Cases and Materials on

EU Law

11th Edition

Stephen Weatherill

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The Evolution of the European Union

The Treaty of Lisbon entered into force on 1 December 2009, over fifty years since the entry into force of the first of the Treaties that shaped the modern European Union. The student is entitled to ask: 'Do I really need to know anything about what happened before December 2009? Can't I just start with the Lisbon Treaty and look forward in my studies, not back?'

It's a very fair question, and in writing this book I have done everything I possibly can to abandon the clutter of what has become merely historically interesting. Just because we old hands have stored up a pile of knowledge about the twists and turns of the EU's development does not mean we should inflict it on the student. But the answer to the question the student is entitled to ask is nevertheless – 'no! You can't just start with the Lisbon Treaty, and yes! You do need to know something about what has gone before'.

In part that is because the Lisbon Treaty is, on its own, utterly incomprehensible. It is an *amending* Treaty. Like its predecessors – the Nice Treaty (which entered into force in 2003), the Amsterdam Treaty (1999), the Maastricht Treaty (1993), and the Single European Act (1987) – it is not designed to be read in isolation. Rather, it amends the original texts, most significantly that of the Treaty of Rome which established from 1958 the most important of the original European Communities, the European Economic Community. The text that you will in practice need to learn to work with is the *consolidated text* of the European Union Treaties – that means, the text that absorbs all the amendments made over the years and sets out the true – comprehensible – picture. It was first made available at http://eurlex.europa.eu/JOHtml.do?uri=OJ:C:2008:115:SOM:EN:HTML. And there are two Treaties, the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). Most of the nuts and bolts are contained in the TFEU, and that will be our major preoccupation in this book.

So in the 1950s there was created a European Economic Community (EEC), but it was renamed the European Community (EC) by the amendments of the Maastricht Treaty with effect from 1993, when the EC became part of a wider, but oddly shaped, European Union (EU). Since 1 December 2009, the date of entry into force of the Lisbon Treaty, the European Community is no more, and the structure has been pulled under a single roof, that of the European Union. So the correct label now is the European Union, and it is European Union (or EU) law which we deal with today.

The majority of the material contained in this book – legislation, case law, academic comment – pre-dates the entry into force of the amendments crafted by the Lisbon Treaty. So it does not always use the precise wording of the current texts. You will see regular references to the European Community and to Community law, even though both were transformed in December 2009 into the European Union and Union law respectively. More awkward still, older material does not use the current numbers of the Articles of the Treaty. In fact the Amsterdam Treaty altered the numbering of the provisions of the Treaties, and the Lisbon Treaty did so once again. So, for example, the original Article 30 EEC became, after Amsterdam, Article 28 EC, and now it is Article

34 TFEU. A table of equivalence(s) is provided at pp. xxxix–lviii. These numerical headaches are now unavoidable, and the shift from Article xyx 'EC' to Article abc 'TFEU' is just something that we have to get used to, but I have written this book in such a way as to avoid making a meal of it. I aim simply to remind you of the mundane but frustrating changes in numbering whenever we come across older material. A lot of the time the alterations are merely cosmetic and older material is as relevant today as it ever was, even though we now live 'after Lisbon' in a European Union, not a European Community. To a large extent, Lisbon matters little when we look at the core issues of EU law. And in this book I do not take any time with dry explanation of what the law *was* – my concern is only to draw out where there are changes, and to reflect on why, in explaining what the law is today. In that sense, you sometimes need to know what the situation was before Lisbon in order to understand why things are as they are today. And, of course, the more you know about past patterns of European integration, the better equipped you are to understand what may lie in the future. But in this book I avoid telling you how things were simply for the sake of it.

The purpose of this introductory chapter is to provide the historical and institutional background. What are the motivations underlying the European Union? How has it acquired its present shape? So we shall return to Lisbon at the end of this chapter, for it is the most recent episode in the EU's construction project.

For students in British law schools, EU law has long held a well-deserved reputation for being extremely difficult to come to grips with. Yet at the end of the course most students tend to look back on it as a subject which they have found more interesting than most of the others which they have studied. There are good reasons for this apparent paradox. European Union law is initially difficult, because it represents an adventure into a new legal system. When a student starts the study of a new English or Scots law subject, he or she comes to it with an accumulated fund of knowledge and expectation about the basic principles of the legal order. It is possible immediately to approach the substance of the subject. Not so with European Union law. Indeed, nothing could be worse than to try to leap into the study of this new legal order equipped with domestic preconceptions about what judges do and about how law should be interpreted and applied. EU law is simply different, and it is necessary to learn to walk before one can run. For the law student who had thought that he or she had already picked up a spanking pace in legal education, this return to basic constitutional law can be a dispiriting experience. However, once the essentials of the subject are mastered, EU law is likely to prove a rewarding race to have run. It is a subject which enjoys internal coherence. Its themes and principles are consistent and can be understood and applied relatively easily. There are themes in the substantive law, such as the objective of establishing an internal market, and there are principles in the constitutional law, such as the supremacy and direct effect of EU law. The approach of the judges of the Court of Justice of the European Union may initially seem odd, but it too displays a certain thematic consistency which can quickly be appreciated. There is even consistency in the difficulties and tensions which beset the development of EU law. The problems of integrating the features of the EU legal order with the traditions of domestic legal systems will be observed on many occasions.

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As an academic lawyer with a particular interest in European Union law, I hope that it will one day be possible to abandon these cautionary notes. Most Law Schools are aware of the need to integrate the key elements of the study of EU law into their degree programmes from the earliest possible stage, so that it does not present to the student this initially forbidding prospect. Those who teach substantive European Union law courses remain aware that this task is by no means complete.

Part One of this book deals with the constitutional law of the EU. This covers the sources of Union law in Chapter 2, and then examines in Chapters 3 to 8 the fundamental

ground rules of the legal order. The most prominent of these essential principles are the doctrines of supremacy and of direct effect, and the preliminary reference procedure.

However, given these comments, is it right to start with Part One? I have already mentioned that the early weeks of study are difficult, even intimidating. True, in examining a legal system, there is an obvious logic in beginning with its sources. But there is an equally strong argument for starting by acquiring a knowledge of the purpose of the system. This broader perspective can help the subject to come alive more quickly. Chapter 9, in Part Two, therefore deserves the student's examination at an early stage. So too do Chapters 17–19, which comprise Part Three of the book and which help to illustrate what the Union actually does, while also drawing out some bigger questions about its nature and its relationship with the Member States. Equally, once the student has grasped the substantive law of the Union it would be helpful to refer back once again to the earlier constitutional law chapters. They will make more sense in the broader context.

It would be ill-advised to approach the study of EU law as a purely legal undertaking. Narrowness of focus is damaging in any branch of the law, but perhaps especially so in European law, where economic, political, and social objectives are close to the surface and exert a profound formative influence on the law. From this perspective, then, the student about to read Part One of this book might be well advised to equip him- or herself in advance with a basic understanding of modern European history. Such introductory material may be found in the opening chapter or chapters of the major textbooks listed in the Selected Bibliography. Other more general sources of information, which do not offer a specifically legal focus, are also mentioned there and deserve the student's attention.

However, the following extracts provide a short but valuable introductory overview of some of the elements of the past, present, and future, which will be glimpsed, but not studied directly, in the course of this book. The opportunity is also taken to clarify terminology – there was a European Community, then there was a European Community within a wider European Union, now, since December 2009, there is only a European Union.

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J. Pinder, *The Building of the European Union*

(3rd ed., Oxford: OUP, 1998), pp. 3–8 [Reproduced by permission of Oxford University Press]

(Footnotes omitted)

1 CREATING THE COMMUNITY AND THE UNION: NATION-STATE AND FEDERAL IDEA

The [...] European Union is a remarkable innovation in relations among states. Its institutions are more powerful than those of conventional international organisations, and offer more scope for development. Much of their specific character was determined in a few weeks in the summer of 1950, when representatives of the six founder members, France, the German Federal Republic, Italy, Belgium, the Netherlands, and Luxembourg, agreed on the outline of the Treaty to establish the European Coal and Steel Community. The initiative had been taken by Robert Schuman, the French foreign minister, who explained the gist of his proposal with these words:

...the French government proposes to take action immediately on one limited but decisive point...to place Franco-German production of coal and steel under a common High Authority, within the framework of an organisation open to the participation of the other countries of Europe...The solidarity in production thus established will make it plain that any war between France and Germany becomes not merely unthinkable, but materially impossible...this proposal will build the first concrete foundation of a European federation which is indispensable to the preservation of peace...

World War II, national sovereignty, the federal idea

World War II was a catastrophe that discredited the previous international order and, for many Europeans, the basic element in that order: the absolutely sovereign nation-state. In the Europe of such states, France and Germany had been at war three times in less than a century, twice at the centre of terrible world wars. Autarky and protection, fragmenting Europe's economy, had caused economic malaise and political antagonism. Fascist glorification of the nation-state had been revealed as a monstrosity; and many felt that insistence on its sovereignty, even without fascist excess, distorted and ossified the political perspective.

This critique pointed towards the limitation of national sovereignty. It was accepted by many people of the anti-fascist resistance, in Germany and Italy as well as the occupied countries. While the idea of limiting sovereignty in a united Europe was widespread, some influential figures were more precise. They envisaged a federal constitution for Europe, giving powers over trade, money, security, and related taxation, to a federal parliament, government, and court, leaving all other powers to be exercised by the institutions of the member states.

Such ideas evoked a ready echo from those Europeans who asked themselves why the war had occurred and what could be done to ensure a better future; and they were encouraged by Winston Churchill who, in a speech in Zurich in September 1946, suggested that France should lead Germany into a United States of Europe. Not everybody noticed that he was reticent about the part that Britain should play in such a union; and many, impressed by the magnanimous vision of the wartime leader with his immense prestige, did not realise how hard it would be to accomplish. For despite the popularity of the federal idea in Continental countries, the structures of the states were gathering strength again and were to prove resistant to radical federal reform.

Some of this resistance stemmed from the principle of national sovereignty as a basic political value. General de Gaulle was to be the most powerful and eloquent exponent of this view; and Mrs Thatcher was a subsequent protagonist. But most of the resisters were more pragmatic. Many bureaucrats, central bankers, and politicians would allow that sovereignty could in principle be shared on the right terms and at the right time: but the right terms were not on offer and the right time would be later.

Two main strategies were devised to overcome the reluctance of governments. One, promoted by the Italian federalist leader, Altiero Spinelli, was to mobilise popular support for a constituent assembly, in which the people's representatives would draw up a European constitution. But this idea bore little fruit until, with the direct elections to the European Parliament in 1979, Spinelli persuaded the people's newly elected representatives to design and approve a Draft Treaty to constitute a European Union. The other strategy, devised by Jean Monnet, was to identify a 'limited but decisive point', as Schuman's declaration put it, on which governments could be persuaded to agree and which, without going the whole way, would mark a significant step towards federation. With this idea, Monnet was to secure an early and spectacular success.

Founding the Community: the ECSC

Monnet's 'limited but decisive point' was the need for a new structure to contain the resurgent heavy industries of the Ruhr, the traditional economic basis for Germany's military might, which had been laid low as a result of the war. It was clear by 1950 that industry in West Germany must develop if Germans were to pay their way in the world and help the West in its rivalry with the Soviet Union, and that this required the revival of German steel production. Of the western Allies then responsible for West Germany, the United States and Britain were increasingly insistent on this. France, through history and geography more sensitive to the potential danger of German power, insisted that the Ruhr's heavy industries should be kept under control. But France lacked the means to restrain the Americans and British; and there were Frenchmen in key positions who realised that the perpetuation of an international Ruhr authority such as had been set up in 1948 to exert control over the Germans, apart from being unacceptable to the two Allies, would be an unstable arrangement, apt to be overturned by Germany at the first opportunity. Hence the idea of a common structure to govern the coal and steel industries, not only of the Ruhr but also of France and other European countries.

This idea was not the invention of Monnet alone. Officials in the French foreign ministry were also working on it. But they would surely have created a conventional international organisation, governed by committees of ministers, whereas Monnet was determined that the new institutions should have a political life independent of the existing governments: that they should be 'the first concrete foundation of a European federation'.

It is the theme of this book that the concept of European institutions which go beyond a conventional system of intergovernmental co-operation, however imperfectly realised so far, has given the Community, and now the Union, its special character: its stability, capacity for achievement, and promise for the future. It is of course possible to argue that the Community is, on the contrary, essentially an intergovernmental organisation to secure free trade and economic co-operation, and that the rest is frills and rhetoric. This book sets out a case for seeing it as more than that.

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Monnet, from his vantage point as head of the French Commissariat du Plan, persuaded Schuman to adopt the more radical project; and he did it at the moment when the French government was most apt to accept, because a solution to the problem of German steel could no longer be delayed. Monnet's solution had the merit of meeting not only the French national interest in the control of German steel but also a wider interest in the development of European political institutions. The proposal was immediately welcomed by the governments of West Germany, Italy, Belgium, the Netherlands, and Luxembourg; and it was enthusiastically received by the wide sectors of opinion in those countries and in France that could be called broadly federalist, in the sense of supporting steps towards a federal end, even if not all would be precise in defining this. The project also received strong and steady support from the United States.

Support for the federal idea had mushroomed in Britain too in 1939 and the first half of 1940, culminating with the Churchill government's proposal for union with France. But after the fall of France in June 1940, with Nazi domination of the Continent, British interest in European union ebbed. For more than a decade after the war, British governments wanted to confine their relationship with the Continent to no more than a loose association. They were not ready to accept the federal implications of Monnet's proposal. So the six founder members negotiated the Treaty establishing the European Coal and Steel Community (ECSC) without Britain or the other West European countries that took the same view.

As chairman of the intergovernmental conference that drew up the ECSC Treaty, Monnet was well placed to ensure that his basic idea was followed through. The High Authority was to be the executive responsible for policy relating to the coal and steel industries in the member countries, and its decisions were to apply directly to the economic agents in each country, without requiring the approval of its government. The policies envisaged in the Treaty bore the mark of French planning ideas. Investment in the two industries was to be influenced by the High Authority, though not subject to much control. Prices and production could be regulated, but only if there were crises of shortage or over-production. Policies for training, housing, and redeployment were to cater for workers' needs. Competition was at the same time to be stimulated by rules on price transparency, as well as by antitrust laws on American lines.

Monnet insisted on the principle of the High Authority's independence from the member states' governments because his experience as an international civil servant had convinced him that it would be hamstrung if they controlled it too directly. But that raised the question of the High Authority's accountability. Monnet, in his inaugural speech as the first President of the High Authority in August 1952, was to explain the Treaty's answer like this. The High Authority was responsible to an Assembly (now called the European Parliament), which would eventually be directly elected, and which had the power to dismiss it. There was recourse to the European Court of Justice in cases that concerned the High Authority's acts. In short, the powers defined by the Treaty would be exercised by institutions with federal characteristics, sovereign within the limits of their competences. The policy of the High Authority and those of the member states would be 'harmonised' by a Council of ministers, voting by majority 'save in exceptional cases'. Monnet ensured that the federal elements in the Community would be clearly explained by employing Spinelli's help in drafting the speech.

Monnet's idea was that the European federation would be built over the years on this 'first concrete foundation' as new sectors of activity were brought within the scope of the pre-federal institutions; and the establishment of the European Economic Community and Euratom in 1958 lent remarkable support to this view. But he does not appear to have foreseen how much the Council would come to dominate the politics of the Community, as the political structures of member states came to assert themselves against the realisation of the federal idea. This reaction led to a long-drawn-out conflict within the Community, which began with a major assault by General de Gaulle as President of France and continued up to the 1990s, with Britain succeeding de Gaulle as champion of national sovereignty...

NOTE: The Treaties of Rome, signed in 1957 and creating the EEC and EURATOM in 1958, led to a deepening of the process. The EEC envisaged the creation of a common market and was not limited to particular sectors of the economy. Its institutions followed the pattern of the ECSC. The EEC had a Commission, where the ECSC has a High Authority. (From 1967 the two functioned as one under the title 'Commission', until 2002 when the ECSC's functions were formally taken over by the EC.) The EEC also had three other institutions – Council, Parliament, and Court. The system is rooted in international Treaties agreed between States, but it represents a much more institutionally sophisticated and intricate model of co-operation than can be found in the orthodox type of 'intergovernmental co-operation' to which Treaty-making is dedicated. Admittedly the roots remain deep and each time the Treaty is revised the process of ratification by States offers a reminder of their foundational role. But there is much more to it than mere intergovernmental co-operation. The dynamic process of institutional interplay *within* the system endows it with a momentum that is not capable of crude control by Member State political elites. It operates as a layer of governance for Europe that

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is driven by motives that are distinct from, though certainly influenced by, those dear to individual Member States. To this extent the system is *not only* intergovernmental *but also* quasi-federal.

Questions about political accountability and institutional development demand the attention of anyone with an interest in the European Union. If the institutions of the Union are to develop autonomous policy-making competence, it is necessary to provide the appropriate democratic safeguards. The evolution of the Union is increasingly characterized by controversial debates about how best to subject the institutions to political and legal control. It is impossible for this book to explore these issues in detail. The next extract covers some specific points which will not yet be familiar, but the themes which it introduces are already valuable. It depicts the Community in the wake of subjection to its first major process of formal Treaty revision. This was effected by the *Single European Act*, which entered into force in 1987, and which took as a major objective the renovation of the institutional and constitutional system in order to improve its capacity to deliver the political objective of completing the internal market by the end of 1992.

R. Dehousse, '1992 and Beyond: The Institutional Dimension of the Internal Market Programme'

[1989/1] LIEI 109, 133–36

(Footnotes omitted.)

The evolution of the Community in the last few years teaches us a series of lessons on what might be called the politics of institutional reform. The first conclusion to be drawn from this experience is that institutional reform is easier to arrive at when it is not pursued for its own sake, but emerges as a logical implication of other political choices. Once the general idea of completing the internal market by 1992 had been accepted, it proved possible to convince even the most reluctant Member States that a shift towards more majority voting was necessary. Had the objective itself not met with consensus, the change would not have been possible. The same logic is apparent in the Single Act's provisions on economic and social cohesion, on research and technological development or on the environment. In all these sectors, unanimous agreement is needed in order to define the objectives to be pursued at Community level; it is only at a second stage that resort to majority voting can be envisaged. The rationale of all these provisions is the same: when a decision of principle is to be taken, Member States must be able to preserve what they regard as their essential interests but, precisely because they have been given this guarantee, no vital interest to be harmed at the implementation stage; the 'Community interest' – and in particular the necessity of an efficient decision-making system – can therefore be given precedence.

Thus, most of the developments which have taken place in these years find their origin in the Commission's capacity to capitalise on the political pressures exerted by the Parliament and to define a 'new frontier' which would be acceptable to all Member States. But the way in which the institutional reform was accomplished also deserves attention. The main feature of the process was certainly its piecemeal character, which is often the case with compromises achieved in decentralised systems. As is known, the Single European Act was not the result of an inspired exercise in constitution-making, but the product of strenuous international negotiation. This cumbersome process had a direct incidence on the final result, which reflects the various aspirations and fears of more or less all Member States. In a typical quid pro quo exercise, France and Germany secured the adoption of provisions on political cooperation, and the backward countries a general commitment in favour of the reinforcement of economic and social cohesion within the Community, while several countries managed to limit the Community's capacity to act autonomously as far as the environment is concerned. Several of the institutional problems mentioned above are linked to the complexity of the structure which eventually emerged. The lengthy discussions on the subject of legal basis offer good examples of difficulties connected with the ambiguity of the compromises made at the time of drafting the Single Act.

With the White Paper on the internal market, questions which were previously considered as essentially technical gained the status of major political objectives. This change was paralleled by an evolution in the decision-making process: the creation of an internal market Council, with its induced effects at national level, has made it easier to coordinate national and Community action in this sphere. The introduction of majority voting has had a similar effect. Even if it is not systematically used, the possibility of a vote reinforces the weight of political decision-makers over that of specialised departments, which are to a large extent deprived of the veto right they had in the past.

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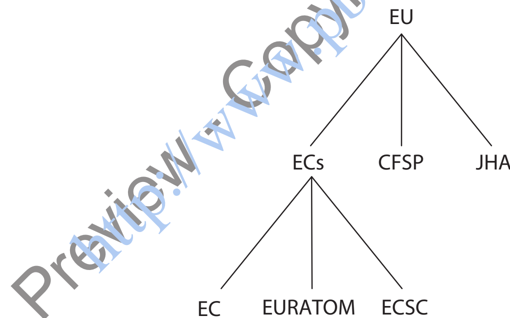
In spite of all the difficulties which can be foreseen, it is clear that the Community has now embarked on an era of dynamism which few expected a couple of years ago. Part of this dynamism finds its origin in external factors like the economic growth experienced in recent years; but it is equally clear that the momentum generated by the White Paper would not have been possible without its healthy institutional pragmatism. Not only did this approach make possible advances generally regarded as beyond reach not so long ago; but it might lead to even further-reaching results. For whether it is achieved by 1992 or only later, completion of the internal market could well generate its own dynamic. It has, for instance, often been argued that the liberalisation of capital movements in a Community with stable exchange rates will make it more difficult for Member States to pursue autonomous macro-economic policies. If at some stage two thirds of the economic and social legislation will have to be adopted at the Community level, as President Delors recently hinted, Community citizens and interest groups might press for a stronger voice in the decision-making process. At the same time, Member States might also realise that more systematic resort to voting, or a stronger involvement of Parliament in the legislative process, do not necessarily mean unbearable threats to their national interests…

NOTE: Even before the deadline for the completion of the internal market, the end of 1992, both the dynamism and the taste for ambiguous compromises noted by Dehousse in this extract were redeployed. In December 1991 agreement was reached at Maastricht on the next step forward – the Treaty on European Union. The Treaty was signed at Maastricht on 7 February 1992. However, only on 1 November 1993 did the Treaty finally come into force following hard-fought campaigns surrounding the ratification process in several Member States. The Danish people voted narrowly against ratification in a referendum in 1992 before voting in favour by a slightly larger margin in a second referendum in 1993. Germany was the last of the 12 Member States to ratify and could do so only after its Constitutional Court had ruled in October 1993 that ratification was not incompatible with the German Constitution ([1994] 1 CMLR 57: see further Chapter 19, p. 589).

The basic structure instituted by the Maastricht Treaty on European Union, and abandoned only as late as December 2009 on the entry into force of the Lisbon Treaty, is best presented in diagrammatic form.



The Treaty on European Union declared that 'The Union shall be founded on the European Communities'. Be that as it may, the Union structure fashioned at Maastricht was built on three pillars and the European Communities were only one of those three pillars. Two of the pillars, those relating to a Common Foreign and Security Policy (the 'second pillar') and Cooperation in the Fields of Justice and Home Affairs (the 'third pillar'), existed outside the traditional, developed EC structure and were much more overtly intergovernmental in nature. Meanwhile, the three European Communities remained in existence as components of what is commonly termed the European Community pillar, or the 'first pillar'. So there was an EC – but it was not co-terminous with the EU. It was a part of the EU. In fact, the most important of the three Communities, the EEC, was formally renamed the EC by the Maastricht Treaty. It was also amended in a number of more substantial respects, such as the inclusion of new Titles enhancing competences, the creation of the status of Citizenship of the

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Union, and adjustments to the legislative procedure which enhanced the position of the Parliament. Perhaps the centrepiece of the Treaty is the insertion into the EC Treaty of detailed provisions designed to lead to Economic and Monetary Union. These provisions carry immense constitutional significance. The Treaty timetable was adhered to and the third stage of economic and monetary union was launched on 1 January 1999, when 11 Member States adopted the euro as their common currency. Greece joined in 2001, Slovenia in 2007, Cyprus and Malta in 2008, Slovakia in 2009, Estonia in 2011, and Latvia in 2014, bringing the tally to 18 Member States (out of 28). Euro banknotes and coins have circulated validly since 1 January 2002. EMU is further discussed, albeit briefly, at p. 261.

There is a disjointed facade to the European Union created at Maastricht. The nature of each of the three pillars is different. The Council seems to be the only institution which is in any significant sense an institution of the whole Union. In November 1993, it accordingly chose to rename itself the Council of the European Union. The impression of a disjointed structure is heightened when one appreciates that even within the EC there were emerging tendencies towards fragmentation. A flavour of the debate at the time can be acquired from Deirdre Curtin's famous expressions of concern about the growth of a 'Europe of Bits and Pieces' (Curtin, D., 'The Constitutional Structure of the Union: A Europe of Bits and Pieces' (1993) 30 CML Rev 17) and there will be further discussion in Chapter 18. The picture was complicated yet further by the coming into existence of the European Economic Area (EEA) at the start of 1994, which extended a mass of rules relevant to free trade more widely into Europe. The EEA structure established further institutions, most prominently the EEA Council. The accession of Austria, Finland, and Sweden to the Union at the start of 1995 greatly reduced the practical importance of the non-EU part of the EEA, which today comprises only Norway, Iceland, and Liechtenstein.

It has been astutely commented that 'the success of the internal market programme lay in its apparent lack of ambition' (Dehousse, Joerges, Majone, and Snyder (eds), 'Europe after 1992: New Regulatory Strategies', EUI Working Paper Law 92/31, Florence). In sharp contrast, as the European Union project unfolds, what is increasingly apparent is the breadth of the ambition. How this will affect the prospects for success dominates the European agenda.

The process of Treaty revision continued. The Treaty of Amsterdam was signed in October 1997. It secured ratification according to domestic constitutional procedures in the 15 Member States of the time while attracting noticeably less opposition than the Maastricht Treaty and it duly entered into force on 1 May 1999. The Amsterdam changes to the Treaties were incremental. They did not disturb the basic existence of the three-pillar structure of the Union presented in diagrammatic form at p. 9. However, the Amsterdam Treaty moved material between the pillars. Of greatest significance was the transfer of material relevant to the free movement of people within the Union from the third pillar to the first pillar, the EC. A new Title was inserted into the EC Treaty on 'Visas, asylum, immigration and other policies related to free movement of persons' dedicated to the progressive establishment of 'an area of freedom, security and justice'. The Title was built around a five-year timetable for dismantling internal borders, although special provision was made in Protocols to the Treaty for Denmark, the United Kingdom, and Ireland. This Title in the EC Treaty was home to modified versions of material that had been allocated to the 'third pillar' by the Maastricht Treaty on European Union. So the first pillar, the EC, gained ground at the expense of the third, formerly dealing with Justice and Home Affairs but now re-worked and restyled *Provisions on Police and Judicial Co-operation in Criminal Matters*. However, the new Title, although part of the EC Treaty, was marked by some institutional aspects alien to the EC system.

As is true of every process of Treaty revision, the Amsterdam changes meant that there was EU law 'pre-Amsterdam' and EU law 'post-Amsterdam', and this must be taken into account when reading older legislative materials and judicial pronouncements. But the pre-Amsterdam legal world is also numerically distinct from the post-Amsterdam. The Amsterdam Treaty's most immediately visible feature was the re-numbering from start to finish of the whole EC Treaty and of the EU Treaty (pursuant to Article 12 of the Treaty of Amsterdam). After Amsterdam both Treaties ran from Article 1 upwards (to Article 314 in the case of the EC Treaty; Article 53 in the EU Treaty). This cleaned out the unwieldy insertions made by the Single European Act and the Maastricht Treaty that littered the EC Treaty with Articles denoted as numbers-plus-letters (e.g., Articles 3b, 100a); and it eliminated entirely the lettering system used in the TEU. The obvious disadvantage of this spring-clean lies in the need to become accustomed to the replacement of familiar numbers for Articles of the Treaty with new numbers. And it is an obstacle that is doubled in height with effect from 1 December 2009 and the entry into force of the Lisbon Treaty, which effects a yet further round of re-numbering for the TFEU (successor to the EC Treaty) and the TEU. These changes will always have to be borne in mind when reading pre-Amsterdam texts and texts from the period between Amsterdam (1999) and Lisbon (2009), including legislation and court judgments, and in fact the EU lawyer will need to become adept at this form of 'currency conversion'. Pages xxxix-lviii of this book contain the Table of Equivalence between the pre-Lisbon and the new numbering which is annexed to the Lisbon Treaty, and the reader will find frequent resort to that table invaluable while he or she is making the necessary mental adjustments. Moreover (see Preface, p. xi), references to the numerical changes are made in introducing key Treaty provisions throughout the book.

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Michel Petite, The Treaty of Amsterdam

(1998), published as a Harvard Jean Monnet Chair Working Paper, 2/98 available at http://www.law.harvard.edu/Programs/JeanMonnet

> The Amsterdam Treaty is by no means the last word on European integration. Like its predecessors it marks a further stage in the process. However one views it, it probably represents the most that the Member States were prepared to agree among themselves at a given moment.
>
> ...Two simple remarks suggest cause for both humility and perseverance:
>
> — first, all of the delegations asserted their commitment to maintaining the institutional balance (yet this balance is constantly shifting, as exemplified by the increased role of the European Parliament); this commitment means that everyone wants to build on the foundations of the achievements of forty years of European integration – and will continue to do so for the foreseeable future. There will be no tabula rasa on which radically new institutional formulas will be rebuilt;
>
> — secondly, there is no magic formula that can confound the mathematics: the organisation will inevitably be more difficult for a group of 21, 26 or 30 than one of 6 or even 15. Enlargement has certain inherent consequences.
>
> What this amounts to is that the reforms to be undertaken in response to the demands of enlargement cannot be achieved by new constitutional formulas so much as by a less headline-grabbing series of changes to the way our institutions operate. Most of these reforms are a question of fine-tuning, and many rightfully belong in the internal rules of procedure rather than in the Treaty itself.

NOTE: For good or ill (*cf* p. 10, the Amsterdam Treaty seemed bereft of any 'big idea'. For J. Weiler, finding 'no shared agenda and no mobilising force behind the exercise', this was 'an Intergovernmental Conference which should never have started'; and in the light of the complexity of the unresolved issues, 'it was, too, an Intergovernmental Conference which should never have ended'. The product was 'an inconclusive Treaty leaving all hard issues for tomorrow' ((1997) 3 ELJ, Editorial, 309, 310).

Tomorrow always comes, and unfinished business needed to be addressed. Some institutional and constitutional questions, relating most of all to Council voting and the composition of the Commission, were left unresolved by the Amsterdam Treaty. These had to be settled in order to re-shape the Union's institutional architecture in anticipation of the pressures imposed by impending enlargement into Central and Eastern Europe. A fresh intergovernmental conference concluded in December 2000 at Nice, where a new amending Treaty was agreed. The broad purpose of the Nice Treaty was to perform surgery designed to improve the efficiency of the EU's institutions without delaying enlargement.

The Nice Treaty, like the Amsterdam Treaty before it, maintained the three-pillar structure of the Union, while making detailed adjustments to each of the pillars. The Nice Treaty too is essentially incremental in its impact. It was agreed in December 2000, but – like the Maastricht Treaty, and unlike the Amsterdam Treaty – it gathered a considerable amount of opposition when put to the test of domestic ratification. The people of Denmark had been the 'problem' in the Maastricht process; now it was the people of Ireland who asserted their right to choose in a referendum held in 2001. The Nice Treaty was rejected in a popular referendum. It was frankly difficult to identify any particular provision of the Nice Treaty to which the Irish objected. It altered arcane matters such as voting rules in Council and the number of seats allocated to each State in the European Parliament. But the Nice Treaty's absence of defining features was perhaps precisely the point; the alienated people of Ireland had little understanding of what they being asked to vote on. A patient campaign of information by the Irish government prepared the ground for a second referendum and in Autumn 2002 the Irish once again followed the example of the Danish approach to Maastricht and, second time round, voted 'yes'. Duly ratified by all 15 Member States, the Nice Treaty entered into force on 1 February 2003.

The accession of new Member States in Central and Eastern Europe was planned to proceed according to a timetable agreed at the December 2002 European Council in Copenhagen. Treaties of accession were duly agreed and ratified, and ten more countries joined the Union from 1 May 2004: Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia. On 1 January 2007 Bulgaria and Romania joined the club. Croatia followed on 1 July 2013. The EU comprises 28 Member States.

There is much discussion about the nature of the entity into which the European Union is evolving. Although not itself a State, it possesses an institutional and constitutional sophistication which marks it out from normal intergovernmental associations. Moreover, the creature has developed not only through the formal process of periodic Treaty revision, but also (as will be traced in this book) through wide-ranging legislative action and through the remarkable activism of its Court. So the Union may not be a State, but it displays some State-like features and it profoundly affects the nature of the States that are members of it. The concluding chapter of this book will devote further attention to these broader questions, once the reader has acquired a fuller understanding of constitutional and substantive law. This chapter is concerned only to trace the trajectory of the process. But Nice was intended to be the last Treaty to respect the pattern for the European Union cautiously mapped at Maastricht. A political preference gradually emerged to eliminate the constitutionally and institutionally distinct 'three pillars', and to replace them with a single trunk. More ambitiously, the aspiration developed to encourage deeper and wider participation by the peoples of Europe in the planning of their destinies. A strong political impetus to dispel the alienation of citizens from the project of European integration urged that it be made more comprehensible, in the (far from uncontroversial) expectation that this will make it more appealing. This quest for *legitimacy* propelled the EU along the rocky road that eventually led to

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the next round of revision of the Treaties, the Treaty of Lisbon which entered into force on 1 December 2009.

From a formal perspective the legitimacy of the process of European integration is guaranteed by the requirement that Treaty revision be conducted with respect for the domestic constitutional arrangements of each Member State and with the support of all of them. The procedure is mapped out in Article 48 TEU. Some Member States are obliged to hold or choose to hold a referendum before proceeding to ratification. This caused awkwardness in the process of ratification of both the Maastricht Treaty (to which the Danes voted first 'no', and only subsequently 'yes') and the Nice Treaty (which generated a similar 'first no, then yes' pattern in Ireland). Other Member States prefer to confine discussion of ratification to Parliamentary processes. This has been true of the UK, which has never held a referendum on ratification (although it did hold a referendum on the question of continued membership in 1975). But the key point is that from a formal perspective the Treaty can be revised, and the EU's powers extended, only provided each Member State agrees. The nature of the legal order as a creature of international law is most vividly demonstrated at times of Treaty revision.

But legitimacy has dimensions that stretch beyond the formal. Do the peoples of Europe treat the European Union as a legitimate source of authority? This is a matter of social observation, not a matter of formal legal authority. The intergovernmental conference is, on the one hand, the means of conferring formal State approval on the shaping of the Union, but it is, on the other hand, a powerful statement to citizens that the Union is remote from their concerns, the plaything of political élites – that it is, in short, none of their business.

Efforts were increasingly devoted to investing the Union with a greater degree of social legitimacy. Relevant devices included the proclamation in 2000 of a non-binding EU Charter of Fundamental Rights (Chapter 2), the creation of the status of Citizenship of the Union (Chapter 15) and the irresistible rise of the principle of subsidiarity (Chapter 18).

The European Council meeting in Nice in December 2000 adopted a Declaration on the Future of the Union. The aim was to initiate a debate about the nature and purpose of the EU and within that debate to emphasize the engagement of citizens.

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DECLARATION ON THE FUTURE OF THE UNION
(adopted by the Conference at Nice)

1. Important reforms have been decided in Nice. The Conference welcomes the successful conclusion of the Conference of Representatives of the Governments of the Member States and commits the Member States to pursue the early ratification of the Treaty of Nice.

2. It agrees that the conclusion of the Conference of Representatives of the Governments of the Member States opens the way for enlargement of the European Union and underlines that, with ratification of the Treaty of Nice, the European Union will have completed the institutional changes necessary for the accession of new Member States.

3. Having thus opened the way to enlargement, the Conference calls for a deeper and wider debate about the future of the European Union. In 2001, the Swedish and Belgian Presidencies, in cooperation with the Commission and involving the European Parliament, will encourage wide-ranging discussions with all interested parties: representatives of national parliaments and all those reflecting public opinion, namely political, economic and university circles, representatives of civil society, etc. The candidate States will be associated with this process in ways to be defined.

4. Following a report to be drawn up for the European Council in Göteborg in June 2001, the European Council, at its meeting in Laeken/Brussels in December 2001, will agree on a declaration containing appropriate initiatives for the continuation of this process.

5. The process should address, *inter alia*, the following questions:
- how to establish and monitor a more precise delimitation of powers between the European Union and the Member States, reflecting the principle of subsidiarity;
- the status of the Charter of Fundamental Rights of the European Union, proclaimed in Nice, in accordance with the conclusions of the European Council in Cologne;
- a simplification of the Treaties with a view to making them clearer and better understood without changing their meaning;
- the role of national parliaments in the European architecture.

6. Addressing the abovementioned issues, the Conference recognises the need to improve and to monitor the democratic legitimacy and transparency of the Union and its institutions, in order to bring them closer to the citizens of the Member States.

7. After these preparatory steps, the Conference agrees that a new Conference of the Representatives of the Governments of the Member States will be convened in 2004, to address the abovementioned items with a view to making corresponding changes to the Treaties.

8. The Conference of Member States will not constitute any form of obstacle or precondition to the enlargement process. Moreover, those candidate States which have concluded accession negotiations with the Union will be invited to participate in the Conference. Those candidate States which have not concluded their accession negotiations shall be invited as observers.

NOTE: As envisaged in para 4 of this Declaration the European Council met in Laeken (Belgium) in December 2001 and agreed to convene a Convention on the 'Future of Europe'. This was designed to pave the way for the next Intergovernmental Conference, to be convened in 2004 (according to para 7 of this Declaration). The Laeken Declaration picks up the four matters to which specific attention is drawn in para 5 of this Declaration, but it goes much further. It attempts to set in motion a process of deliberation that will do justice to the grand aspirations contained in para 6. And the model of a more broadly representative 'Convention', distinct from intergovernmental orthodoxy, was considered sufficiently to have proved its worth in the drafting of the Charter of Fundamental Rights to deserve redeployment in the search for a blueprint for the 'Future of Europe'. The questions raised by the Laeken Declaration are of enduring structural and intellectual importance and the document remains well worth reading.

THE LAEKEN DECLARATION

I. EUROPE AT A CROSSROADS

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

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

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

Fifty years on, however, the Union stands at a crossroads, a defining moment in its existence. The unification of Europe is near. The Union is about to expand to bring in more than ten new Member States, predominantly

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Central and Eastern European, thereby finally closing one of the darkest chapters in European history: the Second World War and the ensuing artificial division of Europe. At long last, Europe is on its way to becoming one big family, without bloodshed, a real transformation clearly calling for a different approach from fifty years ago, when six countries first took the lead.

The democratic challenge facing Europe

At the same time, the Union faces twin challenges, one within and the other beyond its borders.

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

Europe's new role in a globalised world

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

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

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

The expectations of Europe's citizens

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

At the same time, citizens also feel that the Union is behaving too bureaucratically in numerous other areas. In coordinating the economic, financial and fiscal environment, the basic issue should continue to be proper operation of the internal market and the single currency, without this jeopardising Member States' individuality. National and regional differences frequently stem from history or tradition. They can be enriching. In other words, what citizens understand by 'good governance' is opening up fresh opportunities, not imposing further red tape. What they expect is more results, better responses to practical issues and not a European superstate or European institutions inveigling their way into every nook and cranny of life.

In short, citizens are calling for a clear, open, effective, democratically controlled Community approach, developing a Europe which points the way ahead for the world. An approach that provides concrete results in terms of more jobs, better quality of life, less crime, decent education and better health care. There can be no doubt that this will require Europe to undergo renewal and reform.

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II. CHALLENGES AND REFORMS IN A RENEWED UNION

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

A better division and definition of competence in the European Union

Citizens often hold expectations of the European Union that are not always fulfilled. And vice versa – they sometimes have the impression that the Union takes on too much in areas where its involvement is not always essential. Thus the important thing is to clarify, simplify and adjust the division of competence between the Union and the Member States in the light of the new challenges facing the Union. This can lead both to restoring tasks to the Member States and to assigning new missions to the Union, or to the extension of existing powers, while constantly bearing in mind the equality of the Member States and their mutual solidarity.

A first series of questions that needs to be put concerns how the division of competence can be made more transparent. Can we thus make a clearer distinction between three types of competence: the exclusive competence of the Union, the competence of the Member States and the shared competence of the Union and the Member States? At what level is competence exercised in the most efficient way? How is the principle of subsidiarity to be applied here? And should we not make it clear that any powers not assigned by the Treaties to the Union fall within the exclusive sphere of competence of the Member States? And what would be the consequences of this?

The next series of questions should aim, within this new framework and while respecting the 'acquis communautaire', to determine whether there needs to be any reorganization of competence. How can citizens' expectations be taken as a guide here? What missions would this produce for the Union? And, vice versa, what tasks could better be left to the Member States? What amendments should be made to the Treaty on the various policies? How, for example, should a more coherent common foreign policy and defence policy be developed? Should the Petersberg tasks be updated? Do we want to adopt a more integrated approach to police and criminal law cooperation? How can economic-policy coordination be stepped up? How can we intensify cooperation in the field of social inclusion, the environment, health and food safety? But then, should not the day-to-day administration and implementation of the Union's policy be left more emphatically to the Member States and, where their constitutions so provide, to the regions? Should they not be provided with guarantees that their spheres of competence will not be affected?

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

Simplification of the Union's instruments

Who does what is not the only important question; the nature of the Union's action and what instruments it should use are equally important. Successive amendments to the Treaty have on each occasion resulted in a proliferation of instruments, and directives have gradually evolved towards more and more detailed legislation. The key question is therefore whether the Union's various instruments should not be better defined and whether their number should not be reduced.

In other words, should a distinction be introduced between legislative and executive measures? Should the number of legislative instruments be reduced: directly applicable rules, framework legislation and non-enforceable instruments (opinions, recommendations, open coordination)? Is it or is it not desirable to have more frequent recourse to framework legislation, which affords the Member States more room for manoeuvre in achieving policy objectives? For which areas of competence are open coordination and mutual recognition the most appropriate instruments? Is the principle of proportionality to remain the point of departure?

More democracy, transparency and efficiency in the European Union

The European Union derives its legitimacy from the democratic values it projects, the aims it pursues and the powers and instruments it possesses. However, the European project also derives its legitimacy from democratic, transparent and efficient institutions. The national parliaments also contribute towards the legitimacy of the European project. The declaration on the future of the Union, annexed to the Treaty of Nice, stressed the need to

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examine their role in European integration. More generally, the question arises as to what initiatives we can take to develop a European public area.

The first question is thus how we can increase the democratic legitimacy and transparency of the present institutions, a question which is valid for the three institutions.

How can the authority and efficiency of the European Commission be enhanced? How should the President of the Commission be appointed: by the European Council, by the European Parliament or should he be directly elected by the citizens? Should the role of the European Parliament be strengthened? Should we extend the right of co-decision or not? Should the way in which we elect the members of the European Parliament be reviewed? Should a European electoral constituency be created, or should constituencies continue to be determined nationally? Can the two systems be combined? Should the role of the Council be strengthened? Should the Council act in the same manner in its legislative and its executive capacities? With a view to greater transparency, should the meetings of the Council, at least in its legislative capacity, be public? Should citizens have more access to Council documents? How, finally, should the balance and reciprocal control between the institutions be ensured?

A second question, which also relates to democratic legitimacy, involves the role of national parliaments. Should they be represented in a new institution, alongside the Council and the European Parliament? Should they have a role in areas of European action in which the European Parliament has no competence? Should they focus on the division of competence between Union and Member States, for example through preliminary checking of compliance with the principle of subsidiarity?

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

Towards a Constitution for European citizens

The European Union currently has four Treaties. The objectives, powers and policy instruments of the Union are currently spread across those Treaties. If we are to have greater transparency, simplification is essential.

Four sets of questions arise in this connection. The first concerns simplifying the existing Treaties without changing their content. Should the distinction between the Union and the Communities be reviewed? What of the division into three pillars?

Questions then arise as to the possible reorganisation of the Treaties. Should a distinction be made between a basic treaty and the other treaty provisions? Should this distinction involve separating the texts? Could this lead to a distinction between the amendment and ratification procedures for the basic treaty and for the other treaty provisions?

Thought would also have to be given to whether the Charter of Fundamental Rights should be included in the basic treaty and to whether the European Community should accede to the European Convention on Human Rights.

The question ultimately arises as to whether this simplification and reorganization might not lead in the long run to the adoption of a constitutional text in the Union. What might the basic features of such a constitution be? The values which the Union cherishes, the fundamental rights and obligations of its citizens, the relationship between Member States in the Union?

III. CONVENING OF A CONVENTION ON THE FUTURE OF EUROPE

In order to pave the way for the next Intergovernmental Conference as broadly and openly as possible, the European Council has decided to convene a Convention composed of the main parties involved in the debate on the future of the Union. In the light of the foregoing, it will be the task of that Convention to consider the key issues arising for the Union's future development and try to identify the various possible responses.

The European Council has appointed Mr V. Giscard d'Estaing as Chairman of the Convention and Mr G. Amato and Mr J.L. Dehaene as Vice-Chairmen.

Composition

In addition to its Chairman and Vice-Chairmen, the Convention will be composed of 15 representatives of the Heads of State or government of the Member States (one from each Member State), 30 members of national

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> parliaments (two from each Member State), 16 members of the European Parliament and two Commission representatives. The accession candidate countries will be fully involved in the Convention's proceedings. They will be represented in the same way as the current Member States (one government representative and two national parliament members) and will be able to take part in the proceedings without, however, being able to prevent any consensus which may emerge among the Member States…

NOTE: And the Convention was duly established. It held its inaugural session under the Chairmanship of Valery Giscard d'Estaing in February 2002. Representatives of heads of State and government were joined by representatives of the Parliament and the Commission and of national Parliaments. Representatives from candidate accession countries were also included.

Eleven working groups were established to delve into the range of relevant material, and by early 2003 each had submitted a Final Report. The 11 areas covered by the explorations of the working groups were: I Subsidiarity; II Charter/European Convention on Human Rights; III Legal Personality; IV National Parliaments; V Complementary Competencies; VI Economic Governance; VII External Action; VIII Defence; IX Simplification; X Freedom, Security and Justice; and XI Social Europe.

A complete draft Treaty establishing a Constitution for Europe was finally submitted to the Presidency of the European Council in Rome on 18 July 2003 and the Convention on the Future of Europe was closed. A 'Rome Declaration' of 18 July 2003 submitted by Valery Giscard d'Estaing encouraged political leaders to take the text as it stood, but momentum in favour of securing its adoption in an unamended condition by the Member States proved insufficiently strong. Ultimately any proposed amendment to the EU's constituent Treaties must itself take the legal form of a Treaty and must be supported by and ratified by all the Member States. In Brussels in December 2003 agreement proved impossible to reach. However, after the astute Irish Presidency that occupied the first half of 2004, a breakthrough was achieved in June 2004, and a Treaty establishing a Constitution for Europe was agreed by the Heads of State and government. Notwithstanding modest adjustments made during the 2004 political endgame, the framework of the agreed Treaty remained visibly that proposed by the Convention on the Future of Europe in 2003. A definitive final text was signed by the Member States in Rome on 29 October 2004. The finally agreed text was printed at OJ 2004 C310. Under the Treaty establishing a Constitution, the pre-existing three-pillar structure of the European Union would have been replaced by a single Treaty establishing a single Constitution for Europe. So there would have been an EU, and no longer an EC within a wider EU, although deep within the newly minted unified EU there remained some sector specific institutionally distinctive treatment, in particular of common foreign and security policy. There were four Parts to the Treaty establishing a Constitution – the first part containing fundamental principles, the Charter of Fundamental Rights as the second part, the detail of the EU's common policies embedded in the lengthy third part, and final provisions collected in the fourth and final part. Much of what was at stake concerned improving the presentation of what was already done in the name of the EU, and not in effecting radical change. The principal concern was to improve transparency – to make the whole enterprise more intelligible. So the taste for institutional and constitutional continuity identified in the Treaty of Amsterdam by Petite (p. 11) was again prominent in the Treaty establishing a Constitution.

But late 2004 proved to be the high watermark of the constitutional project. Some Member States were required to hold a referendum, others chose to do so, while others were able to ratify without resort to the electorate. In France and the Netherlands 'no' votes were recorded in referenda in 2005. The device of putting the matter to a second referendum, a ploy in the past used successfully in Denmark (Maastricht) and Ireland (Nice), was judged inadvisable. The European Council, meeting in June 2005,

announced a so-called 'period of reflection', which appeared at bottom to have involved avoidance of any overt political discussion of how to cope.

There remained a political desire to complete the process of revision initiated with the Laeken Declaration of December 2001 (p. 14) and to tackle some of the problems which the Treaty establishing a Constitution had been intended to address. There was, in this sense, a momentum in favour of agreeing a new Treaty which the pair of negative referendums had braked but had been insufficient to bring to a halt. However, a consensus prevailed that decisive rejection in two referendums had sealed the fate of the Treaty establishing a Constitution. Re-presenting exactly what had already been rejected by the French and Dutch was not politically possible. And, it became increasingly plain, the aim was to agree a text that could be ratified with the minimum of fuss, and, best of all, as far as possible without reference to the direct expression of will by troublesome voters in the Member States.

So was born the Lisbon Treaty.

Crafted in the summer of 2007 it initially went under the label of the 'Reform Treaty'. It would seek to improve the current system – much as the Treaty establishing a Constitution was designed to achieve. It would be different from the Treaty establishing a Constitution so that it could be ratified quickly and without resort to a referendum in all but a minority of Member States – though *how* different it would be remains a matter of persisting controversy. And, most of all, it would bring to an end the constitutional experiment launched by the Laeken Declaration.

The matter was pursued aggressively by the Portuguese Presidency in the second half of 2007. The text of the Treaty was agreed in autumn 2007 and then signed in Lisbon in December 2007 ([2007] OJ C306). Member States proceeded to ratify it in 2008, and only one, Ireland, felt it necessary to seek approval for ratification by staging a referendum. This was held in the summer of 2008. And once again the result was – no!

So the Lisbon Treaty, like the Treaty establishing a Constitution before it, was put on hold. On this occasion the device of a second referendum was redeployed. A package of promises and safeguards was made by the Heads of State or government of the Member States which were designed to lure a majority of Irish voters into supporting ratification: for a useful explanation and discussion, see Kingston (2009) 34 EL Rev 455. A second referendum was held in Ireland on 2 October 2009. As with the Nice Treaty (p. 12), so with the Lisbon Treaty: the outcome was positive. Other obstacles were also cleared, including the need for approval of ratification by constitutional courts in some Member States, most notably in Germany (Chapter 19, p. 594) and the Czech Republic, the final State to ratify. The Lisbon Treaty duly entered into force on 1 December 2009.

The Treaty of Lisbon amends both the Treaty on European Union and the Treaty establishing the European Community. The European Union loses the three pillars crafted for it at Maastricht (p. 9). But there is not a single EU Treaty, as had been envisaged by the Treaty establishing a Constitution. There remains the EU Treaty (TEU), duly amended, and there is also the Treaty on the Functioning of the European Union (TFEU), which is the amended and re-named EC Treaty.

The first and third pillars of the pre-Lisbon EU are in effect merged into a single system, governed principally by the TFEU, which replaces the EC Treaty. The second pillar, governing a common foreign and security policy (CFSP), retains a visibly separate identity within the EU Treaty (and such matters are after all typically handled differently in most States). The TEU structure is institutionally distinct – displaying heavier emphasis on intergovernmental cooperation and action by unanimity among the States than one finds in the TFEU – and here too the Court's jurisdiction is largely excluded.

It is stated in the Lisbon Treaty that the European Union is founded on the two Treaties, which have the same legal value (Article 1 of both the EU Treaty and the TFEU).

And in this vein Article 40 EU provides *both* that the implementation of the CFSP shall not affect the operation of the TFEU *and* that the implementation of the policies set out in the TFEU shall not affect the operation of the CFSP. The 'EC' and 'EC law' have not existed since 1 December 2009. It is correct to refer only to the EU and to EU law. But there are still two principal Treaties, the EU Treaty and the TFEU, and, on detailed inspection, the TFEU is readily recognizable as the old EC Treaty, even if the numbering of the Articles has been changed (see Table of Equivalence, pp. xxxix–lviii). It is the TFEU, not the TEU, which provides most of the subject matter of this book.

The Lisbon Treaty makes some significant changes and some cosmetic changes to the EU, while leaving a great deal of the substance of EU law unaffected.

Article 19 TEU provides for the basic institutional arrangements governing the Court. There shall be the Court of Justice, the 'General Court' (the successor to the Court of First Instance) and 'specialized courts'. Article 19(1) TEU states that the Court 'shall ensure that in the interpretation and application of the Treaties the law is observed' and also that 'Member States shall provide remedies sufficient to ensure effective legal protection in the field covered by Union law' (for the role of national courts see Chapter 4, p. 101, and in the particular context of judicial review, Chapter 8, p. 214). Broadly, however, there are no significant changes in the tasks entrusted to the Court by the Treaties. And although the Treaty establishing a Constitution would have brought the principle of supremacy into the text of the Treaty, the Lisbon Treaty does not (Chapter 3, p. 74).

The place of fundamental rights protection in the EU is covered at p. 54 of Chapter 2. As will be explained, the Lisbon Treaty makes changes here, both by converting the Charter of Fundamental Rights into a legally binding document and by providing for the EU's accession to the European Convention.

The Lisbon Treaty also makes major presentational and minor substantive changes to the treatment of the competences of the Union. This is explained more fully in Chapter 2, p. 30.

The driving force in institutional reform is a concern to make the system work more *effectively*. Radical overhaul of the pattern of involvement of the political (Council, Commission, Parliament) and judicial (Court) institutions was never on the agenda. The detailed institutional provisions are located in Title III of the EU Treaty, which begins with Article 13 EU and runs to Article 19 EU. The exclusive right of legislative initiative held by the Commission since the 1950s is preserved in the TFEU, excepting only in relation to activity concerning the area of freedom, security, and justice (Chapter 15: this is a lingering remnant of the 'old' three-pillar structure). Article 289 TFEU provides that the ordinary legislative procedure 'shall consist in the joint adoption by the Parliament and the Council of a regulation, directive or decision on a proposal from the Commission', and Article 294 TFEU sets out the detail. This 'ordinary legislative procedure' now dominates EU practice even more than previously, thereby maintaining the theme of recent Treaty revisions which have cemented its primacy. Here the place of both people(s) and States is recognized as central to the EU's functioning: the Parliament, directly elected by the peoples of Europe, and the Member States, represented in the Council, 'co-decide' under the ordinary legislative procedure. The Council votes according to qualified majority under this procedure, and Lisbon goes a considerable way to making the applicable rules transparent and intelligible. From April 2017 a qualified majority in Council will be defined as at least 55% of the members of the Council comprising at least 15 of them and representing Member States comprising at least 65% of the population of the Union. So: both States and people are relevant. In addition: a successful 'blocking minority' must include at least four members of the Council. Until April 2017 there are transitional arrangements: this is covered by Article 238 TFEU and a Protocol on transitional provisions, supported by a Declaration.

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Article 16(3) EU provides that the Council shall vote by Qualified Majority unless the Treaties provide otherwise, and the few exceptions are areas of *particular* sensitivity, where the advantages of quicker decision-making do not override the political need to retain a veto: for example, taxation and, partially, social policy and defence.

Page 18 mentions that 'the taste for institutional and constitutional continuity identified in the Treaty of Amsterdam by Petite (p. 11) is again prominent in the Treaty establishing a Constitution'. The Lisbon Treaty generally sticks to this trend.

The most newsworthy changes made by the Lisbon Treaty involve the three most high-profile jobs in the EU. Jose Manuel Barroso, Herman Van Rompuy and Catherine Ashton were appointed in late 2009 as respectively the President of the Commission, the President of the European Council, and the High Representative of the Union for Foreign Affairs and Security Policy. The President of the Commission is nothing new. The post of President of the European Council is by contrast an innovation. The European Council is composed of the Heads of State or Government of the Member States plus its President and the President of the Commission. Pre-Lisbon the Presidency of the European Council was held by each Member State by rotation for a six-month period. Equitable perhaps, but hardly conducive to consistency or to effective leadership. The Lisbon Treaty created the post of President which will be filled for a two-and-a-half year term, open to renewal once (Article 15(5) EU). The detailed job description is found in Article 15(6) EU but the general intention is that greater coherence and consistency will be provided by virtue of the fact that the individual will not be confined to a six-month tenure. The post of High Representative of the Union for Foreign Affairs and Security Policy is also a new creation. The idea is to provide a sharper focus and a clearer identity for the Union's external face. Article 18 EU sets out the detail, while further elaboration of the envisaged functions of the role is found in the relevant Chapter later in the EU Treaty (especially Article 27 EU et seq.). The mandate comes from the Council and the High Representative shall preside over the Foreign Affairs Council. But he or she shall be a member of the Commission. There is therefore a rather dramatic denial of the institutional separation between the intergovernmental and the supranational elements of the Union, which is foundational across much of the EU's operation. CFSP truly is *different*.

The changes to substantive EU law made by the Lisbon Treaty are very few, beyond the awkward cosmetic issue of re-numbering of the Articles of the Treaty. The heartland of the law of the internal market studied in Part Two of this book is little affected by the Lisbon Treaty. Separate consideration will have to be given in Chapter 15 to Title IV of the TFEU, which is entitled *Area of Freedom, Security and Justice*. It is here that the consolidation of the former pre-Lisbon third pillar with the first pillar treatment of matters pertaining to persons is housed. Page 9 explains the initial choice at Maastricht to establish three pillars for the European Union and page 10 explains how at Amsterdam a certain rapprochement between the pillars was effected. Now, after Lisbon, the pillars are formally removed.

Article 50 TEU is entirely new and arranges a procedure according to which a Member State may choose to withdraw from the Union.

The question whether the Lisbon Treaty is the same as the Treaty establishing a Constitution generated a great deal of argument in and after 2007, particularly from those who believed that once a referendum had been held (as in France and the Netherlands) or promised (as in the UK) on the latter, the same should have applied to the former. Passage of time has taken much of the heat out of the debate. It is, in short, clear that the Lisbon Treaty is *not* the same as the Treaty establishing a Constitution. Lisbon does not re-make the system under a single Treaty, as would have the Treaty establishing a Constitution; Lisbon makes detailed adjustments to the workings of the EU's institutions which display a degree of divergence from those envisaged by the

Treaty establishing a Constitution. But it is *similar* – in many respects it is very similar. Lisbon is another incremental – and regrettably intransparent – round of Treaty reform whereas the Treaty establishing a Constitution would have made a presentationally fresh start by re-making the system under a single Treaty, but this tells us nothing about the *content* of the reforms. And here although Lisbon makes detailed adjustments to the workings of the EU's institutions which display an admitted degree of divergence from those envisaged by the Treaty establishing a Constitution, many of the divergences are minor, for example eight weeks, not six, during which the national Parliaments may raise defined objections to legislative acts (Chapter 2, p. 32, Chapter 18, p. 567); the addition of the UK/Polish Protocol on the Charter (Chapter 2, p. 62) or even merely cosmetic (e.g. the Union Minister becomes the High Representative). The core of the reform effected by the Lisbon Treaty is recognizably the core of that envisaged by the Treaty establishing a Constitution – even if it is not the *same*. Moreover large parts of EU law and policy remain wholly unchanged in their substance by Lisbon as they would have been left untouched by the Treaty establishing a Constitution. The legal order 'constitutionalized' by the Court lives on (Part One of the book); so too the basics of EU trade law (Part Two of the book).

Perhaps the best argument that the two documents are different in materially significant ways insists that Lisbon abandons constitutional trappings such as a motto, a flag, and an anthem favoured by the Treaty establishing a Constitution. This is of no significance in strict legal terms but of great significance in so far as one may have wished – or feared – that such adornments would have propelled the Union towards a more State-like character. After all such emblems have real symbolic force in some national Constitutions and consequently their elimination probably offers the strongest argument to those who would contend that the Lisbon Treaty is *qualitatively* different from the ill-fated Treaty establishing a Constitution. Still, the undoubted similarities between the two documents fuelled much anger that the Treaty establishing a Constitution was placed before the people of several Member States for approval and denied it by two of them while the Lisbon Treaty was calculatedly sheltered from a popular verdict (except in Ireland).

The story also suggests that the Member States will be hesitant to pursue further revision of the Treaties unless left with no choice.

■ QUESTION

To what extent is the process of ratification of the Lisbon Treaty consistent with the Laeken Declaration's concern that the EU 'must be brought closer to its citizens' who 'feel that deals are all too often cut out of their sight and. . .[who] want better democratic scrutiny' (p. 14)? Is this a proper source of concern?

FURTHER READING

Be aware that much of the debate on such fast-moving issues is today conducted electronically, rather than in academic journals. Sites that deserve your attention for their inclusion of topical material, although their intellectual interest is not confined to the process of Treaty revision, include:

Centre for European Studies, University of Oslo: http://www.sv.uio.no/arena/english/

European Constitutional Law Network: http://www.ecln.net/

European Integration online papers: http://eiop.or.at/eiop/

Jean Monnet Working Papers (Jean Monnet Center, NYU School of Law): http://www.jeanmonnetprogram.org/index.html

The Federal Trust: http://www.fedtrust.co.uk

The Federal Union: http://www.federalunion.org.uk/

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And do not neglect more conventional forms of publication:

On the Treaty of Lisbon:

Craig, P., 'The Lisbon Treaty: Process, Architecture and Substance' (2008) 33 EL Rev 137.

Dinan, D., 'Institutions and Governance: Saving the Lisbon Treaty – an Irish Solution to a European Problem' (2009) 47 *JCMS Annual Review* 113.

Dougan, M., 'The Treaty of Lisbon 2007: Winning Minds, not Hearts' (2008) 45 CML Rev 617.

Jacque, J.-P., 'Le traité de Lisbonne: une vue cavalière' (2008) 44 RTDE 439.

Scicluna, N., 'When Failure isn't Failure: European Union Constitutionalism after the Lisbon Treaty' (2012) 50 JCMS 441.

Snell, J., 'European Constitutional Settlement, an Ever-Closer Union and the Treaty of Lisbon: Democracy or Relevance?' (2008) 33 EL Rev 619.

Somek, A., 'Postconstitutional Treaty' [2007] *German Law Journal* 1121.

On the (failed) Treaty establishing a Constitution:

Follesdal, A. 'Towards a Stable Finalité with Federal Features? The Balancing Acts of the Constitutional Treaty for Europe' (2005) 12 JEPP 572.

Halberstam, D. 'The Bride of Messina: Constitutionalism and Democracy in Europe' (2005) 30 EL Rev 775.

NOTE: Discussion of the process leading up to the Treaty of Lisbon's entry into force in December 2009 and also its aftermath will be resumed in the wider context of the legitimacy of the European Union as a uniquely sophisticated transnational organization in Chapter 19. By that time the reader will be better equipped to reflect on the detailed implications of the exercise of power by the European Union. This book now turns to a more detailed exploration of the way the EU system works.

NOTE: For additional material and resources see the Online Resource Centre at: http://www.oxfordtextbooks.co.uk/orc/weatherill11e.

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