards Ukraine.
The challenge of helping Ukraine to survive, to reform and to prosper is a European one. Ultimately, the Ukrainian dream, the dream of the Maidan is European: to live in a modern country, in a stable economy, in a sound and fair political system.
Over the past twelve months, I have got to know President Poroshenko well, at a Summit, over dinner at his home, during many meetings and countless phone calls. He has begun a transformation of his country. He is fighting for peace. He deserves our support.
We have already done a lot, lending €3.41 billion in three Macro-Financial Assistance programmes, helping to broker a deal that will secure Ukraine's winter gas supplies and advising on the reform of the judiciary. The EU and all its Member States must contribute if we are to succeed.
We will also need to maintain our unity.
We need unity when it comes to the security of our Eastern Member States, notably the Baltics. The security and the borders of EU Member States are untouchable. I want this to be understood very clearly in Moscow.
We need more unity when it comes to sanctions. The sanctions the EU has imposed on Russia have a cost for each of our economies, and repercussions on important sectors, like farming. But sanctions are a powerful tool in confronting aggression and violation of international law. They are a policy that needs to be kept in place until the Minsk Agreements are complied with in full. We will have to keep our nerve and our unity.
But we must also continue to look for solutions.

I spoke to President Putin in Brisbane at the G20, in a bilateral meeting that went on into the early hours of the morning. We recalled how long we have known each other, how different times had become. A spirit of cooperation between the EU and Russia has given way to suspicion and distrust.
The EU must show Russia the cost of confrontation but it must also make clear it is prepared to engage.
I do not want a Europe that stands on the sidelines of history. I want a Europe that leads. When the European Union stands united, we can change the world.

United in Leadership in Addressing Climate Change
One example of where Europe is already leading is in our action on climate change.
In Europe we all know that climate change is a major global challenge – and we have known for a while now.
The planet we share – its atmosphere and stable climate – cannot cope with the use mankind is making of it.
Some parts of the world have been living beyond their means, creating carbon debt and living on it. As we know from economics and crisis management, living beyond our means is not sustainable behaviour.
Nature will foot us the bill soon enough. In some parts of the world, climate change is changing the sources of conflict – the control over a dam or a lake can be more strategic than an oil refinery. Climate change is even one the root causes of a new migration phenomenon. Climate refugees will become a new challenge – if we do not act swiftly.
The world will meet in Paris in 90 days to agree on action to meet the target of keeping the global temperature rise below 2 degrees Celsius. The EU is on track and made a clear pledge back in March: a binding, economy-wide emissions reduction target of at least 40% by 2030, compared to 1990 levels. This is the most ambitious contribution presented to date.
Others are following, some only reluctantly.
Let me be very clear to our international partners: the EU will not sign just any deal. My priority, Europe's priority, is to adopt an ambitious, robust and binding global climate deal.
This is why my Commission and I have been spending part of this first year in drumming support for ambition in Paris. Last May I was in Tokyo where I challenged Prime Minister Abe to work with us in ensuring that Paris is a worthy successor of Kyoto.
In June at the G7 summit, leaders agreed to develop long-term low-carbon strategies and abandon fossil fuels by the end of the century.
Later I met Chinese Premier Li Keqiang to prepare Paris and to launch a partnership to ensure that cities of today are designed to meet the energy and climate needs of tomorrow.
And, in coordination with the High Representative, the members of the College have been engaged in climate diplomacy efforts. Today Commissioner Arias Cañete is in Papua New Guinea discussing the plans for Paris with the leaders of the Pacific Islands Forum. If corrective action is not taken to tackle climate change, the tide will rise and those islands will be the proverbial canary in the coalmine.
However, if Paris delivers, humanity will, for the first time, have an international regime to efficiently combat climate change.
Paris will be the next stop but not the last stop. There is a Road to Paris; but there is also a Road from Paris.
My Commission will work to ensure Europe keeps leading in the fight against climate change. We will practice what we preach.

We have no silver bullet to tackle climate change. But our laws, such as the EU Emissions Trading Scheme, and our actions have allowed us to decrease carbon emissions whilst keeping the economy growing.
Our forward-looking climate policy is also delivering on our much needed Energy Union goals: it is making us a world leader in the renewable energy sector, which today employs over one million people across the EU and generates €130 billion turnover, including €35 billion worth of exports. European companies today hold 40% of all patents for renewable technologies and the pace of technological change increases the potential for new global trade in green technology.
This is why a strategic focus on innovation and on interconnecting our markets is being given in the implementation of the Energy Union.
This is what I promised you last year and this is what this Commission has delivered and will continue to deliver.
The fight against climate change will not be won or lost in diplomatic discussions in Brussels or in Paris. It will be won or lost on the ground and in the cities where most Europeans live, work and use about 80% of all the energy produced in Europe.
That is why I have asked President Schulz to host the Covenant of the Mayors meeting in the Parliament next month, bringing together more than 5,000 European mayors. They have all pledged to meet the EU CO2 reduction objective. I hope that all members of this House will lend their support to the action that communities and localities across Europe are taking to making Paris and its follow up a success.

Conclusion
Mr President, Honourable Members,
There were many things I did not and could not mention today. For example, I would have liked to talk to you about Cyprus and my hope, my ambition and my wish to see the island united next year. After I met for a long talk with Presidents Nikos Anastasiades and Mustafa Akinci in the middle of the Green Line in July, I am confident that, with the necessary vision and political will from the two leaders, this is feasible under the current conditions and with continued good coordination between UN and EU efforts. I will offer all my support and assistance to help achieve this objective. Because I believe that walls and fences have no place in an EU Member State.
I have not spoken about Europe's farmers who were protesting this week in Brussels. I agree with them that there is something wrong in a market when the price of a litre of milk is less than the price of a litre of water. But I do not believe that we can or should start micromanaging the milk market from Brussels. We should compensate the farmers who are suffering from the effects of sanctions against Russia. And this is why the Commission is putting a €500 million solidarity package for farmers on the table. And European and national competition authorities should take a close look into the structure of the market. Something has turned sour in the milk market. My impression is that we need to break some retail oligopolies.
There is much more to be said but in touching upon the main issues, the main challenges confronting us today, for me there is one thing that becomes clear: whether it is the refugee crisis we are talking about, the economy or foreign policy: we can only succeed as a Union.
Who is the Union that represents Europe's 507 million citizens? The Union is not just Brussels or Strasbourg. The Union is the European Institutions. The Union is also the Member States. It is national governments and national Parliaments.
It is enough if just one of us fails to deliver for all of us to stumble.
Europe and our Union have to deliver. While I am a strong defender of the Community method in normal times, I am not a purist in crisis times – I do not mind how we cope with a crisis, be it by intergovernmental solutions or community-led processes. As long as we find a solution and get

things done in the interest of Europe's citizens.
However, when we see the weaknesses of a method, we have to change our approach.
Look at the relocation mechanism for refugees we put on the table for Greece and Italy in May: the Commission proposed a binding, communitarian solidarity scheme. Member States opted instead for a voluntary approach. The result: the 40,000 figure was never reached. Not a single person in need of protection has been relocated yet and Italy and Greece continue to cope alone. This is simply not good enough.
Look at intergovernmental solutions like the 2011 Fiscal Compact to strengthen fiscal discipline or the 2014 Agreement setting up a common bank resolution fund. Today, we see that not a single Member State has completely implemented the Fiscal Compact. And only 4 out of 19 Member States have ratified the agreement on the bank resolution fund, which is meant to be launched on 1 January 2016.
This is simply not good enough if we want to cope with the present, immense challenges.
We have to change our way of working.
We have to be faster.
We have to be more European in our method.
Not because we want power at European level. But because we need urgently better and swifter results.
We need more Europe in our Union.
We need more Union in our Union.
All my life, I have believed in Europe. I have my reasons, many of which I know and am relieved are not relatable to generations today.
Upon taking office, I said I want to rebuild bridges that had started to crumble. Where solidarity had started to fray at the seams. Where old daemons sought to resurface.
We still have a long way to go.
But when, generations from now, people read about this moment in Europe's history books, let it read that we stood together in demonstrating compassion and opened our homes to those in need of our protection.
That we joined forces in addressing global challenges, protecting our values and resolving conflicts.
That we made sure taxpayers never again have to pay for the greed of financial speculators.
That hand in hand we secured growth and prosperity for our economies, for our businesses, and above all for our children.
Let it read that we forged a Union stronger than ever before.
Let it read that together we made European history. A story our grandchildren will tell with pride.[108]

[108] http://europa.eu/rapid/press-release_SPEECH-15-5614_en.htm .

## 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 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 2016 the Council Presidency is held by the Netherlands. After the Netherlands the Presidency will be held for 6 months each by Slovakia, Malta and the United Kingdom. Luxembourg held the Presidency in the second half of 2015 Three Member States, trios, decide together on the Council's agenda over time (right now this means the Netherlands, Slovakia and Malta). When the Council meets its composition is determined by the subject matter of its meetings. For example, if the Council is to consider agricultural policy it is composed of agriculture ministers from the Member States; if it is to consider consumer affairs it will be composed of the consumer

affairs ministers from the Member States. The Council thus contrasts with the other institutions which have a fixed composition over a definite period of time. The Council has an inherently shifting composition and the vagaries of national politics including elections and changes in the composition of governments apart from elections may lead to additional changes in the Council's composition. But the Council has a staff. 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 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). Qualified majority voting has come to apply to more and more policy areas over time, and since the Lisbon Treaty it is the default voting method. 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%).

Since 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. 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 in the past tended to focus on the Council. The Lisbon Treaty prompted a new focus on openness and transparency, and when the Council now meets as a legislator its meetings are open to the public, and you can view the Council's proceedings on the internet.[109] The Council makes some of its working documents available online, and it is possible to request access

[109] *See* http://video.consilium.europa.eu/ .

to other documents that are not made generally available.[110]

## 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.[111]

The Court of Justice has often invoked the language in the Treaty (in paragraph 1 of Art 19) requiring it to ensure that "in the interpretation and application of the Treaties the law is observed" to 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 11 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).[112] One judge acts as a rapporteur for each case before the

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[110] Under Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents, OJ No. L 145/43 (May 31,2001).

[111] The Statute of the Court is at http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/staut_cons_en.pdf and the Rules of Procedure are at http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp_en.pdf .

[112] 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."

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 and concerns over the workload of the General Court prompted discussions about increasing the number of jugdes in that court.[113] The Court of Justice has held that failures by the General Court to decide cases within a reasonable time involve breaches of Article 47 of the EU Charter of Fundamental Rights.[114] Such a breach gives rise to a claim in damages.[115] In December 2015 the Council adopted a regulation reforming the General Court, which will involve gradually increasing the number of judges so that in 2019 there will be 56 judges on the General Court.[116]

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,[117] and that solving this problem by working increasingly through smaller chambers would risk "jeopardizing the coherence of the case law". 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."

The Commission also recognized this potential conflict:

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[113] *See, e.g.*, Response to the invitation from the Italian Presidency of the Council to present new proposals in order to facilitate the task of securing agreement within the Council on the procedures for increasing the number of Judges at the General Court (Oct. 3, 2014).

[114] *See, e.g.*, *Gascogne Sack Deutschland GmbH* v *Commission* [2013] EUECJ C-40/12.

[115] *Kendrion* v *Court of Justice of the European Union*, Case T-479/1, involves an attempt to recover damages against the Court of Justice. The Court of Justice has argued that the claim for damages should be brought against the Commission.

[116] Regulation 2015/2422 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, OJ No. L 341/14 (Dec. 24, 2015).

[117] 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.")

In an enlarged Union it will be necessary to safeguard the effectiveness of the Community's judicial system and the consistency of its case-law, factors which are essential if Community law is to be applied uniformly in an increasingly diverse Europe.[118]

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.[119]

A court of 28 judges is very large.[120] 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.[121] 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.[122] 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.[123] The US Supreme Court, which has the responsibility for establishing what federal law is in cases where the federal

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

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

[120] The Working Party suggested that the quality of decisions of a large court might be impaired. Working Party, note 119 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.")

[121] 28 U.S.C. § 46(b).

[122] 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.")

[123] 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).

appeals courts' views diverge, and is thus functionally comparable to the Court of Justice, has only 9 Justices.[124]

The comparison between the EU courts and federal courts in the US illustrates a general concern that a large judicial body may be unmanageable.[125] 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.[126] In fact Congress has considered whether to split the 9th Circuit because of its size.[127] 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,[128] 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

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

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

[126] *See* Ninth Circuit Evaluation Committee, Interim Report, note 123 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)

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

[128] 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).

conditions laid down in the Statute of the Court of Justice of the European Union. The Judges shall elect the President of the Court of Justice from among their number for a term of three years. He may be re-elected.
Retiring Judges and Advocates-General may be reappointed. The Court of Justice shall appoint its Registrar and lay down the rules governing his service. The Court of Justice shall establish its Rules of Procedure. Those Rules shall require the approval 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.

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) are anonymous. Judges are required to maintain the secrecy of the proceedings of the Court. As a result, 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. Direct actions contrast with **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.

Decisions of the General Court may be appealed 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 75). 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.[129]

## 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.[130] Natural and legal persons[131] 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 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 the courts of that Member State.

Although Member States have standing under Art. 259 TFEU to bring enforcement actions against other Member States this power is hardly ever used.

The problem of non-compliance by Member States with their Treaty obligations is significant. The Commission produces annual reports monitoring Member State compliance with Community law.[132] The report published in 2008 stated:

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

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[129] *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 160/1 (May 28, 2011) at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:160:0001:0005:EN:PDF (noting that this had not occurred).

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

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

[132] *See, e.g.*,EU Commission, 32nd Annual Report on Monitoring the Application of EU Law (2014), COM(2015) 329 (Jul. 9, 2015).

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. [133]

Late transposition of directives was still an issue the following year.[134] The most recent report contains the following information about enforcement actions:

Efficient monitoring of the application of EU law is part of the Commission's Better Regulation Agenda. The results of such monitoring feed into evaluations of the law, into impact assessments for new initiatives and, more generally, into the legislative life cycle. The objective is both to improve the implementation and enforcement of existing legislation and to enhance the quality of new legislation.
The Commission has a unique and essential role in overseeing the application of EU law. At the same time, EU law forms an integral part of the national legal order in the Member States, which bear primary responsibility for applying it correctly. Their public administrations and judiciary have to ensure that the laws and obligations are properly applied and enforced. Before starting formal infringement procedures, the Commission works in partnership with the Member States to solve problems efficiently and in accordance with Union law, through a process of structured dialogue with clear deadlines that was introduced for this purpose. This process is referred to as `EU Pilot'. If no solution is found, the Commission pursues the bilateral discussion and may launch formal infringement proceedings under Article 258 TFEU. Financial penalties are imposed if Member States do not comply with Court rulings (Article 260(2) TFEU) or fail to transpose EU legislative directives on time (Article 260(3) TFEU). These provisions are essential to the overall objective of

[133] EU Commission, 25th Annual Report from the Commission on Monitoring the Application of Community Law, 2-3, COM(2008) 777/4 (Nov. 2008).

[134] EU Commission, 26th Annual Report from the Commission on Monitoring the Application of Community Law, 4 COM(2009) 675 (Dec. 15, 2009).

the Commission's enforcement policy, which is to ensure that EU law is implemented and applied correctly and on time, for the benefit of people and businesses.
Members of the public, businesses, NGOs and other organisations contribute significantly to the Commission's monitoring by reporting shortcomings in the transposition and/or application of EU law by Member State authorities. The Commission fully acknowledges their important role and has committed to giving administrative guarantees when handling complaints, such as informing the complainant of any steps the Commission takes in further processing the complaint, and notifying the complainant before closing the complaint....
3715 new complaints were registered in 2014. The three Member States against which the most complaints were filed were:
• Spain: 553 complaints, most of them related to employment (222 complaints); environment (111 complaints); and justice (76 complaints);
• Italy: 475 complaints, especially in connection with employment (110 complaints); environment (92 complaints); and internal market and services (65 complaints); and
• Germany: 276 complaints, mainly related to internal market and services (55 complaints); environment (54 complaints); and justice (50 complaints)....
The Court delivered 38 judgments under Article 258 TFEU in 2014, of which 35 (92%) were in favour of the Commission. The Court delivered the most judgments against Spain (5, all in favour of the Commission), Belgium (4, all in favour of the Commission), Germany (4, of which one was in Germany's favour), Italy (4, all in favour of the Commission), Poland (4, all in favour of the Commission) and the United Kingdom (4, all in favour of the Commission). Environment (10),taxation (8) and enterprise and industry (5) were the subject of the most judgments delivered by the Court during 2014.
Member States frequently take the necessary measures to comply with the judgment of the Court promptly. However, at the end of 2014, 61 infringement procedures were still open after a Court ruling because the Commission considered that the Member States concerned had not yet complied with the judgments under Article 258 TFEU. Most of these cases concerned Spain (8), Poland (7) and Greece (6) and were related to environment (19), taxation & customs union (14), transport (6) and health and consumer protection (6). Of these 61 cases, 3 had already been referred to the Court for the second time.
Under Article 260(2) TFEU the Commission can propose and the Court can impose a lump sum and/or a daily penalty on the defaulting Member State, which must immediately pay the lump sum and pay the periodic penalty until it complies fully with the first and second Court judgments. In 2014, 5 Court judgments were delivered under Article 260(2) TFEU. The Court imposed penalty payments on Italy, Greece, Portugal, Spain, and Sweden. At the end of 2014, 7 infringement procedures were still open after a Court ruling under Article260(2) TFEU.
The overall decrease of the number of in fringement procedures can be put in relation to the important increase of preliminary rulings under Article 267 TFEU since 2010. The Court of Justice has addressed conformity issues of national laws in regard of EU legislation in about half of its judgments under Article 267 TFEU since 2010 and identified non conformities in numerous cases. Whilst preliminary rulings are distinct from infringement judgments, this gives the Commission an additional opportunity to ensure in a more systematic manner that violations of Union law deriving from national legislation or its application are remedied.[135]

[135] EU Commission, 32nd Annual Report on Monitoring the Application of EU Law (2014), COM(2015) 329 (Jul. 9, 2015).

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. Using regulations rather than directives means Member States do not need to implement EU rules. And where directives are used the Commission provides resources to help the Member States with implementation, such as explanatory memoranda, dedicated websites and contact points.

In some areas the EU has chosen to develop "**soft law** " instruments (such as codes of conduct, communications,[136] standards, benchmarking and guidelines),[137] 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, as noted above in the excerpt from the 32nd Annual Monitoring Report. Earlier 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.[138] Greece has been fined in respect of failures to comply with EU rules on waste disposal.[139]

The Commission has emphasized that the Member States have responsibilities for ensuring compliance with EU law, and that it will work with the Member States to ensure they take these responsibilities seriously:

> ... it is important to bear in mind that EU law forms an integral part of the national legal order in the Member States, regardless of whether the EU rules are directly applicable (e.g. regulations) or require prior transposition into national law (directives). It follows that the onus for the correct application of EU law is primarily on the Member States' administration and judiciary, which have to ensure that rights and obligations for citizens and businesses are properly enforced. National authorities often enjoy wide discretion in how to organise these enforcement mechanisms, including the sanctions for non-compliance. The European legislature and the Commission can, however, promote effective law application at Member State level in various ways.
> For example, in the passenger rights area, as a reaction to the crisis caused by the volcanic ash cloud, which paralysed the European airspace in spring 2010, the Commission rapidly met with the national enforcement authorities to ensure, through agreed guidelines, a balanced and uniform interpretation of Regulation (EC) No 261/200420 on air passenger rights, in particular, on the

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[136] *See, e.g.*, note 100 above.

[137] Recommendations and opinions are examples referred to in Art. 288 above (at p. 32).

[138] *Commission* v *France* (Case C-304/02) [2005] All ER (D) 122.

[139] *Commission* v *Greece* (Case C-387/97) [2000] ECR I-5047.

assistance stranded passengers were entitled to receive from airline companies.
Furthermore, existing EU legislation and international agreements require Member States to provide for access to redress mechanisms in certain areas.... The appeal rules in information society measures ... and the corresponding case law define a broad group of interested persons who may contest decisions by national authorities and courts. Home affairs legislation ... obliges Member States to allow third parties (for example, trade unions) to intervene on behalf of employees involved in administrative or civil proceedings. Migration rules make it mandatory to give reasons for refusing an application for a residence permit and to inform applicants about possible redress mechanisms and time limits. Refusals of visa applications have to be justified as well.
Some recent EU directives require Member States to open up additional or alternative channels for dispute resolution... Consumer protection rules are still a major area where remedies are rooted in EU law with the European Small Claims procedure .. and the obligations of Member States in the main directives... to put in place adequate and effective means of redress. Directives on the liberalisation of the EU's electricity and gas markets ... also deepen consumer protection by calling for an energy ombudsman or a consumer body for out-of-court dispute settlements. Another example of how EU law supports enforcement is the creation of equality bodies under the anti-discrimination laws: one of their tasks is to refer victims of discrimination to mediating organisations.
Promoting cooperation between the national competent authorities can often constitute a useful accompanying measure. This can be done through networks .., classical advisory committees ... or innovative structures such as the 'Forum' of enforcement authorities linked to the European Chemicals Agency under the REACH Regulation.
Informal problem-solving mechanisms continued to deliver fast and pragmatic solutions to citizens.[140]

Since the Lisbon Treaty Member States may be subjected to enforcement actions for failure to implement properly EU legislation in the area of criminal law and policing.

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.

[140] EU Commission, 28th Monitoring Report, on Monitoring the Application of EU Law (2012), COM(2011) 588 (Sep.29 , 2011) at 9-11.

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.

## 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.[141] 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).[142] But at the point where a national or EU authority sought to enforce the regulation against an individual or firm that individual or firm would have the right to challenge the enforcement action and also the regulation on which it was based. The Treaty now makes clear that natural and legal persons can challenge regulatory acts, which was not spelled out before. Thus the standing rules have been liberalized.

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

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[141] 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) .

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

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.

### **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 RULINGS/ 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 ruling or reference procedure is the source of very many of the cases which come before the Court of Justice.[143] 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.[144] 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. In 2012 the Court made **Recommendations to national courts in relation to the initiation of preliminary ruling proceedings**:

he originator of the request for a preliminary ruling
9. Under Article 267 TFEU, any court or tribunal of a Member State, in so far as it is called upon to give a ruling in proceedings intended to arrive at a decision of a judicial nature, may as a rule submit a request for a preliminary ruling to the Court of Justice. Status as a court or tribunal is interpreted by the Court of Justice as a self-standing concept of European Union law, the Court taking account of a number of factors such as whether the body making the reference is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent.

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[143] Since 2008 there is an urgent preliminary ruling procedure which applies to measures relating to freedom, security and justice. The Information note cited in note 129 above states" It should .. be requested only where it is absolutely necessary for the Court to give its ruling on the reference as quickly as possible. Although it is not possible to provide an exhaustive list of such situations, particularly because of the varied and evolving nature of the rules of European Union law governing the area of freedom, security and justice, a national court or tribunal might, for example, consider submitting a request for the urgent preliminary ruling procedure to be applied in the following situations: in the case, referred to in the fourth paragraph of Article 267 TFEU, of a person in custody or deprived of his liberty, where the answer to the question raised is decisive as to the assessment of that person's legal situation or, in proceedings concerning parental authority or custody of children, where the identity of the court having jurisdiction under European Union law depends on the answer to the question referred for a preliminary ruling."

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

10.Whether or not the parties to the main proceedings have expressed the wish that it do so, it is for the national court or tribunal alone to decide whether to refer a question to the Court of Justice for a preliminary ruling.

References on interpretation

11.Article 267 TFEU provides that any court or tribunal may submit a request for a preliminary ruling to the Court of Justice on the interpretation of a rule of European Union law if it considers it necessary to do so in order to resolve the dispute brought before it.

12.However, courts or tribunals against whose decisions there is no judicial remedy under national law must bring such a request before the Court, unless the Court has already ruled on the point (and there is no new context that raises any serious doubt as to whether that case-law may be applied in that instance), or unless the correct interpretation of the rule of law in question is obvious.

13.Thus, a national court or tribunal may, in particular when it considers that sufficient guidance is given by the case-law of the Court of Justice, itself decide on the correct interpretation of European Union law and its application to the factual situation before it. However, a reference for a preliminary ruling may prove particularly useful when there is a new question of interpretation of general interest for the uniform application of European Union law, or where the existing case-law does not appear to be applicable to a new set of facts.

14. In order to enable the Court of Justice properly to identify the subject-matter of the main proceedings and the questions that arise, it is helpful if, in respect of each question referred, the national court or tribunal explains why the interpretation sought is necessary to enable it to give judgment.

References on determination of validity

15.Although the courts and tribunals of the Member States may reject pleas raised before them challenging the validity of acts of an institution, body, office or agency of the Union, the Court of Justice has exclusive jurisdiction to declare such an act invalid.

16. All national courts or tribunals must therefore submit a request for a preliminary ruling to the Court when they have doubts about the validity of such an act, stating the reasons for which they consider that the act may be invalid.

17.However, if a national court or tribunal has serious doubts about the validity of an act of an institution, body, office or agency of the Union on which a national measure is based, it may exceptionally suspend application of that measure temporarily or grant other interim relief with respect to it. It must then refer the question of validity to the Court of Justice, stating the reasons for which it considers the act to be invalid.

The appropriate stage at which to make a reference for a preliminary ruling

18. A national court or tribunal may submit a request for a preliminary ruling to the Court as soon as it finds that a ruling on the interpretation or validity of European Union law is necessary to enable it to give judgment. It is that court or tribunal which is in fact in the best position to decide at what stage of the proceedings such a request should be made.

19.It is, however, desirable that a decision to make a reference for a preliminary ruling should be taken when the national proceedings have reached a stage at which the referring court or tribunal is able to define the legal and factual context of the case, so that the Court of Justice has available to it all the information necessary to check, where appropriate, that European Union law applies to the main proceedings. In the interests of the proper administration of justice, it may also be desirable for the reference to be made only after both sides have been heard.

The form and content of the request for a preliminary ruling
20.The decision by which a court or tribunal of a Member State refers one or more questions to the Court of Justice for a preliminary ruling may be in any form allowed by national law as regards procedural steps. However, it must be borne in mind that it is that document which will serve as the basis of the proceedings before the Court and that it must therefore contain such information as will enable the Court to give a reply which is of assistance to the referring court or tribunal. Moreover, it is only the request for a preliminary ruling which is notified to the parties to the main proceedings and to the other interested persons referred to in Article 23 of the Statute, including the Member States, in order to obtain any written observations.
21. Owing to the need to translate it into all the official languages of the European Union, the request for a preliminary ruling should therefore be drafted simply, clearly and precisely, avoiding superfluous detail.
22.About 10 pages is often sufficient to set out in a proper manner the context of a request for a preliminary ruling. That request must be succinct but sufficiently complete and must contain all the relevant information to give the Court and the interested persons entitled to submit observations a clear understanding of the factual and legal context of the main proceedings. In accordance with Article 94 of the Rules of Procedure, the request for a preliminary ruling must contain, in addition to the text of the questions referred to the Court for a preliminary ruling:
- a summary of the subject-matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions referred are based;
- the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law ;
- a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of European Union law, and the relationship between those provisions and the national legislation applicable to the main proceedings.
23. The European Union law provisions relevant to the case should be identified as accurately as possible in the request for a preliminary ruling, which should include, if need be, a brief summary of the relevant arguments of the parties to the main proceedings.
24. If it considers itself able to do so, the referring court or tribunal may, finally, briefly state its view on the answer to be given to the questions referred for a preliminary ruling. That information may be useful to the Court, particularly where it is called upon to give a preliminary ruling in an expedited or urgent procedure.
25. In order to make the request for a preliminary ruling easier to read, it is essential that the Court receive it in typewritten form. To enable the Court to refer to the request it is also very helpful if the pages and paragraphs of the order for reference – which must be dated and signed – are numbered.
26. The questions themselves should appear in a separate and clearly identified section of the order for reference, preferably at the beginning or the end. It must be possible to understand them on their own terms, without referring to the statement of the grounds for the request, which will however provide the necessary background for a proper understanding of the implications of the case.
27. Under the preliminary ruling procedure, the Court will, as a rule, use the information contained in the order for reference, including nominative or personal data. It is therefore for the referring court or tribunal itself, if it considers it necessary, to delete certain details in its request for a preliminary ruling or to render anonymous one or more persons or entities concerned by the dispute in the main proceedings.
28.After the request for a preliminary ruling has been lodged, the Court may also render such

persons or entities anonymous of its own motion, or at the request of the referring court or tribunal or of a party to the main proceedings. In order to maintain its effectiveness, such a request for anonymity must, however, be made at the earliest possible stage of the proceedings, and in any event prior to publication in the Official Journal of the European Union of the notice relating to the case concerned, and to service of the request for a preliminary ruling on the interested persons referred to in Article 23 of the Statute.

The effects of the reference for a preliminary ruling on the national proceedings
29. Although the national court or tribunal may still order protective measures, particularly in connection with a reference on determination of validity (see point 17 above), the lodging of a request for a preliminary ruling nevertheless calls for the national proceedings to be stayed until the Court of Justice has given its ruling.
30. In the interests of the proper conduct of the preliminary ruling proceedings before the Court and in order to maintain their effectiveness, it is incumbent on the referring court or tribunal to inform the Court of Justice of any procedural step that may affect the referral and, in particular, if any new parties are admitted to the national proceedings.[145]

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.[146]

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.[147] Under the acte clair doctrine, a national court or tribunal may decide not to

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[145] Recommendations to National Courts in Relation to the Initiation of Preliminary Ruling Proceedings, O. J. C 338 (Nov, 6, 2012).

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

[147] *See, e.g.*, Working Party, note 119 above, at 14.

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.

## OPINIONS ON EU ACCESSION TO TREATIES (Opinion 2/13)

The next (very long) excerpt from a judgment of the Court of Justice relates to the Court's evaluation of the proposal for the EU to accede to the European Convention on Human Rights. The Court's analysis of the issues tells us about the nature of the EU. As you read the Court's decision notice that the Court cites to its own prior decisions (I have included some, but not all of these citations in editing the material for you to read). Courts in civil law systems do not typically cite prior judgments in this way. The Court of Justice makes clear here that it is building on a body of law which it has developed through its decisions over time.

The conclusions appear in paragraph 8 which appears in bold below. It takes a long time to get there - the Court's analysis of the issues is very detailed. I won't expect you to memorize all of the details that appear in the decision and you will likely find reading it to be hard going. But lawyers do have to be able to navigate and understand long, complicated texts. We will discuss what is going on in the decision in class. Remember, be sure to ask if you have questions. Before you read the excerpt from the decision you should read this blog post: Opinion 2/13 of the Court of Justice on Access of the EU to the ECHR – One step ahead and two steps back, by Stefan Reitemeyer and Benedikt Pirker at http://europeanlawblog.eu/?p=2731 (I am providing a link to this article on our class blog).

### Opinion 2/13

157 As the Court of Justice has repeatedly held, the founding treaties of the EU, unlike ordinary international treaties, established a new legal order, possessing its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only those States but also their nationals (see, in particular, judgments in van Gend & Loos, 26/62... and Costa, 6/64...
158. The fact that the EU has a new kind of legal order, the nature of which is peculiar to the EU, its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation, has consequences as regards the procedure for and conditions of accession to the ECHR.
159. It is precisely in order to ensure that that situation is taken into account that the Treaties make accession subject to compliance with various conditions.
160. Thus, first of all, having provided that the EU is to accede to the ECHR, Article 6(2) TEU makes clear at the outset, in the second sentence, that '[s]uch accession shall not affect the Union's competences as defined in the Treaties'.
161. Next, Protocol No 8 EU, which has the same legal value as the Treaties, provides in particular that the accession agreement is to make provision for preserving the specific characteristics of the EU and EU law and ensure that accession does not affect the competences of the EU or the powers of its institutions, or the situation of Member States in relation to the ECHR, or indeed

Article 344 TFEU.
162. Lastly, by the Declaration on Article 6(2) of the Treaty on European Union, the Intergovernmental Conference which adopted the Treaty of Lisbon agreed that accession must be arranged in such a way as to preserve the specific features of EU law.
163. In performing the task conferred on it by the first subparagraph of Article 19(1) TEU, the Court of Justice must review, in the light, in particular, of those provisions, whether the legal arrangements proposed in respect of the EU's accession to the ECHR are in conformity with the requirements laid down and, more generally, with the basic constitutional charter, the Treaties (judgment in Les Verts v Parliament, 294/83... paragraph 23).
164. For the purposes of that review, it must be noted that ... the conditions to which accession is subject under the Treaties are intended, particularly, to ensure that accession does not affect the specific characteristics of the EU and EU law.
165. It should be borne in mind that these characteristics include those relating to the constitutional structure of the EU, which is seen in the principle of conferral of powers referred to in Articles 4(1) TEU and 5(1) and (2) TEU, and in the institutional framework established in Articles 13 TEU to 19 TEU.
166. To these must be added the specific characteristics arising from the very nature of EU law. In particular, as the Court of Justice has noted many times, EU law is characterised by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States (see, to that effect, judgments in Costa, and Internationale Handelsgesellschaft.... and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves (judgment in van Gend & Loos...
167. These essential characteristics of EU law have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other, which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a 'process of creating an ever closer union among the peoples of Europe'.
168. This legal structure is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected.
169. Also at the heart of that legal structure are the fundamental rights recognised by the Charter (which, under Article 6(1) TEU, has the same legal value as the Treaties), respect for those rights being a condition of the lawfulness of EU acts, so that measures incompatible with those rights are not acceptable in the EU...
170. The autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law requires that the interpretation of those fundamental rights be ensured within the framework of the structure and objectives of the EU...
171. As regards the structure of the EU, it must be emphasised that not only are the institutions, bodies, offices and agencies of the EU required to respect the Charter but so too are the Member States when they are implementing EU law...
172. The pursuit of the EU's objectives, as set out in Article 3 TEU, is entrusted to a series of fundamental provisions, such as those providing for the free movement of goods, services, capital and persons, citizenship of the Union, the area of freedom, security and justice, and competition policy. Those provisions, which are part of the framework of a system that is specific to the EU, are structured in such a way as to contribute - each within its specific field and with its own particular characteristics - to the implementation of the process of integration that is the raison d'être of the EU itself.

173. Similarly, the Member States are obliged, by reason, inter alia, of the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU, to ensure, in their respective territories, the application of and respect for EU law. In addition, pursuant to the second subparagraph of Article 4(3) TEU, the Member States are to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU...
174. In order to ensure that the specific characteristics and the autonomy of that legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law.
175. In that context, it is for the national courts and tribunals and for the Court of Justice to ensure the full application of EU law in all Member States and to ensure judicial protection of an individual's rights under that law...
176. In particular, the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law (see, to that effect, judgment in van Gend & Loos,... thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties ...
177. Fundamental rights, as recognised in particular by the Charter, must therefore be interpreted and applied within the EU in accordance with the constitutional framework...

..The compatibility of the agreement envisaged with EU primary law
178. In order to take a position on the Commission's request for an Opinion, it is important (i) to ascertain whether the agreement envisaged is liable adversely to affect the specific characteristics of EU law just outlined and, as the Commission itself has emphasised, the autonomy of EU law in the interpretation and application of fundamental rights, as recognised by EU law and notably by the Charter, and (ii) to consider whether the institutional and procedural machinery envisaged by that agreement ensures that the conditions in the Treaties for the EU's accession to the ECHR are complied with.

..The specific characteristics and the autonomy of EU law
179. It must be borne in mind that, in accordance with Article 6(3) TEU, fundamental rights, as guaranteed by the ECHR, constitute general principles of the EU's law. However, as the EU has not acceded to the ECHR, the latter does not constitute a legal instrument which has been formally incorporated into the legal order of the EU...
180. By contrast, as a result of the EU's accession the ECHR, like any other international agreement concluded by the EU, would, by virtue of Article 216(2) TFEU, be binding upon the institutions of the EU and on its Member States, and would therefore form an integral part of EU law...
181. Accordingly, the EU, like any other Contracting Party, would be subject to external control to ensure the observance of the rights and freedoms the EU would undertake to respect in accordance with Article 1 of the ECHR. In that context, the EU and its institutions, including the Court of Justice, would be subject to the control mechanisms provided for by the ECHR and, in particular, to the decisions and the judgments of the EctHR.
182. The Court of Justice has admittedly already stated in that regard that an international agreement providing for the creation of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not, in principle, incompatible with EU law; that is particularly the case where, as in this instance, the

conclusion of such an agreement is provided for by the Treaties themselves. The competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions...
183. Nevertheless, the Court of Justice has also declared that an international agreement may affect its own powers only if the indispensable conditions for safeguarding the essential character of those powers are satisfied and, consequently, there is no adverse effect on the autonomy of the EU legal order...
184. In particular, any action by the bodies given decision-making powers by the ECHR, as provided for in the agreement envisaged, must not have the effect of binding the EU and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of EU law...
185. It is admittedly inherent in the very concept of external control that, on the one hand, the interpretation of the ECHR provided by the ECtHR would, under international law, be binding on the EU and its institutions, including the Court of Justice, and that, on the other, the interpretation by the Court of Justice of a right recognised by the ECHR would not be binding on the control mechanisms provided for by the ECHR, particularly the ECtHR, as Article 3(6) of the draft agreement provides and as is stated in paragraph 68 of the draft explanatory report.
186. The same would not apply, however, with regard to the interpretation by the Court of Justice of EU law, including the Charter. In particular, it should not be possible for the ECtHR to call into question the Court's findings in relation to the scope ratione materiae of EU law, for the purposes, in particular, of determining whether a Member State is bound by fundamental rights of the EU.
187. In that regard, it must be borne in mind, in the first place, that Article 53 of the Charter provides that nothing therein is to be interpreted as restricting or adversely affecting fundamental rights as recognised, in their respective fields of application, by EU law and international law and by international agreements to which the EU or all the Member States are party, including the ECHR, and by the Member States' constitutions.
188. The Court of Justice has interpreted that provision as meaning that the application of national standards of protection of fundamental rights must not compromise the level of protection provided for by the Charter or the primacy, unity and effectiveness of EU law...
189. In so far as Article 53 of the ECHR essentially reserves the power of the Contracting Parties to lay down higher standards of protection of fundamental rights than those guaranteed by the ECHR, that provision should be coordinated with Article 53 of the Charter, as interpreted by the Court of Justice, so that the power granted to Member States by Article 53 of the ECHR is limited - with respect to the rights recognised by the Charter that correspond to those guaranteed by the ECHR - to that which is necessary to ensure that the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised.
190. However, there is no provision in the agreement envisaged to ensure such coordination.

191. In the second place, it should be noted that the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law ...
192. Thus, when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another

Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU.
193. The approach adopted in the agreement envisaged, which is to treat the EU as a State and to give it a role identical in every respect to that of any other Contracting Party, specifically disregards the intrinsic nature of the EU and, in particular, fails to take into consideration the fact that the Member States have, by reason of their membership of the EU, accepted that relations between them as regards the matters covered by the transfer of powers from the Member States to the EU are governed by EU law to the exclusion, if EU law so requires, of any other law.
194. In so far as the ECHR would, in requiring the EU and the Member States to be considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other, including where such relations are governed by EU law, require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law.
195. However, the agreement envisaged contains no provision to prevent such a development.
196. In the third place, it must be pointed out that Protocol No 16 permits the highest courts and tribunals of the Member States to request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms guaranteed by the ECHR or the protocols thereto, even though EU law requires those same courts or tribunals to submit a request to that end to the Court of Justice for a preliminary ruling under Article 267 TFEU.
197. It is indeed the case that the agreement envisaged does not provide for the accession of the EU as such to Protocol No 16 and that the latter was signed on 2 October 2013, that is to say, after the agreement reached by the negotiators in relation to the draft accession instruments, namely on 5 April 2013; nevertheless, since the ECHR would form an integral part of EU law, the mechanism established by that protocol could - notably where the issue concerns rights guaranteed by the Charter corresponding to those secured by the ECHR - affect the autonomy and effectiveness of the preliminary ruling procedure provided for in Article 267 TFEU.
198. In particular, it cannot be ruled out that a request for an advisory opinion made pursuant to Protocol No 16 by a court or tribunal of a Member State that has acceded to that protocol could trigger the procedure for the prior involvement of the Court of Justice, thus creating a risk that the preliminary ruling procedure provided for in Article 267 TFEU might be circumvented, a procedure which, as has been noted in paragraph 176 of this Opinion, is the keystone of the judicial system established by the Treaties.
199. By failing to make any provision in respect of the relationship between the mechanism established by Protocol No 16 and the preliminary ruling procedure provided for in Article 267 TFEU, the agreement envisaged is liable adversely to affect the autonomy and effectiveness of the latter procedure.
200. Having regard to the foregoing, it must be held that the accession of the EU to the ECHR as envisaged by the draft agreement is liable adversely to affect the specific characteristics of EU law and its autonomy.

b) Article 344 TFEU
201. The Court has consistently held that an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system, observance of which is ensured by the Court. That principle is notably enshrined in Article 344 TFEU, according to which Member States undertake not to submit a dispute concerning the interpretation or

application of the Treaties to any method of settlement other than those provided for therein...
202. Furthermore, the obligation of Member States to have recourse to the procedures for settling disputes established by EU law - and, in particular, to respect the jurisdiction of the Court of Justice, which is a fundamental feature of the EU system - must be understood as a specific expression of Member States' more general duty of loyalty resulting from Article 4(3) TEU ... it being understood that, under that provision, the obligation is equally applicable to relations between Member States and the EU.
203. It is precisely in view of these considerations that Article 3 of Protocol No 8 EU expressly provides that the accession agreement must not affect Article 344 TFEU.
204. However, as explained in paragraph 180 of this Opinion, as a result of accession, the ECHR would form an integral part of EU law. Consequently, where EU law is at issue, the Court of Justice has exclusive jurisdiction in any dispute between the Member States and between those Member States and the EU regarding compliance with the ECHR.
205. Unlike the international convention at issue in the case giving rise to the judgment in Commission v Ireland[148] (EU:C:2006:345, paragraphs 124 and 125), which expressly provided that the system for the resolution of disputes set out in EU law must in principle take precedence over that established by that convention, the procedure for the resolution of disputes provided for in Article 33 of the ECHR could apply to any Contracting Party and, therefore, also to disputes between the Member States, or between those Member States and the EU, even though it is EU law that is in issue.
206. In that regard, contrary to what is maintained in some of the observations submitted to the Court of Justice in the present procedure, the fact that Article 5 of the draft agreement provides that proceedings before the Court of Justice are not to be regarded as a means of dispute settlement which the Contracting Parties have agreed to forgo in accordance with Article 55 of the ECHR is not sufficient to preserve the exclusive jurisdiction of the Court of Justice.
207. Article 5 of the draft agreement merely reduces the scope of the obligation laid down by Article 55 of the ECHR, but still allows for the possibility that the EU or Member States might submit an application to the ECtHR, under Article 33 of the ECHR, concerning an alleged violation thereof by a Member State or the EU, respectively, in conjunction with EU law.
208. The very existence of such a possibility undermines the requirement set out in Article 344 TFEU.
209. This is particularly so since, if the EU or Member States did in fact have to bring a dispute between them before the ECtHR, the latter would, pursuant to Article 33 of the ECHR, find itself seised of such a dispute.
210. Contrary to the provisions of the Treaties governing the EU's various internal judicial procedures, which have objectives peculiar to them, Article 344 TFEU is specifically intended to preserve the exclusive nature of the procedure for settling those disputes within the EU, and in particular of the jurisdiction of the Court of Justice in that respect, and thus precludes any prior or subsequent external control.

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[148] In this case the Commission sought a declaration by the Court that, by instituting dispute-settlement proceedings against the UK under the United Nations Convention on the Law of the Sea concerning the MOX plant located at Sellafield Ireland had breached its EU Treaty obligations. The Court stated that "he obligation of close cooperation within the framework of a mixed agreement involved, on the part of Ireland, a duty to inform and consult the competent Community institutions prior to instituting dispute-settlement proceedings concerning the MOX plant within the framework of the Convention."

211. Moreover, Article 1(b) of Protocol No 8 EU itself refers only to the mechanisms necessary to ensure that proceedings brought before the ECtHR by non-Member States are correctly addressed to Member States and/or to the EU as appropriate.
212. Consequently, the fact that Member States or the EU are able to submit an application to the ECtHR is liable in itself to undermine the objective of Article 344 TFEU and, moreover, goes against the very nature of EU law, which, as noted in paragraph 193 of this Opinion, requires that relations between the Member States be governed by EU law to the exclusion, if EU law so requires, of any other law.
213. In those circumstances, only the express exclusion of the ECtHR's jurisdiction under Article 33 of the ECHR over disputes between Member States or between Member States and the EU in relation to the application of the ECHR within the scope ratione materiae of EU law would be compatible with Article 344 TFEU.
214. In the light of the foregoing, it must be held that the agreement envisaged is liable to affect Article 344 TFEU.

c) The co-respondent mechanism
215. The co-respondent mechanism has been introduced, as is apparent from paragraph 39 of the draft explanatory report, in order to 'avoid gaps in participation, accountability and enforceability in the [ECHR] system', gaps which, owing to the specific characteristics of the EU, might result from its accession to the ECHR.
216. In addition, that mechanism also has the aim of ensuring that, in accordance with the requirements of Article 1(b) of Protocol No 8 EU, proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the EU as appropriate.
217. However, those objectives must be pursued in such a way as to be compatible with the requirement of ensuring that the specific characteristics of EU law are preserved, as required by Article 1 of that protocol.
218. Yet, first, Article 3(5) of the draft agreement provides that a Contracting Party is to become a co-respondent either by accepting an invitation from the ECtHR or by decision of the ECtHR upon the request of that Contracting Party.
219. When the ECtHR invites a Contracting Party to become co-respondent, that invitation is not binding, as is expressly stated in paragraph 53 of the draft explanatory report.
220. This lack of compulsion reflects not only, as paragraph 53 of the draft explanatory report indicates, the fact that the initial application has not been brought against the potential co-respondent and that no Contracting Party can be forced to become a party to a case where it was not named in the application initiating proceedings, but also, above all, the fact that the EU and Member States must remain free to assess whether the material conditions for applying the co-respondent mechanism are met.
221. Given that those conditions result, in essence, from the rules of EU law concerning the division of powers between the EU and its Member States and the criteria governing the attributability of an act or omission that may constitute a violation of the ECHR, the decision as to whether those conditions are met in a particular case necessarily presupposes an assessment of EU law.
222. While the draft agreement duly takes those considerations into account as regards the procedure in accordance with which the ECHR may invite a Contracting Party to become co-respondent, the same cannot be said in the case of a request to that effect from a Contracting Party.
223. As Article 3(5) of the draft agreement provides, if the EU or Member States request leave to intervene as co-respondents in a case before the ECtHR, they must give reasons from which it can

be established that the conditions for their participation in the procedure are met, and the ECtHR is to decide on that request in the light of the plausibility of those reasons.
224. Admittedly, in carrying out such a review, the ECtHR is to ascertain whether, in the light of those reasons, it is plausible that the conditions set out in paragraphs 2 and 3 of Article 3 are met, and that review does not relate to the merits of those reasons. However, the fact remains that, in carrying out that review, the ECtHR would be required to assess the rules of EU law governing the division of powers between the EU and its Member States as well as the criteria for the attribution of their acts or omissions, in order to adopt a final decision in that regard which would be binding both on the Member States and on the EU.
225. Such a review would be liable to interfere with the division of powers between the EU and its Member States.
226. Secondly, Article 3(7) of the draft agreement provides that if the violation in respect of which a Contracting Party is a co-respondent to the proceedings is established, the respondent and the co-respondent are to be jointly responsible for that violation.
227. That provision does not preclude a Member State from being held responsible, together with the EU, for the violation of a provision of the ECHR in respect of which that Member State may have made a reservation in accordance with Article 57 of the ECHR.
228. Such a consequence of Article 3(7) of the draft agreement is at odds with Article 2 of Protocol No 8 EU, according to which the accession agreement is to ensure that nothing therein affects the situation of Member States in relation to the ECHR, in particular in relation to reservations thereto.
229. Thirdly, there is provision at the end of Article 3(7) of the draft agreement for an exception to the general rule that the respondent and co-respondent are to be jointly responsible for a violation established. The ECtHR may decide, on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant, that only one of them is to be held responsible for that violation.
230. A decision on the apportionment as between the EU and its Member States of responsibility for an act or omission constituting a violation of the ECHR established by the ECtHR is also one that is based on an assessment of the rules of EU law governing the division of powers between the EU and its Member States and the attributability of that act or omission.
231. Accordingly, to permit the ECtHR to adopt such a decision would also risk adversely affecting the division of powers between the EU and its Member States.
232. That conclusion is not affected by the fact that the ECtHR would have to give its decision solely on the basis of the reasons given by the respondent and the co-respondent.
233. Contrary to the submissions of some of the Member States that participated in the present procedure and of the Commission, it is not clear from reading Article 3(7) of the draft agreement and paragraph 62 of the draft explanatory report that the reasons to be given by the respondent and co-respondent must be given by them jointly.
234. In any event, even it is assumed that a request for the apportionment of responsibility is based on an agreement between the co-respondent and the respondent, that in itself would not be sufficient to rule out any adverse effect on the autonomy of EU law. The question of the apportionment of responsibility must be resolved solely in accordance with the relevant rules of EU law and be subject to review, if necessary, by the Court of Justice, which has exclusive jurisdiction to ensure that any agreement between co-respondent and respondent respects those rules. To permit the ECtHR to confirm any agreement that may exist between the EU and its Member States on the sharing of responsibility would be tantamount to allowing it to take the place of the Court of Justice in order to settle a question that falls within the latter's exclusive jurisdiction.
235. Having regard to the foregoing, it must be held that the arrangements for the operation of the co-respondent mechanism laid down by the agreement envisaged do not ensure that the specific

characteristics of the EU and EU law are preserved.

d) The procedure for the prior involvement of the Court of Justice

236. It is true that the necessity for the procedure for the prior involvement of the Court of Justice is, as paragraph 65 of the draft explanatory report shows, linked to respect for the subsidiary nature of the control mechanism established by the ECHR, as referred to in paragraph 19 of this Opinion. Nevertheless, it should equally be noted that that procedure is also necessary for the purpose of ensuring the proper functioning of the judicial system of the EU.

237. In that context, the necessity for the prior involvement of the Court of Justice in a case brought before the ECtHR in which EU law is at issue satisfies the requirement that the competences of the EU and the powers of its institutions, notably the Court of Justice, be preserved, as required by Article 2 of Protocol No 8 EU.

238. Accordingly, to that end it is necessary, in the first place, for the question whether the Court of Justice has already given a ruling on the same question of law as that at issue in the proceedings before the ECtHR to be resolved only by the competent EU institution, whose decision should bind the ECtHR.

239. To permit the ECtHR to rule on such a question would be tantamount to conferring on it jurisdiction to interpret the case-law of the Court of Justice.

240. Yet neither Article 3(6) of the draft agreement nor paragraphs 65 and 66 of the draft explanatory report contain anything to suggest that that possibility is excluded.

241. Consequently, the prior involvement procedure should be set up in such a way as to ensure that, in any case pending before the ECtHR, the EU is fully and systematically informed, so that the competent EU institution is able to assess whether the Court of Justice has already given a ruling on the question at issue in that case and, if it has not, to arrange for the prior involvement procedure to be initiated.

242. In the second place, it should be noted that the procedure described in Article 3(6) of the draft agreement is intended to enable the Court of Justice to examine the compatibility of the provision of EU law concerned with the relevant rights guaranteed by the ECHR or by the protocols to which the EU may have acceded. Paragraph 66 of the draft explanatory report explains that the words '[a]ssessing the compatibility of the provision' mean, in essence, to rule on the validity of a legal provision contained in secondary law or on the interpretation of a provision of primary law.

243. It follows from this that the agreement envisaged excludes the possibility of bringing a matter before the Court of Justice in order for it to rule on a question of interpretation of secondary law by means of the prior involvement procedure.

244. However, it must be noted that, just as the prior interpretation of primary law is necessary in order for the Court of Justice to be able to rule on whether that law is consistent with the EU's commitments resulting from its accession to the ECHR, it should be possible for secondary law to be subject to such interpretation for the same purpose.

245. The interpretation of a provision of EU law, including of secondary law, requires, in principle, a decision of the Court of Justice where that provision is open to more than one plausible interpretation.

246. If the Court of Justice were not allowed to provide the definitive interpretation of secondary law, and if the ECtHR, in considering whether that law is consistent with the ECHR, had itself to provide a particular interpretation from among the plausible options, there would most certainly be a breach of the principle that the Court of Justice has exclusive jurisdiction over the definitive interpretation of EU law.

247. Accordingly, limiting the scope of the prior involvement procedure, in the case of secondary law, solely to questions of validity adversely affects the competences of the EU and the powers of

the Court of Justice in that it does not allow the Court to provide a definitive interpretation of secondary law in the light of the rights guaranteed by the ECHR.
248. Having regard to the foregoing, it must be held that the arrangements for the operation of the procedure for the prior involvement of the Court of Justice provided for by the agreement envisaged do not enable the specific characteristics of the EU and EU law to be preserved.

e) The specific characteristics of EU law as regards judicial review in CFSP matters
249. It is evident from the second subparagraph of Article 24(1) TEU that, as regards the provisions of the Treaties that govern the CFSP, the Court of Justice has jurisdiction only to monitor compliance with Article 40 TEU and to review the legality of certain decisions as provided for by the second paragraph of Article 275 TFEU.
250. According to the latter provision, the Court of Justice is to have jurisdiction, in particular, to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 TFEU, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the EU Treaty.
251. Notwithstanding the Commission's systematic interpretation of those provisions in its request for an Opinion — with which some of the Member States that submitted observations to the Court have taken issue — essentially seeking to define the scope of the Court's judicial review in this area as being sufficiently broad to encompass any situation that could be covered by an application to the ECtHR, it must be noted that the Court has not yet had the opportunity to define the extent to which its jurisdiction is limited in CFSP matters as a result of those provisions.
252. However, for the purpose of adopting a position on the present request for an Opinion, it is sufficient to declare that, as EU law now stands, certain acts adopted in the context of the CFSP fall outside the ambit of judicial review by the Court of Justice.
253. That situation is inherent to the way in which the Court's powers are structured by the Treaties, and, as such, can only be explained by reference to EU law alone.
254. Nevertheless, on the basis of accession as provided for by the agreement envisaged, the ECtHR would be empowered to rule on the compatibility with the ECHR of certain acts, actions or omissions performed in the context of the CFSP, and notably of those whose legality the Court of Justice cannot, for want of jurisdiction, review in the light of fundamental rights.
255. Such a situation would effectively entrust the judicial review of those acts, actions or omissions on the part of the EU exclusively to a non-EU body, albeit that any such review would be limited to compliance with the rights guaranteed by the ECHR.
256. The Court has already had occasion to find that jurisdiction to carry out a judicial review of acts, actions or omissions on the part of the EU, including in the light of fundamental rights, cannot be conferred exclusively on an international court which is outside the institutional and judicial framework of the EU..
257. Therefore, although that is a consequence of the way in which the Court's powers are structured at present, the fact remains that the agreement envisaged fails to have regard to the specific characteristics of EU law with regard to the judicial review of acts, actions or omissions on the part of the EU in CFSP matters.
**258. In the light of all the foregoing considerations, it must be held that the agreement envisaged is not compatible with Article 6(2) TEU or with Protocol No 8 EU in that:**
**– it is liable adversely to affect the specific characteristics and the autonomy of EU law in so far it does not ensure coordination between Article 53 of the ECHR and Article 53 of the Charter, does not avert the risk that the principle of Member States' mutual trust under EU law may be undermined, and makes no provision in respect of the relationship between the**

**mechanism established by Protocol No 16 and the preliminary ruling procedure provided for in Article 267 TFEU;**
**– it is liable to affect Article 344 TFEU in so far as it does not preclude the possibility of disputes between Member States or between Member States and the EU concerning the application of the ECHR within the scope ratione materiae of EU law being brought before the ECtHR;**

**– it does not lay down arrangements for the operation of the co-respondent mechanism and the procedure for the prior involvement of the Court of Justice that enable the specific characteristics of the EU and EU law to be preserved; and**
**– it fails to have regard to the specific characteristics of EU law with regard to the judicial review of acts, actions or omissions on the part of the EU in CFSP matters in that it entrusts the judicial review of some of those acts, actions or omissions exclusively to a non-EU body.**

**Consequently, the Court (Full Court) gives the following Opinion:**
**The agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms is not compatible with Article 6(2) TEU or with Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms**.

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. When they met in summit meetings they were described as the European Council. Under the Lisbon Treaty the European Council is part of the EU's formal institutional framework and it is subject to the jurisdiction of the Court of Justice.

### 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. A MULTI-LINGUAL COMMUNITY

The EU has chosen to be a multi-lingual community.[149] 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. The EU has 24 official languages,[150] and even some unofficial languages.[151]

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

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[149] *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).

[150] *See* http://europa.eu/pol/mult/index_en.htm.

[151] *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.

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 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.[152]

In practice the institutions rely on some languages more than on others. Major documents such as Green and White Papers[153] 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:

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.[154]

In order to deal with the increased translation burden associated with enlargement, Commission departments were instructed to draft shorter documents.[155] 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.[156]

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[152] 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.

[153] 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.

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

[155] 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).")

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

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, although EU English is sometimes odd.[157]

## 5. 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.[158]

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

Harry Arthurs 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.[159]

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

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[157] *See, e.g.*, European Court of Auditors, Secretariat General Translation Directorate, Misused English Words and Expressions in EU Publications (Sept. 2013)

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

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

initially in a Treaty and now in a Regulation.[160] 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.[161] Another regulation addresses the question of what law applies to non-contractual obligations.[162]

In the last few years the EU has been discussing whether and how to harmonize rules of contract law. For many years the EU has been working on harmonizing consumer protection rules, and this harmonization has affected national contract laws. But there is not as yet a comprehensive code of EU contract law. Some people have argued 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. In late 2011 the Commission put forward a proposal for a European Sales Law.[163] The Explanatory Memorandum stated:

Differences in contract law between Member States hinder traders and consumers who want to engage in cross-border trade within the internal market. The obstacles which stem from these differences dissuade traders, small and medium-sized enterprises (SME) in particular, from entering cross border trade or expanding to new Member States' markets. Consumers are hindered from accessing products offered by traders in other Member States.
Currently, only one in ten of Union traders, involved in the sale of goods, exports within the Union and the majority of those who do only export to a small number of Member States. Contract law related barriers are one of the major factors contributing to this situation. Surveys show that out of the range of obstacles to cross-border trade including tax regulations, administrative requirements, difficulties in delivery, language and culture, traders ranked contract-law-related obstacles among the top barriers to cross-border trade.
The need for traders to adapt to the different national contract laws that may apply in crossborder dealings makes cross-border trade more complex and costly compared to domestic trade, both for business-to-consumer and for business-to-business transactions.
Additional transaction costs compared to domestic trade usually occur for traders in crossborder situations. They include the difficulty in finding out about the provisions of an applicable foreign

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[160] 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).

[161] 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) The original proposal for a regulation to take the place of an earlier treaty was in COM(2005) 650 final (Dec. 15, 2005).

[162] 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).

[163] Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law COM(2011) 635 (Oct. 11,2011).

contract law, obtaining legal advice, negotiating the applicable law in business-to-business transactions and adapting contracts to the requirements of the consumer's law in business-to-consumer transactions.

In cross-border transactions between a business and a consumer, contract law related transaction costs and legal obstacles stemming from differences between different national mandatory consumer protection rules have a significant impact. Pursuant to Article 6 of Regulation 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I),2 whenever a business directs its activities to consumers in another Member State, it has to comply with the contract law of that Member State. In cases where another applicable law has been chosen by the parties and where the mandatory consumer protection provisions of the Member State of the consumer provide a higher level of protection, these mandatory rules of the consumer's law need to be respected. Traders therefore need to find out in advance whether the law of the Member State of the consumer's habitual residence provides a higher level of protection and ensure that their contract is in compliance with its requirements. The existing harmonisation of consumer law at Union level has led to a certain approximation in some areas but the differences between Member States' laws remain substantial. In e-commerce transactions, traders incur further contract law related costs which stem from the need to adapt the business's website to the legal requirements of each Member State where they direct their activity.

In cross-border transactions between traders, parties are not subject to the same restrictions on the applicable law. However, the economic impact of negotiating and applying a foreign law is also high. The costs resulting from dealings with various national laws are burdensome particularly for SME. In their relations with larger companies, SME generally have to agree to apply the law of their business partner and bear the costs of finding out about the content of the foreign law applicable to the contract and of complying with it. In contracts between SME, the need to negotiate the applicable law is a significant obstacle to cross-border trade. For both types of contracts (business-to-business and business-to-consumer) for SME, these additional transaction costs may even be disproportionate to the value of the transaction.

These additional transaction costs grow proportionately to the number of Member States into which a trader exports. Indeed, the more countries they export to, the greater the importance traders attach to differences in contract law as a barrier to trade. SME are particularly disadvantaged: the smaller a company's turnover, the greater the share of transaction costs.

Traders are also exposed to increased legal complexity in cross-border trade, compared to domestic trade, as they often have to deal with multiple national contract laws with differing characteristics.

Dealing with foreign laws adds complexity to cross-border transactions. Traders ranked the difficulty in finding out the provisions of a foreign contract law first among the obstacles to business-to-consumer transactions and third for business-to-business transactions. Legal complexity is higher when trading with a country whose legal system is fundamentally different while it has been demonstrated empirically that bilateral trade between countries which have a legal system based on a common origin is much higher than trade between two countries without this commonality.

Thus, differences in contract law and the additional transaction costs and complexity that they generate in cross-border transactions dissuade a considerable number of traders, in particular SME, from expanding into markets of other Member States. These differences also have the effect of limiting competition in the internal market. The value of the trade foregone each year between Member States due to differences in contract law alone amounts to tens of billions of Euros.

The missed opportunities for cross-border trade also have a negative impact upon European consumers. Less cross-border trade, results in fewer imports and less competitiveness between

traders. This can lead to a more limited choice of products at a higher price in the consumer's market.
While cross-border shopping could bring substantial economic advantages of more and better offers, the majority of European consumers shop only domestically. One of the important reasons for this situation is that, because of the differences of national laws consumers are often uncertain about their rights in cross-border situations. For example, one of their main concerns is what remedies they have when a product purchased from another Member State is not in conformity with the contract. Many consumers are therefore discouraged to purchase outside their domestic market. They miss out on opportunities in the internal market, since better offers in terms of quality and price can often be found in another Member State.
E-commerce facilitates the search for offers as well as the comparison of prices and other conditions irrespective of where a trader is established. However, when consumers try to place orders with a business from another Member State, they are often faced with the business practice of refusal to sell which is often due to differences in contract law.
The overall objective of the proposal is to improve the establishment and the functioning of the internal market by facilitating the expansion of cross-border trade for business and crossborder purchases for consumers. This objective can be achieved by making available a selfstanding uniform set of contract law rules including provisions to protect consumers, the Common European Sales Law, which is to be considered as a second contract law regime within the national law of each Member State.
Traders should be able to apply the Common European Sales Law in all their cross-border dealings within the European Union instead of having to adapt to different national contract laws, provided that the other party to the contract agrees. It should cover the full life cycle of a contract and thus comprise most of the areas which are relevant when concluding crossborder contracts. As a result, the need for traders to find out about the national laws of other Member States would be limited to only some, much less important, matters which are not covered by the Common European Sales Law. In business-to-consumer transactions there would be no further need to identify the mandatory consumer protection provisions in the consumer's law, since the Common European Sales Law would contain fully harmonised consumer protection rules providing for a high standard of protection throughout the whole of the European Union. In cross-border transactions between traders, negotiations about the applicable law could run more smoothly, as the contracting parties would have the opportunity to agree on the use of the Common European Sales Law – equally accessible to both of them – to govern their contractual relationship.
As a direct consequence, traders could save on the additional contract law related transaction costs and could operate in a less complex legal environment for cross-border trade on the basis of a single set of rules across the European Union. Thus, traders would be able to take better advantage of the internal market by expanding their trade across borders and, consequently, competition in the internal market would increase. Consumers would benefit from better access to offers from across the European Union at lower prices and would face fewer refusals of sales. They would also enjoy more certainty about their rights when shopping cross-border on the basis of a single set of mandatory rules which offer a high level of consumer protection.

The proposal was controversial, and was described as complex and not readily understandable.[164] The UK's House of Commons decided to send to the Presidents of the

[164] Law Commission and Scottish Law Commission, An Optional Common European Sales Law: Advantages and Problems. Advice to the UK Government, v (Nov. 2011)("The

Council, the European Parliament and the Commission a Reasoned Opinion stating that the Draft Regulation did not comply with the principle of subsidiarity. In 2015 the Commission abandoned the proposal and focused instead on contract law barriers to the sale of goods and digital content across the EU.[165]

Do you think that a body such as the EU should have 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?

There are international initiatives for harmonizing contract law, such as the United Nations Convention on the International Sale of Goods,[166] and the Unidroit Principles for International Commercial Contracts.[167] Would it be more sensible for the EU to focus on working through groups such as UNCITRAL[168] 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 directives have allowed Member States to impose their own rules if they are stricter than the requirements of the directive, but this is sometimes not possible.

In the US, business organization laws mix elements of state and federal regulation,

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European Commission's draft is a complex document, which is not always easy to understand.")

[165] Public Consultation on Contract Rules for Online Purchases of Digital Content and Tangible Goods (Sep. 3, 2015) at http://ec.europa.eu/justice/newsroom/contract/opinion/150609_en.htm .

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

[167] See http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010. Unidroit is an intergovernmental organization originally established under the League of Nations to work on unifying private law.

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

and of the sort of harmonization processes that produce the UCC.[169] 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.[170]

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



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

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