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FOREWORD

The legal order created by the European Union (EU) has become an established component of our political life and society. Each year, on the basis of the EU treaties, thousands of decisions are taken that crucially affect the EU Member States and the lives of their citizens. Individuals have long since ceased to be merely citizens of their country, town or district; they are also EU citizens. For this reason alone, it is of crucial importance that they should be informed about the legal order that affects their daily lives. Yet the complexities of the EU's structure and its legal order are not easy to grasp. This is partly due to the wording of the treaties themselves, which is often somewhat obscure, with implications which are not easy to appreciate. An additional factor is the unfamiliarity of many concepts with which the treaties seek to master new situations. The following pages are thus an attempt to provide interested citizens with an initial insight into the structure of the EU and the supporting pillars of the European legal order. Although the basic structure of the EU – and its legal order, which is of particular interest here – is very stable, it nevertheless undergoes countless changes on a greater or lesser scale, for example the consequences of the United Kingdom's withdrawal from the EU. This edition of *The ABC of EU Law* covers all key developments in the EU's legal order up to 2023.

GLOSSARY OF ABBREVIATIONS

ACP	Africa, the Caribbean and the Pacific
EC	European Community
ECB	European Central Bank
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)
ECR	European Court Reports
ECSC	European Coal and Steel Community
EC Treaty	Treaty establishing the European Community
EEC	European Economic Community
EESC	European Economic and Social Committee
EPPO	European Public Prosecutor's Office
ESM	European Stability Mechanism
EU	European Union
EU Treaty / TEU	Treaty on European Union
Euratom	European Atomic Energy Community
MEP	Member of the European Parliament
NATO	North Atlantic Treaty Organisation
OECD	Organisation for Economic Co-operation and Development
OEEC	Organisation for European Economic Cooperation
OSCE	Organisation for Security and Cooperation in Europe
SAP	stabilisation and association process
TFEU	Treaty on the Functioning of the European Union

TIMELINE

26 June 1945: Signing of the United Nations Charter in San Francisco

9 September 1946: Speech by Winston Churchill in Zurich on the benefits of the United States of Europe

17 March 1948: Signing of the Treaty establishing the Western European Union in Brussels

4 April 1949: Signing of the North Atlantic Treaty establishing NATO in Washington

16 April 1949: Establishment of the Organisation for European Economic Cooperation in Paris

5 May 1949: Signing of the Treaty establishing the Council of Europe in Strasbourg

9 May 1950: Declaration by Robert Schuman on the creation of the European Coal and Steel Community as the first stage in establishing a European Federation

4 November 1950: Signing of the European Convention on the Protection of Human Rights and Fundamental Freedoms in Rome

18 April 1951: Signing of the Treaty establishing the European Coal and Steel Community (ECSC Treaty) in Paris by Belgium, West Germany, France, Italy, Luxembourg and the Netherlands – to run for 50 years

23 July 1952: Entry into force of the ECSC Treaty

1 June 1955: Conference of Foreign Ministers at Messina to prepare for the EEC Treaty

25 March 1957: Signing of the Treaties establishing the European Economic Community (EEC Treaty) and the European Atomic Energy Community (EAEC Treaty / Euratom Treaty) in Rome by Belgium, West Germany, France, Italy, Luxembourg and the Netherlands (Treaties of Rome)

1 January 1958: Entry into force of the Treaties of Rome

4 January 1960: Establishment of the European Free Trade Association in Stockholm by Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the United Kingdom

14 December 1960: Signing of the Convention on the Organisation for Economic Co-operation and Development in Paris

8 April 1965: Signing of the Treaty establishing a single Council and single Commission of the European Communities (Merger Treaty)

1 July 1967: Entry into force of the Merger Treaty

1 January 1973: Denmark, Ireland and the United Kingdom accede to the European Communities

1 August 1975: Signing of the Final Act of the Conference on Security and Cooperation in Europe in Helsinki

18 December 1978: Establishment of the European Monetary System

7–10 June 1979: First direct election of the European Parliament

1 January 1981: Accession of Greece to the European Communities

1 January 1985: Withdrawal of Greenland from the European Economic Community

14 June 1985: Schengen Agreement between Belgium, France, West Germany, Luxembourg and the Netherlands on the gradual abolition of common border controls

1 January 1986: Accession of Portugal and Spain to the European Communities

1 July 1987: Inception of the Single European Act

3 October 1990: Accession of East Germany to the Federal Republic of Germany and integration into the European Communities

7 February 1992: Signing of the Treaty on European Union (Maastricht Treaty) in Maastricht

2 May 1992: Signing of the Agreement on the European Economic Area (EEA Agreement) in Porto

1 January 1993: Inception of the European single market

1 November 1993: Entry into force of the Treaty on European Union (Maastricht Treaty)

1 January 1994: Entry into force of the EEA Agreement

1 January 1995: Accession of Austria, Finland and Sweden to the European Union

1 March 1995: Entry into force of the Schengen Convention (additional members up to March 2001: Denmark, Greece, Spain, Italy, Austria, Portugal, Finland and Sweden)

16 July 1997: Publication of the European Commission's Agenda 2000 programme aimed at enlarging the EU

2 October 1997: Signing of the Treaty of Amsterdam

12 December 1997: Start of the European Union enlargement process by the European Council in Luxembourg

1 October 1998: Entry into force of the Europol Convention (police cooperation in the EU)

1 January 1999: Introduction of the single European currency, the 'euro'

1 May 1999: : Entry into force of the Treaty of Amsterdam

24 March 2000: Adoption of the Lisbon strategy for the economic, social and environmental renewal of the EU

8 December 2000: Solemn proclamation of the Charter of Fundamental Rights of the European Union

26 February 2001: Signing of the Treaty of Nice

1 January 2002: Introduction of euro banknotes and coins as a means of payment

28 February 2002: Establishment of Eurojust (since 2019, the European Union Agency for Criminal Justice Cooperation)

1 February 2003: Entry into force of the Treaty of Nice

1 May 2004: Accession of Czechia, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia, and Slovakia to the EU

29 October 2004: Signing of the Treaty establishing a Constitution for Europe

May/June 2005: Rejection of the Treaty establishing a Constitution for Europe in referenda in France (54.7 % vote no) and the Netherlands (61.7 % vote no)

1 January 2007: Accession of Bulgaria and Romania to the EU

1 January 2007: Introduction of the euro in Slovenia

1 March 2007: Establishment of the European Union Agency for Fundamental Rights

12 December 2007: Solemn proclamation of the Charter of Fundamental Rights by the European Parliament, the Council of the European Union and the European Commission in Strasbourg

13 December 2007: Signing of the Treaty of Lisbon

21 December 2007: Entry of Czechia, Estonia, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia to the Schengen Area

1 January 2008: Introduction of the euro in Cyprus and Malta

12 June 2008: First referendum in Ireland on the Treaty of Lisbon (53.4 % vote no)

12 December 2008: Entry of Switzerland to the Schengen Area

1 January 2009: Introduction of the euro in Slovakia

2 October 2009: Second referendum in Ireland on the Treaty of Lisbon (67.1 % vote yes)

1 December 2009: Entry into force of the Treaty of Lisbon

1 December 2009: First President of the European Council (Herman Van Rompuy); first High Representative of the Union for Foreign Affairs and Security Policy (Baroness Catherine Ashton)

21 June 2010: : Creation of the European External Action Service

1 January 2011: Introduction of the euro in Estonia

1 January 2011: Launch of the European Financial Supervisory Authority

25 March 2011: Adoption of the Euro Plus Pact for economic policy coordination in the economic and monetary union

19 December 2011: Entry of Liechtenstein to the Schengen Area

30 January 2012: Agreement by 25 Member States of a Treaty on Stability, Coordination and Governance in the economic and monetary union

2 February 2012: Signing of the Treaty establishing the European Stability Mechanism

1 July 2013: : Accession of Croatia to the EU

1 January 2014: Introduction of the euro in Latvia

18 September 2014: Referendum on Scottish independence: 55.3 % vote no, 44.7 % vote yes

1 January 2015: Introduction of the euro in Lithuania

12 March 2015: Formal withdrawal of Iceland's application for EU membership

23 June 2016: Exit referendum in the United Kingdom (51.9 % vote to leave)

30 December 2016: Entry into force of the Paris Climate Change Agreement by the EU after ratification by the Member States

29 March 2017: Formal notice by Prime Minister Theresa May of the United Kingdom's intention to leave the EU

31 January 2020: Withdrawal of the United Kingdom from the EU after 47 years of membership

9 May 2020: : 70-year anniversary of the Schuman Declaration

1 January 2021 : The United Kingdom withdraws from the EU's internal market and customs union and from all EU policies and trade agreements after the end of the transition period. They are replaced by the Trade and Cooperation Agreement between the EU and the United Kingdom

10 March 2021: Signature of the Joint Declaration by the EP, the Council and the Commission on the Conference on the Future of Europe

28 June 2021: The EU adopts its first Climate Law

1 January 2023: Introduction of the euro in Croatia (20th member of the euro area)

1 January 2023: Entry of Croatia to the Schengen area

FROM PARIS TO LISBON VIA ROME, MAASTRICHT, AMSTERDAM AND NICE

Until shortly after the end of the Second World War, our concept of the state and our political life had developed almost entirely based on national constitutions and laws. It was on this basis that the rules of conduct, binding not only on citizens and parties in our democratic states but also on the state and its organs, were created. It took the complete collapse of Europe and its political and economic decline to create the conditions for a new beginning and give a fresh impetus to the idea of a new European order.

In overall terms, moves towards unification in Europe since the Second World War have created a confusing mixture of complex organisations that are difficult to keep track of. For example, the Organisation for Economic Co-operation and Development (OECD), the North Atlantic Treaty Organisation (NATO), the Council of Europe and the European Union coexist without any real links between them.

This variety of organisations only acquires a logical structure if we look at their specific aims. They can be divided into three main groups.

First group: the Euro-Atlantic organisations

The Euro-Atlantic organisations came into being as a result of the alliance between the United States and Europe after the Second World War. It was no coincidence that the first European organisation of the post-war period, the Organisation for European Economic Cooperation (OEEC), founded in 1948, was created at the initiative of the United States. The US Secretary of State at the time, George Marshall, called on the countries of Europe in 1947 to join forces in rebuilding their economies and promised American help. This came in the form of the Marshall Plan, which provided the foundation for the rapid reconstruction of western Europe. At first, the main aim of the OEEC was to liberalise trade between countries. In 1960, when Canada and the United States became members, a further objective was added, namely

Paul-Henri Spaak, Belgian Minister for Foreign Affairs, signs the treaty merging the executives of the three Communities (ECSC, EEC, Euratom), Brussels, Belgium, 8 April 1965. The treaty established a single Council and a single Commission of the European Communities.

to promote economic progress in the Third World through development aid. The OEEC then became the OECD, which now has 38 members.

In 1949, NATO was founded as a military alliance with Canada and the United States. The aim of NATO is collective defence and collective support. It was conceived as part of a global security belt to stem Soviet influence. Following the fall of the Iron Curtain in 1989 and the subsequent dissolution of the Soviet Union, the organisation has increasingly taken on the tasks of crisis management and promoting stability. NATO has 31 member countries, consisting of 22 EU Member States (not including Ireland, Cyprus, Malta, Austria and Sweden) and Albania, Canada, Iceland, Montenegro, North Macedonia, Norway, Türkiye, the United Kingdom and the United States. In 1954, the Western European Union (WEU) was created to strengthen security policy cooperation between the countries of Europe. The WEU marked the beginnings of a security and defence policy in Europe. However, its role has not developed further, and the majority of its powers have been transferred to other international institutions, notably NATO, the Council of Europe and the EU. Consequently, the WEU was dissolved on 30 June 2011.

Second group: Council of Europe and Organisation for Security and Cooperation in Europe

The feature common to the second group of European organisations is that they are structured to enable as many countries as possible to participate. At the same time, there was an awareness that these organisations would not go beyond **customary international cooperation**.

These organisations include the **Council of Europe**, which was founded as a political institution on 5 May 1949 and now has 46 members, including all the current EU Member States. Its statute does not make any reference to moves towards a federation or union, nor does it provide for the transfer or merging of sovereign rights. Decisions on all important questions require unanimity, which means that every country has a power of veto. The Council of Europe is therefore designed only with international cooperation in mind.

Numerous conventions have been concluded by the Council of Europe in the fields of economics, culture, social policy and law. The most important – and best known – of these is the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 4 November 1950; all 46 members of the Council are now party to the convention. The ECHR

The Schuman Declaration on 9 May 1950 in the clock room of the French Foreign Ministry on the Quai d'Orsay in Paris: the French Foreign Minister Robert Schuman proposed that the European coal and steel industry be pooled to create the European Coal and Steel Community. It was thought that this would make war between the participating countries not merely unthinkable, but materially impossible.

not only enabled a minimum standard for the safeguarding of human rights to be laid down for the member countries; it also established a system of legal protection that enables the bodies established in Strasbourg under the convention (the European Commission on Human Rights and the European Court of Human Rights) to condemn violations of human rights in the member countries.

This group of organisations also includes the **Organisation for Security and Cooperation in Europe (OSCE)**, founded in 1994 as the successor to the Conference on Security and Cooperation in Europe. The OSCE, which currently has 57 participating states, is bound by the principles and aims set out in the 1975 Helsinki Final Act and the 1990 Charter of Paris. Alongside measures to build up trust between the countries of Europe, these aims also include the creation of a 'safety net' to enable conflicts to be settled by peaceful means.

Third group: European Union

The third group of European organisations comprises the European Union (EU). The feature that is completely new in the EU and distinguishes it from the usual type of international association of states is that the Member States have ceded some of their sovereign rights to the EU and have conferred on it powers to act independently. In exercising these powers, the EU is able to adopt European legislation that has the same force as national laws in individual states.

The foundation stone of the EU was laid by the then French Foreign Minister Robert Schuman in his declaration of 9 May 1950, in which he put forward the plan he had worked out with Jean Monnet to bring Europe's coal and steel industries together to form a European Coal and Steel Community (ECSC). This would, he declared, constitute a historic initiative for an 'organised and vital Europe', which was 'indispensable for civilisation' and without which the 'peace of the world could not be maintained'.

The 'Schuman Plan' finally became a reality with the conclusion of the founding treaty of the ECSC by the six founding states (Belgium, Germany, France, Italy, Luxembourg and the Netherlands) on 18 April 1951 in Paris (Treaty of Paris) and its entry into force on 23 July 1952. This Community was established for a period of 50 years, and was 'integrated' into the European Community when its founding treaty expired (on 23 July 2002). Some

years later, there was a further development with the Treaties of Rome of 25 March 1957, which created the **European Economic Community (EEC)** and the **European Atomic Energy Community (Euratom)**; these took up their activities when the treaties entered into force on 1 January 1958.

The creation of the European Union by means of the Treaty of Maastricht marked a further step along the path to the political unification of Europe. Although the treaty was signed in Maastricht on 7 February 1992, a number of obstacles in the ratification process (approval by the people of Denmark only after a second referendum; legal action in Germany to have its parliament's approval of the treaty declared unconstitutional) meant that it did not enter into force until 1 November 1993. The treaty referred to itself as 'a new stage in the process of creating an ever closer union among the peoples of Europe'. It contained the instrument establishing the European Union, although it did not bring this process to completion. The European Union did not replace the European Communities, but instead placed them under the same umbrella as the new policies and forms of cooperation. Hence the 'three pillars' upon which the EU is built. The first pillar consisted of the European Communities: the EEC (renamed the EC), the ECSC (until 2002) and Euratom. The second pillar consisted of cooperation between the Member States under the common foreign and security policy. The third pillar covered cooperation between the Member States in the fields of justice and home affairs.

Further development came in the form of the Treaties of Amsterdam and Nice, which entered into force on 1 May 1999 and 1 February 2003, respectively. The aim of these reforms was to preserve the capacity for effective action even in an EU enlarged by a sizeable number of new members. The two treaties therefore focused on institutional reforms. Compared with previous reforms, the political will to deepen European integration was relatively weak.

The subsequent criticism from several quarters resulted in the start of a debate on the future of the EU and its institutional set-up. As a result, on 5 December 2001 in Laeken (Belgium), the Heads of State or Government adopted a Declaration on the Future of the European Union, in which the EU undertook to become more democratic, transparent and effective and to open the road to a constitution. The first step to achieving this goal was taken by setting up a European convention, chaired by the former President of France, **Valéry Giscard d'Estaing**, with the remit of drafting a European constitution. The draft of the Treaty establishing a Constitution for Europe

drawn up by the convention was officially submitted to the President of the European Council on 18 July 2003 and adopted, with various amendments, by the Heads of State or Government on 17 and 18 July 2004 in Brussels.

The constitution was intended to turn the European Union and the European Community as we knew them into a new, single European Union that would be based on a single constitutional treaty. Only the European Atomic Energy Community would continue to exist as a separate community – although it would continue to be closely associated with the new European Union. However, this attempt at a constitution failed in the ratification process carried out by the Member States. After the initial votes in favour in 13 of the then 25 Member States, the treaty was rejected in referendums in France (54.7 % against, from a turnout of 69.3 %) and the Netherlands (61.7 % against, from a turnout of 63 %).

Following a period of reflection of almost 2 years, a new package of reforms was launched in the first half of 2007. This reform package represented a formal move away from the idea of a European constitution under which all existing treaties would be revoked and replaced by a single text called the Treaty establishing a Constitution for Europe. Instead, a Reform Treaty was drawn up, which, like the Treaties of Maastricht, Amsterdam and Nice before it, made fundamental changes to the existing EU treaties in order to strengthen the EU's capacity to act within and outside the Union, increase its democratic legitimacy and enhance the efficiency of EU action overall. In line with tradition, this Reform Treaty was named after the place where it was signed: the Treaty of Lisbon. The treaty was drafted unusually quickly, chiefly due to the fact that the Heads of State or Government themselves set out in detail, in the conclusions of the meeting of the European Council of 21 and 22 June 2007 in Brussels, how and to what extent the changes negotiated for the Reform Treaty were to be incorporated into the existing treaties. Their approach was unusual in that they did not limit themselves to general directions to be implemented by an intergovernmental conference, but themselves drew up the structure and content of the changes to be made, and often set out the exact wording of a provision.

The main points of contention were the delimitation of competences between the EU and the Member States, the future of the common foreign and security policy, the new role of the national parliaments in the integration process, the incorporation of the Charter of Fundamental Rights of the European Union into EU law and possible progress in the area of police and judicial cooperation in criminal matters. As a result, the intergovernmental

conference convened in 2007 had little room for manoeuvre and was only empowered to implement the required changes technically. The work of the conference was completed by 18 and 19 October 2007 and obtained the political approval of the European Council, which was meeting informally in Lisbon at the same time.

Finally, the treaty was formally signed by the Heads of State or Government of the then 27 EU Member States (Croatia did not join the EU until 2013) on 13 December 2007 in Lisbon. However, the ratification process for this treaty also proved extremely difficult. Although the Treaty of Lisbon, unlike the Treaty establishing a Constitution for Europe, was successfully ratified in France and the Netherlands, it initially fell at the hurdle of a first referendum in Ireland on 12 June 2008 (53.4 % against, from a turnout of 53.1 %). Only after a number of legal assurances were given on the (limited) scope of the new treaty were Irish citizens called to vote in a second referendum on the treaty in October 2009. This time it received the broad support of the Irish population (67.1 % in favour, from a turnout of 59 %). The success of the referendum in Ireland also opened the way for ratification of the Treaty of Lisbon in Poland and Czechia. In Poland, President Kaczyński had made signature of the instrument of ratification dependent on a favourable outcome in the Irish referendum. The Czech President, Václav Klaus, also initially wanted to wait for the Irish referendum, but then made his signature of the instrument of ratification additionally dependent on a guarantee that the 'Beneš decrees' of 1945, which disallowed claims to land in areas of Czechia that were formerly German, would remain unaffected by the Treaty of Lisbon, and in particular the Charter of Fundamental Rights incorporated into the EU Treaty. Once a solution had been found to this demand, Klaus signed the instrument of ratification on 3 November 2009. Thus, the ratification process was successfully completed, and the Treaty of Lisbon could enter into force on 1 December 2009.

The Treaty of Lisbon merged the European Union and the European Community into a single **European Union**. The word 'Community' was replaced throughout by the word 'Union'. The European Union replaced and succeeded the European Community. However, EU law is still shaped by the following **three treaties**.

EU treaties currently in force

TREATY ON EUROPEAN UNION

The Treaty on European Union (EU Treaty /TEU) is divided into the following six titles: (I) Common provisions, (II) Provisions on democratic principles, (III) Provisions on the institutions, (IV) Provisions on enhanced cooperation, (V) General provisions on the Union's external action and specific provisions on the common foreign and security policy and (VI) Final provisions.

TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION

The Treaty on the Functioning of the European Union (TFEU) was developed from the Treaty establishing the European Community (EC Treaty). It has more or less the same structure as that treaty. The main changes concern the external action of the EU and the introduction of new chapters, in particular on energy policy, police and judicial cooperation in criminal matters, astronautics, and sport and tourism.

TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY

The Treaty establishing the European Atomic Energy Community (Euratom Treaty) has been amended at various stages. In each case, the specific amendments have been made in protocols annexed to the Treaty of Lisbon.

The EU Treaty and the TFEU have the **same legal standing** and neither is superior or subordinate to the other. This explicit legal clarification is necessary, since the levels of regulation in both treaties and the new title of the former EC Treaty (Treaty on the Functioning of the European Union) give the impression that the EU Treaty is a sort of constitution or basic treaty, whilst the TFEU is intended as an implementing treaty. The EU Treaty and the TFEU are not formally constitutional in nature either. The terms used in the treaties overall reflect this change of approach from the former draft constitution: the expression 'constitution' is no longer used; the 'EU foreign minister' is referred to as the 'High Representative of the Union for Foreign Affairs and Security Policy'; and the definitions of 'law' and 'framework law' have been abandoned. The amended treaties also contain no articles referring to the symbols of the EU, such as the flag or anthem. The primacy of EU law is not explicitly laid down in a treaty, but is derived, as before, from a declaration that refers to the case-law of the Court of Justice of the European Union that is relevant to the question of primacy.

The Treaty of Lisbon also abandons the EU's 'three pillars'. However, the special procedures relating to the common foreign and security policy, including European defence, remain in force – the intergovernmental conference declarations attached to the treaty underline the special nature of this policy area and the particular responsibilities of the Member States in this respect.

EU membership

Following the withdrawal of the United Kingdom, the EU currently has 27 Member States. These comprise first of all the six founder members of the EEC, namely **Belgium**, **Germany** (including the territory of the former East Germany following the unification of the two Germanies on 3 October 1990), **France**, **Italy**, **Luxembourg** and **the Netherlands**. On 1 January 1973, **Denmark** (now excluding Greenland, which in a referendum in February 1982 voted by a narrow majority not to remain in the EC), **Ireland** and the **United Kingdom** (which left the EU on 31 January 2020) joined the Community; Norway's planned accession was rejected in a referendum in October 1972 (with 53.5 % against EC membership).

The 'enlargement to the south' was begun with the accession of **Greece** on 1 January 1981 and completed on 1 January 1986 with the accession of **Spain** and **Portugal**. The next enlargement took place on 1 January 1995, when **Austria**, **Finland** and **Sweden** joined the EU. In Norway, a referendum led to a repeat of the outcome from 22 years before, with a small majority (52.4 %) against Norwegian membership of the EU. On 1 May 2004, the Baltic states of **Estonia**, **Latvia** and **Lithuania**, the east and central European states of **Czechia**, **Hungary**, **Poland**, **Slovenia** and **Slovakia** and the two Mediterranean islands of **Cyprus** and **Malta** joined the EU. Only a little over 2 years later, enlargement to the east continued with the accession of **Bulgaria** and **Romania** on 1 January 2007.

Croatia became the newest member of the EU on 1 July 2013. The population of the Union has increased to a current figure of 447 million. This historic enlargement of the EU is the centrepiece of a long process leading to the reunification of a Europe that had been divided for over half a century by the Iron Curtain and the Cold War. Above all, these enlargements reflect the desire to bring peace, stability and economic prosperity to a unified European continent.

The EU is also open to the **accession** of further countries, provided that they meet the accession criteria established by the Copenhagen European Council in 1993.

- **Political criteria.** Stability of institutions, democracy, the rule of law, guarantee of human rights and respect for and protection of minorities.
- **Economic criteria.** The existence of a functioning market economy that can cope with competitive pressure and market forces in the EU.
- **Legal criteria.** Ability to take on the obligations of EU membership, including acceptance of the aims of political, economic and monetary union.

The accession procedure consists of three stages, which must be approved by all current Member States of the EU:

1. a country is offered the prospect of membership;
2. a country receives official candidate status once it has met the conditions for accession, but this does not necessarily mean that formal negotiations have been opened;
3. formal accession negotiations are entered into with the candidate country, in which the arrangements and procedures for adopting the applicable EU legislation are agreed.

When the negotiations and accompanying reforms have been completed to the satisfaction of both sides, the findings and the conditions for accession are laid down in an accession treaty. First of all, the European Parliament must give its assent to this accession treaty by an absolute majority of its members. The Council must then give its – unanimous – approval. Following this, the accession treaty must be signed by the EU Heads of State or Government and the accession country. The accession treaty must then be ratified by the EU Member States and the accession country according to the respective constitutional provisions. With the deposit of the instruments of ratification, the accession process is completed and the accession treaty enters into force. The accession country then becomes a Member State.

Accession negotiations are currently being held with Türkiye (since 2005), Montenegro (since 2012), Serbia (since 2014), and Albania and North Macedonia (since 2022).

Türkiye submitted its application for membership on 14 April 1987. However, relations between the EU and Türkiye go back further than this. As long

ago as 1963, Türkiye and the EEC entered into an association agreement that referred to the prospect of membership. In 1995 a customs union was formed, and in Helsinki in December 1999 the European Council decided to grant Türkiye the official status of an accession candidate. This was a reflection of the belief that the country had the basic features of a democratic system, although it still displayed serious shortcomings in terms of human rights and the protection of minorities. In December 2004, based on the Commission's recommendation, the European Council finally gave the go-ahead for the opening of accession negotiations with Türkiye. The negotiations began in October 2005, but continue to be challenging. This is due in part to the country's continuing poor record with regard to human rights, the rule of law, the freedom of the media and the fight against corruption. The fact that eight chapters can only be opened for negotiations once Türkiye has ratified the additional protocol on Cyprus appended to the Ankara Agreement, and that the provisional closure of the chapters already dealt with rests on the same event, presents an additional stumbling block. The ultimate aim of these negotiations is accession, but there is no guarantee that this aim will be achieved.

Iceland submitted its application for membership on 17 July 2009. Accession negotiations were formally opened in 2010; they too made good progress at first, but, after the change of government, they stalled before eventually being abandoned completely, after which Iceland withdrew its application for membership on 12 March 2015.

In 2022, the EU granted candidate country status to Bosnia and Herzegovina, Moldova and Ukraine.

The prospect of future EU membership has also been offered to Kosovo ([1]) and Georgia.

Provision has also been made for withdrawal from the EU. A **withdrawal clause** (Article 50) has been incorporated into the EU Treaty, allowing a Member State to leave. There are no conditions for such a withdrawal from the EU; all that is required is an agreement between the EU and the Member State concerned on the arrangements for its withdrawal. If such an agreement cannot be reached, the withdrawal becomes effective without any agreement 2 years after the notification of the intention to withdraw. There is no

[1] This designation is without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence.

provision for the expulsion of a Member State from the EU against its declared will, however, even for serious and persistent breaches of the treaties.

The option of withdrawing was exercised sooner than anyone could have expected. On 23 June 2016, in a referendum on the United Kingdom's membership of the EU, 51.9 % of the UK public (from a turnout of 72.2 %) voted against remaining in the European Union. This led, on 29 March 2017, to the formal submission to the European Council of the United Kingdom's notice of withdrawal from the EU and the European Atomic Energy Community. Three years after the UK referendum, and following very stormy negotiations on the exit agreement, on 31 January 2020 the seal was finally set on the United Kingdom's withdrawal from the EU, after 47 years of EU membership. Upon expiry of the transition period on 31 December 2020, the United Kingdom left the EU entirely on 1 January 2021, and in particular withdrew from the EU's internal market, customs union, EU policies and EU trade agreements. The future relations between the EU and the United Kingdom as a non-EU country are set out in the bilateral **Trade and Cooperation Agreement**, which, together with the **Withdrawal Agreement** governing the terms of the exit process and the **Political Declaration**, setting out the framework for negotiations on the future relationship between the United Kingdom and the European Union, is a key element of the withdrawal.

Two aspects of the Withdrawal Agreement warrant particular attention.

- The Irish border problem

Seeking to avoid the creation of a hard border between Northern Ireland and Ireland, the EU demanded a '**backstop**' proposal, which, however, would have forced virtually the entire United Kingdom into a customs union with the EU. That possibility threatened to make any agreement impossible, but at the last minute an arrangement was found that was acceptable to both sides. A protocol to the Withdrawal Agreement sets out unequivocally that Northern Ireland is part of the customs territory of the United Kingdom. Trade agreements that the United Kingdom is able to conclude after the end of the transition period, and the country's departure from the EU customs union, will also apply without restriction in Northern Ireland. Northern Ireland will therefore have a border with Ireland, and thus with the internal market and the customs union of the EU, which in theory would also call for goods checks at that border. However, that would conflict with the Good Friday (Belfast) Agreement of 1998, which was signed after 30 years of violence in Northern Ireland, known as the Troubles. It was therefore arranged

in the Withdrawal Agreement that the customs border between the United Kingdom and the EU would be moved to the sea between the United Kingdom and Northern Ireland. Northern Ireland thus remains subject to all relevant EU customs and market regulations, in particular the regulations on the movement of goods, standards of health, production standards, the selling arrangements for agricultural products, value added tax and excise-duty regulations, and the rules on State-aid control. Goods manufactured in Northern Ireland can be brought into Ireland (and taken from there to any place in the EU) with no border checks. All other goods and products imported into Northern Ireland will be checked by UK Customs at ports or airports. The key aim is to determine whether those goods and products are intended solely for one of the UK markets, or whether they give rise to the 'risk' of being brought via Ireland into the EU's market area. A joint committee will undertake to set limits on this 'risk' on the basis of certain criteria (nature and value of the product, use for direct consumption or for further processing, likelihood of abuse, etc.) and provide for exemptions. Customs treatment will then be determined by allocation to the relevant customs territory: if the goods are intended for the market in Northern Ireland, UK customs regulations will apply in full; if, on the other hand, there is a 'risk' that the goods in question will reappear on the EU internal market, EU customs regulations will apply. After the transition period, the Northern Irish parliament can decide by a simple majority every 4 years whether it wishes to continue applying the EU rules. In the event of a negative decision, the EU regulations will cease to be valid in Northern Ireland after a further 2 years. In such a case, another solution would have to be found over a period of 2 years to avoid a physical border between Northern Ireland and Ireland.

Reciprocal citizens' rights

In view of the fact that 3.2 million EU citizens are resident in the United Kingdom, and that 1.2 million UK nationals live in the EU, the issue of the reciprocal protection of citizens' rights is a top priority. According to the Withdrawal Agreement, EU citizens and UK citizens who exercised their right to reside in the respective territory before the end of the transition period (31 December 2020) and continue to live there afterwards will enjoy for life all rights to which they were entitled before Brexit. These rights are also extended to the family members of those citizens. Even after the transition period has ended, they can continue to live, work or study there. Their spouse, children or grandchildren living in another country can relocate to that family member's territory at any time. The beneficiaries also retain all entitlements to healthcare and other social security benefits. The

reciprocal recognition of professional qualifications is assured. Any discrimination on grounds of nationality will continue to be prohibited, even beyond the transition period. Citizens enjoy full equality of treatment, particularly with regard to equal rights and opportunities in access to employment and education. However, those rights will no longer apply automatically. Instead, EU citizens, for instance, must have proved their status as residents in the United Kingdom by June 2021. If the deadline was missed, that status can be obtained only if there are compelling grounds for the late application.

The **Trade and Cooperation Agreement** was signed on 30 December 2020. It was applied provisionally from 1 January 2021, and entered into force definitively on 1 May 2021.

Among other things, the Trade and Cooperation Agreement establishes a comprehensive trade partnership. In essence, this partnership is based on a free trade agreement that makes provision for neither tariffs nor quotas and therefore heads off significant trade restrictions. Such a partnership also requires fair framework conditions, however, and so both sides have agreed on far-reaching regulations with a view to guaranteeing fair competition. This applies to State aid and to standards in the fields of consumer protection, the protection of workers, the environment and the climate. Yet there could be no question of a genuine economic partnership if future relations did not extend beyond trade issues. The EU and the United Kingdom have therefore also agreed on a framework for their future cooperation in many other areas: services; professional qualifications; public procurement; environmental and energy issues; freight transport by air, sea and rail; and provisions on social security and on research and development. The agreement will also serve as a basis for the United Kingdom's participation in a number of EU programmes in the future. In order to reflect the close links between the EU and the United Kingdom, and their geographical proximity, the agreement also establishes a close security partnership to facilitate cooperation in the fields of justice and home affairs. Specifically, this means that both sides will continue to cooperate closely on the fight against crime, and to act in concert when combating money laundering, transnational crime and terrorism, for example under the aegis of Europol (the European Union Agency for Law Enforcement Cooperation). The agreement furthermore regulates mutual exchanges of data, for example passenger name record data or criminal records. Contrary to what the EU had wanted, the agreement does not make any provision for cooperation on foreign and security policy. The EU and the United Kingdom will remain key partners within NATO, the OSCE and the United Nations.

FUNDAMENTAL VALUES OF THE EUROPEAN UNION

Article 2 TEU (values of the Union)

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.

Article 3 TEU (aims of the Union)

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.
>
> …

The foundations of a united Europe were laid on fundamental ideas and values to which the Member States have subscribed in Article 2 TEU and are translated into practical reality by the EU's operational institutions. These fundamental values include respect for human dignity, equality, freedom and solidarity. The EU's avowed aims are to safeguard the principles of liberty, democracy and the rule of law that are shared by all the Member States, and to protect human rights.

These values do not merely set the standard for countries wishing to join the EU in the future; serious and persistent breaches of these values and principles by a Member State can also be penalised pursuant to Article 7 TEU. First of all, the Heads of State or Government in the European Council must unanimously determine the existence of a serious and persistent breach of the values and principles of the EU. This determination is made by the Heads of State or Government based on a proposal by one third of the Member States or by the European Commission, and after obtaining the assent of the European Parliament. The Council of the European Union may then, acting by a qualified majority, suspend certain of the rights deriving from the application of the EU Treaty and the TFEU to the Member State in question, including voting rights in the Council. On the other hand, the obligations on the Member State in question under the treaties continue

to be binding. Particular account is taken of the effects on the rights and obligations of citizens and enterprises.

The European Union as guarantor of peace

There is no greater motivation for European unification than the desire for peace (cf. Article 3 TEU). In the last century, two world wars were waged in Europe between countries that are now Member States of the European Union. Thus, a policy for Europe means at the same time a policy for peace. The establishment of the EU created the centrepiece of a framework for peace in Europe that renders a war between the Member States impossible. More than seventy years of peace in Europe are proof of this. The more European states that join the EU, the stronger this framework of peace will become. The latest enlargements of the EU have made a major contribution in this respect. In 2012, the EU received the Nobel Peace Prize for advancing the causes of peace, reconciliation, democracy and human rights in Europe.

But peace in Europe cannot be taken for granted, as, Russia's unprovoked and unjustified military aggression against Ukraine shows. Rather, the Union needs to play a peacemaking role beyond the peace zone created within the EU. Cooperation among the Member States on foreign and security policy should offer enhanced possibilities for this.

Unity and equality as the recurring themes

Unity is a recurring theme. The major problems of the present can be mastered only if the European countries speak and act in unison, while preserving their diversity. Many people take the view that without European integration, it would not be possible to secure peace (both in Europe and worldwide), democracy, law and justice, economic prosperity and social security, and guarantee them for the future. Climate change, unemployment, inadequate growth, security of energy supply and environmental pollution have long ceased to be merely national problems, and they cannot be solved at the national level. It is only in the context of the EU that a stable economic order can be established, and only through joint European efforts that we can secure an international economic policy that improves the performance of the European economy, while at the same time supporting the achievement of the climate targets and contributing to social justice. Without internal cohesion, Europe cannot assert its political and economic independence

from the rest of the world, win back its influence on the international stage and regain its role in world politics.

Unity can endure only where **equality** is the rule. No citizen of the EU may be placed at a disadvantage or discriminated against because of their nationality. Discriminatory treatment on the grounds of gender, race, ethnic origin, religion or beliefs, disability, age or sexual orientation must be combated. The Charter of Fundamental Rights of the European Union goes still further. Any discrimination based on any ground such as colour, genetic features, language, political or any other opinion, membership of a national minority, property or birth is prohibited. In addition, all EU citizens are equal before the law. As far as the Member States are concerned, the principle of equality means that no state has precedence over another, and natural differences such as size, population and differing structures must be considered only in accordance with the principle of equality.

The fundamental freedoms

Freedom results directly from peace, unity and equality. Creating a larger entity by linking 27 states affords at the same time freedom of movement beyond national frontiers. This means, in particular, freedom of movement for workers, freedom of establishment, freedom to provide services, free movement of goods and free movement of capital. These fundamental freedoms guarantee business people freedom of decision-making, workers freedom to choose their place of work and consumers freedom of choice between the greatest possible variety of products. Freedom of competition permits businesses to offer their goods and services to an incomparably wider circle of potential customers. Workers can seek employment and change job according to their own wishes and interests throughout the entire territory of the EU. Consumers can select the cheapest and best products from the far greater range of goods on offer that results from increased competition.

The accession treaty often lays down transition rules for a country's accession to the EU, however, particularly with regard to the free movement of workers, the freedom to provide services and the freedom of establishment. These rules allow the 'old' EU Member States to use national law or existing bilateral agreements to control the exercise of these fundamental freedoms for nationals of new Member States for up to 7 years.

The principle of solidarity

Solidarity is the necessary corrective to freedom, for inconsiderate exercise of freedom is always at the expense of others. For that reason, if an EU framework is to endure, it must always recognise the solidarity of its members as a fundamental principle, and share both the advantages, i.e. prosperity, and the burdens equally and fairly among its members.

Respect for national identity

The **national identities** of the Member States are respected. The idea is not for the Member States to be 'dissolved' into the EU, but rather for them to contribute their own particular qualities. It is precisely this variety of national characteristics and identities that lends the EU its moral authority, which in turn is used for the benefit of the EU as a whole.

The need for security

All of these fundamental values are ultimately dependent on **security**. Particularly since the attack on the United States of 11 September 2001 and the growing number of increasingly vicious terrorist attacks in Europe, the fight against terrorism and organised crime in Europe has also been in the spotlight again. Police and judicial cooperation continues to be consolidated, and protection of the EU's external borders has intensified.

However, security in the European context also means the social security of all citizens living in the EU, job security and secure general economic and business conditions. In this respect, the EU institutions are called upon to make it possible for citizens and businesses to work out their future by creating the conditions on which they depend.

The fundamental rights

The fundamental values and concepts at the heart of the EU also include the fundamental rights of its individual citizens. The history of Europe has for more than 200 years been characterised by continuing efforts to enhance the protection of fundamental rights. Starting with the declarations of human and civil rights in the 18th century, fundamental rights and civil

liberties have now become firmly anchored in the constitutions of most civilised states. This is especially true of the EU Member States, whose legal systems are constructed on the basis of the rule of law and respect for the dignity, freedom and the right to self-development of the individual. There are also numerous international conventions on the protection of human rights, among which the ECHR is of very great significance for Europe.

It was not until 1969 that the Court of Justice of the European Union established a body of case-law to serve as a framework of fundamental rights. Prior to that, the Court had rejected all actions relating to basic rights on the grounds that it need not concern itself with matters falling within the scope of national constitutional law. The Court had to alter its position not least because it was itself the embodiment of the primacy of EU law and its precedence over national law; this primacy can only be firmly established if EU law is sufficient in itself to guarantee the protection of basic rights with the same legal force as under the national constitutions.

The starting point in this case-law was the *Stauder* judgment, in which the point at issue was the fact that a recipient of welfare benefits for war victims regarded the requirement that he give his name when registering for the purchase of butter at reduced prices at Christmas time as a violation of his human dignity and the principle of equality. Although the Court of Justice came to the conclusion, in interpreting the EU provision, that it was not necessary for recipients to give their name so that, in fact, consideration of the question of a violation of a fundamental right was superfluous, it declared finally that the general fundamental principles of the EU legal order, which the Court of Justice had to safeguard, included respect for fundamental rights. This was the first time that the Court of Justice had recognised the existence of an EU framework of fundamental rights.

Initially, the Court developed its safeguards for fundamental rights from a number of provisions in the treaties. This is especially the case for the numerous **bans on discrimination**, which, in specific circumstances, address particular aspects of the general principle of equality. Examples include the prohibition of any discrimination on grounds of nationality (Article 18 TFEU); preventing people being treated differently on the grounds of gender, race, ethnic origin, religion or beliefs, disability, age or sexual orientation (Article 10 TFEU); the equal treatment of goods or persons in relation to the four basic freedoms – freedom of movement of goods (Article 34 TFEU), freedom of movement of persons (Article 45 TFEU), the right of establishment (Article 49 TFEU) and freedom to provide services (Article 57 TFEU);

freedom of competition (Article 101 et seq. TFEU); and equal pay for men and women (Article 157 TFEU). Explicit guarantees are also provided for the **right of association** (Article 169 TFEU), the **right to petition** (Article 24 TFEU) and the **protection of business and professional secrecy** (Article 339 TFEU).

The Court of Justice has steadily developed and added to these initial attempts at protecting fundamental rights through EU law. It has done this by recognising and applying general legal principles, drawing on the concepts that are common to the constitutions of the Member States and on the international conventions on the protection of human rights to whose conclusion the Member States have been party. Prominent among the latter is the ECHR, which helped to shape the substance of fundamental rights in the EU and the mechanisms for their protection. On this basis, the Court has recognised a number of freedoms as basic rights secured by EU law: **right of ownership**, **freedom to engage in an occupation**, the **inviolability of the home**, **freedom of opinion**, **general rights of personality**, the **protection of the family** (e.g. family members' rights to join a migrant worker), **economic freedom** and **freedom of religion or faith**, along with a number of **fundamental procedural rights** such as the right to due legal process, the principle of confidentiality of correspondence between lawyer and client (known as 'privileged communications' in the common-law countries), the ban on being punished twice for the same offence or the requirement to provide justification for an EU legal act.

One particularly important principle regularly invoked in legal disputes is the **principle of equal treatment**. Put simply, this means that like cases must be treated alike, unless there is some objectively justifiable ground for distinguishing them. The jurisprudence of the Court of Justice has also given the EU an extensive body of **quasi-constitutional law**. In practical terms, the principle of proportionality is foremost among these. What it means is that the objectives pursued and the means deployed must be weighed up and an attempt made to keep them in proper balance so that the citizen is not subjected to excessive burdens. Among the other fundamental principles underlying EU law are the general principles of administrative law and the concept of **due process**: legitimate expectations must be protected, retroactive provisions imposing burdens or withdrawing legitimately acquired advantages are precluded and the right to due legal process – natural justice is the traditional term for this – must be secured in the administrative procedures of the Commission and the judicial procedures of the Court of Justice. Particular value is also attached to greater transparency, which

The Eugen Schmidberger case related to a demonstration on the Brenner motorway which resulted in the complete closure of the motorway to road traffic for 30 hours.

means that decisions should be taken as openly as possible, and as closely as possible to the citizen. An important aspect of this transparency is that any EU citizen or legal person registered in a Member State may have access to Council or Commission documents. All grants and subsidies from the EU budget must also be disclosed to natural or legal persons by means of databases accessible to every EU citizen.

With all due respect for the achievements of the Court of Justice in the development of unwritten fundamental rights, this process of deriving 'European fundamental rights' had a serious disadvantage: the Court of Justice was confined to the particular case in point. It was therefore unable to develop fundamental rights from the general legal principles for all areas in which this appeared necessary or desirable. Nor was it able to lay down the scope of and the limits to the protection of fundamental rights as generally and distinctively as was necessary. As a result, the EU institutions could not assess with enough precision whether they were in danger of violating a fundamental right or not. Nor could any EU citizen who was affected judge without further effort in every case whether one of their fundamental rights had been infringed.

For a long time, **EU accession to the ECHR** was regarded as a way out of this situation. In its Opinion 2/94, however, the Court had held that, as EU law stood at that time, the EU had no competence to accede to the convention. The Court stated that respect for human rights was a condition for the lawfulness of EU acts. However, accession to the convention would entail a substantial change in the present Union system for the protection of human rights in that it would involve the EU entering into a distinct international institutional system as well as integration of all the provisions of the convention into the EU legal order. The Court took the view that such a modification of the system for the protection of human rights in the EU, with equally fundamental institutional implications for the EU itself and for the Member States, would be of constitutional significance and would therefore go beyond the scope of the dispositive powers provided for in Article 352 TFEU. This deficiency was remedied by the Treaty of Lisbon. The EU's accession to the convention is now specifically provided for in Article 6(2) TEU. Accession negotiations were then promptly reopened in 2010. In spring 2013, an agreement was reached on the draft accession agreement. The Commission sent this draft to the Court of Justice and requested an opinion on its compatibility with EU law. In its Opinion 2/13, the Court concluded that, in the form proposed, the draft agreement on the accession of the EU to the ECHR was not compatible with EU law, as it carried the risk,

on a number of points, of adversely affecting the special characteristics and the autonomy of EU law.

The transport company Schmidberger asked the Republic of Austria - the authorities of which had not prohibited the demonstration - to pay damages for the loss it incurred as a result of the closure. The Court of Justice found that the failure to prohibit the demonstration did restrict the free movement of goods but could be objectively justified. It stated that the decision respected the fundamental rights of the demonstrators to freedom of expression and freedom of assembly, which are guaranteed by the Austrian constitution and the European Convention on Human Rights. The Court found that the Austrian authorities could therefore not be said to have committed a breach of law such as to give rise to liability.

A significant point of criticism in this context was that, if the EU were to accede to the ECHR, the Court of Justice would have to submit to the decisions of the European Court of Human Rights and that the Union's common foreign and security policy would also be subject to the human rights supervision of the European Court of Human Rights. The Judges took the view that this was contrary to important structural principles of the EU. Although, in theory, accession of the European Union to the ECHR remains possible after this decision, in practice it is out of the question for the time being, as a number of technical details in the accession draft need to be amended beforehand.

Irrespective of the EU's accession to the ECHR, the Treaty of Lisbon made a further, decisive step towards the creation of a common constitutional law for the EU and put the protection of fundamental rights in the EU on a new footing. A new article on fundamental rights (Article 6 TEU) subjects the actions of the EU institutions and the Member States, insofar as they apply and implement EU law, to the Charter of Fundamental Rights of the European Union, which is made legally binding at the EU level by a reference in that article. This Charter of Fundamental Rights is based on a draft previously drawn up by a convention of 16 representatives of the Heads of State or Government of the Member States and of the President of the European Commission, 16 Members of the European Parliament and 30 members of national parliaments (two from each of the then 15 Member States) chaired by Prof. Roman Herzog. This draft was solemnly proclaimed to be the 'Charter of Fundamental Rights of the European Union' by the Presidents of the European Parliament, the Council and the European Commission at the beginning of the Nice European Council on 7 December 2000. During the

negotiations on a European constitution, the Charter of Fundamental Rights was revised and made an integral part of the Treaty establishing a Constitution for Europe of 29 October 2004. Following the failure of the treaty, the Charter of Fundamental Rights was again solemnly proclaimed as the 'European Union's Charter of Fundamental Rights', this time as a separate instrument, by the Presidents of the European Parliament, the Council and the European Commission on 12 December 2007 in Strasbourg. The EU Treaty refers to this version of the charter in binding form. This makes the Charter of Fundamental Rights legally binding and also establishes the applicability of fundamental rights in EU law. However, this does not apply to Poland, as this Member State did not wish to adopt the system of fundamental rights of the charter, as it was concerned that it would be obliged to surrender or at least change certain national positions concerning, in particular, issues of religion and faith. Poland is therefore not bound by the fundamental rights of the charter, but by the case-law of the Court of Justice, as previously.

THE METHODS FOR UNIFYING EUROPE

European unification is characterised by two different concepts for defining the way in which the countries of Europe work together: **cooperation** and **integration**. **Enhanced cooperation** has emerged as a further method.

Cooperation between the Member States

The essence of cooperation is that, although Member States are prepared to go beyond their national frontiers in order to work together with other Member States, they will only do so if their national sovereignty is preserved as a matter of principle. Therefore, unification efforts based on cooperation do not aim to create a new, single state, but are instead confined to connecting sovereign states to form a federation of states in which national structures are preserved (**confederation**). The working methods of the Council of Europe and the OECD are consistent with the principle of cooperation.

The concept of integration

The concept of integration transcends the traditional parallel existence of nation states. The traditional view that the sovereignty of states is inviolable and indivisible gives way to the conviction that the imperfect order of human and national coexistence, the inherent inadequacy of the national system and the many instances in European history of one state asserting its power over another (hegemony) can only be overcome if the individual national sovereignties are pooled to create a common sovereignty and, at a higher level, are amalgamated into a supranational community (federation).

The EU is a creation of this concept of integration, without national sovereignty having been amalgamated. The Member States were not prepared to relinquish the structure of their nation state – which they had only just recovered and then consolidated after the Second World

War – for the benefit of a European confederation. Thus, once again, a compromise had to be found, which, without having to create a European confederation, ensured more than mere cooperation between the states. The solution consisted in incrementally bridging the gaps between the preservation of national independence and a European confederation. The Member States were not asked to relinquish their sovereignty altogether, but merely to let go of the belief that it is indivisible. Thus, it was initially only a case of identifying areas in which the Member States were prepared to forego some of their sovereignty voluntarily for the benefit of a community that was superior to all of them. The three founding treaties – ECSC, E(E)C and Euratom – reflect the outcome of these efforts.

These treaties and the EU treaties of the present day specify the areas in which sovereign rights have been transferred to the EU. In this context, the EU and its institutions are not granted any general power to take the measures necessary to pursue the objectives of the treaties, but rather the nature and extent of the powers to act are laid down in the respective treaty provisions (principle of specific conferment of powers). In this way, the Member States are able to monitor and control the surrender of their own powers.

Enhanced cooperation

The instrument of enhanced cooperation forms the basis for implementing the idea of **multispeed integration**. The idea is that even relatively small groups of Member States are given the opportunity to increase their integration in a particular area that falls within the competence of the EU, without being hindered by the Member States that are reluctant or unwilling to do so.

As the conditions and procedures for using this instrument were originally (Treaty of Amsterdam) very strict, they were relaxed somewhat in view of the enlargement of the EU (Treaty of Nice). The Treaty of Lisbon combines the previous provisions on enhanced cooperation in Article 20 TEU (framework conditions) and in Articles 326 to 334 TFEU (supplementary conditions, participation, procedures, voting rules).

The rules for enhanced cooperation can be summarised as follows.

- Such cooperation may be used only within the framework of the EU's existing competences and must serve to further the objectives of the Union and reinforce the European integration process (Article 20 TEU). It is therefore incapable of mitigating the shortcomings of economic and monetary union that are embedded in the architecture of the EU treaties. Enhanced cooperation must not undermine the internal market or the economic and social cohesion of the EU. Moreover, it must not constitute a barrier to or discrimination in trade between Member States nor distort competition (Article 326 TFEU). The competences, rights, obligations and interests of those Member States that do not participate in the cooperation must be respected (Article 327 TFEU).

- Enhanced cooperation must be open to all Member States. In addition, the Member States must also be allowed to participate in the cooperation at any time, provided that the Member States concerned comply with the decisions made within the framework of the enhanced cooperation. The Commission and the Member States must ensure that as many Member States as possible participate in the enhanced cooperation (Article 328 TFEU).

- Enhanced cooperation may be undertaken only as a last resort, when it has been established within the Council that the objectives of such cooperation cannot be attained within a reasonable period by applying the relevant provisions of the treaties. The minimum threshold for establishing enhanced cooperation is nine Member States (Article 20(2) TEU).

- Acts adopted within the framework of enhanced cooperation are not regarded as part of the EU *acquis*. These acts have direct applicability only in the Member States that participate in the decision-making process (Article 20(4) TEU). The Member States that do not participate in the process must not impede the implementation of these acts, however.

- Expenditure resulting from enhanced cooperation, other than administrative costs, are to be financed by the participating Member

States, unless all members of the Council, acting unanimously after consulting the European Parliament, decide otherwise (Article 332 TFEU).

- The Council and the Commission must ensure the consistency of activities undertaken within the framework of enhanced cooperation with the other policies and activities of the Union (Article 334 TFEU).

In practice, this instrument is being used more and more frequently: For the first time in the history of the EU, the Member States availed themselves of the enhanced cooperation procedure to create a regulation that allows spouses of different nationalities to choose the applicable law for a **divorce**. After a Commission proposal to that effect in 2006 failed to achieve the required unanimity in the Council, the latter granted authorisation to proceed with enhanced cooperation by decision of 12 July 2010. On the basis of a new Commission proposal, 14 Member States (Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia) originally agreed on such provisions for the divorce or separation of spouses of different nationalities; these were subsequently joined by Lithuania (2014), Greece (2015) and Estonia (2018). The outcome is laid down in Regulation (EU) No 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation. This enhanced cooperation was expanded in 2016 with the addition of Regulation (EU) 2016/1103 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes.

A further case in which enhanced cooperation was implemented relates to **patent protection in Europe**. Without Spain and Croatia, and with the subsequent participation of Italy, a total of 25 EU Member States agreed on enhanced cooperation to create unitary patent protection. Regulation (EU) No 1257/2012 implementing enhanced cooperation regarding unitary patent protection and Regulation (EU) No 1260/2012 regarding the applicable translation arrangements entered into force on 20 January 2013. However, the regulations will only apply once the Agreement on a Unified Patent Court has entered into force. For this to happen, the agreement must be ratified by at least 13 Member States.

Finally, the European Public Prosecutor's Office (EPPO) was also set up as a result of enhanced cooperation. Under the Treaty of Lisbon, the EU

was empowered to set up such an office (Article 86 TFEU) by means of a regulation unanimously adopted by the Council after obtaining the consent of the European Parliament. With Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office, the Council ultimately made use of this competence within the framework of enhanced cooperation, as the required unanimity in the Council could not be achieved. So far, 22 Member States have participated in this enhanced cooperation.

THE 'CONSTITUTION' OF THE EUROPEAN UNION

Every social organisation has a constitution. A constitution is the means by which the structure of a political system is defined, i.e. the relationship of the various parts to each other and to the whole is specified, the common objectives are defined and the rules for making binding decisions are laid down. The constitution of the EU, as an association of states to which quite specific tasks and functions have been allotted, must thus be able to answer the same questions as the constitution of a state.

In the Member States the body politic is shaped by two overriding principles: the rule of law and democracy. All the activities of the EU, if they are to be true to the fundamental requirements of law and democracy, must therefore have both legal and democratic legitimacy: the elements on which it is founded, its structure, its powers, the way it operates, the position of the Member States and their institutions, and the position of the citizen.

Following the failure of the Treaty establishing a Constitution for Europe of 29 October 2004, the EU 'constitution' is still not laid down in a comprehensive constitutional document, as it is in most of the constitutions of its Member States, but arises from the totality of rules and fundamental values by which those in authority perceive themselves to be bound. These rules are to be found partly in the European treaties, in the legal instruments produced by the EU institutions or in the case-law of the Court of Justice, but they also rest partly on custom.

The legal nature of the European Union

Any consideration of the **legal nature** of the EU must start by looking at its characteristic features. Although the EU's legal nature was set out in two precedent-setting judgments of the Court of Justice in 1963 and 1964 relating to the then European Economic Community, the judgments are still valid for the European Union in its current form.

Van Gend & Loos

In this legal dispute, the Dutch transport company Van Gend & Loos filed an action against the Dutch customs authorities for imposing an import duty on a chemical product from Germany that was higher than duties on earlier imports. The company considered this an infringement of the earlier Article 12 of the Treaty establishing the European Economic Community (EEC Treaty), which prohibited the introduction of new import duties or any increase in existing customs duties between the Member States. The court in the Netherlands then suspended the proceedings and referred the matter to the Court of Justice for clarification as regards the scope and legal implications of the abovementioned article of the EEC Treaty.

The Court of Justice used this case as an opportunity to set out a number of observations of a fundamental nature concerning the legal nature of the EEC. In its judgment, the Court stated the following:

> 'The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens.
>
> […]
>
> The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals.'

Costa v ENEL

Just a year later, Case 6/64 *Costa* v *ENEL* gave the Court of Justice an opportunity to set out its position in more detail. The facts of this case were as follows. In 1962, Italy nationalised the production and distribution of electricity

and transferred the assets of the electricity undertakings to the national electricity board, ENEL. As a shareholder of Edison Volta, one of the companies that was nationalised, Mr Costa considered that he had been deprived of his dividend and consequently refused to pay an electricity bill for ITL 1 926. In proceedings before the arbitration court in Milan, one of the arguments put forward by Mr Costa to justify his conduct was that the nationalising act infringed a number of provisions of the EEC Treaty. In order to be able to assess Mr Costa's submissions in his defence, the court requested that the Court of Justice interpret various aspects of the EEC Treaty. In its judgment, the Court of Justice stated the following in relation to the legal nature of the EEC:

> 'By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which … became an integral part of the legal systems of the Member States and which their courts are bound to apply.
>
> By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the *in*ternational plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the Community, the Member States have limited their sovereign rights and have thus created a body of law which binds both their nationals and themselves.'

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

> 'It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.
>
> The transfer by the states from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.'

In the light of these judgments, the elements which together typically characterise the special legal nature of the EU are:

- the **institutional set-up**, which ensures that action by the EU is also characterised by the overall European interest, i.e. is reflected in or influenced by the EU interest as laid down in the objectives;
- the **transfer of powers** to the EU institutions to a greater degree than in other international organisations, and extending to areas in which states normally retain their sovereign rights;
- the **establishment of its own legal order**, which is independent of the Member States' legal orders;
- the **direct applicability of EU law**, which makes provisions of EU law fully and uniformly applicable in all Member States, and bestows rights and imposes obligations on both the Member States and their citizens;
- the **primacy of EU law**, which ensures that EU law may not be revoked or amended by national law and that it takes precedence over national law if the two conflict.

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

The EU has, by its very nature, certain **features in common** with the usual kind of **international organisation** or **federal-type** structure, as well as a number of differences.

The EU is itself not yet a 'finished product'; it is in the process of evolving and the form it finally takes cannot yet be predicted.

The only feature that the EU has in common with the traditional international organisations is that it too came into being as a result of international treaties. However, the EU has already moved a long way from these beginnings. This is because the treaties establishing the EU led to the creation of an independent Union with its own sovereign rights and responsibilities. The Member States have ceded some of their sovereign powers to this Union and transferred them to the EU so that they can be exercised jointly.

Through these differences between the EU and the traditional type of international organisation, the EU is in the process of acquiring a status similar to that of an individual state. In particular, the Member States' partial surrender

of sovereign rights was taken as a sign that the EU was already structured along the lines of a federal state. However, this view fails to take into account that the EU institutions only have powers in certain areas to pursue the objectives specified in the treaties. This means that they are not free to choose their objectives in the same way as a sovereign state; nor are they in a position to meet the challenges facing modern states today. The EU has neither the comprehensive jurisdiction enjoyed by sovereign states nor the powers to establish new areas of responsibility ('jurisdiction over jurisdiction').

The EU is therefore neither an international organisation in the usual sense nor an association of states, but rather an autonomous entity somewhere in between the two. In legal circles, the term 'supranational organisation' is now used.

The tasks of the European Union

The list of tasks entrusted to the EU strongly resembles the constitutional order of a state. These are not the narrowly circumscribed technical tasks commonly assumed by international organisations, but fields of competence that, taken as a whole, form essential attributes of statehood.

The list of tasks entrusted to the EU is very wide ranging, covering economic, social and political action.

Economic tasks

The **economic tasks** are centred around establishing a common market that unites the national markets of the Member States and on which all goods and services can be offered and sold on the same conditions as on an internal market, and to which all EU citizens have the same, free access. The plan to create a common market was essentially fulfilled through the **programme aimed at completing the internal market** by 1992, which was initiated by the then President of the Commission, **Jacques Delors**, and approved by the Heads of State or Government, with the EU institutions succeeding in laying down a legal framework for a properly functioning single market. This framework has now been fleshed out very largely by national transposition measures, with the result that the single market has already become a reality. This single market also makes itself felt in everyday life, especially when travelling within the EU, where checks on people and goods at national borders have long since been discontinued.

The internal market with its characteristic four freedoms (cf. Article 26 TFEU) is a core element of the Treaty on the Functioning of the European Union: free movement of goods (Article 34), free movement of persons (Articles 45 and 49), freedom to provide services (Article 57) and free movement of capital (Article 63).

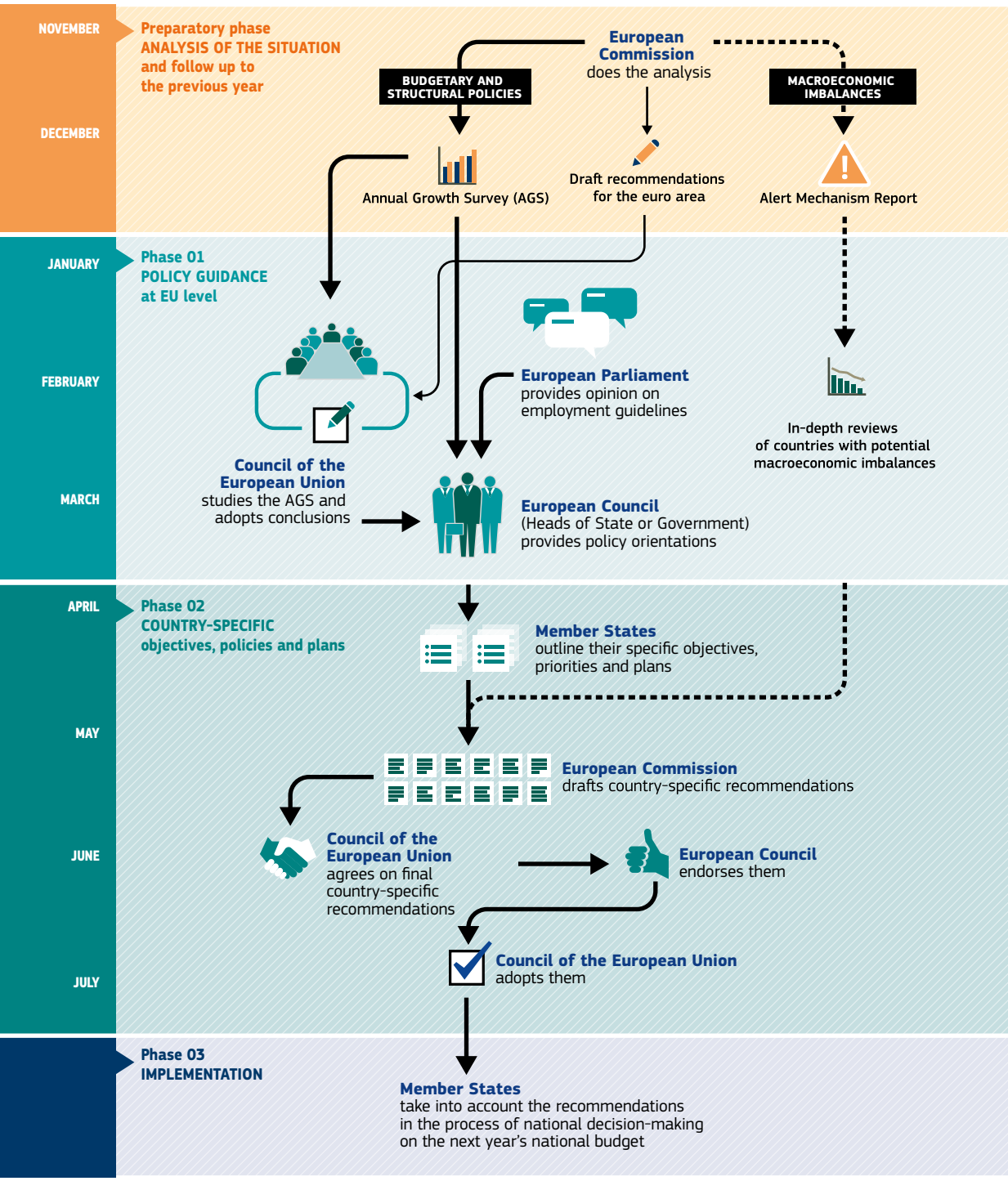
The internal market is backed up by the economic and monetary union. The EU's task in **economic policy** is not to lay down and operate a European economic policy, but to coordinate the national economic policies so that the policy decisions of one or more Member States do not have negative repercussions for the operation of the single market. To this end, a Stability and Growth Pact was adopted to give Member States the detailed criteria that their decisions on budgetary policy have to meet. If they fail to do this, the European Commission can issue warnings and, in cases of continuing excessive budgetary deficit, the Council can also impose penalties.

In the course of the global economic and financial crisis, economic policy cooperation at the EU level was further reinforced from 2010 to 2012. Economic policy coordination at the EU level was supplemented by a permanent crisis mechanism, which consists primarily of the following elements: strengthening of the Commission's role, introduction of new automatic correction mechanisms, establishment of economic policy coordination at the highest political level, concerted coordination in the European Semester with stricter reporting obligations for the Member States, strengthening of the role of the national parliaments and the European Parliament, and voluntary commitments to be laid down in national law.

At the heart of this new crisis mechanism is the European semester. The European semester is a cycle during which the EU Member States coordinate their economic and fiscal policy. Its focus is on the first 6 months of a year, hence its name – the 'semester'. During the European semester, the Member States align their budgetary and economic policies with the objectives and rules agreed at the EU level. The aim of the European semester is therefore to contribute to ensuring sound public finances, fostering economic growth and preventing excessive macroeconomic imbalances in the EU.

The EU's task in **monetary policy** was and is to introduce a single currency in the EU and to control monetary issues centrally. Some success has already been achieved in this area. On 1 January 1999, the euro was introduced as the single European currency in the Member States that had already met the convergence criteria established for that purpose (inflation rate: 1.5 %, government deficit = annual new debt: 3 %, government debt: 60 %, long-term interest rate: 2 %). These were **Belgium**, **Germany**, **Spain**, **France**, **Ireland**, **Italy**, **Luxembourg**, **the Netherlands**, **Austria**, **Portugal** and **Finland**. On 1 January 2002, the national currencies of these states were replaced with euro banknotes and coins. Since then, their day-to-day payments and financial transactions have been made in only one

Who does what in the European semester?



A new cycle starts again towards the end of the year, when the Commission gives an overview of the economic situation in its AGS for the coming year.

Source: http://www.consilium.europa.eu/en/policies/european-semester/

currency – the euro. In the following years, an ever increasing number of Member States met the criteria for adopting the euro: **Greece** (1 January 2001), **Slovenia** (1 January 2007), **Cyprus** (1 January 2008), **Malta** (1 January 2008), **Slovakia** (1 January 2009), **Estonia** (1 January 2011), **Latvia** (1 January 2014), **Lithuania** (1 January 2015) and finally **Croatia** (1 January 2023). The euro area – countries that have the euro as their currency – now covers 20 Member States.

In principle, the remaining Member States are also obliged to adopt the euro as their national currency as soon as they meet the convergence criteria. The only exception is for **Denmark**, which secured an opt-out that allows it to decide whether and when the procedure for verifying compliance with the criteria for joining the single currency is initiated. **Sweden**, which does not have an opt-out clause, represents a special case. Its adoption of the euro instead depends on whether the Commission and the European Central Bank (ECB) recommend Sweden's participation to the Council. If such a recommendation is made and approved by the Council, Sweden will not be able to refuse to participate.

Despite all the concerns, the euro has developed into a strong and internationally recognised currency that also forms a solid link between the Member States of the euro area. Even the sovereign debt crisis that began in 2010 did not change this. Quite the opposite. The EU responded to the crisis by introducing temporary support mechanisms, which were permanently replaced by the European Stability Mechanism (ESM) in 2013. As a permanent crisis-resolution framework, the ESM provides the Member States of the euro area with external financial assistance, with an effective lending capacity of EUR 500 billion. Euro-area Member States may only receive this financial assistance under strict conditions, which are aimed at rigorous fiscal consolidation and are reflected in an economic adjustment programme to be negotiated by the Commission and the International Monetary Fund, in close cooperation with the ECB. By means of the ESM, the EU has the capacity to act to defend the euro, even in the most stressed scenarios. This is a clear reflection of the common interest and solidarity within the euro area, as well as the individual responsibility of each Member State before its peers.

In addition to the area of economic and monetary policy, there are many other economic policy areas in which the EU has responsibilities. These include, in particular, climate and energy policy, agricultural and fisheries policy, transport policy, consumer policy, structural and cohesion policy, research and development policy, space policy, environment policy, health policy, trade policy and energy policy.

Social tasks

In **social policy**, the EU also has the tasks of shaping the social dimension of the single market and ensuring that the benefits of economic integration are not only felt by those active in the economy. One of the starting points for this has been the introduction of a social security system for migrant workers. Under this system, workers who have worked in more than one Member State, and therefore fallen under different social insurance schemes, will not suffer a disadvantage with regard to their social security (old-age pension, invalidity pension, healthcare, family benefits, unemployment benefits). A further priority task of social policy, in view of the unemployment situation in the EU, which has been a source of concern for a number of years, has been the need to devise a European employment strategy. This calls on the Member States and the EU to develop an employment strategy, and particularly to promote a skilled, trained and adaptable workforce, in addition to which labour markets should be made adaptable to economic change. Employment promotion is regarded as a matter of common concern and requires Member States to coordinate their national measures within the Council. The EU will contribute to a high level of employment by encouraging cooperation between Member States and, if necessary, complementing their action while respecting their competences.

Political tasks

With regard to the actual **area of politics**, the EU has tasks in the area of the **fight against climate change**, **EU citizenship**, **policy on judicial cooperation in criminal matters** and **common foreign and security policy**.

The EU is fighting **climate change** through ambitious policies at home and close cooperation with international partners. Climate action is at the heart of the European Green Deal – an ambitious package of measures ranging from ambitiously cutting greenhouse gas emissions, to investing in cutting-edge research and innovation, to preserving Europe's natural environment. First climate action initiatives under the Green Deal include:

- the European Climate Law, to enshrine the 2050 climate-neutrality objective into EU law;
- the European climate pact, to engage citizens and all parts of society in climate action;
- the 2030 climate target plan, to further reduce net greenhouse gas emissions by at least 55 % by 2030;

- the new EU strategy for adaptation to climate change, to make Europe a climate-resilient society by 2050, fully adapted to the unavoidable impacts of climate change.

EU citizenship has further strengthened the rights and interests of nationals of the Member States within the EU. Citizens enjoy the right to move freely within the EU (Article 21 TFEU), the right to vote and stand as a candidate in local elections (Article 22 TFEU), entitlement to protection by the diplomatic and consular authorities of any Member State (Article 23 TFEU), the right to petition the European Parliament (Article 24 TFEU) and, in the context of the general ban on discrimination, the right to be treated by all Member States in the same way as they treat their own nationals (Article 20(2), in conjunction with Article 18 TFEU).

In the area of judicial cooperation in criminal matters, the main role of the EU is to carry out tasks that are in the interests of Europe as a whole. These include, in particular, combating organised crime, preventing trafficking in human beings and prosecuting criminal offences. Since organised crime can no longer be effectively countered at the national level, a joint response at the EU level is needed. Two very positive steps have already been taken with the directive on money laundering and the creation of a European police authority, Europol, which has been operational since 1998 (Article 88 TFEU). Europol has been an EU agency since 2010, and is now known as the European Union Agency for Law Enforcement Cooperation. This cooperation is also concerned with facilitating and accelerating cooperation in relation to proceedings and the enforcement of decisions, facilitating extradition between Member States, establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism, trafficking in human beings and the sexual exploitation of women and children, illicit drug trafficking and illicit arms trafficking, money laundering and corruption (Article 83 TFEU).

One of the most significant advances in EU judicial cooperation was the creation of the EPPO. It was created by the Council with the consent of the European Parliament under Regulation (EU) 2017/1939 as part of enhanced cooperation involving 22 Member States. In June 2021, 3 years after the entry into force of the EPPO regulation, the EPPO launched its operations following a decision by the Commission based on a proposal by the European Chief Prosecutor. The EPPO has its seat in Luxembourg. The EPPO will be organised at a central level and at a decentralised level. The central level will consist of the Central Office, composed of the College, the Permanent Chambers,

the European chief prosecutor, the deputy European chief prosecutors, the European prosecutors and the administrative director. The decentralised level will consist of European delegated prosecutors, who will be located in the Member States. The EPPO will be responsible for investigating, prosecuting and bringing to judgment the perpetrators of, and accomplices to, criminal offences affecting the financial interests of the EU. In that respect, the EPPO will undertake investigations, and carry out acts of prosecution and exercise the functions of a prosecutor in the competent courts of the Member States, until the case has been finally disposed of. The EPPO will ensure that its activities respect the rights enshrined in the Charter of Fundamental Rights. It will be bound by the principles of the rule of law and proportionality in all its activities. The EPPO will conduct its investigations in an impartial manner and will seek all relevant evidence, whether inculpatory or exculpatory.

Further progress has been made with the European Arrest Warrant, which has been valid throughout the EU since January 2004. The warrant can be issued for anyone accused of an offence for which the minimum penalty is more than 1 year in prison. The European Arrest Warrant has replaced the lengthy extradition procedures of the past.

With respect to common foreign and security policy, the EU has, in particular, the tasks of safeguarding the commonly held values, fundamental interests and independence of the EU; strengthening the security of the EU and its Member States; securing world peace and increasing international security; promoting democracy, the rule of law and international cooperation; safeguarding human rights and basic freedoms; and establishing a common defence.

Since the EU is not an individual state, these tasks can only be carried out step by step. Traditionally, foreign policy, and especially security policy, is an area in which the Member States are particularly keen to retain their own sovereignty. Another reason why common interests in this area are difficult to define is that France is the only EU country that still has nuclear weapons. Another problem is that some Member States are not in NATO. Most common foreign and security policy decisions are therefore still currently taken on the basis of **cooperation between states**. In the meantime, however, a **range of tools** has emerged in its own right, thus giving cooperation between states a firm legal framework.

In the light of a changing security environment, the EU global strategy for foreign and security policy started a process of closer cooperation in security and defence. The Member States have agreed to expand the EU's work in this area

and have recognised that closer coordination, greater investment in defence and cooperation in developing defence capabilities are essential to achieving this. This is the main objective of the permanent structured cooperation (PESCO) in security and defence matters, as envisaged in Article 42(6) and Article 46 TEU and in Protocol No 10 thereto. Through the PESCO, Member States increase their effectiveness in addressing security challenges and advancing towards further integrating and strengthening defence cooperation within the EU framework. On 11 December 2017, the Council adopted the decision to establish the PESCO and the list of its participants, thus taking a historic step. A total of 25 Member States have opted to take part in the PESCO: Belgium, Bulgaria, Czechia, Germany, Estonia, Ireland, Greece, Spain, France, Croatia, Italy, Cyprus, Latvia, Lithuania, Luxembourg, Hungary, the Netherlands, Austria, Poland, Portugal, Romania, Slovenia, Slovakia, Finland and Sweden.

The powers of the European Union

The treaties establishing the European Union do not confer on the EU institutions any general power to take all measures necessary to achieve the objectives of the treaties, but lay down in each chapter the extent of the powers to act. As a basic principle, the EU and its institutions do not have the power to decide on their legal basis and competencies; the **principle of specific conferment of powers** (Article 2 TFEU) continues to apply. This method has been chosen by the Member States in order to ensure that the surrender of their own powers can be more easily monitored and controlled.

The range of matters covered by the specific conferment of powers varies according to the nature of the tasks allotted to the EU. Competences that have not been transferred to the EU remain in the exclusive power of the Member States. The EU Treaty explicitly states that matters of national security stay under the exclusive authority of the Member States.

This naturally begs the question of where the dividing line is between EU competencies and those of the Member States. This dividing line is drawn on the basis of three categories of competence.

- **Exclusive competence** of the EU (Article 3 TFEU) in areas where it can be assumed that a measure at the EU level will be more effective than a measure in any Member State that is not coordinated. These areas are clearly set out and comprise the customs union, the establishing of the competition rules necessary for the functioning of the internal market, the monetary policy of the euro states, the common commercial policy

and parts of the common fisheries policy. In these policy areas only the European Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the EU or for the implementation of EU acts (Article 2(1) TFEU).

- **Shared competence** between the EU and the Member States (Article 4 TFEU) in areas where action at the EU level will add value over action by Member States. There is shared competence for internal-market rules; economic, social and territorial cohesion; agriculture and fisheries; environment; transport; trans-European networks; energy supply; and the area of freedom, security and justice. Shared competence also covers common safety concerns in public health matters; research and technological development; space; development cooperation; and humanitarian aid. In all these areas the EU can exercise competence first, but only with regard to matters laid down in the relevant European Union instrument, and not to the entire policy area. The Member States exercise their competence to the extent that the EU has not exercised, or has decided to cease exercising, its competence (Article 2(2) TFEU). The latter situation arises when the relevant EU institutions decide to repeal a legislative act, in particular to respect the principles of subsidiarity and proportionality. The Council may, on the initiative of one or more of its members, request that the Commission submit proposals for repealing a legislative act.
- **Competence to carry out supporting action** (Article 6 TFEU). The EU's competence to carry out supporting action is limited to coordinating or providing complementary action for the action of the Member States; the EU cannot harmonise national law in the areas concerned (Article 2(5) TFEU). Responsibility for drafting legislation therefore continues to lie with the Member States, which thus have considerable freedom to act. The areas covered by this category of competence are the protection and improvement of human health, industry, culture, tourism, education, youth, sport, vocational training, civil protection and administrative cooperation. In the areas of employment and economic policy, the Member States explicitly acknowledge the need to coordinate national measures within the EU.

In addition to these special powers to act, the EU treaties also confer on the institutions a power to act when it is essential for the operation of the single market or for ensuring undistorted competition (see Article 352 TFEU – **dispositive powers or flexibility clause**). These articles do not, however, confer on the institutions any general power enabling them to carry out tasks that lie outside the objectives laid down in the treaties, and the EU institutions

cannot extend their powers to the detriment of those of the Member States. In practice, the possibilities afforded by this power were used very often in the past, since the EU was over time repeatedly faced with new tasks that were not foreseen at the time the founding treaties were concluded, and for which accordingly no appropriate powers were conferred in the treaties. Examples are the protection of the environment and of consumers or the establishment of the European Regional Development Fund as a means of closing the gap between the developed and underdeveloped regions of the EU. Now, however, specific jurisdiction has been given in the above-mentioned fields. These specific provisions have meant that the practical importance of the dispositive powers has very much declined. The exercise of these powers requires the approval of the European Parliament.

Finally, there are further powers to take such measures as are indispensable for the effective and meaningful implementation of powers that have already been expressly conferred (**implied powers**). These powers have acquired a special significance in the conduct of external relations. They enable the EU to assume obligations towards non-EU countries or other international organisations in fields covered by the list of tasks entrusted to the EU. An outstanding example is provided by the *Kramer* case ruled on by the Court of Justice. This case concerned the EU's capacity to cooperate with international organisations in fixing fishing quotas and, where considered appropriate, to assume obligations on the matter under international law. Since there was no specific provision laid down in the EU Treaty, the Court inferred the necessary external competence of the EU from its internal competence for fisheries policy under the common agricultural policy.

However, in the exercise of these powers, the EU is governed by the **subsidiarity principle**, taken over from Roman Catholic social doctrine, which has acquired virtually constitutional status through being embodied in the EU Treaty (Article 5(3) TEU). There are two facets to it: the **affirmative** statement that the EU must act where the objectives to be pursued **can be better attained at the Union level**, which enhances its powers; and the **negative** statement that it must not act where objectives can be satisfactorily attained by the Member States acting individually, which constrains them. This is automatically to be assumed for the areas of the exclusive competence of the EU, and as a result any subsidiarity check can be dispensed with in these areas. For all other areas of responsibility, however, what this means in practice is that all EU institutions, but especially the Commission, must always demonstrate that there is a real need for common rules and common action. To paraphrase **Montesquieu**, when it is not necessary for

the EU to take action, it is necessary that it should take none. If the need for EU rules is demonstrated, the next question that arises concerns the intensity and the form that they should take. The answer flows from the **principle of proportionality**, which is established in the EU Treaty in conjunction with the competence provisions (Article 5(4) TEU). It means that the need for the specific legal instrument must be thoroughly assessed to see whether there is a less constraining means of achieving the same result. The main conclusion to be reached in general terms is that framework regulations, minimum standards and mutual recognition of the Member States' existing standards should be preferred to excessively detailed legal provisions, and harmonising provisions should be avoided wherever possible.

National parliaments can also now check compliance with the principles of subsidiarity and proportionality. For this purpose, an **early warning system** has been introduced, allowing national parliaments to issue a reasoned position within 8 weeks following transmission of an EU legislative proposal, setting out why the legislative proposal in question does not meet the subsidiarity and proportionality requirements. If this reasoned position is supported by at least one third of the votes allocated to the national parliaments (where each national parliament has two votes, or, in the case of chamber systems, one vote per chamber), the legislative proposal must be reviewed again by the institution that issued it (usually the European Commission). Following this review, the proposal can be retained, amended or withdrawn. If the Commission decides to retain the draft, it must issue a reasoned opinion, stating why it considers the draft to follow the subsidiarity principle. This reasoned opinion is sent to the EU legislator together with the reasoned opinions of the national parliaments, so that they can be taken into account in the legislative procedure. If, by a 55 % majority of the members of the Council or by a majority of the votes cast in the European Parliament, the EU legislator is of the opinion that the proposal does not comply with the subsidiarity principle, the legislative proposal is not examined any further.

The institutions and bodies of the European Union

Article 13 TEU (institutional framework)

> (1) The Union shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions.

The Union's institutions shall be:
– the European Parliament,
– the European Council,
– the Council,
– the European Commission,
– the Court of Justice of the European Union,
– the European Central Bank,
– the Court of Auditors.

(2) Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practise mutual sincere cooperation.

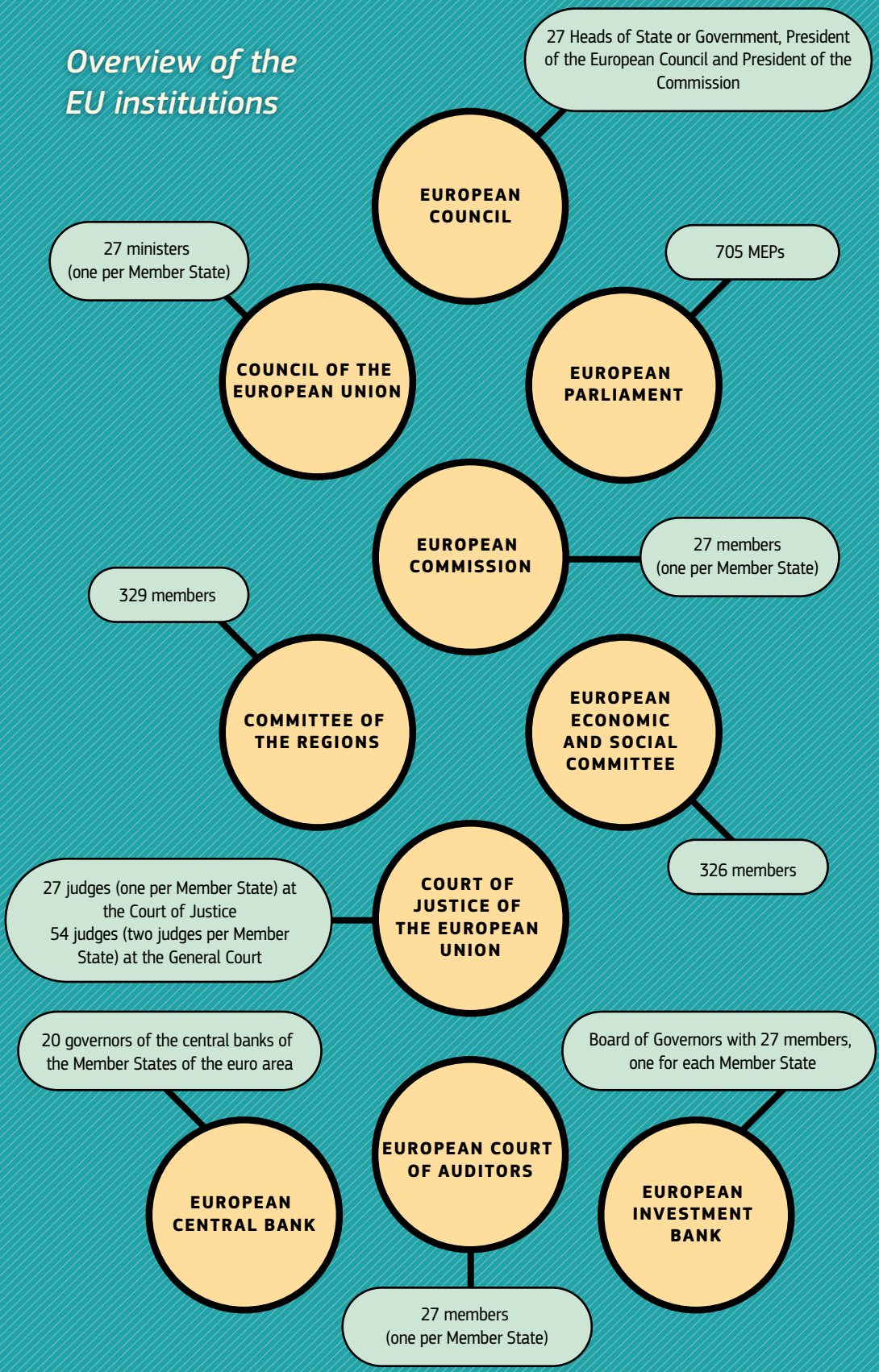
(3) The provisions relating to the European Central Bank and the Court of Auditors and detailed provisions on the other institutions are set out in the Treaty on the Functioning of the European Union.

(4) The European Parliament, the Council and the Commission shall be assisted by an Economic and Social Committee and a Committee of the Regions acting in an advisory capacity.

Another question arising in connection with the constitution of the European Union is that of its organisation. What are the institutions of the EU? Since the EU exercises functions normally reserved for states, does it have a government, a parliament, administrative authorities and courts like those with which we are familiar in the Member States? Action on the tasks assigned to the EU and the direction of the integration process was intentionally not left to Member States or to international cooperation. The EU has an institutional system that equips it to give new stimuli and objectives to the unification of Europe and to create a body of law that is uniformly devised and binding in all the Member States in the matters falling within its responsibility.

The main players in the EU institutional system are the institutions – the European Parliament, the European Council, the Council of the European Union, the European Commission, the Court of Justice of the European Union, the European Central Bank and the European Court of Auditors. The ancillary bodies in the institutional system of the EU are the European Investment Bank, the European Economic and Social Committee and the European Committee of the Regions.

Overview of the EU institutions



Institutions

European Parliament (Article 14 TEU)

The European Parliament represents the peoples of the EU Member States. It is an amalgamation of the ECSC Joint Assembly, the EEC Assembly and the Euratom Assembly, which were combined to form an 'assembly' under the 1957 Convention on Certain Institutions Common to the European Communities (first Merger Treaty). The name was not officially changed to 'European Parliament' until the EC Treaty was amended by the EU Treaty (Maastricht Treaty), although this step merely reflected what was already common usage dating back to the assembly's own change of its name to 'European Parliament' in 1958.

Composition and election

STRUCTURE OF THE EUROPEAN PARLIAMENT 2019–2024

- PRESIDENT
- 14 vice-presidents
- 5 quaestors (advisory)

The President of the European Parliament, vice-presidents and quaestors (MEPs entrusted with administrative and financial tasks) make up the **Bureau**, which is elected by Parliament for terms of 2½ years. There is also a Conference of Presidents, which consists of the president and the chairs of the political groups. It is responsible for the organisation of the Parliament's work and for relations with the other EU institutions and with non-EU institutions.

PARLIAMENT PLENARY SESSION WITH 705 MEMBERS

Member State	Seats in the European Parliament
Germany	**96**
France	**79**
Italy	**76**
Spain	**59**
Poland	**52**
Romania	**33**
Netherlands	**29**
Belgium	**21**
Czechia	**21**
Greece	**21**
Hungary	**21**
Portugal	**21**
Sweden	**21**
Austria	**19**
Bulgaria	**17**
Denmark	**14**
Slovakia	**14**
Finland	**14**
Ireland	**13**
Croatia	**12**
Lithuania	**11**
Latvia	**8**
Slovenia	**8**
Estonia	**7**
Cyprus	**6**
Luxembourg	**6**
Malta	**6**

Until 1979, representatives in the European Parliament were selected from the membership of national parliaments and delegated by them to the European Parliament. The **direct general election of Members of the European Parliament (MEPs)** by the peoples of the Member States was provided for in the treaties themselves, but the first direct elections were not held until June 1979, a number of earlier initiatives having been fruitless. Elections are now held every 5 years, which corresponds to the length of a 'legislative period'. Following decades of efforts, a **uniform electoral procedure** was finally introduced by the Act concerning the election of representatives of the European Parliament by direct universal suffrage in 1976 and then fundamentally reformed by the Direct Elections Act in 2002. Under this act, each Member State lays down its own election procedure, but must apply the same basic democratic rules:

- direct general election,
- proportional representation,
- free and secret ballots,
- minimum age (for the right to vote, this is 18 in all Member States with the exception of Austria and Malta, where the minimum voting age is 16, and Greece, where the minimum voting age has been set at 17),
- renewable 5-year term of office,
- incompatibilities (MEPs may not hold two offices at the same time, e.g. the office of judge, public prosecutor, minister; they are also subject to the laws of their country, which may further limit their ability to hold more than one post or office),
- election date,
- equality between men and women.

In some countries (Belgium, Luxembourg and Greece), voting is compulsory.

In addition, a **uniform statute for MEPs** came into force in 2009, which makes the terms and conditions of their work more transparent and contains clear rules. It also introduces a uniform salary for all MEPs, which is paid from the EU budget.

Now that it is directly elected, the Parliament enjoys democratic legitimacy and can truly claim to represent the citizens of the EU. But the mere existence of a directly elected Parliament cannot satisfy the fundamental requirement of a democratic constitution, which is that all public authority must emanate from the people. That does not only mean that the decision-making process must be transparent and the decision-making institutions representative;

parliamentary control is required, and the Parliament must lend legitimacy to the EU institutions involved in the decision-making process. A great deal of progress has been made in this area too over recent years. Not only have the rights of the Parliament been continually extended, but the Treaty of Lisbon explicitly established the obligation for action by the EU to adhere to the principle of **representative democracy**. As a result, all citizens of the European Union are directly represented in the Parliament and entitled to participate actively in the EU's democratic life. The underlying objective of this is that decisions at the EU level are taken as openly as possible and as closely as possible to the citizen. The political parties at the EU level are to contribute to the shaping of a European identity and to articulate the will of the EU's citizens. If there is any deficit to the current democratic model of the EU, it is that the European Parliament, unlike the true parliaments in a parliamentary democracy, does not elect a government that answers to it.

Article 10 TEU (representative democracy)

> (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.

However, the reason for this deficit is that, quite simply, no government in the normal sense exists at the EU level. Instead, the **functions analogous to government** provided for in the EU treaties are performed by the Council and the Commission according to a form of division of labour. Nevertheless, the Treaty of Lisbon gave the Parliament extensive powers in respect of

appointments to the Commission, ranging from election by the Parliament of the President of the Commission on the recommendation of the European Council, to the Parliament's vote of approval of the full college of commissioners (**right of investiture**). However, the Parliament has no such influence over the membership of the Council, which is subject to parliamentary control only insofar as each of its members, as a national minister, is answerable to the national parliament.

The **role of the European Parliament in the** EU's legislative process has increased considerably. The raising of the co-decision procedure to the level of ordinary legislative procedure has, in effect, turned the Parliament into a **'co-legislator'** alongside the Council. In the ordinary legislative procedure, the Parliament can not only put forward amendments to legislation at various readings but also, within certain limits, get them accepted by the Council. EU legislation cannot be passed without agreement between the Parliament and the Council.

Traditionally, the Parliament has also played a major role in the **budgetary procedure**. The Treaty of Lisbon further extended the budgetary powers of the Parliament, stipulating that it must approve the multiannual financial plan and giving it co-decision powers on all expenditure.

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

The **supervisory powers** of the European Parliament have also grown significantly over time. They are exercised mainly through the fact that the Commission must **answer** to the Parliament, defend its proposals before it and present it with an annual report on the activities of the EU for debate. The Parliament can, by a two-thirds majority of its members, pass a **motion of censure** and thereby compel the Commission to resign as a body (Article 234 TFEU). Several such motions have been put before the Parliament, but none has achieved the required majority ([1]). Since in practice the Council also answers parliamentary questions, the Parliament has the opportunity for direct political debate with two major institutions.

[1] The resignation of the Santer Commission in 1999 was triggered by Parliament's refusal to discharge it with regard to financial management; the motion of censure that had also been brought was unsuccessful, although only by a small margin.

These supervisory powers of the Parliament have since been boosted. It is now also empowered to set up special committees of inquiry to look specifically at alleged cases of infringement of EU law or maladministration. One such committee was set up in June 2016 in the light of the Panama Papers revelations about offshore companies and their secret owners. Its task is to investigate possible breaches of EU law in relation to money laundering and tax avoidance and tax evasion. Another committee of inquiry, also set up in 2016, dealt with the vehicle emissions scandal. Finally, in June 2020, the Parliament set up a committee of inquiry into animal transport in the EU to investigate violations of the EU regulation on the transport of live animals (Regulation (EC) No 1/2005). Also written into the treaties is the right of any natural or legal person to address petitions to the Parliament, which are then dealt with by a standing Committee on Petitions. Finally, the Parliament has also made use of its power to appoint a European Ombudsman to whom complaints about maladministration in the activities of EU institutions or bodies, with the exception of the Court of Justice, can be referred. The Ombudsman may conduct enquiries and must inform the institution or body concerned of such action, and must submit to the Parliament a report on the outcome of their inquiries.

Seat

The Parliament has its seat in Strasbourg, where the 12 periods of monthly plenary sessions, including the budget session, are held. The periods of additional plenary sessions are held in Brussels, where the committees also meet. The Parliament's Secretariat-General is based in Luxembourg, however. The European Council's decision on these locations in 1992 was confirmed in Protocol No 6 to the Treaty of Lisbon. The result of this decision is that MEPs and some Parliament officials and employees must commute between Strasbourg, Brussels and Luxembourg – a very costly business.

European Council (Article 15 TEU)

The Heads of State or Government and the Presidents of the Council and the Commission meet in the European Council at least twice in every 6 months in Brussels.

Composition and tasks

COMPOSITION OF THE EUROPEAN COUNCIL

- Heads of State or Government of the Member States
- President of the European Council
- President of the European Commission
- High Representative of the Union for Foreign Affairs and Security Policy

TASKS

Define the general political aims and priorities of the EU

The Treaty of Lisbon created the office of **President of the European Council**. The President of the European Council, unlike the presidency, has a **European mandate**, not a national one, running for 2½ years on a full-time basis. The person appointed president should be an outstanding personality, selected by qualified-majority voting of the members of the European Council. Re-election is possible once. The president's tasks comprise the preparation and follow-up of European Council meetings and representing the EU at international summits in the area of foreign and security policy.

The European Council does not exercise legislative functions. Its function is to establish the general policy guidelines for EU action. These take the form of 'conclusions', which are adopted by consensus and contain basic policy decisions or instructions and guidelines to the Council or the Commission. The European Council has in this way directed work on economic and monetary union, the European monetary system, direct elections to the Parliament and a number of accession issues.

Council of the European Union (Article 16)

Composition and presidency

The Council of the European Union is made up of representatives of the governments of the Member States. All 27 Member States send one representative – as a rule, though not necessarily, the departmental or junior minister responsible for the matters under consideration. It is important that these representatives are empowered to act with binding effect on their governments. The very fact that governments may be represented in various ways obviously means that there are **no permanent members of**

the Council; instead, the representatives sitting in the Council meet in 10 different configurations depending on the subjects under discussion.

THE 10 CONFIGURATIONS OF THE COUNCIL

One representative of each Member State government at ministerial level, with composition varying according to the subject discussed

Chaired by the High Representative of the Union for Foreign Affairs and Security Policy:
- Foreign Affairs

Chaired by the Member State holding the presidency of the Council:
- General Affairs
- Economic and Financial Affairs
- Justice and Home Affairs
- Employment, Social Policy, Health and Consumer Affairs
- Competitiveness
- Transport, Telecommunications and Energy
- Agriculture and Fisheries
- Environment
- Education, Youth, Culture and Sport

The **Foreign Affairs Council** handles the EU's action abroad in accordance with the strategic guidelines of the European Council and ensures that the EU's action is consistent and coherent. The **General Affairs Council** coordinates the work of the Council in its various configurations and, together with the President of the European Council and the European Commission, prepares the European Council meetings. The presidency of the Council – with the exception of the Foreign Affairs Council, which is chaired by the High Representative of the Union for Foreign Affairs and Security Policy – is held by each Member State in turn for 6 months. The order in which the office of president is held is decided unanimously by the Council. The presidency changes hands on 1 January and 1 July each year (2020: Croatia, Germany; 2021: Portugal, Slovenia; 2022: France, Czechia; 2023: Sweden, Spain). Given this fairly rapid turnover, each presidency bases its action on a work programme agreed with the next two presidencies and therefore valid for a period of 18 months ('team presidency'). The presidency is mainly responsible for overall coordination of the work of the Council and the committees providing it with input. It is also important in political terms in that the Member State holding the presidency of the Council enjoys an enhanced role on the world stage, and small Member States in particular are thus

given an opportunity to rub shoulders with the 'major players' and make their mark in European politics.

The Council's work is prepared by a considerable number of preparatory bodies (committees and working groups) composed of representatives from the Member States. The most important of the preparatory bodies is the Permanent Representatives Committee (Coreper I and II), which meets as a general rule at least once a week.

The Council is supported by a General Secretariat, which is under the authority of a secretary-general appointed by the Council.

The seat of the Council is in Brussels.

Tasks

The Council has the following five key tasks.

- The top priority of the Council is **legislation**, which it carries out together with the Parliament in the ordinary legislative procedure.
- The Council is also responsible for ensuring coordination of the **economic policies** of the Member States.
- It develops the EU's **common foreign and security policy** on the basis of guidelines set by the European Council.
- The Council is responsible for **concluding agreements** between the EU and non-EU countries or international organisations.
- It establishes the **budget** on the basis of a draft from the Commission, which must then be approved by the Parliament. In addition, it issues a recommendation to the Parliament on giving discharge to the Commission in respect of the implementation of the budget.

It is also responsible for appointing the members of the European Court of Auditors, the European Economic and Social Committee and the European Committee of the Regions.

Negotiations and decision-making in the Council

It is in the Council that the individual interests of the Member States and the EU's interest are balanced. Even though the Member States primarily defend their own interests in the Council, its members are at the same time obliged to take into account the objectives and needs of the European

Union as a whole. The Council is an EU institution and not an intergovernmental conference. Consequently it is not the lowest common denominator between the Member States that is sought in the Council's deliberations, but rather the right balance between the EU's and the Member States' interests.

The Council only discusses and reaches decisions on documents and drafts that are available in the 24 official languages (Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish). If a matter is urgent, this rule may be dispensed with by unanimous agreement. This also applies to proposals for amendments tabled and discussed in the course of a meeting.

Under the EU treaties, the majority rule is applied in Council voting – as a general rule, a **qualified majority** is sufficient (Article 16(3) TEU). A **simple majority**, where each Council member has one vote, is applied only in certain areas, particularly procedural issues (the simple majority for 27 Member States is achieved with 14 votes).

According to the **double majority system**, a qualified majority is achieved when the Commission proposal is supported by at least 55 % of the members of the Council, comprising at least 15 Member States representing at least 65 % of the EU population (Article 16(4) TEU) ([2]).

To prevent less-populous Member States from blocking the adoption of a decision, a blocking minority must consist of at least four Member States representing at least 35 % of the EU population. The system is complemented by a supplementary mechanism: if a blocking minority is not achieved, the decision-making process can be suspended. In this case, the Council does not proceed with the vote, but continues negotiations for a reasonable period of time, if requested by Members of the Council representing at least 75 % of the population or at least 75 % of the number of Member States required for a blocking minority.

In the case of decisions to be taken in especially sensitive political areas, the treaties require **unanimity**. The adoption of a decision cannot be blocked by means of abstentions, however. Unanimity is still required for decisions on such matters as taxes, social security and social protection of

[2] The population figures and the calculation can be accessed via the following hyperlink: https://www.consilium.europa.eu/en/council-eu/voting-system/voting-calculator/.

workers, determining whether a Member State has infringed constitutional principles, and for decisions laying down principles for common foreign and security policy and implementing it, or certain decisions in the area of police and judicial cooperation in criminal matters.

The High Representative of the Union for Foreign Affairs and Security Policy (Article 18 TEU)

The High Representative of the Union for Foreign Affairs and Security Policy has not become the EU foreign minister, as planned in the constitutional project; however, their position within the institutional set-up has been considerably strengthened and expanded. The high representative has a base in both the Council, where they hold the presidency of the Foreign Affairs Council, and the Commission, where they are the vice-president in charge of foreign affairs. The high representative is appointed by the European Council, acting by a qualified majority, with the agreement of the President of the Commission. They are assisted by a European External Action Service, which was newly created in 2011 and was formed by merger of the foreign policy departments of the Council and the Commission and the integration of diplomats from the national diplomatic services.

European Commission (Article 17 TEU)

COMPOSITION

27 members, including:
- president
- 3 executive vice-presidents
- High Representative of the Union for Foreign Affairs and Security Policy
- 4 additional vice-presidents
- 18 commissioners

TASKS

- Initiating EU legislation
- Monitoring observance and proper application of EU law
- Administering and implementing EU legislation
- Representing the EU in international organisations

Composition

The European Commission consists of 27 members, one for each Member State, which means that 27 commissioners (with various functions) are currently active in the Commission (Article 17(4) TEU). Following a decision of the European Council, the provision in Article 17(5) TEU to reduce the size of the Commission to two thirds of the number of Member States as from 1 November 2014 was not activated.

The Commission is led by a president, who has a strong position within the Commission. The president is no longer merely 'first among equals' but enjoys a prominent position in that they lay down guidelines within which the Commission is to work and also decides on the internal organisation of the Commission (Article 17(6)(a) and (b) TEU). The president thus has both the authority to issue guidelines and organisational control. Endowed with these powers, the president is responsible for ensuring that the action taken by the Commission is consistent and efficient, and complies with the principle of collegiality, which is reflected in particular by the fact that decisions are taken as a collegiate body (Article 250(1) TFEU). The president structures and allocates the responsibilities incumbent upon the Commission among its members, and may reshuffle the allocation of those responsibilities during the Commission's term of office (Article 248 TFEU). The president appoints the executive vice-presidents and the other vice-presidents, with the exception of the High Representative of the Union for Foreign Affairs and Security Policy, who is already an *ex officio* vice-president of the Commission. Moreover, it is expressly provided that a member of the Commission must resign if the president so requests (second subparagraph of Article 17(6) TEU). Finally, the president's prominent position is also reflected by their right to be heard regarding the selection of other members of the Commission and by their membership of the European Council. Since December 2019, the European Commission has for the first time been led by a female president, Ursula von der Leyen.

Under the leadership of a vice-president, there are six teams of commissioners whose task, regardless of the principle of collegiality, is to monitor and advance the work on the top political priorities:

- a European Green Deal, under the responsibility of Executive Vice-President Frans Timmermans;
- a Europe fit for the digital age, under the responsibility of Executive Vice-President Margrethe Vestager;

Ursula von der Leyen, President of the European Commission, delivers her State of the Union address to Members of the European Parliament, Strasbourg, France, 15 September 2021.

- an economy that works for people, under the responsibility of Executive Vice-President Valdis Dombrovskis;
- a stronger Europe in the world, under the responsibility of High Representative for Foreign Affairs and Security Policy Josep Borell Fontelles;
- promoting the European way of life, under the responsibility of Vice-President Margaritis Schinas;
- a new push for European democracy, under the responsibility of Vice-President Věra Jourová.

The president and members of the Commission are appointed for a term of 5 years using the **investiture** procedure, the rules for which were changed by the Treaty of Lisbon in Article 17(7) TEU. The procedure consists of several stages. Firstly, the president is nominated, and then the people to be appointed as members of the Commission are selected. In a third step, the President of the Commission, the High Representative of the Union for Foreign Affairs and Security Policy and the other members of the Commission are officially appointed.

After having held the appropriate consultations, the European Council, acting by a qualified majority, proposes to the European Parliament a candidate for President of the Commission. The results of the European Parliament elections must be taken into account when selecting the candidate for the office of president. This new requirement aims to increase the level of politicisation of the Commission. This ultimately means that the political groups that control a majority in the Parliament carry significant weight when nominating the president.

After the president has been elected, the European Council adopts 'by consensus' (Article 15(4) TEU) the list of the other people whom it intends to appoint as members of the Commission, which is drawn up according to the proposals of the Member States. People should be chosen on the ground of their general competence and European commitment and should also be completely independent in the performance of their duties. A qualified majority in the Council is sufficient for the appointment of the High Representative of the Union for Foreign Affairs and Security Policy (Article 18(1) TEU). The Council and the president-elect of the Commission must reach agreement on the candidates. The appointment of the high representative even requires the express agreement of the president-designate of the Commission. The other members of the Commission cannot be appointed if the president-elect issues a veto against it.

Once the president has been elected and the High Representative of the Union for Foreign Affairs and Security Policy and the other members of the Commission have been nominated, college is subject to a vote of approval by the Parliament. However, the commissioners-designate must firstly respond to questions from MEPs in a hearing. The questions generally relate to topics falling within the envisaged scope of responsibilities and personal attitudes on the future of the EU. After the Parliament has given its assent, for which a simple majority is sufficient, the president and the other members of the Commission are appointed by the European Council, acting by a qualified majority. The Commission takes up its duties as soon as its members have been appointed.

The **seat** of the European Commission is in Brussels.

Tasks

The Commission is first of all the **driving force behind EU policy**. It is the starting point for every European Union action, as it is the Commission that has to present proposals and drafts for EU legislation to the Council (this is termed the Commission's **right of initiative**). The Commission is not free to choose its own activities. It is obliged to act if the EU interest so requires. The Parliament (Article 225 TFEU), the Council (Article 241 TFEU) and a group of EU citizens acting on behalf of a citizens' initiative (Article 11(4) TEU) may also ask the Commission to draw up a proposal. The Commission has primary powers to initiate legislation in certain areas (e.g. the EU budget, the Structural Funds, measures to tackle tax discrimination, the provision of funding, safeguard clauses). Much more extensive, however, are the **powers for the implementation of EU rules** conferred on the Commission by the Parliament and the Council (Article 290 TFEU).

The Commission is also the **guardian of the treaties**, and therefore of EU law. It monitors the Member States' application and implementation of primary and secondary EU legislation, institutes infringement proceedings in the event of any violation of EU law (Article 258 TFEU) and, if necessary, refers the matter to the Court of Justice. The Commission also intervenes if EU law, particularly competition law, is infringed by any natural or legal person, and imposes heavy penalties. Over the last few years, efforts to prevent abuse of EU rules have become a major part of the Commission's work.

Closely connected with the role of guardian is the task of **representing the EU's interests**. As a matter of principle, the Commission may serve no

interests other than those of the EU. It must constantly endeavour, in what often prove to be difficult negotiations within the Council, to make the EU interest prevail and seek compromise solutions that take account of that interest. In so doing, it also plays the role of mediator between the Member States, a role for which, by virtue of its neutrality, it is particularly suited and qualified.

Lastly, the Commission is – albeit to a limited extent – an **executive body**. This is especially true in the field of competition law, where the Commission acts as a normal administrative authority, checking facts, granting approval or issuing bans and, if necessary, imposing penalties. The Commission's powers in relation to the Structural Funds and the EU budget are similarly wide ranging. As a rule, however, it is the Member States themselves that have to ensure that EU rules are applied in individual cases. This solution chosen by the EU treaties has the advantage that citizens are brought closer to what is still to them the 'foreign' reality of the EU system through the workings and in the familiar form of their own national system.

ADMINISTRATIVE STRUCTURE OF THE EUROPEAN COMMISSION

- Commission (27 members)
- Generaldirektionen und Dienststellen
- Generalsekretariat
- Juristischer Dienst

DIRECTORATES-GENERAL AND SERVICES

- Secretariat-General
- Legal Service
- Directorate-General for Communication
- IDEA – Inspire, Debate, Engage and Accelerate Action
- Directorate-General for Budget
- Directorate-General for Economic and Financial Affairs
- Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs
- Directorate-General for Defence Industry and Space
- Directorate-General for Human Resources and Security
- Directorate-General for Informatics
- Internal Audit Service
- European Anti-Fraud Office
- Directorate-General for Competition
- Directorate-General for Employment, Social Affairs and Inclusion
- Directorate-General for Agriculture and Rural Development

- Directorate-General for Mobility and Transport
- Directorate-General for Energy
- Directorate-General for Environment
- Directorate-General for Climate Action
- Directorate-General for Research and Innovation
- Directorate-General for Communications Networks, Content and Technology
- Joint Research Centre
- Directorate-General for Maritime Affairs and Fisheries
- Directorate-General for Financial Stability, Financial Services and Capital Markets Union
- Directorate-General for Regional and Urban Policy
- Directorate-General for Structural Reform Support
- Directorate-General for Taxation and Customs Union
- Directorate-General for Education, Youth, Sport and Culture
- Directorate-General for Health and Food Safety
- Health Emergency Preparedness and Response Authority
- Directorate-General for Migration and Home Affairs
- Directorate-General for Justice and Consumers
- Directorate-General for Trade
- Directorate-General for Neighbourhood and Enlargement Negotiations
- Directorate-General for International Partnerships
- Directorate-General for European Civil Protection and Humanitarian Aid Operations (ECHO)
- Eurostat
- Directorate-General for Interpretation
- Directorate-General for Translation
- Publications Office of the European Union
- Service for Foreign Policy Instruments
- Office for the Administration and Payment of Individual Entitlements
- Office for Infrastructure and Logistics in Brussels
- Office for Infrastructure and Logistics in Luxembourg
- European Personnel Selection Office

OTHER SERVICE DEPARTMENTS

- Data Protection Officer
- European Commission Library
- European School of Administration
- Historical Archives Service
- Recovery and Resilience Task Force
- Spokesperson's Service

Court of Justice of the European Union (Article 19 TEU)

Any system will endure only if its rules are supervised by an independent authority. What is more, in a union of states there is a risk of the common rules – if they are subject to control by the national courts – being interpreted and applied differently from one state to another. The uniform application of EU law in all Member States would thus be jeopardised. These considerations led to the establishment of a Community Court of Justice in 1952, as

soon as the first Community (the ECSC) was created. In 1957, it also became the judicial body for the other two Communities (E(E)C and Euratom). The Court of Justice of the European Union has its seat in Luxembourg.

Today it is the judicial body of the EU. The judicial work is now carried out on **two levels** by:

- the Court of Justice, as the highest instance in the legal order of the EU (Article 253 TFEU); and
- the General Court (Article 254 TFEU).

In 2004, to relieve the burden on the Court of Justice and improve legal protection in the EU, the Council attached a specialised court for civil-service cases to the General Court (see Article 257 TFEU). In 2015, however, the EU legislature decided to gradually increase the number of judges at the General Court (to 54 in 2020) and to transfer to it the jurisdiction of the Civil Service Tribunal. The Tribunal was thus dissolved on 1 September 2016.

COMPOSITION OF THE COURT OF JUSTICE

27 judges
and
11 advocates general
appointed by the governments of the Member States by common accord for a term of 6 years

TYPES OF PROCEEDING

- **Actions for failure to fulfil obligations under the treaties:** Commission v Member State (Article 258 TFEU); Member State v Member State (Article 259 TFEU)
- **Actions for annulment and actions on grounds of failure to act** brought by an EU institution or a Member State (against the Parliament and/or the Council) in connection with an illegal act or failure to act (Articles 263 and 265 TFEU)
- **Cases referred from national courts for preliminary rulings** to clarify the interpretation and validity of EU law (Article 267 TFEU)
- **Appeals** against decisions of the General Court (Article 256 TFEU)

The Court of Justice is the highest judicial authority in matters of EU law. In general terms, its task is to 'ensure that in the interpretation and application of the treaties the law is observed'.

This general description of responsibilities encompasses three main areas:

- monitoring the application of EU law, both with regard to the conduct of the EU institutions when implementing treaty provisions and with regard to the fulfilment of obligations under EU law by the Member States and individuals;
- interpretation of EU law;
- further shaping of EU law.

In carrying out these tasks, the Court's work involves both legal advice and adjudication. **Legal advice** is provided in the form of binding opinions on agreements the EU wishes to conclude with non-EU countries or international organisations. Its function as a **body for the administration of justice** is much more important, however. In exercising that function, it operates in matters that in the Member States would be assigned to different types of court, depending on their national systems. It acts as a **constitutional court** when disputes between EU institutions are before it or legislative instruments are up for review for legality; as an **administrative court** when reviewing the administrative acts of the Commission or of national authorities applying EU legislation; as a **labour court** or **industrial tribunal** when dealing with freedom of movement, social security and equal opportunities; as a **fiscal court** when dealing with matters concerning the validity and interpretation of directives in the fields of taxation and customs law; and as a **civil court** when hearing claims for damages or interpreting the provisions on the enforcement of judgments in civil and commercial matters.

General Court

The number of cases referred to the Court of Justice has increased steadily and will continue to grow, given the potential for disputes that has been created by the huge number of directives that have been adopted in the context of the single market and transposed into national law in the Member States. The signs are already there that the EU Treaty has raised further questions that will ultimately have to be settled by the Court. This is why, in 1988, a General Court was established to take the pressure off the Court of Justice.

COMPOSITION OF THE GENERAL COURT

54 judges
with each Member State providing two judges appointed by the governments of the Member States by common accord for a term of 6 years

TYPES OF PROCEEDING

- **Actions for annulment and complaints of failure to act** filed by natural and legal persons on the grounds of illegality or absence of Union legal acts; actions brought by Member States against the Council and/or the Commission in the areas of subsidies, anti-dumping and implementing powers (Articles 263 and 265 TFEU)
- **Actions for damages** on the grounds of contractual or non-contractual liability (Article 268 and Article 340(1) and (2) TFEU)

The General Court is not a new EU institution but rather a constituent component of the Court of Justice of the European Union. Nevertheless, it is an autonomous body separate from the Court of Justice in organisational terms. It has its own registry and rules of procedure. Cases handled by the General Court are identified by means of a 'T' (Tribunal) (e.g. T-1/20), whilst those referred to the Court of Justice are coded with a 'C' (Court) (e.g. C-1/20).

Although the General Court was originally responsible for only a limited range of cases, it now has the following tasks.

- At first instance, i.e. subject to the legal supervision of the Court of Justice, the General Court has competence to rule on actions for annulment and actions for failure to act brought by natural and legal persons against an EU body; on actions brought by Member States against the Council and/or the Commission in the areas of subsidies, anti-dumping and implementing powers; on an arbitration clause contained in a contract concluded by the EU or on its behalf; and on actions for damages brought against the EU.
- It is also planned to confer jurisdiction on the General Court for preliminary-ruling proceedings concerning certain areas; however, this option has not yet been used.

European Central Bank (Articles 129 and 130 TFEU)

The European Central Bank, based in Frankfurt am Main, is at the **heart of the economic and monetary union**. Its task is to maintain the stability of the European Union currency, the euro, and control the amount of currency in circulation (Article 128 TFEU).

In order to carry out this task, the ECB's independence is guaranteed by numerous legal provisions. When exercising their powers or carrying out their tasks and duties, neither the ECB nor a national central bank may take instructions from EU institutions, governments of Member States or any other body. The EU institutions and the Member States' governments will not seek to influence the ECB (Article 130 TFEU).

The **European System of Central Banks** is composed of the ECB and the central banks of the Member States (Article 129 TFEU). It has the task of defining and implementing the monetary policy of the EU, and has the exclusive right to authorise the issue of banknotes and coins within the EU. It also manages the official currency reserves of the Member States and ensures the smooth operation of payment systems (Article 127(2) TFEU).

European Court of Auditors (Articles 285 and 286 TFEU)

The European Court of Auditors was set up on 22 July 1975 and began work in Luxembourg in October 1977. It has since risen to the rank of EU institution (Article 13 TEU). It consists of **27 members**, corresponding to the present number of Member States. They are appointed for 6 years by the Council, which approves, by qualified majority and following consultation with the Parliament, a list of members drawn up in accordance with proposals from the Member States (Article 286(2) TFEU). The members elect the President of the Court of Auditors from among their number for a term of 3 years; the president may be re-elected.

The Court of Auditors' **task** is to examine whether all revenue has been received and all expenditure incurred in a lawful and regular manner and whether financial management has been sound. The chief weapon in its armoury is the fact that it can **publicise its findings**. The results of its investigations are summarised in an annual report at the end of each financial year, which is published in the *Official Journal of the European Union* and thus brought to public attention. It may also make special reports at any

time on specific areas of financial management, and these are also published in the Official Journal.

Advisory bodies

European Economic and Social Committee (Article 301 TFEU)

The purpose of the European Economic and Social Committee (EESC) is to give the various economic and social groups (especially employers and employees, farmers, carriers, business people, craft workers, the professions and managers of small and medium-sized businesses) representation in an EU institution. It also provides a forum for consumers, environmental groups and associations.

The EESC is composed of a maximum of 350 members (currently 326), drawn from the most representative organisations in the individual Member States. They are appointed for 5 years by the Council, which adopts a list of members drawn up in accordance with the proposals made by each Member State.

The allocation of seats is as follows:

Germany, France, Italy	**24**
Spain, Poland	**21**
Romania	**15**
Belgium, Bulgaria, Czechia, Greece, Hungary, Netherlands, Austria, Portugal, Sweden	**12**
Denmark, Ireland, Croatia, Lithuania, Slovakia, Finland	**9**
Latvia, Slovenia	**7**
Estonia	**6**
Cyprus, Luxembourg, Malta	**5**

The members are divided up into three groups (employers, workers and other parties representative of civil society). Opinions to be adopted at plenary sessions are drawn up by 'study groups'. The EESC also works closely together with the committees of the European Parliament.

In certain circumstances, it must be consulted in the legislative procedure. It also issues opinions on its own initiative. These opinions represent a synthesis of sometimes very divergent viewpoints and are extremely useful for the Council and the Commission because they show what changes the groups directly affected by a proposal would like to see.

The EESC has its seat in Brussels.

European Committee of the Regions (Article 305 TFEU)

A new advisory body was set up alongside the EESC by the EU Treaty (Treaty of Maastricht): the European Committee of the Regions. Like the EESC, it is not strictly an EU institution, as its function is purely **advisory.** It is not its task to produce legally binding decisions in the same way as the fully fledged EU institutions (Parliament, European Council, Council, Commission, Court of Justice, ECB, Court of Auditors).

Like the EESC, the European Committee of the Regions consists of a maximum of 350 members (at present this figure is 329). The members are representatives of regional and local authorities in the Member States who must have a mandate based on elections from the authorities they represent, or must be politically accountable to them.

The allocation of seats is as follows:

Germany, France, Italy	**24**
Poland, Spain	**21**
Romania	**15**
Belgium, Bulgaria, Czechia, Greece, Hungary, Netherlands, Austria, Portugal, Sweden	**12**
Denmark, Ireland, Croatia, Lithuania, Slovakia, Finland	**9**
Estonia, Latvia, Slovenia	**7**
Cyprus, Luxembourg	**6**
Malta	**5**

There are a number of areas in which **consultation by the Council or the Commission** is required (mandatory consultation): education; culture; public health; trans-European networks; transport, telecommunications and energy infrastructure; economic and social cohesion; employment policy and

social legislation. The Council also consults the European Committee of the Regions regularly, and without any legal obligation, in connection with a wide range of draft legislation (non-mandatory consultation).

The European Committee of the Regions also has its seat in Brussels.

The European Investment Bank (Article 308 TFEU)

As financing agency for its 'balanced and steady development', the EU has at its disposal the European Investment Bank, located in Luxembourg. The Bank provides loans and guarantees in all economic sectors, especially to promote the development of less-developed regions, to modernise or convert undertakings or create new jobs and to assist projects of common interest to several Member States.

THE LEGAL ORDER OF THE EUROPEAN UNION

The constitution of the EU described above, and particularly the fundamental values it embodies, are initially very abstract and need to be fleshed out by EU law. This makes the EU a legal reality in two different senses: it is created by law and is a Union based on law.

The European Union as a creation of law and a Union based on law

What is entirely new about the EU and what distinguishes it from earlier attempts to unite Europe is the fact that it works not by means of force or subjugation but simply by means of law. For only unity based on a freely made decision can be expected to last – unity founded on the fundamental values such as freedom and equality, and protected and translated into reality by law. That is the insight underlying the treaties that created the European Union.

However, the EU is not merely a creation of law but also pursues its objectives purely by means of law. It is a Union **based on** law. The common economic and social life of the peoples of the Member States is governed not by the threat of force but by the law of the Union. This is the basis of the institutional system. It lays down the procedure for decision-making by the EU institutions and regulates their relationship to each other. It provides the institutions with the means – in the shape of regulations, directives and decisions – of enacting legal instruments binding on the Member States and their citizens. Thus the individuals themselves become a main focus of the EU. Its legal order directly affects their daily life to an ever increasing extent. It accords them rights and imposes obligations on them, so that as citizens both of their state and of the EU they are governed by a hierarchy of legal orders – a phenomenon familiar from federal constitutions. Like any legal order, that of the EU provides a self-contained system of legal protection for the purpose of recourse to and the enforcement of EU law. EU law also defines the relationship between the EU and the Member States. The Member States must take all appropriate measures to ensure fulfilment of the obligations arising from the treaties or resulting from action taken by

the institutions of the EU. They must facilitate the achievement of the EU's tasks and abstain from any measure that could jeopardise the attainment of the objectives of the treaties. The Member States are answerable to the citizens of the EU for any harm caused through violations of EU law.

The legal sources of European Union law

The term 'legal source' has two meanings. In its original meaning, it refers to the reason for the emergence of a legal provision, i.e. the motivation behind the creation of a legal construct. According to this definition, the 'legal source' of EU law is the will to preserve peace and create a better Europe through closer economic ties – two cornerstones of the EU. In legal parlance, on the other hand, 'legal source' refers to the origin and embodiment of the law.

The founding treaties of the European Union as the primary source of EU law

The **first source of EU law** in this sense is the EU's founding treaties, with the various annexes, appendices and protocols attached to them, and later additions and amendments. These founding treaties and the instruments amending and supplementing them (chiefly the Treaties of Maastricht, Amsterdam, Nice and Lisbon) and the various accession treaties contain the basic provisions on the EU's objectives, organisation and modus operandi, and parts of its economic law. The same is true of the Charter of Fundamental Rights of the European Union, which has had the same legal value as the treaties since the Treaty of Lisbon entered into force (Article 6(1) TEU). They thus set the constitutional framework for the life of the EU, which is then fleshed out in the Union's interest by legislative and administrative action by the EU institutions. The treaties, being legal instruments created directly by the Member States, are known in legal circles as **primary EU law**.

The European Union legal instruments as the secondary source of EU law

Law made by the EU institutions by exercising the powers conferred on them is referred to as **secondary legislation**, the **second important source of EU law**.

Legal sources of EU law

It consists of legislative acts, non-legislative acts (simple legal instruments, delegated acts, implementing acts), non-binding instruments (opinions, recommendations) and other acts that are not legal acts (e.g. interinstitutional agreements, resolutions, declarations, action programmes). 'Legislative acts' (Article 289 TFEU) are legal acts adopted by ordinary or special legislative procedure. 'Delegated acts' (Article 290 TFEU) are non-legislative acts of general and binding application to supplement or amend certain non-essential elements of a legislative act. They are adopted by the Commission; a legislative act must be drawn up explicitly delegating power to the Commission for this purpose. Where uniform conditions are needed for implementing legally binding EU acts, this is done by means of appropriate **implementing acts**, which are generally adopted by the Commission and, in certain exceptional cases, by the Council (Article 291 TFEU). The EU institutions can issue recommendations and opinions in the form of **non-binding instruments**. Finally, there is a whole set of 'acts that are not legal acts' that the EU institutions can use to issue non-binding measures and statements or that regulate the internal workings of the EU or its institutions, such as agreements or arrangements between the institutions, or internal rules of procedure.

These legislative and non-legislative acts can take very **different forms**. The most important of these are listed and defined in Article 288 TFEU. In the way of **binding legal acts**, it includes regulations, directives and decisions. In the way of non-binding **legal acts**, the list includes recommendations and opinions. This list of acts is not exhaustive, however. Many other legal acts do not fit into specific categories. These include resolutions, declarations, action programmes or White and Green Papers. There are considerable differences between the various acts in terms of the procedure involved, their legal effect and those to whom they are addressed; these differences will be dealt with in more detail in the section 'The European Union's means of action'.

Binding instruments

- Regulations
- Directives
- Decisions

Legislative acts

= legal acts that are enacted through the ordinary legislative procedure

Simple legal instruments

= legal acts that are not enacted through the legislative procedure

Delegated acts

Article 290 TFEU

Implementing acts

Article 291 TFEU

Non-binding instruments

- Recommendations
- Opinions

Other forms of action that are not legal acts

- Resolutions
- Declarations
- Communications from the Commission
- Action programmes
- White Papers
- Green Papers

The creation of secondary EU legislation is a gradual process. Its emergence lends vitality to the primary legislation deriving from the EU treaties, and progressively generates and enhances the European legal order.

International agreements of the European Union

A **third source of EU law** is connected with the EU's role at the international level. As one of the focal points of the world, Europe cannot confine itself to managing its own internal affairs; it has to concern itself with economic, social and political relations with the world outside. The EU therefore concludes agreements in international law with non-EU countries ('third countries') and with other international organisations. The following such agreements are particularly worth mentioning.

Association agreements

Association goes far beyond the mere regulation of trade policy, and involves close economic cooperation and wide-ranging financial assistance from the EU for the country concerned (Article 217 TFEU). A distinction may be drawn between three different types of association agreement.

Agreements that maintain special links between certain Member States and non-EU countries

One particular reason for the creation of the association agreement was the existence of countries and territories outside Europe with which Denmark, France, the Netherlands and the United Kingdom maintained particularly close economic ties as a legacy of their colonial past. The introduction of a common external tariff in the EU would have seriously disrupted trade with these territories, which meant that special arrangements were needed. The purpose of association is therefore to promote the economic and social development of the countries and territories and to establish close economic relations between them and the EU as a whole (Article 198 TFEU). As a result, there is a whole range of preferential agreements enabling goods to be imported from these countries and territories at reduced or zero customs rates. Financial and technical assistance from the EU was channelled through the European Development Fund. Far and away the most important agreement in practice is the EU–ACP Partnership Agreement between the EU and 70 states in Africa, the Caribbean and the Pacific (ACP). This agreement is currently being converted into regional economic partnership agreements, gradually giving the ACP countries free access to the European internal market.

Agreements as preparation for possible accession to the European Union or for the establishment of a customs union

Association arrangements are also used in the preparation of countries for possible membership of the EU. The arrangement serves as a preliminary stage towards accession during which the applicant country can work on converging its economy with that of the EU. This strategy is currently being implemented for the countries of the western Balkans (Bosnia and Herzegovina, Kosovo, Montenegro, Serbia). Here, the accession process is being backed up by the extended stabilisation and association process (SAP), which constitutes the overall framework for the progression of the countries of the western Balkans, all the way to their accession. The SAP pursues three objectives: (1) stabilisation and a swift transition to a functioning market economy; (2) the promotion of regional cooperation; (3) the prospect of EU membership. The SAP is based on a progressive partnership in which the EU offers trade concessions, economic and financial support and a contractual relationship in the form of stabilisation and association agreements. Each country must make specific progress within the framework of the SAP in order to meet the requirements of potential membership. The progress

of the countries of the western Balkans towards possible EU membership is evaluated in annual reports.

Agreement on the European Economic Area (EEA)

The EEA Agreement brings the (remaining) countries in the European Free Trade Association (Iceland, Liechtenstein and Norway) into the internal market and, by requiring them to incorporate nearly two thirds of the EU's legislation, lays a firm basis for subsequent accession. In the EEA, on the basis of the *acquis communautaire* (the body of primary and secondary EU legislation), there is to be free movement of goods, persons, services and capital, uniform rules on competition and state aid, and closer cooperation on horizontal and flanking policies (environment, research and development, education).

Cooperation agreements

Cooperation agreements are not as far reaching as association agreements, being aimed solely at intensive economic cooperation. The EU has such agreements with the Maghreb states (Algeria, Morocco and Tunisia), the Mashreq states (Egypt, Jordan, Lebanon and Syria) and Israel, for instance.

Trade agreements

The EU also has a considerable number of trade agreements with individual non-EU countries, with groupings of such countries or within international trade organisations relating to tariffs and trade policy. The most important international trade agreements are the Agreement establishing the World Trade Organisation and the multilateral trade agreements deriving from it, including in particular the General Agreement on Tariffs and Trade 1994; the Antidumping and Subsidies Code; the General Agreement on Trade in Services; the Agreement on Trade-Related Aspects of Intellectual Property Rights; and the Understanding on Rules and Procedures Governing the Settlement of Disputes. However, bilateral free trade agreements have increasingly been gaining ground over multilateral agreements. Owing to the tremendous difficulties inherent in concluding multilateral liberalisation agreements within the framework of the World Trade Organisation, for instance, all the trading powers, including the EU, have turned to concluding bilateral free trade agreements. The most recent examples are the successful conclusion of trade negotiations with Canada, Chile, Japan, Mexico, Singapore, South Korea, Vietnam, the Mercosur countries (Argentina, Brazil,

Norway (Svalbard archipelago pictured here) is a member of the EEA, which also includes Iceland and Liechtenstein, as well as the 27 Member States of the EU. The four freedoms (free movement of goods, persons, services and capital) apply in the EEA.

Paraguay and Uruguay) and New Zealand and the conclusion of a partnership agreement between the EU and the Organisation of African, Caribbean and Pacific States (OACPS, previously the ACP States). Further trade negotiations are ongoing, in particular with Australia, India, and Indonesia.

Sources of unwritten law

The sources of EU law described so far share a common feature in that they all produce written law. Like all systems of law, however, the EU legal order cannot consist entirely of written rules: there will always be gaps that have to be filled by unwritten law.

General principles of law

The unwritten sources of EU law are the general principles of law. These are rules reflecting the elementary concepts of law and justice that must be respected by any legal system. Written EU law for the most part deals only with economic and social matters, and is only to a limited extent capable of laying down rules of this kind, which means that the general principles of law form one of the most important sources of law in the EU. They allow gaps to be filled and questions of the interpretation of existing law to be settled in the fairest way.

These principles are given effect when the law is applied, particularly in the judgments of the Court of Justice, which is responsible for ensuring that 'in the interpretation and application of the Treaty the law is observed'. The main points of reference for determining the general principles of law are the principles common to the legal orders of the Member States. They provide the background against which the EU rules needed for solving a problem can be developed.

Alongside the principles of autonomy, direct applicability and the primacy of EU law, other legal principles include the guarantee of basic rights (at least for Poland, which is not subject to the Charter of Fundamental Rights due to an opt-out), the principle of proportionality (which has actually been regulated by a positive provision in Article 5(4) TEU), the protection of legitimate expectations, the right to a proper hearing and the principle that the Member States are liable for infringements of EU law.

Legal custom

Unwritten EU law also encompasses legal custom. This is understood to mean a practice that has been followed and accepted and thus become legally established, and that adds to or modifies primary or secondary legislation. The possible establishment of legal custom in EU law is acknowledged in principle. There are considerable limitations on its becoming established in the context of EU law, however. The first hurdle is the existence of a special procedure for the amendment of the treaties (Article 48 TEU). This does not rule out the possible emergence of legal custom, but it does make the criteria according to which a practice is deemed to have been followed and accepted for a substantial period much harder to meet. Another hurdle to the establishment of legal custom in the EU institutions is the fact that any action by an institution may derive its validity only from the treaties, and not from that institution's actual conduct or any intention on its part to create legal relations. This means that, at the level of the treaties, legal custom can under no circumstances be established by the EU institutions; at most, only the Member States can do this – and then only subject to the stringent conditions mentioned above. Procedures and practices followed and accepted as part of the law by EU institutions may, however, be drawn on when interpreting the legal rules laid down by them, which might alter the legal implications and scope of the legal act concerned. However, the conditions and limitations arising from primary EU legislation must also be borne in mind here.

Agreements between the Member States

The **final source of EU law** comprises agreements between the Member States. Agreements of this kind may be concluded for the settlement of issues closely linked to the EU's activities, but no powers have been transferred to the EU institutions (for example the 2012 Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, also known as the Fiscal Compact Treaty, which was entered into without Czechia). There are also full-scale international agreements (treaties and conventions) between the Member States aimed especially at overcoming the drawbacks of territorially limited arrangements and creating law that applies uniformly throughout the EU. This is important primarily in the field of private international law (for example the Convention on the Law Applicable to Contractual Obligations (1980)).

The European Union's means of action

The attainment of the objectives pursued by the EU requires that its bodies undertake actions that make it possible for the European Union to align the disparate economic, social and, not least, environmental conditions in the various Member States. EU law must therefore provide a set of legal instruments, such as are also required by, and available to, the bodies of the states themselves for the performance of their national tasks.

The obvious option of applying the range of instruments adopted from the Member States, however, was not considered feasible, because they use forms of action at the national level that vary from country to country, and adopting the model of an individual Member State would be unlikely to meet the needs and interests of the EU as a whole. When the EEC was set up, legislators thus faced the difficult task of 'developing' a range of instruments that were aligned with the structures and responsibilities of the Community. The first priority was to decide what forms these legal instruments should take and what effects they should have. The institutions had to be able to align the disparate economic, social and, not least, environmental conditions in the various Member States, and do so effectively, i.e. without depending on the goodwill of the Member States, so that the best possible living conditions could be created for all the citizens of the EU. On the other hand, they were not to interfere in the domestic systems of law any more than necessary. The entire EU legislative system is therefore based on the principle that where the same arrangement, even on points of detail, must apply in all Member States, national arrangements must be replaced by EU legislation, but where this is not necessary due account must be taken of the existing legal orders in the Member States.

Against this background a range of instruments was developed that allowed the EU institutions to impact on the national legal systems to varying degrees. The most drastic action is the replacement of national rules by EU ones. There are also EU rules by which the EU institutions act on the Member States' legal systems only indirectly. Measures may also be taken that affect only a defined or identifiable addressee, in order to deal with a particular case. Lastly, provision is also made for legal acts that have no binding force, either on the Member States or on the citizens of the EU.

If we look at the range of legal instruments in terms of the persons to whom they are addressed and their practical effects in the Member States, the system of EU legal instruments can be broken down as follows, on the basis of Article 288 TFEU.

System of EU legal instruments

Article 288 TFEU

Regulations as European Union 'laws'

The legal acts that enable the EU institutions to impinge furthest on the domestic legal systems are the regulations. Two features highly unusual in international law mark them out.

- The first is their **EU nature**, which means that they lay down the same law throughout the EU, regardless of international borders, and apply in full in all Member States. A Member State has no power to apply a regulation incompletely or to select only those provisions of which it approves as a means of ensuring that an instrument that it opposed at the time of its adoption or that runs counter to its perceived national interest is not given effect. Nor can it invoke provisions or practices of domestic law to preclude the mandatory application of a regulation.
- The second is **direct applicability**, which means that the legal acts do not have to be transposed into national law but confer rights or impose obligations on the EU citizen in the same way as national law. The Member States and their governing institutions and courts are bound directly by EU law and have to comply with it in the same way as with national law.

The similarities between these legal acts and statute law passed in individual Member States are unmistakable. If they are enacted jointly by the Parliament and the Council (under the 'ordinary legislative procedure' – see the section 'The legislative process in the EU'), they are therefore referred to as 'legislative acts'. Parliament has no responsibility for regulations, which are only enacted by the Council or the European Commission and thus, from a procedural point of view at least, they lack the essential characteristics of legislation of this kind.

Directives

Alongside the regulation, the directive is the most important legislative instrument. Its purpose is to reconcile the dual objectives of securing the necessary uniformity of EU law and respecting the diversity of national traditions and structures. What the directive therefore primarily aims for is not the unification of the law, which is the regulation's purpose, but its harmonisation. The idea is to remove contradictions and conflicts between national laws and regulations or gradually iron out inconsistencies so that, as far as possible, the same material conditions exist in all the Member States. The directive is one of the primary means deployed in building the single market.

A directive is binding on the Member States as regards the objective to be achieved but leaves it to the national authorities to decide on how the agreed EU objective is to be incorporated into their domestic legal systems. The reasoning behind this form of legislation is that it allows intervention in domestic economic and legal structures to take a milder form. In particular, Member States can take account of special domestic circumstances when implementing EU rules. What happens is that the directive does not supersede the laws of the Member States, but places the Member States under an obligation to adapt their national law in line with EU provisions. The result is generally a two-stage lawmaking process:

First, at the **initial stage**, the directive lays down the objective that is to be achieved **at the EU level** by any or all Member States to which it is addressed within a specified time frame. The EU institutions can actually spell out the objective in such detailed terms as to leave the Member States with no room for manoeuvre, and this has in fact been done in directives on technical standards and environmental protection.

Second, at the **national stage**, the objective set out at the EU level is translated into actual legal or administrative provisions in the Member States. Even if the Member States are in principle free to determine the form and methods used to transpose their EU obligation into domestic law, EU criteria are used to assess whether they have done so in accordance with EU law. The general principle is that a legal situation must be generated in which the rights and obligations arising from the directive can be recognised with sufficient clarity and certainty to enable the EU citizen to invoke or, if appropriate, challenge them in the national courts. This normally involves enacting mandatory provisions of national law or repealing or amending existing rules. Administrative custom on its own is not enough since it can, by its very nature, be changed at will by the authorities concerned, nor does it have a sufficiently high profile.

Directives do not, as a rule, directly confer rights or impose obligations on the EU citizen. They are expressly addressed to the Member States alone. Rights and obligations for the citizen flow only from the measures enacted by the authorities of the Member States to implement the directive. This point is of no importance to citizens as long as the Member States actually comply with their EU obligation. But there are **disadvantages** for EU citizens where a Member State does not take the requisite implementing measures to achieve an objective set in a directive that would benefit them, or where the measures taken are inadequate. The Court of Justice has refused

to tolerate such disadvantages, and a long line of cases has determined that, in such circumstances, EU citizens can plead that the directive or recommendation has direct effect in actions in the national courts to secure the rights conferred on them by it. Direct effect is defined by the Court as follows:

- the provisions of the directive must lay down the rights of the EU citizen/undertaking with sufficient clarity and precision;
- the exercise of the rights is not conditional;
- the national legislative authorities may not be given any room for manoeuvre regarding the content of the rules to be enacted;
- the time allowed for implementation of the directive has expired.

The decisions of the Court of Justice concerning direct effect are based on the general view that the Member State is acting equivocally and unlawfully if it applies its old law without adapting it to the requirements of the directive. This is an abuse of rights by the Member State and the recognition of direct effect of the directive seeks to combat it by ensuring that the Member State derives no benefit from its violation of EU law. Direct effect thus has the effect of **penalising** the offending Member State. In that context it is significant that the Court of Justice has applied the principle solely in cases between citizen and Member State, and then only when the directive was for the citizen's benefit and not to their detriment – in other words when the citizen's position under the law as amended under the directive was more favourable than under the old law (known as 'vertical direct effect').

The direct effect of directives in relations between citizens themselves ('horizontal direct effect') has not been accepted by the Court of Justice. The Court concludes from the punitive nature of the principle that it is not applicable to relations between private individuals, since they cannot be held liable for the consequences of the Member State's failure to act. Rather, individuals can rely on certainty in the law and the protection of legitimate expectations. The citizen must be able to count on the effect of a directive being achieved by national implementing measures. However, the Court of Justice has developed a primary-law principle according to which the content of a guideline is also applicable to private-law issues, provided that it gives expression to the general prohibition of discrimination. The Court of Justice's construct goes beyond the prohibition of discrimination, which, as expressed in the respective directives, obliges national authorities, and particularly national courts, to provide, within the limits of their jurisdiction, the legal protection that individuals derive from EU law and to ensure the full

Directive 2012/27/EU of 25 October 2012 (the energy efficiency directive) contains a package of binding measures intended to contribute towards the EU achieving its objective of increasing energy efficiency by 20 % by 2020. The EU Member States had to transpose the directive into national law by 5 June 2014.

effectiveness of that law, disapplying if need be any provision of national legislation contrary to that principle. Owing to the primacy of EU law, therefore, the prohibition of discrimination as set out by the respective directives takes precedence over conflicting national law. Thus, although the Court has not cast doubt on its case-law on the lack of horizontal effect of directives, it has effectively reached that conclusion with regard to the prohibition on discrimination in all cases in which the latter is given expression in a directive. The Court has previously found this to be the case for guidelines that related to traditional discrimination based on nationality, sex or age. This should, however, apply to all guidelines that are adopted to combat the grounds for discrimination listed in Article 19 TFEU.

The direct effect of a directive does not necessarily imply that a provision of the directive confers rights on the individual. In fact, the provisions of a directive have a direct effect insofar as they have the **effect of objective law**. The same conditions apply to the recognition of this effect as for the recognition of a direct effect, the only exception being that, instead of clear and precise law being set out for the EU citizen or enterprise, a clear and precise obligation is established for the Member States. Where this is the case, all institutions – i.e. the legislator, administration and courts of the Member States – are bound by the directive and must automatically comply with it and apply it as EU law with primacy. In concrete terms, they also therefore have an obligation to interpret national law in accordance with the directives or give the provision of the directive in question priority of application over conflicting national law. In addition, the directives have certain limiting effects on the Member States – even before the end of the transposition period. In view of the binding nature of a directive and their duty to facilitate the achievement of the EU's tasks (Article 4 TEU), Member States must abstain, before the end of the transposition period, from any measure that could jeopardise the attainment of the objective of the directive.

In its judgments in Joined Cases C-6/90 and C-9/90 *Francovich* and *Bonifaci* in 1991, the Court of Justice held that Member States are liable to pay damages where loss is sustained by reason of failure to transpose a directive in whole or in part. Both cases were brought against Italy for failure to transpose on time Council Directive 80/987/EEC of 20 October 1980 on the protection of employees in the event of the employer's insolvency, which sought to protect the employee's rights to remuneration in the period preceding insolvency and dismissal on grounds of insolvency. To that end, guarantee funds were to be established with protection from creditors; they were to be funded by employers, the public authorities or both. The

problem facing the Court was that, although the aim of the directive was to confer on employed workers a personal right to continued payment of remuneration from the guarantee funds, this right could not be given direct effect by the national courts, meaning that they could not enforce it against the national authorities, since in the absence of measures transposing the directive the guarantee fund had not been established and it was not possible to ascertain who was the debtor in connection with the insolvency. The Court ruled that, by failing to implement the directive, Italy had deprived the employed workers in question of their rights and was accordingly liable to damages. Even if the duty to compensate is not written into EU law, the Court of Justice sees it as an integral part of the EU legal order, since its full effect would not be secured and the rights conferred by it would not be protected if EU citizens did not have the possibility of seeking and obtaining compensation for infringement of their rights by Member States acting in contravention of EU law ([1]).

Decisions

By means of 'decisions', the Treaty of Lisbon made an addition to the range of legal instruments. A distinction can be made between two categories of decision: decisions that specify those to whom they are addressed, and general decisions that do not have any specific addressees (cf. Article 288(4) TFEU). Whereas the decisions that specify those to whom they are addressed replace the previous decisions for regulating individual cases, the general decisions that do not have specific addresses encompass a variety of instruments that have in common the fact that they do not regulate individual cases. It is regrettable that two very different types of legal instrument are referred to by the same name, as the inevitable issues of definition give rise to a great deal of legal uncertainty. It would have been better to use one term for measures providing for individual cases, with external, legally binding effect on the individual, and to introduce an additional term for the other legal instruments with binding force.

The EU bodies (particularly the Council and the Commission) typically use **decisions that specify to whom they are addressed** to carry out their executive function. Such decisions can require a Member State, company or EU citizen to perform or refrain from an action, or can confer rights or impose obligations on them. The situation in the Member States' own systems is

[1] More details in the section 'Liability of Member States for infringements of EU law'.

exactly the same; legislation will be applied by the authorities in an individual case by means of an administrative decision.

The basic characteristics of this type of decision can be summed up as follows.

- It is distinguished from the regulation by being of **individual applicability**: the persons to whom it is addressed must be named in it and are the only ones bound by it. This requirement is met if, at the time the decision is issued, the category of addressees can be identified and can thereafter not be extended. Reference is made to the actual content of the decision, which must be such as to have a direct, individual impact on the citizen's situation. Even a third party may fall within the definition if, by reason of personal qualities or circumstances that distinguish them from others, they are individually affected and are identifiable as such in the same way as the addressee.
- It is distinguished from the directive in that it is **binding** in its entirety (whereas the directive simply sets out the objective to be attained).
- It is **directly binding** on those to whom it is addressed. A decision addressed to a Member State may in fact have the same direct effect in relation to the citizen as a directive.

General decisions that do not specify to whom they are addressed are binding in their entirety, although it is not clear whom they are binding upon. This can ultimately only be established from the content of each decision. For general decisions, distinction can be made between the following types of instrument.

- **Decisions for amending treaty provisions.** These decisions are applicable in a general and abstract manner, which is to say they are binding on all EU institutions, bodies, offices or agencies, and on the Member States. Mention can be made of decisions for simplifying adoption procedures (Article 81(3) and Article 192(2)(c) TFEU) or for relaxing majority requirements (Articles 312(2) and 333(1) TFEU).
- **Decisions for adding substance to treaty law.** These decisions have binding effect on the whole of the EU, or on the relevant EU institutions, bodies, offices or agencies in the case of a decision regarding their composition; they do not have any external effect on the individual.
- **Decisions for adopting intra-institutional and interinstitutional law.** These decisions are binding on the EU institutions, bodies, offices or agencies that are affected and involved. Examples include the

internal rules of procedure of the institutions (intra-institutional law) and interinstitutional agreements entered into between the EU bodies (interinstitutional law).

- **Decisions in the context of organisational control.** These decisions (e.g. appointments, remuneration) bind the relevant officeholder or members of bodies.
- **Decisions for making policy.** These decisions compete with regulations and directives but are not intended to have an external, legally binding effect on the individual. In principle, their binding effect is confined to the institutions involved in issuing them, particularly when they relate to orientations or guidelines for future policy. Only in exceptional cases do they have legal effects of a general and abstract nature or financial consequences.
- **Decisions within the framework of the common foreign and security policy.** These decisions are legally binding on the EU. The extent to which they are binding on the Member States is restricted by special provisions (e.g. Articles 28(2) and (5) and 31(1) TEU). They are not subject to the supremacy of the case-law of the Court of Justice.

Recommendations and opinions

A final category of legal measures explicitly provided for in the treaties is recommendations and opinions. They enable the EU institutions to express a view to Member States, and in some cases to individual citizens, that is not binding and does not place any legal obligation on the addressee.

In **recommendations**, the party to whom they are addressed is called on, but not placed under any legal obligation, to behave in a particular way. For example, in cases where the adoption or amendment of a legal or administrative provision in a Member State causes a distortion of competition in the internal market, the Commission may recommend to the state concerned such measures as are appropriate to avoid this distortion (cf. Article 117(1), second sentence, TFEU).

Opinions, on the other hand, are issued by the EU institutions when giving an assessment of a given situation or developments in the EU or individual Member States. In some cases, they also prepare the way for subsequent, legally binding acts, or are a prerequisite for the institution of proceedings before the Court of Justice (cf. Articles 258 and 259 TFEU).

The real significance of recommendations and opinions is political and moral. In providing for legal acts of this kind, the drafters of the treaties anticipated that, given the authority of the EU institutions and their broader view and wide knowledge of conditions beyond the narrower national framework, those concerned would voluntarily comply with recommendations addressed to them and would react appropriately to the EU institutions' assessment of a particular situation. However, recommendations and opinions can have indirect legal effect where they are a preliminary to subsequent mandatory instruments or where the issuing institution has committed itself, thus generating legitimate expectations that must be met.

Resolutions, declarations and action programmes

Alongside the legal acts provided for in the treaties, the EU institutions also have available a variety of other forms of action for forming and shaping the EU legal order. The most important of these are resolutions, declarations and action programmes.

Resolutions. Resolutions may be issued by the Parliament, the European Council and the Council. They set out jointly held views and intentions regarding the overall process of integration and specific tasks within and outside the EU. Resolutions relating to the internal working of the EU are concerned, for example, with basic questions regarding political union, regional policy, energy policy and economic and monetary union (particularly the European Monetary System). The primary significance of these resolutions is that they help to give the future work of the Council a political direction. As **manifestations of a commonly held political will**, resolutions make it considerably easier to achieve a consensus in the Council, in addition to which they guarantee at least a minimum degree of correlation between decision-making hierarchies in the EU and the Member States. Any assessment of their legal significance must also take account of these functions, i.e. they should remain a flexible instrument and not be tied down by too many legal requirements and obligations.

Declarations. There are two different kinds of declaration. If a declaration is concerned with the **further development of the EU**, such as the declaration on the EU, the declaration on democracy and the declaration on fundamental rights and freedoms, it is more or less equivalent to a resolution. Declarations of this type are mainly used to reach a wide audience or a specific group of addressees. The other type of declaration is issued in the context of the Council's decision-making process, and sets out the views of all or

individual Council members regarding the interpretation of the Council's decisions. **Interpretative declarations** of this kind are standard practice in the Council and are an essential means of achieving compromises. Their legal significance should be assessed under the basic principles of interpretation, according to which the key factor when interpreting the meaning of a legal provision should in all cases be the underlying intention of its originator. This principle is only valid, however, if the declaration receives the necessary public attention; this is because, for example, secondary EU legislation granting direct rights to individuals cannot be restricted by secondary agreements that have not been made public.

Action programmes. These programmes are drawn up by the Council and the Commission on their own initiative or at the instigation of the European Council, and serve to put into practice the legislative programmes and general objectives laid down in the treaties. If a programme is specifically provided for in the treaties, the EU institutions are bound by those provisions when planning it. On the other hand, other programmes are in practice merely regarded as **general guidelines** with no legally binding effect. They are, however, an indication of the EU institutions' intended actions.

White Papers and Green Papers are also of considerable importance in the Union. **White Papers** are published by the Commission and contain concrete proposals for EU measures in a specific policy area. If a White Paper is favourably received by the Council, it may form the basis for an EU action programme. Examples of this include the White Papers on the future of Europe (2017) and artificial intelligence (2020). **Green Papers** are intended to stimulate discussion on given topics at the EU level and form the basis for public consultation and debate regarding the topics dealt with in the Green Paper. They may give rise to legislative developments that are then outlined in White Papers.

Publication and communication

EU legislative acts and legally binding acts are published in the *Official Journal of the European Union,* L series (L = legislation). They enter into force on the date specified in them or, if no date is specified, on the 20th day following their publication.

There is no obligation to publish and communicate **non-binding instruments**, but they are usually published in the *Official Journal of the European Union,* C **series** ('information and notices' (C = communication)). All

the official documents of the EU institutions, bodies and agencies are also published in the C series.

Legislative acts that **specify to whom they are addressed** are notified to those to whom they are addressed and take effect upon such notification.

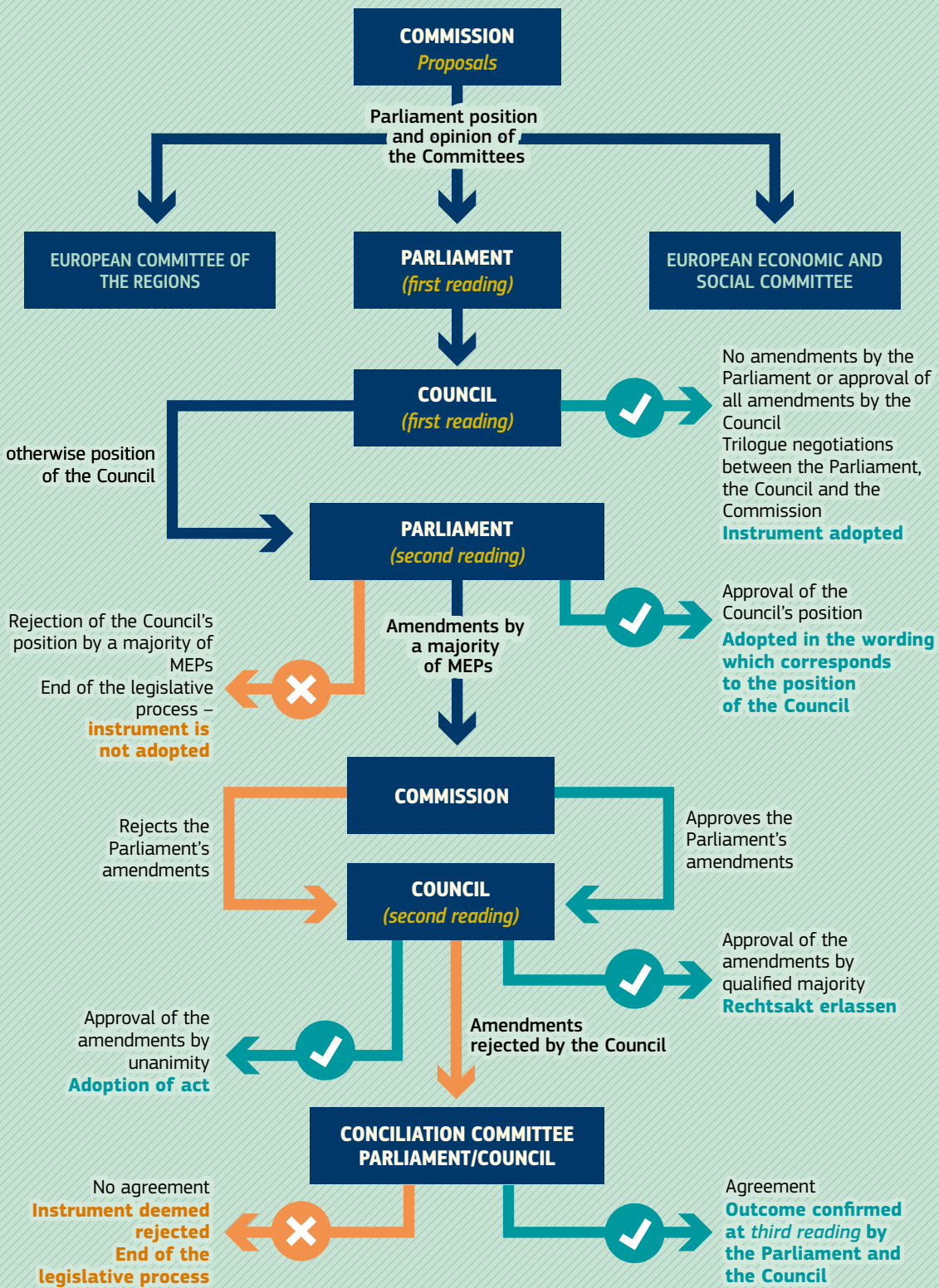
The legislative process in the European Union

Whereas in a state the will of the people will usually be expressed in parliament, it was for a long time the representatives of the Member States' governments meeting in the Council who played the decisive role in expressing the will of the EU. This was simply because the EU does not consist of a 'European nation' but owes its existence and form to the combined input of its Member States. These did not simply transfer part of their sovereignty to the EU, but pooled it on the understanding that they would retain the joint power to exercise it. However, as the process of EU integration has developed and deepened, this division of powers in the EU decision-making process, originally geared towards the defence of national interests by the Member States, has evolved into something much more balanced, with constant enhancement of the status of the European Parliament. The original procedure whereby the Parliament was merely consulted was first of all broadened to include cooperation with the Council, and the Parliament was eventually given powers of co-decision in the EU's legislative process.

The legislative procedure in the EU was reorganised and restructured by the Treaty of Lisbon. A distinction is to be made between the following:

1) the ordinary legislative procedure for the adoption of legislative acts (Article 289(1) TFEU), which essentially corresponds to the earlier co-decision procedure and applies as a general rule to lawmaking at the EU level, along with the special legislative procedure (Article 289(2) TFEU), in which legislative acts are adopted by the Parliament with the participation of the Council, or by the latter with the participation of the Parliament;
2) certain legal acts that must go through a consent procedure in the Parliament before they can take effect;
3) non-legislative acts that are adopted in a simplified procedure;
4) special procedures that are in place for the adoption of delegated acts and implementing acts.

Procedure for adopting legislative acts



Order of the procedure

Formulation stage

The machinery is, in principle, set in motion by the Commission, which draws up a proposal for the EU measure to be taken (known as the 'right of initiative'). The proposal is prepared by the Commission department dealing with the particular field; frequently the department will also consult national experts at this stage. This sometimes takes the form of deliberations in specially convened committees; alternatively, experts may have questions put to them by the relevant departments of the Commission. However, the Commission is not obliged to accept the advice of the national experts when drawing up its proposals. The draft drawn up by the Commission, setting out the content and form of the measure to the last detail, goes before the Commission as a whole, when a simple majority is sufficient to have it adopted. It is now a 'Commission proposal' and is sent simultaneously to the Parliament and the Council and, where consultation is required, to the European Economic and Social Committee and the European Committee of the Regions, with detailed explanatory remarks.

First reading in the Parliament and in the Council

The President of the European Parliament passes the proposal on to a Parliamentary coordination committee for further consideration. The outcome of the committee's deliberations is discussed at a plenary session of the Parliament, and is set out in an opinion which may accept or reject the proposal or propose amendments. The Parliament then sends its **position** to the Council.

The Council can now act as follows in the first reading.

- If it approves the Parliament's position, the act is adopted in the wording that corresponds to that position; this marks the end of the legislative process. In practice, it has actually become the rule for the legislative process to be completed at first reading. To this end, use has been made of the 'informal trilogue', in which representatives of the Parliament, the Council and the Commission sit at a table to seek a mutually acceptable compromise at this early state of the legislative process. Such trilogues are typically successful, which means that only very controversial legislative projects pass through the entire ordinary legislative procedure.

- If the Council does not approve the Parliament's position, it adopts its position at first reading and communicates it to the Parliament.

The Council informs the Parliament fully of the reasons that led it to adopt its position. The Commission informs the Parliament fully of its position.

Second reading in the Parliament and in the Council

The Parliament has 3 months starting from the communication of the Council's position to do one of the following.

1. Approve the Council's position or not take a decision – the act concerned is then deemed.to have been adopted in the wording that corresponds to the position of the Council;
2. Reject, by a majority of its component members, the Council's position – the proposed act is then deemed not to have been adopted and the legislative process ends.
3. Make, by a majority of its members, amendments to the Council's position – the text thus amended is then forwarded to the Council and to the Commission, which delivers an opinion on those amendments.

The Council discusses the amended position and has 3 months from the date of receiving the Parliament's amendments to do one of the following.

1. Approve all of the Parliament's amendments – the act in question is then deemed to have been adopted. A qualified majority is sufficient if the Commission is also in agreement with the amendments; if not, the Council can approve the Parliament's amendments only by unanimity.
2. Choose not to approve all of the Parliament's amendments, or it does not attain the required majority – this results in a conciliation procedure.

Conciliation procedure

The conciliation procedure is initiated by the President of the Council in agreement with the President of the European Parliament. At its heart is the Conciliation Committee, which is currently composed of 27 representatives each from the Parliament and the Council. The Conciliation Committee has the task of reaching agreement on a joint text by a qualified majority within 6 weeks of its being convened, on the basis of the positions of the Parliament and the Council at second reading. This involves a compromise solution that is to be found on the basis of 'examination of all the aspects

of the disagreement'. However, it is always simply a case of reaching a compromise between the two diverging positions of the Parliament and the Council. To this end, use may be made of new items that facilitate the compromise process, provided that they fit into the overall outcome of the second reading. However, it is not possible to make use of amendments that failed to achieve the required majorities at second reading.

The Commission takes part in the Conciliation Committee's proceedings and takes all the necessary initiatives with a view to reconciling the positions of the Parliament and the Council.

If, within 6 weeks of its being convened, the Conciliation Committee does not approve the joint text, the proposed act is deemed not to have been adopted.

Third reading in the Parliament and in the Council

If, within the 6-week period, the Conciliation Committee approves a joint text, the Parliament, acting by a majority of the votes cast, and the Council, acting by a qualified majority, each have a period of 6 weeks from that approval in which to adopt the act in question in accordance with the joint text. If they fail to do so, the proposed act is deemed not to have been adopted and the legislative process is ended.

Publication

The final text (in the **24 current official languages** of the EU: Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish), is signed by the Presidents of the Parliament and the Council, and then published in the *Official Journal of the European Union*.

The co-decision procedure represents both a challenge and an opportunity for the Parliament. If the procedure is to operate successfully, there must be an agreement in the Conciliation Committee. However, the procedure also radically changes the relationship between the Parliament and the Council. The two institutions are now placed on an equal footing in the legislative process, and it is up to the Parliament and the Council to demonstrate their capacity for compromise and to direct their energies in the Conciliation Committee towards coming to an agreement.

The special legislative procedure

The special legislative procedure is usually characterised by the Council, acting **unanimously** on a proposal from the Commission and after consulting the Parliament, taking a decision (e.g. Article 308 TFEU: Statute of the European Investment Bank) or by the Parliament adopting a legal act after obtaining the approval of the Council (e.g. Article 226, third paragraph, TFEU: exercise of the right of inquiry via a parliamentary committee of inquiry; Article 228(4) TFEU: conditions governing the performance of the Ombudsman's duties).

There are further forms of lawmaking that differ from these regular cases but are nonetheless attributable to special legislative procedure.

- Taking a decision on the budget (Article 314 TFEU): the procedure has detailed rules and largely corresponds to the ordinary legislative procedure.
- The Council takes a decision by majority on a proposal of the Commission and after consulting the Parliament (or other EU institutions and consultative bodies). This was originally the consultation procedure that was initially the standard legislative procedure at the EU level, but it is now used only in isolated cases as a special legislative procedure (e.g. Article 140(2) TFEU: derogations in the context of economic and monetary union; Article 128(2) TFEU: issuing coins).
- The Council takes a decision without the participation of the Parliament. This constitutes a rare exception, however, and – other than in the area of the common foreign and security policy, where the Parliament is informed by Council decisions (Article 36 TEU) – only takes place in very isolated cases (e.g. Article 31 TFEU: fixing a Common Customs Tariff; Article 301(2) TFEU: composition of the European Economic and Social Committee).

Policy areas for which there is provision for a special legislative procedure can be switched to the ordinary legislative procedure by means of 'bridging clauses', or unanimity in the Council can be replaced by a qualified majority. A distinction is to be made between two types of bridging clauses: (1) the general bridging clause that applies to all policy areas and requires a unanimous decision from the European Council; and (2) specific bridging clauses that apply to certain policy areas (e.g. multiannual financial framework: Article 312 TFEU; judicial cooperation in family law: Article 81(3) TFEU; enhanced cooperation: Article 333 TFEU; the social domain: Article 153 TFEU;

the environment: Article 192 TFEU). These clauses differ from general bridging clauses in that, as a general rule, the national parliaments do not have a right of veto and the decision can also be made by the Council and not necessarily the European Council.

Approval procedure

Another principal form of Parliamentary involvement in the EU legislative process is the approval procedure, whereby a legal instrument can only be adopted with the prior approval of the Parliament. This procedure does not, however, give the Parliament any scope for directly influencing the nature of the legal provisions. For example, it cannot propose any amendments or secure their acceptance during the approval procedure; its role is restricted to accepting or rejecting the legal instrument submitted to it. Provision is made for this procedure in connection with the conclusion of international agreements (Article 218(6)(a) TFEU), enhanced cooperation (Article 329(1) TFEU) or for the exercise of dispositive powers (Article 352(1) TFEU). The approval procedure can form part of both a special legislative procedure for adopting legislative acts and the simplified legislative procedure for adopting binding, non-legislative acts.

Procedure for adopting non-legislative acts

Non-legislative acts are adopted in a simplified procedure in which an EU institution or other body adopts a legal act within its own powers. The authority to do so arises from the relevant basis of competence in the EU treaties.

This procedure initially applies to (simple) binding legislative acts that are adopted by an EU institution within its own powers (e.g. Commission regarding State aid, Article 108(2) TFEU).

The simplified procedure is also used for the adoption of non-binding instruments, especially recommendations and opinions issued by the EU institutions and the consultative bodies.

Procedure for adopting delegated acts and implementing acts

It has long been common practice for the Parliament and the Council to confer legislative and implementing powers on the Commission. The powers conferred have been exercised by setting up comitology committees, in which the influence of the Parliament, the Council, the Commission and

Member States varied. However, there was no clear separation between the delegation of lawmaking powers (legislative power) and the conferment of implementing powers (executive power). The Treaty of Lisbon made a long overdue distinction in primary law in relation to the performance of legislative tasks and executive tasks (Articles 290 and 291 TFEU).

The **adoption of delegated acts** is carried out by the Commission **on the basis of a special authorisation** provided by a legislative act passed by the Parliament and the Council (Article 290 TFEU). The subject of the delegation can consist only of the amendment of certain non-essential elements of a legislative act; the essential elements of an area must not be the subject of a delegation of power. This means that fundamental provisions are adopted by the legislative branch itself and are not to be delegated to the executive branch. This takes account of the principles of democracy and separation of powers. If politically important decisions with far-reaching consequences are involved, the Parliament and the Council should always shoulder their primary responsibility of legislating. This is particularly true of political objectives for legislative action, the selection of the means for achieving those goals and the possible implications of the provisions for natural and legal persons. Moreover, delegated acts must only amend or supplement a legislative act, so as not to compromise its purpose. Finally, the provisions that are to be amended or supplemented by means of the delegated act must be clearly specified in the legislative act. Delegated acts may therefore encompass legislative adaptations to future developments, such as changes in the state of the art, alignment with foreseeable changes to other legislation or ensuring that the provisions of a legislative act are applied even when special circumstances arise or new information comes to light. The delegation of powers may be given a time limit or, if it is to be carried out indefinitely, there may be a provision for the right to revoke it. In addition to the possibility of revoking the delegation of powers, the Parliament and the Council may provide for the right to express objections to the entry into force of delegated acts of the Commission. If the Parliament and the Council have delegated implementing power to the Commission, the latter may adopt implementing acts. There is no provision of primary law that allows for the inclusion of other institutions. However, the Commission is authorised to consult national experts in particular, and generally does so in practice.

The **adoption of implementing acts** by the Commission (Article 291 TFEU) is designed as an exception to the principle of the Member States' responsibility for the administrative implementation of EU law (Article 197 TFEU) and is therefore under the control of the Member States. This is a significant

departure from the previous legal position, in which the comitology procedure gave the Parliament and the Council co-determination rights in the adoption of implementing measures. This change reflects the fact that the clear separation of delegated acts and implementing acts meant that the rights of control and participation had to be reorganised accordingly. Whereas, as the EU legislator, the Parliament and the Council have access to delegated acts, this lies with the Member States in the case of implementing acts, in line with their inherent responsibility for the administrative implementation of EU law. In line with its legislative mandate, the EU legislator (i.e. the Parliament and the Council) has laid down general rules and principles concerning mechanisms for control of the exercise of implementing powers in Regulation (EU) No 182/2011 (the comitology regulation). This regulation has reduced the number of comitology procedures to two: the advisory procedure and the examination procedure. Specific provisions on the choice of procedure have been created.

In the **advisory procedure**, an advisory committee delivers opinions by a simple majority, which are recorded in the minutes. The Commission should take the utmost account of them, but is not obliged to do so.

In the **examination procedure**, the comitology committee, which is composed of representatives of the Member States, votes on the Commission draft for implementing measures by qualified majority. If it is approved, the Commission must adopt the measures as submitted. If no decision is taken owing to the absence of a quorum, the Commission may in principle adopt its draft. In the case of a negative opinion from the committee or a lack of approval, the Commission may submit a new draft in the examination committee or refer the original draft to an appeal committee.

The **appeal committee** is the second instance in the examination procedure. The purpose of referral to the appeal committee is to reach a compromise between the Commission and the representatives of the Member States if it is not possible to reach an outcome in the examination committee. Where the appeal committee delivers a positive opinion, the Commission adopts the implementing act. It may also do so if no opinion is delivered.

The European Union system of legal protection

A Union that aspires to be a community governed by law must provide its citizens with a complete and effective system of legal protection. The European Union's system of legal protection meets this requirement. It recognises the right of the individual to **effective judicial protection of the rights** derived from EU law. This protection, which is codified in Article 47 of the Charter of Fundamental Rights, is one of the fundamental legal principles resulting from the constitutional traditions common to the Member States and the ECHR (Articles 6 and 13). It is guaranteed by the EU's legal system (the Court of Justice and the General Court – Article 19(1) TEU). For this purpose, a series of procedures is available, as described below.

Treaty infringement proceedings (Article 258 TFEU)

This is a procedure for establishing whether a Member State has failed to fulfil an obligation imposed on it by EU law. It is conducted exclusively before the Court of Justice of the European Union. Given the seriousness of the accusation, the referral to the Court of Justice must be preceded by a preliminary procedure in which the Member State is given the opportunity to submit its observations. If the dispute is not settled at that stage, either the Commission (Article 258 TFEU) or another Member State (Article 259 TFEU) may institute an action in the Court. In practice the initiative is usually taken by the Commission. The Court investigates the complaint and decides whether a treaty has been infringed. If so, the offending Member State is then required to take the measures needed to conform. If a Member State fails to comply with a judgment given against it, the Commission has the possibility of a second Court ruling ordering that state to pay a lump-sum fine and/or a penalty (Article 260 TFEU). There are therefore serious financial implications for a Member State that continues to disregard a Court judgment against it for treaty infringement.

Actions for annulment (Article 263 TFEU)

Actions for annulment are a means to objective judicial control of the action of the EU institutions and bodies (**abstract** judicial review) and provide the citizen with access to EU justice, although with some restrictions (**guarantee of individual legal protection**).

They can be lodged against all measures of the EU institutions and bodies that produce binding legal effects likely to affect the interests of the

applicant by seriously altering their legal position. In addition to the Member States, the Parliament, the Council, the Commission, the Court of Auditors, the ECB and the European Committee of the Regions may also lodge actions for annulment provided that they invoke violation of the rights conferred on them.

Citizens and undertakings, on the other hand, can only proceed against decisions that are personally addressed to them or that, though addressed to others, have a direct individual effect on them. This is deemed by the Court of Justice to be the case if a person is affected in so specific a way that a clear distinction exists between them and other individuals or undertakings. This criterion of 'immediacy' is intended to ensure that a matter is only referred to the Court of Justice or the General Court if the fact of the plaintiff's legal position being adversely affected is clearly established along with the nature of those adverse effects. The 'individual concern' requirement is also intended to prevent 'relator suits' from being filed.

The Treaty of Lisbon also introduced an additional category of acts against which actions for annulment can also be brought directly by natural and legal persons. Natural and legal persons now also have standing to institute proceedings against a 'regulatory act', provided that it 'is of direct concern to them and does not entail implementing measures'. This new category closed a 'gap in the legal protection' that had been pointed out by the Court in the *Jégo-Quéré* case, as judicial protection had not previously been guaranteed in cases in which, although an economic operator was directly affected by an EU legislative act, it was not possible to review the legality of that act using the remedies available for that purpose: challenges via an action for annulment (Article 263 TFEU) had been unsuccessful owing to a lack of individual concern; the preliminary ruling procedure (Article 267 TFEU) could not be used due to the absence of national implementing measures (except in certain criminal proceedings regarding the failure to discharge obligations under EU law by the economic operator, which must be disregarded, however, because the economic operator cannot be expected to bring about a review of legality via unlawful conduct); finally, actions for damages could not in any event result in a solution that is in the interests of the EU citizen, as they cannot be used to remove an unlawful legislative act from the EU legal order either.

As Article 263(4) TFEU dispensed with the need for 'individual concern' when challenging regulatory acts, and instead only requires direct concern

and the absence of national implementing measures, part of this gap was closed.

The meaning of 'regulatory acts' is problematic, however. When interpreted restrictively, the term is understood to refer only to acts of general application that are not legislative acts, whereas, when interpreted broadly, it is understood to encompass all acts of general application, including legislative acts. In its judgment in the *Inuit Tapiriit Kanatami* case, the General Court dealt with both these approaches in detail and, based on a grammatical, historical and teleological interpretation, concluded that 'regulatory acts' can be regarded only as acts of general application that are not legislative acts. In addition to delegated acts (cf. Article 290 TFEU) and implementing acts (cf. Article 291 TFEU), these also encompass directives, provided that they are directly applicable according to the case-law, and decisions of an abstract and general nature, provided that they were not adopted in the legislative procedure. Therefore, the General Court has clearly adopted a narrow interpretation of the concept of 'regulatory'. The Court of Justice confirmed this finding in its judgment on appeal in 2013. This is regrettable from the perspective of guaranteeing effective legal protection, as the established gap in the legal protection can only be partly closed using the restrictive approach.

Acts of EU bodies and other offices, particularly those of the numerous agencies, can now also be reviewed for lawfulness (Article 263, fifth paragraph, TFEU). Thus, a gap in legal protection that was previously only patched up by the case-law has been remedied, and primary law also takes account of the fact that some of those bodies have been endowed with powers that enable them to perform acts that produce legal effects in relation to third parties so, in the interests of having a system of legal protection that is free of gaps, recourse to legal action must be available in relation to those acts also.

If the action succeeds, the Court of Justice or General Court may declare the instrument void with retroactive effect. In certain circumstances, it may declare it void solely from the date of the judgment. However, in order to safeguard the rights and interests of those bringing legal actions, the declaration of nullity may be exempted from any such restriction.

Complaints for failure to act (Article 265 TFEU)

This form of action supplements the legal protection available against the Parliament, the European Council, the Council, the Commission and the ECB. There is a preliminary procedure whereby the complainant puts the institution on notice to fulfil its duty. The order sought in an action by the institutions is a declaration that the body concerned has infringed the treaty by neglecting to take a decision required of it. Where the action is brought by an EU citizen or an undertaking, it is for a declaration that the EU institution has infringed the treaty by neglecting to address an individual decision to them. The judgment simply finds that the neglect was unlawful. The Court of Justice / General Court has no jurisdiction to order that a decision be taken: the party against whom judgment is given is merely required to take measures to comply with the judgment (Article 266 TFEU).

Actions for damages (Article 268 and Article 340, second paragraph, TFEU)

Citizens and undertakings – and also Member States – that sustain damage by reason of a fault committed by EU staff have the possibility to file actions for damages with the Court of Justice. The basis for EU liability is not fully set out by the treaties and is otherwise governed by the general principles common to the laws of the Member States. The Court has fleshed this out, holding that the following conditions must be satisfied before an award of damages can be made.

1) There must be an unlawful act by an EU institution or by a member of its staff in the exercise of his or her functions. An unlawful act takes place when there is a serious infringement of a rule of EU law that confers rights on an individual, undertaking or Member State or has been passed to protect them. Laws recognised to have a protective nature are in particular the fundamental rights and freedoms of the internal market or the fundamental principles of the protection of legitimate expectations and proportionality, but also any other directly applicable rule of law that confers personal rights on the EU citizen. The infringement is sufficiently serious if the institution concerned has exceeded the limits of its discretionary power to a considerable degree. The Court tends to gear its findings to the narrowness of the category of persons affected by the offending measure and the scale of the damage sustained, which must be in excess of the commercial risk that can be reasonably expected in the business sector concerned.

In the Jégo-Quéré case, a fishing company applied for annulment of parts of a regulation on the protection of juvenile hake. Specifically, it related to the prohibition of fishing nets with a mesh of 8 cm, such as those used by Jégo-Quéré. In order to guarantee effective judicial protection, the Court of First Instance construed the notion of individual concern extensively and found that the action was admissible. The Court of Justice disagreed. It found that being directly burdened by a regulation of general application could not be equated with individual concern.

2) Actual harm must have been suffered.
3) There must be a causal link between the act of the EU institution and the damage sustained.
4) Intent or negligence do not have to be proved.

Actions by European Union staff (Article 270 TFEU)

Disputes between the EU and its staff members or their surviving family members arising from the employment relationship can also be brought before the Court of Justice. Jurisdiction for these actions lies with the General Court.

Appeals procedure (Article 256 TFEU)

The relationship between the Court of Justice and the General Court is designed in such a way that judgments of the General Court are subject to a right of appeal to the Court of Justice on points of law only. The appeal may lie on the grounds of lack of competence of the General Court, a breach of procedure that adversely affects the interests of the appellant or the infringement of EU law by the General Court. If the appeal is justified and procedurally admissible, the judgment of the General Court is rescinded by the Court of Justice. If the matter is ripe for a court ruling, the Court of Justice may issue its own judgment; otherwise, it must refer the matter back to the General Court, which is bound by the Court of Justice's legal assessment.

Provisional legal protection (Articles 278 and 279 TFEU)

Actions filed with the Court of Justice or the General Court, or appeals lodged against their judgments, do not have suspensive effect. It is, however, possible to apply to the Court of Justice or the General Court for an order to **suspend the application of the contested act** (Article 278 TFEU) or for an **interim court order** (Article 279 TFEU).

The merits of any application for interim measures are assessed by the courts on the basis of the following three criteria.

1) **Prospect of success on the main issue (*fumus boni juris*).** This is assessed by the court in a preliminary summary examination of the arguments submitted by the appellant.
2) **Urgency of the order.** This is assessed on the basis of whether the order applied for by the appellant is necessary in order to ward

off serious and irreparable harm. The criteria used for making this assessment include the nature and seriousness of the infringement, and its specific and irreversibly adverse effects on the appellant's property and other objects of legal protection. Financial loss is deemed to be of a serious and irreparable nature only if it cannot be made good even if the appellant is successful in the main proceedings.

3) **Weighing of interests.** The adverse effects likely to be suffered by the appellant if the application for an interim order is refused are weighed against the EU's interest in immediate implementation of the measure, and against the detrimental effects on third parties if the interim order were to be issued.

Preliminary rulings (Article 267 TFEU)

This is the procedure whereby the national courts can seek guidance on EU law from the Court of Justice. Where a national court is required to apply provisions of EU law in a case before it, it may stay the proceedings and ask the Court of Justice for clarification as to the validity of the EU instrument at issue and/or the interpretation of the instrument and of the treaties. The Court of Justice responds in the form of a judgment rather than an advisory opinion; this emphasises the binding nature of its ruling. The preliminary ruling procedure, unlike the other procedures under consideration here, is not a contentious procedure but simply one stage in the proceedings that begin and end in the national courts.

The **object of this procedure** is first of all to secure a uniform interpretation of EU law and hence the unity of the EU legal order. Alongside the latter function, the procedure is also of importance in protecting individual rights. The national courts can only assess the compatibility of national and EU law and, in the event of any incompatibility, enforce EU law – which takes precedence and is directly applicable – if the content and scope of EU provisions are clearly set out. This clarity can normally only be brought about by a preliminary ruling from the Court of Justice, which means that proceedings for such a ruling offer EU citizens an opportunity to challenge actions of their own Member State that are in contravention of EU law and ensure the enforcement of EU law before the national courts. This dual function of preliminary ruling proceedings compensates to a certain extent for the restrictions on individuals directly filing actions before the Court of Justice and is thus crucial for the legal protection of the individual. However, success in these proceedings depends ultimately on how 'keen' national judges and courts are to refer cases to a higher authority.

Subject matter. The Court of Justice rules on the **interpretation** of instruments of EU law and **examines the validity** of the EU institutions' acts of legal significance. Provisions of national law may not be the subject of a preliminary ruling. In proceedings for a preliminary ruling, the Court of Justice is not empowered to interpret national law or assess its compatibility with EU law. This fact is often overlooked in the questions referred to the Court of Justice, which is called on to look at many questions specifically concerned with the compatibility of provisions of national and EU law, or to decide on the applicability of a specific provision of EU law in proceedings pending before a national court. Although these questions are in fact procedurally inadmissible, the Court of Justice does not simply refer them back to the national court; instead, it reinterprets the question referred to it as a request by the referring court for basic or essential criteria for interpreting the EU legal provisions concerned, thus enabling the national court to then give its own assessment of compatibility between national and EU law. The procedure adopted by the Court of Justice is to extract from the documentation submitted – particularly the grounds for referral – those elements of EU law that need to be interpreted for the purpose of the underlying legal dispute.

Capacity to proceed. The procedure is available to all 'courts of the Member States'. This expression should be understood within the meaning of EU law and focuses not on the name but rather on the function and position occupied by a judicial body within the systems of legal protection in the Member States. On this basis, 'courts' are understood to mean all independent institutions (i.e. not subject to instructions) empowered to settle disputes in a constitutional state under due process of law. According to this definition, the constitutional courts in the Member States and dispute-settling authorities outside the state judicial system – but not private arbitration tribunals – are also entitled to refer cases. The national court's decision as to whether or not to make a referral will depend on the **relevance of the point of EU law** in issue for the settlement of the dispute before it, which is a matter for the national court to assess. The parties can only request it, not require it, to refer a case. The Court of Justice considers the relevance of the point solely in terms of whether the question concerned is amenable to referral (i.e. whether it actually concerns the interpretation of the EU treaties or the legal validity of an act by an EU institution) or whether a genuine legal dispute is involved (i.e. whether the questions on which the Court of Justice is to give its legal opinion in a preliminary ruling are merely hypothetical or relate to a point of law that has already been settled). It is exceptional for the Court to decline to consider a matter for these reasons because, given the special

importance of cooperation between judicial authorities, the Court exercises restraint when applying these criteria. Nevertheless, recent judgments of the Court show that it has become more stringent as regards eligibility for referral in that it is very particular about the already established requirement that the order for referral contain a sufficiently clear and detailed explanation of the factual and legal background to the original proceedings, and that if this information is not provided it declares itself unable to give a proper interpretation of EU law and rejects the application for a preliminary ruling as inadmissible.

Obligation to refer. A national court or tribunal against whose decision there is no judicial remedy in national law is obliged to refer. The **concept of right of appeal** encompasses all forms of legal redress by which a court ruling may be reviewed in fact and in law (appeal) or only in law (appeal on points of law). The concept does not, however, encompass ordinary legal remedies with limited and specific effects (e.g. new proceedings, constitutional complaints). A court obliged to refer a case may only avoid such a referral if the question is of no material importance for the outcome of the case before it, or has already been answered by the Court of Justice, or the interpretation of EU law is not open to reasonable doubt. However, the obligation to refer is unconditional where the validity of an EU instrument is at issue. The Court of Justice made it quite clear in this respect that it alone has the power to reject illegal provisions of EU law. The national courts must therefore apply and comply with EU law until it is declared invalid by the Court of Justice. A special arrangement applies to courts in proceedings for the granting of provisional legal protection. According to recent judgments of the Court of Justice, these courts are empowered, subject to certain conditions, to suspend enforcement of a national administrative act deriving from an EU regulation, or to issue interim orders in order to provisionally determine the arrangements of legal relations while disregarding an existing provision of EU law.

Failure to discharge the obligation to refer constitutes an infringement of the EU treaties, which may make the Member State concerned liable to **infringement proceedings**. In practice, however, the effects of such a course of action are very limited, given that the government of the Member State concerned cannot comply with any order issued by the Court of Justice because the independence of its judiciary and the principle of separation of powers mean that it is unable to give instructions to national courts. Now that the principle of Member States' **liability under EU law** for failure to comply with it has been recognised (see the section 'Liability of the Member

States for infringements of EU law'), the possibility of individuals filing for damages which may have arisen from the Member State concerned failing to meet its obligation to refer offers better prospects of success.

Effect. The preliminary ruling, issued in the form of a court order, is directly binding on the referring court and all other courts hearing the same case. In practice it also has a very high status as a precedent for subsequent cases of a like nature.

Liability of the Member States for infringements of EU law

The liability of a Member State for harm suffered by individuals as a result of an infringement of EU law attributable to that state was established in principle by the Court of Justice in its judgment of 5 March 1996 in Joined Cases C-46/93 *Brasserie du pêcheur* and C-48/93 *Factortame*. This was a precedent-setting judgment on a par with earlier Court judgments on the primacy of EU law, the direct applicability of provisions of EU law and recognition of the EU's own set of fundamental rights. The judgment is even referred to by the Court itself it as 'the necessary corollary of the direct effect of the Community provisions whose breach caused the damage sustained', and considerably enhances the possibilities for an individual to force state bodies of all three centres of power (i.e. legislative, executive and judiciary) to comply with and implement EU law. The judgment is a further development of the Court's ruling in Joined Cases C-6/90 and C-9/90 *Francovich* and *Bonifaci*. Whilst the earlier judgments restricted the liability of the Member States to instances where individuals suffered harm as a result of failure to transpose in good time a directive granting them personal rights but not directly addressed to them, this judgment established the principle of **general liability** encompassing any infringement of EU law attributable to a Member State.

The liability of the Member States for infringements of EU law is defined by three criteria that are largely the same as those applying to the EU in a similar situation.

1. The aim of the EU provision that has been infringed must be to grant rights to the individual.
2. The infringement must be sufficiently serious, i.e. a Member State must clearly have exceeded the limits of its discretionary powers to a

considerable degree. This must be decided on by the **national courts**, which have sole responsibility for ascertaining the facts and assessing the seriousness of the infringements of EU law. The Court of Justice's judgment in *Brasserie du pêcheur* nevertheless offers the national courts a number of basic guidelines, as follows:

> 'The factors which the competent court may take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or [Union] authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a [Union] institution may have contributed towards the omission, and the adoption of retention of national measures or practices contrary to [Union] law. On any view, a breach of [Union] law will clearly be sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established, or a preliminary ruling or settled case-law of the Court on the matter from which it is clear that the conduct in question constituted an infringement.'

3. A **direct causal** link must exist between the infringement of the obligation on the Member State and the harm suffered by the injured party. It is **not** necessary to demonstrate **fault** (intent or negligence) in addition to establishing that a sufficiently serious infringement of EU law has occurred.

The Court of Justice makes it quite clear that the principles established by it for determining liability **also apply to the last of the three central powers**, namely the judiciary. Its judgments are now not only subject to review at the successive stages of appeal; if they were delivered in disregard or infringement of EU law they may also be the subject of an action for damages before the competent courts in the Member States. When ascertaining the facts surrounding a judgment's infringement of EU law, proceedings of this kind must also reconsider the questions relating to the substance of EU law, in the process of which the court concerned may not merely invoke the binding effects of the judgment of the specialised court to which the case is referred. The court to which the competent national courts would have to refer questions of interpretation and/or the validity of EU provisions, and also the compatibility of national liability regimes with EU law, is again the Court of Justice, to which questions may be referred under the preliminary ruling

procedure (Article 267 TFEU). However, liability for infringement through a judgment will remain the exception. In view of the strict conditions attached, liability can be considered only if a court deliberately disregards EU law or, as in Case C-224/01 *Köbler*, a court of last instance, in violation of EU law, gives legal force to a decision to the detriment of the individual without having previously asked the Court of Justice to clarify the situation with regard to EU law which is relevant to the decision. In this latter case, it is essential for the protection of the rights of EU citizens who invoke EU law that the damage caused to them by a court of last instance be made good.

THE POSITION OF EUROPEAN UNION LAW IN RELATION TO THE LEGAL ORDER AS A WHOLE

After all that we have learnt about the structure of the EU and its legal set-up, it is not easy to assign EU law its rightful place in the legal order as a whole and define the boundaries between it and other legal orders. Two possible approaches to classifying it must be rejected from the outset. EU law must not be conceived of as a mere collection of international agreements, nor can it be viewed as a part of, or an appendage to, national legal systems.

Autonomy of the European Union's legal order

By establishing the EU, the Member States have limited their legislative sovereignty and in so doing have created a self-sufficient body of law that is binding on them, their citizens and their courts.

One of the best-known cases heard in the Court of Justice was Case 6/64 *Costa* v *ENEL* in 1964, in which Mr Costa filed an action against the nationalisation of electricity generation and distribution, and the consequent vesting of the business of the former electricity companies in ENEL, the new public corporation.

The autonomy of the EU legal order is of fundamental significance for the nature of the EU, for it is the only guarantee that EU law will not be watered down by interaction with national law, and that it will apply uniformly throughout the Union. This is why the concepts of EU law are interpreted in the light of the aims of the EU legal order and of the Union in general. This Union-specific interpretation is indispensable, since particular rights are secured by EU law and without it they would be endangered, for each

Member State could then, by interpreting provisions in different ways, decide individually on the substance of the freedoms that EU law is supposed to guarantee. An example is the concept of a 'worker', on which the scope of the concept of freedom of movement is based. The specific EU concept of the worker is quite capable of deviating from the concepts that are known and applied in the legal orders of the Member States. Furthermore, the only standard by which EU legal instruments are measured is EU law itself, and not national legislation or constitutional law.

Against the backdrop of this concept of the autonomy of the EU legal order, what is the relationship between EU law and national law?

Even if EU law constitutes a legal order that is self-sufficient in relation to the legal orders of the Member States, this situation must not be regarded as one in which the EU legal order and the legal systems of the Member States are superimposed on one another like layers of bedrock. The fact that they are applicable to the same people, who thus simultaneously become citizens of a national state and of the EU, negates such a rigid demarcation of these legal orders. Secondly, such an approach disregards the fact that EU law can become operational only if it forms part of the legal orders of the Member States. The truth is that the EU legal order and the national legal orders are interlocked and interdependent.

Interaction between European Union law and national law

This aspect of the relationship between EU law and national law covers those areas where the two systems complement each other. Article 4(3) TEU is clear enough:

> *'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.*
>
> *The Member States shall 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 Union.*

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.'

This general principle of sincere cooperation was inspired by an awareness that the EU legal order on its own is not able to fully achieve the objectives pursued by the establishment of the EU. Unlike a national legal order, the EU legal order is not a self-contained system but relies on the support of the national systems for its operation. All three branches of government – legislature, executive and judiciary – therefore need to acknowledge that the EU legal order is not a 'foreign' system and that the Member States and the EU institutions have established indissoluble links between themselves so as to achieve their common objectives. The EU is not just a community of interests; it is a community based on solidarity. It follows that national authorities are required not only to observe the EU treaties and secondary legislation; they must also implement them and bring them to life. The interaction between the two systems is so multifaceted that a few examples are called for.

The first illustration of how the EU and national legal orders mesh with and complement each other is the **directive**, already considered in the chapter on legislation. All the directive itself fixes in binding terms is the result to be achieved by the Member State; it is for national authorities, via domestic law, to decide how and by what means the result is actually brought about. In the **judicial field**, the two systems mesh through the preliminary ruling procedure referred to in Article 267 TFEU, whereby national courts may, or sometimes must, refer questions on the interpretation and validity of EU law to the Court of Justice, whose ruling may well be decisive in settling the dispute before them. Two things are clear: firstly, the courts in the Member States are required to observe and apply EU law; and secondly, the interpretation of EU law and declarations as to its validity are the sole preserve of the Court of Justice. The interdependence of EU and national law is further illustrated by what happens when **gaps in EU law** need to be filled: EU law refers back to existing rules of national law to complete the rules it itself determines. From a certain point onwards, the fate of a provision of EU law is therefore determined by the respective provisions of national law. This principle applies to the full range of **obligations under EU law** unless the latter has laid down rules for its own enforcement. In any such case, national authorities enforce EU law by the provisions of their own legal systems. But the principle is subject to one proviso: the uniform application of EU law must be preserved, for it would be wholly unacceptable for citizens and

undertakings to be judged by different criteria – and therefore be treated unjustly.

Conflict between European Union law and national law

However, the relationship between EU law and national law is also characterised by an occasional 'clash' or conflict between the EU legal order and the national legal orders. Such a situation always arises when a provision of EU law confers rights and imposes obligations directly upon EU citizens while its content conflicts with a rule of national law. Concealed behind this apparently simple problem area are two fundamental questions underlying the construction of the EU, the answers to which were destined to become the acid test for the existence of the EU legal order, namely: the **direct applicability of EU law** and the **primacy of EU law** over conflicting national law.

Direct applicability of European Union law to national law

Firstly, the direct applicability principle simply means that EU law confers rights and imposes obligations directly not only on the EU institutions and the Member States but also on the EU's citizens.

One of the outstanding achievements of the Court of Justice is that it has enforced the direct applicability of EU law despite the initial resistance of certain Member States, and has thus guaranteed the existence of the EU legal order. Its case-law on this point started with a case already mentioned, namely that of the Dutch transport firm Van Gend & Loos. The firm brought an action in a Dutch court against the Dutch customs authorities, which had charged increased customs duties on a chemical product imported from West Germany. In the final analysis, the outcome of these proceedings depended on the question of whether individuals too may invoke Article 12 of the EEC Treaty, which specifically prohibits the introduction by the Member States of new customs duties and the increase of existing duties in the common market. Despite the advice of numerous governments and its advocate general, the Court ruled that, in view of the nature and objective of the Union, the provisions of EU law were in all cases directly applicable. In the grounds for its judgment, the Court stated that:

> 'The … Community constitutes a new legal order ... the subjects of which comprise not only the Member States but also their nationals.
>
> Independently of the legislation of Member States, Community law not only imposes obligations on individuals but is also intended to confer upon them rights … These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.'

That bald statement does not, however, get us very far, since the question remains as to **which provisions** of EU law are **directly applicable**. The Court first of all looked at this question in relation to primary EU legislation and declared that individuals may be directly subject to all the provisions of the EU treaties that (i) set out absolute conditions, (ii) are complete in themselves and self-contained in legal terms and therefore (iii) do not require any further action on the part of the Member States or the EU institutions in order to be complied with or acquire legal effect.

The Court ruled that the former Article 12 EEC met these criteria, and that the firm Van Gend & Loos could therefore also derive rights from it that the court in the Netherlands was obliged to safeguard, as a consequence of which the Dutch court invalidated the customs duties levied in contravention of the treaty. Subsequently, the Court continued to apply this reasoning in regard to other provisions of the EEC Treaty that are of far greater importance to citizens of the EU than Article 12. The judgments that are especially noteworthy here concern the direct applicability of provisions on freedom of movement (Article 45 TFEU), freedom of establishment (Article 49 TFEU) and freedom to provide services (Article 56 TFEU).

With regard to the guarantees concerning **freedom of movement**, the Court of Justice delivered a judgment declaring them directly applicable in the Case 41/74 *van Duyn*. The facts of this case were as follows. Ms van Duyn, a Dutch national, was in May 1973 refused permission to enter the United Kingdom, which was at that time an EU Member State, in order to take up employment as a secretary with the Church of Scientology, an organisation considered by the Home Office to be 'socially harmful'. Invoking the EU rules on freedom of movement for workers, Ms van Duyn brought an action before the High Court, seeking a ruling that she was entitled to stay in the

United Kingdom for the purpose of employment and be given leave to enter the United Kingdom. In answer to a question referred by the High Court, the Court of Justice held that Article 48 of the EEC Treaty (now Article 45 TFEU) was directly applicable and hence conferred on individuals rights that are enforceable before the courts of a Member State.

The Court of Justice was asked by the Belgian Conseil d'État to give a ruling on the direct applicability of provisions guaranteeing **freedom of establishment**. The Conseil d'État had to decide on an action brought by a Dutch lawyer, J. Reyners, who wished to assert his rights arising out of Article 52 of the EEC Treaty (Article 49 TFEU). Mr Reyners felt obliged to bring the action after he had been denied admission to the legal profession in Belgium because of his foreign nationality, despite the fact that he had passed the necessary Belgian examinations. In its judgment of 21 June 1974, the Court held that unequal treatment of nationals and foreigners as regards establishment could no longer be maintained, as Article 52 of the EEC Treaty had been directly applicable since the end of the transitional period and hence entitled EU citizens to take up and pursue gainful employment in another Member State in the same way as a national of that state. As a result of this judgment Mr Reyners had to be admitted to the legal profession in Belgium.

The Court of Justice was given an opportunity in Case 33/74 *van Binsbergen* to specifically establish the direct applicability of provisions relating to the **freedom to provide services**. These proceedings involved, among other things, the question of whether a Dutch legal provision to the effect that only persons habitually resident in the Netherlands could act as legal representatives before an appeal court was compatible with the EU rules on freedom to provide services. The Court ruled that it was not compatible on the grounds that all restrictions to which EU citizens might be subject by reason of their nationality or place of residence infringe Article 59 of the EEC Treaty (Article 56 TFEU) and are therefore void.

Also of considerable importance in practical terms is the recognition of the direct applicability of provisions on the **free movement of goods** (Article 26 TFEU), the principle of **equal pay for men and women** (Article 157 TFEU), the **general prohibition of discrimination** (Article 45 TFEU) and **freedom of competition** (Article 101 TFEU).

As regards **secondary legislation**, the question of direct applicability only arises in relation to directives and decisions addressed to the Member States, given that regulations and decisions addressed to individuals

already derive their direct applicability from the EU treaties (Article 288, second and fourth paragraphs, TFEU). Since 1970, the Court has extended its principles concerning direct applicability to provisions in directives and in decisions addressed to the Member States.

The practical importance of the direct effect of EU law in the form in which it has been developed and brought to fruition by the Court of Justice can scarcely be overemphasised. It improves the position of the individual by turning the freedoms of the common market into rights that may be enforced in a national court of law. The direct effect of EU law is therefore one of the pillars, as it were, of the EU legal order.

Primacy of European Union law over national law

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

Such a conflict between EU law and national law can be settled only if one gives way to the other. EU legislation contains no express provision on the question. None of the EU treaties contains a provision stating, for example, that EU law overrides or is subordinate to national law. Nevertheless, the only way of settling conflicts between EU law and national law is to grant EU law primacy and allow it to supersede all national provisions that diverge from an EU rule and take their place in the national legal orders. After all, precious little would remain of the EU legal order if it were to be subordinated to national law. EU rules could be set aside by any national law. There would no longer be any question of the uniform and equal application of EU law in all Member States. Nor would the EU be able to perform the tasks entrusted to it by the Member States. The EU's ability to function would be jeopardised, and the construction of a common system of European law on which so many hopes rest would never be achieved.

No such problem exists as regards the relationship between international law and national law. Given that **international law** does not become part of a country's own legal order until it is absorbed by means of an act of incorporation or transposition, the issue of primacy is decided on the basis of national law alone. Depending on the order of precedence ascribed to international law by a national legal system, it may take precedence over constitutional law, be ranked between constitutional law and ordinary

statutory law, or merely have the same status as statutory law. The relationship between incorporated or transposed international law and national law is determined by applying the rule under which the most recently enacted legal provisions prevail against those previously in place (*lex posterior derogat legi priori*). These national rules on conflict of laws do not, however, apply to the relationship between EU law and national law, because EU law does not form part of any national legal order. Any conflict between EU law and national law may only be settled on the basis of the EU legal order.

Once again it fell to the Court of Justice, in view of these implications, to establish – despite opposition from several Member States – the principle of the primacy of EU law that is essential to the existence of the EU legal order. In so doing, it erected the second pillar of the EU legal order alongside direct applicability, which was to turn that legal order at last into a solid edifice.

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

First, the Member States have definitively transferred sovereign rights to a Community created by them, and subsequent unilateral measures would be inconsistent with the concept of EU law.

Second, it is a principle of the treaty that no Member State may call into question the status of EU law as a system uniformly and generally applicable throughout the EU.

It follows from this that EU law, which was enacted in accordance with the powers laid down in the treaties, has primacy over any conflicting law of the Member States. Not only is it stronger than earlier national law, but it also has a limiting effect on laws adopted subsequently.

Ultimately, the Court did not, in its judgment on *Costa* v *ENEL*, call into question the nationalisation of the Italian electricity industry, but it quite emphatically established the primacy of EU law over national law.

The **legal consequence** of this rule of precedence is that, in the event of a conflict of laws, national law that is in contravention of EU law **ceases to apply**, and no new national legislation may be introduced unless it is compatible with EU law.

The Court has since consistently upheld this finding, and has in fact developed it further in one respect. Whereas the *Costa* judgment was concerned only with the question of the primacy of EU law over ordinary national laws, the Court confirmed the principle of primacy also with regard to the relationship between EU law and national constitutional law. After initial hesitation, national courts in principle accepted the interpretation of the Court of Justice. In the Netherlands, no difficulties could arise anyway, because the primacy of EU law over national statute law is expressly laid down in the constitution (Articles 65 to 67). In the other Member States, the principle of the primacy of EU law over national law has likewise been recognised by national courts. However, the constitutional courts of **Germany** and **Italy** initially refused to accept the primacy of EU law over **national constitutional law**, in particular regarding the guaranteed protection of fundamental rights. They withdrew their objections only after the protection of fundamental rights in the EU legal order had reached a standard that corresponded in essence to that of their national constitutions. However, Germany's **Federal Constitutional Court** continued to entertain misgivings about further integration, as it has made quite clear in its judgments on the Treaty of Maastricht and, more recently, the Treaty of Lisbon, couching its argument in terms of an '*ultra vires* review' whereby the Federal Constitutional Court expresses its intention to examine whether legal instruments of the EU institutions and bodies, including judgments of the Court of Justice, remain within the limits of the sovereign powers conferred on them or whether in fact the EU courts interpret the treaties more expansively, which would be tantamount to an inadmissible autonomous treaty amendment. The Federal Constitutional Court subsequently categorised this *ultra vires* review under the need for 'due care', with the proviso that this review may only be carried out by the Federal Constitutional Court (and not, for instance, by other national courts), and only with restraint and in a manner that is open to EU law. In particular:

1. the Federal Constitutional Court must in principle take into consideration the decisions of the Court of Justice as a binding interpretation of EU law;
2. before an *ultra vires* act is adopted, the Court of Justice is to be given the opportunity, under the framework of a procedure for preliminary rulings (Article 267 TFEU), to interpret the agreement and to decide on the validity and interpretation of the legal act in question;
3. a review will only be applied if it is apparent that action taken by EU bodies has exceeded the powers conferred on those bodies.

With this dense network of conditions, there would be every reason to believe that any *ultra vires* legal act would remain nothing more than a theoretical notion. However, reality has taught us otherwise. In its judgment of 5 May 2020 on the ECB's emergency purchase programme, the Federal Constitutional Court criticised the purchase of government bonds by the ECB as being in violation of competences and infringing Germany's Basic Law. A judgment on the EU legality of the bond purchase programme previously requested by the Federal Constitutional Court from the Court of Justice by way of a preliminary ruling was characterised by the Federal Constitutional Court as 'absolutely incomprehensible' with regard to the check on the proportionality of the legal acts passed for the implementation of the purchase programme, and was therefore rejected. In giving this judgment, the Federal Constitutional Court has set itself on a clear collision course with the Court of Justice, while at the same time making clear that it wishes to review for itself, on a case-by-case basis, the primacy of application of EU law over national law, which it has itself deemed, in an earlier decision, essential for the functioning of the EU. In addition, it clearly has no hesitation in disregarding a Court of Justice judgment in the matter. It is to be hoped that the two courts will soon be able to mend the rift opened by the Federal Constitutional Court ruling and find their way back to working with staunch cooperation and mutual respect, in particular because the Federal Constitutional Court does not call into serious question the primacy of EU law, including over national constitutional law, but instead reserves the right of final scrutiny in certain very rare cases. The situation is different as regards a judgment handed down by **Poland's Constitutional Tribunal** on 7 October 2021, which declared sections of EU law incompatible with the Polish Constitution. In the opinion of Poland's Constitutional Tribunal, the Court of Justice's attempt to interfere in Poland's judicial system violates the principle of constitutional primacy and Poland's sovereignty. In March 2021, the Court of Justice had found that the EU is entitled to oblige Member States to disregard individual provisions of national law, including constitutional law. In concrete terms, the EU judges were concerned that the procedure for making appointments to Poland's Supreme Court might violate EU law. This would have meant that the Court of Justice could force Poland to abrogate parts of the controversial reform. Following this judgment, the European Commission immediately made it clear that the fundamental principles of the EU legal order were not to be haggled over by the national courts, including the constitutional courts, and that EU law took precedence over national law, including national constitutional law. The Commission has kept all of its options open with a view to making use of its powers under the treaties and guaranteeing the uniform application and integrity of EU law.

Interpretation of national law in line with European Union law

To prevent conflict between EU law and national law arising from the application of the rule of precedence, all state bodies that specifically implement or rule on the law must initially draw on the **interpretation of national law in line with EU law**.

It took a fairly long time for the concept of interpretation in line with EU law to be recognised by the Court of Justice and incorporated into the EU legal order. After the Court of Justice had initially considered it to be appropriate to ensure that national laws were in harmony with a directive only when requested to do so by national courts, it established an **obligation to interpret national law in accordance with the directives** for the first time in 1984, in Case 14/83 *von Colson and Kamann*. This case ruled on the amount of compensation to be awarded for discrimination against women with regard to access to employment. Whereas the relevant German legal provisions provided only for compensation for *Vertrauensschaden* (futile reliance on a legitimate expectation), Directive 76/207/EEC states that national law must provide for effective penalties to ensure that equal opportunities are provided with regard to access to employment. Since, however, the relevant penalties were not set out in more detail, the directive could not be considered directly applicable on this point, and there was a risk that the Court of Justice would have to rule that, although the national law failed to comply with EU law, there was no basis for the national courts to not take the national law into account. The Court of Justice therefore ruled that the national courts were obliged to interpret and apply national legislation in civil matters in such a way that there were effective penalties for discrimination on the basis of gender. Purely symbolic compensation would not meet the requirement of effective application of the directive.

The Court of Justice attributes the **legal basis** for the **interpretation of national law in line with EU law** to the general principle of sincere cooperation (Article 4(3) TEU). Under this article, Member States must take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the EU Treaty or resulting from action taken by the EU institutions. The national authorities are therefore also obliged to bring the interpretation and application of national law, which is secondary to EU law, into line with the wording and purpose of EU law (duty of cooperation – Joined Cases C-397/01 to C-403/01 *Pfeiffer and others*). For the national courts, this is reflected in their role as European courts in the sense that they ensure the correct application and observance of EU law.

In the Pfeiffer case, the Court of Justice clarified, in 2004, that emergency workers fall within the scope of protection of the working time directive (Directive 93/104/EC). On-call time had to be fully taken into account in the calculation of the maximum period of weekly working time of 48 hours.

One particular form of interpretation of national law in accordance with EU law is that of **interpretation in accordance with the directives**, under which Member States are obliged to implement directives. Legal practitioners and courts must help their Member States to meet this obligation in full by applying the principle of interpretation in accordance with the directives. Interpretation of national law in accordance with the directives ensures that there is conformity with the directives at the level at which law is applied, and thus ensures that national implementing law is interpreted and applied uniformly in all Member States. This prevents matters from being differentiated at the national level that have just been harmonised at the EU level by means of the directive.

The **limits** of interpretation of national law in line with EU law are in the unambiguous wording of a national law that is not open to interpretation; even though there is an obligation under EU law to interpret national law in line with EU law, national law may not be interpreted *contra legem*. This also applies in cases where the national legislator explicitly refuses to transpose a directive into national law. A resulting conflict between EU law and national law can be resolved only by means of proceedings against the Member State concerned for failure to fulfil obligations under the treaty (Articles 258 and 259 TFEU).

CONCLUSIONS

What overall picture emerges of the EU's legal order?

The EU's legal order is the true foundation of the Union, giving it a common system of law under which to operate. Only by creating new law and upholding it can the EU's underlying objectives be achieved. The EU legal order has already accomplished a great deal in this respect. It is thanks not least to this new legal order that the largely open borders, the substantial trade in goods and services, the migration of workers and the large number of transnational links between companies have already made the European internal market part of everyday life for 447 million people. Another, historically important, feature of the EU legal order is its peacemaking role. With its objective of maintaining peace and liberty, it replaces force as a means of settling conflicts by rules of law that bind both individuals and the Member States into a single community. As a result, the EU legal order is an important instrument for the preservation and creation of peace.

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

For all its imperfections, the EU legal order makes an invaluable contribution towards solving the political, economic and social problems of the Member States of the European Union.

CASE-LAW CITED

All decisions issued by the Court of Justice of the European Union can be found online (www.eur-lex.europa.eu). In addition, EUR-Lex also provides you with free access, in the 24 official languages of the EU, to the following:

- EU law (EU treaties, regulations, directives, decisions, consolidated legislation, etc.);
- preparatory work (legislative proposals, reports, Green and White Papers, etc.);
- international conventions;
- summaries of EU legislation that place legislative acts in their political context.

Nature and primacy of EU law

Case 26/62 *Van Gend & Loos* [1963] ECR 1 (nature of EU law; rights and obligations of individuals).

Case 6/64 *Costa* v *ENEL* [1964] ECR 1251 (nature of EU law; direct applicability, primacy of EU law).

Case 14/83 *von Colson and Kamann* [1984] ECR 1891 (interpretation of national law in line with EU law).

Case C-213/89 *Factortame* [1990] ECR I-2433 (direct applicability and primacy of EU law).

Joined Cases C-6/90 *Francovich* and C-9/90 *Bonifaci* [1991] ECR I-5357 (effect of EU law; liability of Member States for failure to discharge EU obligations; here: non-transposition of a directive).

Joined Cases C-46/93 *Brasserie du pêcheur* and C-48/93 *Factortame* [1996] ECR I-1029 (effect of EU law; general liability of Member States for failure to discharge EU obligations).

Joined Cases C-397/01 to C-403/01 Pfeiffer and others [2004] ECR I-8835 (interpretation of national law in line with EU law).

Powers of the EU

Joined Cases 3, 4 and 6-76 *Kramer* [1976] ECR 1279 (external relations; international commitments; authority of the EU).

Opinion 2/91 [1993] ECR I-1061 (distribution of powers between the EU and the Member States).

Opinion 2/94 [1996] ECR I-1759 (accession by the EC to the ECHR; absence of powers).

Opinion 2/13 EU:C:2014:2454 (incompatibility between the draft agreement on the accession of the EU to the ECHR and EU law).

Effects of legal acts

Case 2/74 *Reyners* [1974] ECR 631 (direct applicability; freedom of establishment).

Case 33/74 *van Binsbergen* [1974] ECR 1299 (direct applicability; provision of services).

Case 41/74 *van Duyn* [1974] ECR 1337 (direct applicability; freedom of movement).

Fundamental rights

Case 29/69 *Stauder* [1969] ECR 419 (fundamental rights; general principles of law).

Case C-112/00 *Eugen Schmidberger* [2003] ECR I-5659 (free movement of goods, fundamental rights).

Legal protection

Case T-177/01 *Jégo-Quéré et Cie* v *Commission* [2002] ECR II-2265 (gap in legal protection in acts with direct effect but lacking individual concern); different position taken by the Court of Justice in its judgment on appeal of

1 April 2004 in Case C-263/02 P *Commission* v *Jégo-Quéré et Cie* [2004], ECR I-3425

Case T-18/10 *Inuit Tapiriit Kanatami* [2010] ECR II-5599 (definition of 'regulatory act'); confirmed by the Court of Justice in its judgment on appeal of 3 October 2013 in Case C-583/11 P.

The ABC of EU Law

The legal order created by the European Union shapes our political life and society. Individuals are not merely citizens of their country, town or district; they are also EU citizens.

The ABC of EU Law by Prof. Klaus-Dieter Borchardt examines the roots of the European project and its development as a legal order, and is a definitive reference work on the subject.

It is intended for interested readers who would like an initial insight into the structure of the European Union and the supporting pillars of the European legal order.

Prof. Dr. Klaus-Dieter Borchardt held various roles within the European Commission until his retirement in 2019. He is an Honorary Professor at the University of Würzburg and has published numerous works on European law.

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