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PROFESSOR NIGEL FOSTER, FRSA

Visiting Professor of European Law, Europa Institut, Universität des Saarlandes, Saarbrücken, Germany and Programme Leader for the LLM in International Business Law, Robert Kennedy College, Switzerland.

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1

The History and Constitutional Basis of the European Union

1.1 Introduction

Any study of European Union (EU) law and its predecessor, European Community (EC) law, must be preceded by the study and understanding of the history and development of the Union. Without it, you will probably be somewhat confused. It will be exceedingly difficult to understand just why the Union is so complex and so strangely constructed. You will not understand why the law-making procedures and forms of law have been subject to so many changes and remain so complex, especially now following the Lisbon Treaty changes to qualified majority voting in Council. You will not appreciate why there are such concepts as 'direct effects' and 'subsidiarity' and why there is a huge body of further reading on such strange subjects as 'comitology'. In any subject, merely learning the rules does not help you to understand the purpose for which they were enacted and the reasons that led to the need for them in the first place. This is even more the case with the EU. Many of the laws, whilst clearly aimed at specific topics such as ensuring the free movement of goods or persons, or requiring the equality of treatment of different groups, or regulating the recognition of a profession in the member states, are a compromise of different perspectives. In the EU, these perspectives arise from different nations, different cultural understandings, different histories, and different social and economic backgrounds and systems; hence the treaties, and laws that have been produced under the treaties, are often achieved only as a compromise of these different elements. On their own, the individual rules may not make a great deal of sense; with an understanding of their history and development, hopefully, they might make a lot more sense.

This chapter tries to set the context and provide an understanding of the historical basis of the Union, before looking in detail at its constitutional base.

A brief mention will be made here in respect of the terms 'European Union' and 'European Community', because their use can be confusing. The term 'European Union' was brought in by the Treaty on European Union (TEU, also known and referred to as the 'Maastricht Treaty'), and describes the extension by the member states into additional policies and areas of cooperation. At that time, the EU consisted of three pillars comprising the existing Communities (the three original treaties), a Common Foreign and Security Policy (CFSP), and, following the reorganization by the Treaty of Amsterdam, a third pillar called Provisions on Judicial and Police Cooperation in Criminal Matters. Following the entry into force of the 2007 Lisbon Treaty, the three-pillar structure was effectively broken up. The CFSP has been kept in the EU Treaty, and the freedom, security, and justice matters, which were in the third pillar, are now organized in a title of the Treaty on the Functioning of the EU. At present, most undergraduate EU law courses, and indeed books, are not likely to consider these aspects of EU law in any depth, if at all.

1.2 The Motives for European Integration

Even a cursory glance at European history will reveal what a chaotic, despotic, border-changing, bone-crunching, blood-spilling time we have had over the centuries. The most horrific of the series of wars is, of course, World War II during which some 55 million souls worldwide, but mostly in Europe, lost their lives. There have been centuries of invasions, occupations, and dictatorial rule in most, if not all, of the countries of Europe at some stage. Of course, since World War II we do not gas, maim, butcher, torture, or murder people in the biblical proportions as before, but even post-World War II we have seen some pretty nasty regimes imposing their will against peoples and countries in Europe, and further conflicts between European nations and peoples. As a result, since 1945 an estimated additional 900,000 people have died in Europe, which is incredible—more so because some of these events are not long in the past, but much more recent. In the 1990s, the Balkans, especially in Croatia and Kosovo, became the latest to be added to the list of European killing fields.[1] With this firmly in mind, it should come as no surprise that the strong reaction after World War II to this death and destruction was a very important and motivating factor in the moves to create a more peaceful and stable European environment in which countries would be able to develop and prosper without resorting to the obliteration or subjugation of others. It is too easy, in the present period of relative peace and stability, to understate this motive. Of course, there are reasons underlying the violence, and featuring large, as Ward clearly sets out in the first pages of his critical introduction to EU law,[2] is the desire to make Europe one; to homogenize Europe; to unify Europe; and in pursuit of this goal, for one country or ethnic group to impose its culture or religion or government on others. Unfortunately, most of these attempts have been neither peaceful nor voluntarily accepted on the part of the subjects on the receiving end of such unwelcome attention and, over the ages, these attempts have affected the majority of the citizens of Europe. Generally, the attempts to unite, from the Romans to World War II, have led to wholesale loss of life—even attempted genocide and that ghastly modern euphemism for the same, 'ethnic cleansing'. It is therefore this bleak, but simple and understandable, backdrop that led to an increased desire to do something to stop the cycle of death and destruction. Whilst there had been ideas and discussions to unite European nations over the centuries, particularly following World War I, it was only after World War II that these desires and expressions found substance.

As a recognition of this, the EU won the 2012 Nobel Peace Prize, which is something quite remarkable although not universally appreciated.[3] The reasons given by the Nobel Peace Prize Committee Secretary for the award are the reasons which have been highlighted in previous editions of this book as those motivating European integration in the first place and contributing to the developing integration of Europe. The initial impetus was the desire to establish and maintain peace, but to continue to remain relevant, especially to new generations; the EU had to and still has to establish new legitimacies. To some extent the additional reasons given for the Peace Prize award recognize and

[1] For the full catalogue of such events, refer to the chilling *Historical Atlas of the 20th Century: Wars, Massacres and Atrocities of the Twentieth Century*, available at **http://users.erols.com/mwhite28/war-1900.htm**.

[2] I. Ward, *A Critical Introduction to European Law*, 3rd edn, Cambridge University Press, Cambridge, 2009.

[3] To see but one of many comments portraying a range of views go to **http://www.guardian.co.uk/world/2012/oct/12/nobel-peace-prize-2012-live**.

acknowledge those new legitimacies, but in view of the present day resurgence of nationalism in many countries and the large degree of apathy and even antipathy towards the EU, the EU still needs to do more to justify itself.[4]

1.3 The Founding of the European Communities

The period following World War II saw a number of moves towards the integration of European nation states although, admittedly, some of these find their roots in the inter-war period. However, post-1945, political and economic cooperation and development between nations was regarded as crucial to replace the economic competition that was viewed as a major factor in the outbreak of wars between European nation states. Some of these moves were taking place within a worldwide effort for greater political cooperation between nation states, the most notable being the establishment of the United Nations in 1945 and the Council of Europe in 1949. The Council of Europe must not be confused with the EU institutions, the Council (of Ministers) and the European Council, despite similarity of name. Arguably, the most notable achievement of the Council of Europe is the establishment of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and its enforcement machinery, notably the Committee of Ministers and Court of Human Rights (ECtHR), based in Strasbourg.[5]

There were also inherently economically motivated steps towards international cooperation that resulted in the establishment of such organizations as the International Monetary Fund (IMF), the General Agreement on Tariffs and Trade (GATT), and, most notably, the Marshall Plan, which funded the establishment of the Organisation for European Economic Co-operation (OEEC), and the later Organisation for Economic Co-operation and Development (OECD), designed initially to finance the post-war reconstruction of Europe.

When we come to the European Communities, which were the forerunners of the EU that we have today, their purposes are not so distinctly discernible. As remains the case today, even before the foundation of the Communities there was a conflict of opinion between those who wished to see European integration take the form of a much more involved model, such as a federal model, and those who wished merely to see a purely economic form of integration, such as a free trade area. The first steps were, predictably, a modest compromise of the political, economic, and social desires of various parties. The scene was set by the address by Winston Churchill at the University of Zürich in September 1946, and his call to build 'a kind of United States of Europe' and in particular, for the time, the brave call for a partnership between France and Germany. However, even within that speech Churchill and Britain did not envisage a role as a key participant and instead envisaged Britain outside any general European integration, in the same way as the USA and the Soviet Union, merely observing and assisting a European state to rise from the ashes of the destruction of World War II.

At the time, a further and developing factor, which considerably influenced the desire on the part of the European nations to cooperate, was the deteriorating relations between the former Allied powers. It was not long after the Americans, the British, and

[4] The Nobel Peace Prize Committee secretary Geir Lundestad advised that the EU was awarded the prize for its 'accumulated record over more than six decades' and that the prize was deserved for the peace and reconciliation brought about in the EU and support of democracy and human rights. The further individually cited reasons will be highlighted in turn and summarized later in the chapter.

[5] **http://www.coe.int/**.

the Russians had met victoriously in the streets of Berlin in 1945 that understandings between those countries broke down and they became increasingly suspicious of each other. Winston Churchill had described in March 1946, in Fulton, Missouri, the situation of increasing Soviet influence and control over Eastern Europe, in a phrase that was taken up generally, as a kind of 'iron curtain'[6] that had descended between Western and Eastern Europe. The general situation came to be described as the 'Cold War', and lasted in lesser and greater states of tension until the collapse of communism in Europe in 1989–90. The prospect of reuniting the divided eastern and western occupied zones of Germany after the war disappeared in the late 1940s with this 'cold war' development and, instead, the two separated entities of West and East Germany were established. With this increased fear of the domination of Europe by the Soviet Union and possible expansion, combined with possible Soviet influence and control over the countries of Western Europe, the tension mounted in the late 1940s and throughout the 1950s. At its worst, in the 1960s, the Cold War threatened the nuclear annihilation of the opposing parties and much of the world. It therefore became increasingly important that the countries of Western Europe integrate amongst themselves to form a bulwark against further Soviet expansion. The Cold War was thus a clear and real catalyst for West European integration. And, finally, it should not be forgotten that, following the end of World War II, there were considerable food shortages in Europe leading to hunger and, in some parts, even starvation. This too was a motivation for integration to ensure the peaceful and uninterrupted ability to grow and produce sufficient food in Europe to feed its populations, and goes a long way towards explaining the importance given to the Common Agricultural Policy (CAP) in the negotiations and establishment of the Treaty Establishing the European Economic Community (the EEC Treaty). Food security and economic security were regarded as indispensable for political security.

1.3.1 **The Schuman Plan (1950)**

The climate was certainly ready to consider a greater form of integration in Europe and the first direct impetus for the Communities came in the form of the plan proposed in May 1950 by French Foreign Minister Robert Schuman,[7] based on the research and plans of Jean Monnet, a French government official, to link the French and German coal and steel industries.[8] These industries would be taken out of the hands of the nation states and put under the control of a supranational body. This would not only help economic recovery, but also remove the disastrous competition between the two states. It was aimed to make future war not only unthinkable, but also materially impossible, because it put

[6] 'From Stettin in the Baltic to Trieste in the Adriatic, an iron curtain has descended across the Continent': **http://www.winstonchurchill.org/learn/biography/in-opposition/qiron-curtainq-fulton-missouri-1946** and **http://www.earthstation1.com/pgs/churchill/des-ChurchillZurichSummer46-UnitedStatesOfEurope.mp3.html**. Note, however, that the origin of this phrase can be reliably traced to Joseph Goebbels, the German Third Reich Propaganda Minister, written in an open letter to the Allies entitled 'Das Jahr 2000' and published in *Das Reich*, 25 February 1945, pp 1–2, which was a prediction on how Europe would look in the year 2000 following an Allied–Soviet victory over Germany.

[7] An appreciation of Robert Schuman's personal history helps to explain why he received Jean Monnet's plan so readily. Schuman fought in both world wars, but for the Germans in World War I and for the French in World War II, because he lived on the border between the two countries, meaning that, when the border was moved following World War I, his nationality was altered.

[8] This reconciliation of France and Germany after World War II is the first of the five achievements of the EU which was cited as justifying the award of the Peace Prize.

control over coal and steel production, vital then for the production of armaments and thus the capability of waging war in the hands of a supranational authority and not the individual member states. The plan was open for other European countries to join in its discussions. The UK, though, was reluctant to involve itself, even in the negotiations, sending only observers. The plan was readily accepted by Germany under Chancellor Adenauer. Belgium, the Netherlands, and Luxembourg, the 'Benelux' nations, which had already moved ahead with their customs union, also saw the benefits to be gained from membership and this form of integration. Italy also considered it to be in its economic interest to join and, perhaps more importantly, believed that such integration would help to act as a defence against the perceived threat in that country from increased internal communist support and a possible seizure of power. Thus six nations went ahead to sign the European Coal and Steel Community Treaty (ECSC) in Paris in 1951, which entered into force on 1 January 1952.

This first form of integration was thus both politically and economically motivated. It was also a mix of both intergovernmental and supranational integration (which terms are considered in Section 1.5.1), because the institutions set up included both the High Authority (to become the European Commission), which was a supranational body, and a Council of Ministers of representative government ministers from the member states. Whilst the Community established did not fulfil the wishes of Monnet, who was a federalist,[9] he was appointed the first President of the High Authority and the degree of integration that it achieved was, without any doubt, a very important and indispensable first step from which further integration could follow. Indeed, it was assumed by some—the so-called neo-functionalists—that further integration would be inevitable.[10]

It was not long before the next proposals for greater integration were put forward.

1.3.2 **The Proposed European Defence Community and European Political Community**

The Schuman Plan that formed the basis of the ECSC was not the only proposal for integration being discussed and negotiated at the time. Monnet put forward a proposal (the Pleven Plan) for a European Defence Community (EDC) in 1952. In addition, because it was argued to be politically and practically necessary, in support of that, a European Political Community (EPC) was also proposed in 1953 to oversee political control and foreign policy for the EDC. The proposals and the negotiations proved to be complex and drawn out because they were surrounded by other political considerations, such as the expansion of communism in South East Asia and concerns about rearmament of West Germany. Both of these proposals, with hindsight, were perhaps far too ambitious for the time and thus premature. They faced opposition from both outside the ECSC, the UK in particular, and within the Community, most notably and fundamentally from France, which, after some prevarication, failed to ratify the EDC in the National Assembly. Even today, the prospect of a common European army and political union is far too radical; with hindsight, then, the EDC was simply unrealistic—even though the other five countries had agreed to it.

Since 1955, however, there has been a limited defence arrangement with the Western European Union (WEU), which was established to fill the vacuum of the collapsed EDC.

[9] For a complete biography, refer to F. Duchene, *Jean Monnet: The First Statesman of Interdependence*, W. W. Norton & Co., London, 1996.

[10] This will be considered at Section 1.5.1.

The WEU was taken under EU auspices by the Treaty of European Union (1992) and worked closely with the North Atlantic Treaty Organization (NATO) but has now been wound up as the EU slowly assumed competences in these areas.[11] Prompted by the Balkan wars in the 1990s, movement was subsequently made towards establishing an effective European Security and Defence Policy (ESDP) that was formally set up in 1999 and led to the establishment, not long afterwards, of the EU Rapid Reaction Force. Defence cooperation now takes place under the umbrella of the European Defence Agency (EDA),[12] which was established in 2004 by a Joint Action of the Council of Ministers in order 'to support the Member States in their effort to improve European defence capabilities in the field of crisis management and to sustain the ESDP as it stands now and develops in the future'. With the exception of Denmark, all present EU member states participate in the EDA but as further details are beyond the remit of this book, refer to the web addresses cited in the footnote for further details.

The Lisbon Treaty has established a framework for a common defence policy, whilst confirming the commitments of those EU member states that are members of NATO to that organization (see Art 42 TEU).

An extensive chapter on CFSP is now to be found in Arts 23–46 TEU.

1.3.3 **Progress Nevertheless**

It might have been thought that the unfortunate failure to agree the EDC would have put paid to any further attempts at European integration and it was, without doubt, a blow to the European federalists. Rather than jeopardize any such attempts, however, it appeared to strengthen the resolve of some of the original six member states to take matters further. Once again, Jean Monnet was centrally involved. He had resigned as President of the ECSC High Authority in order to promote European integration.[13] Working in particular with the Benelux nations, it was proposed that rather than leave the integration to two industries, the nations should integrate the whole of their economies. Following the Messina Intergovernmental Conference (IGC) in 1955, the Spaak Report (named after Belgium's prime minister) was prepared to consider the establishment of an Economic Community, and an Atomic Energy Community for energy and the peaceful use of nuclear power. There were also additional external catalysts for such further moves, including the Algerian war of independence, the Soviet suppression of the 1956 Hungarian Uprising, and the Suez Canal climb-down,[14] which served to highlight the real politics at play in the world in the 1950s and the precarious position of individual nation states in Europe, which no longer wielded the influence that they did prior to World War II. All of this assisted in bringing the European treaties' negotiations to a much quicker and more successful conclusion. Thus, in 1957, the Treaties of Rome were agreed by the same six nations, establishing the European Economic Community (EEC) and the European Atomic Energy Community (EURATOM).

At first, all three Communities each had their own institutions, but shared a Court of Justice and a common Parliamentary Assembly. The separate institutions were merged

[11] **http://www.weu.int/**.

[12] See **http://www.eda.europa.eu/**.

[13] As the founder and leading member of the Action Committee for the United States of Europe.

[14] This was the joint invasion by British and French forces to regain control of the Suez Canal after it had been forcibly nationalized by President Nasser of Egypt. Britain and France were forced to give way in the face of growing world and US pressure.

under the treaty establishing a single Council and a single Commission of the European Communities (the Merger Treaty) in 1965, which entered into force in 1967 and the provisions of which have been incorporated into the present treaties. Due to the range of subject matters and policies covered, the EEC Treaty was the most important. The ECSC Treaty, established for 50 years only, expired in 2002. The Treaty Establishing the European Community (or EC Treaty, now essentially the Treaty on the Functioning of the European Union, or TFEU) took over the obligations and responsibilities arising under the ECSC Treaty.

1.4 The Relationship of the UK with the European Communities and Union

1.4.1 The Early Relationship

As noted earlier, in the late 1940s and early 1950s, the UK was also initially keen to see a united Europe, but without its direct participation. It had, at the time, a historical legacy that involved quite different economic and social ties, including the Empire and Commonwealth and the Atlantic alliance, both of which featured strongly in the recently won World War II. These ties of security and common language are often overlooked, but played no small part in the attitude of Britain to European integration in the immediate post-war years. Britain also regarded its status as remaining a world power, its sovereignty, and independence might be compromised by membership. As well as the offer to participate in the ECSC negotiations, Britain was also invited to participate in the EEC and EURATOM negotiations. However, it played no significant or indeed useful part, and withdrew after minimal participation.[15] Instead, with Austria, Switzerland, and other nations, the UK embarked on the path of establishing the European Free Trade Association (EFTA) in 1958, which involved no supranational or political aims of economic integration and was intended merely to set up a free trade area for goods.

It was not long, however, before a change of heart and policy took place, in what could be regarded as a tacit admission of error. Within months of the entry into force of the EEC Treaty, the Macmillan Conservative government led the UK application for associate membership and, very shortly after that, on 9 August 1961, an application for full membership. The reasons for previously not joining had been undermined. Amongst the changes were the demise of the UK's previous world-power status, the fact that direct links with most of the world had been weakened by the economic demise of the UK, the Suez climb-down, and the continuing conversion of the Empire into a Commonwealth of independent states. Trade patterns were also shifting towards Europe, and the Atlantic alliance was less prominent—and pointedly so after the disagreement as to how to handle the Suez crisis. More than anything, Britain had observed the much faster economic progress made by the six and this provoked the desire for membership. Whether Britain was ever interested in the entire Community package is not clear. Britain had now, however, to bargain from the outside, and its applications both for associate and full membership were steadfastly and consistently rejected by French President Charles de Gaulle, including the 1967 second UK application by the Wilson Labour government. De Gaulle's opposition to the potentially distorting influence of the UK in the Community was clearly

[15] In the post-war period the UK had undergone a period of nationalization of key industries including coal and steel, therefore the plan to relinquish state control of these industries was another reason that the proposals were not considered in the UK's best interests at the time.

expressed at the time and included the fear of too much influence or indeed domination by the USA.[16]

1.4.2 **From Membership Acceptance to Date**

In 1970, following the resignation and withdrawal from politics of de Gaulle in France, the entry application by the Conservative Prime Minister Edward Heath was successful. Thus, the UK joined in 1973, as did Ireland and Denmark, mainly because of their trade dependency with the UK. However, soon afterwards the UK sought to renegotiate entry terms and held a referendum on membership. The timing of the 1973 entry was, in fact, unfortunate. Instead of the UK being able to participate equally in the post-war boom and recovery, the world economy and that of Europe had received a severe setback, and Britain, along with the rest of the Western world, became the hostage of massive oil price increases. Instead of a period of economic prosperity, the 1970s witnessed high inflation and economic stagnation (sometimes termed 'stagflation'). To aggravate matters still further, the high and arguably inequitable level of the British contribution to the European budget became the focus of attention. It did not take long before disquiet with the terms of entry arose. It seems that the UK paid too high a price to join the club and that budget wrangles, which both then and in the future were to polarize opinion both in Europe and the UK, were inevitable. The pattern of trade in the UK, which initially favoured imports from Commonwealth non-EEC countries, coupled with having to pay the higher EEC CAP-regulated food prices, meant that British contributions were extremely high and simply added to the then severe UK domestic economic problems.

To recap for a moment, in the context of the UK entry, the Community was spawned in the aftermath of World War II. For membership, the original states exchanged some sovereignty and monetary contribution for security, the stability of democratic nationhood, and economic progress. It is argued that Britain did not need the first two, and the third proved illusory in the 1970s and '80s. Hence when, in 1974, a new government was elected in the UK, a renegotiation of the terms of entry was started. This was climaxed by the clear-cut (over 67 per cent in favour) approval of the British public in the then unprecedented 1975 referendum that not only *post facto* approved membership, but also the renegotiated terms – and specifically the revised budget contributions. However, it was only a partial cure for the level of contributions and this dispute was later reopened by the UK Prime Minister Margaret Thatcher, and budget contributions still feature as a contentious issue between the UK, the other member states, and the EU every time an EU budget plan is negotiated. Its effect was, however, to cast the UK firmly in the role of the reluctant partner and of troublemaker in Europe. Viewed politically, the UK had decided to cast its lot with the Communities, aware that some loss of sovereignty was involved, and that a potentially high monetary contribution was required. One side of the bargain was not, as with other member states, the security of nationhood or the stamp of approval and stability of the democratic political system that membership gave. The fact that the UK had won the war and had centuries of stability meant that these were so well secured in the UK that the European Communities could never seriously be considered for these advantages, or to keep the peace, which Britain had secured by victory in the last war, albeit with considerable help. The other side of the bargain was to share in the spoils of European economic progress. Given the changing circumstances, this proved to be a

[16] First rejection: **http://europa.eu/about-eu/eu-history/1960-1969/1963/index_en.htm**; second rejection: **http://news.bbc.co.uk/onthisday/hi/dates/stories/november/27/newsid_4187000/4187714.stm**.

dubious economic gain. No wonder that there was a feeling by some, which still remains, that membership had sold Britain short.

In the 1980s, the first part of the decade was occupied with further wrangles over the British budget contribution and reluctance to reform the Communities that hindered progress on other matters in the Community, and which did not engender relaxed relations with Britain's EC partners. It was surprising that then Conservative Prime Minister Thatcher signed the Single European Act (SEA), which saw the first major reform of the original treaties, because of the steps contained within it for further integration and some democratization of the Communities. Indeed, it was regarded later as an error by Mrs Thatcher,[17] who was most probably lured into agreeing to the SEA by the promise of the liberalized trade advantages of the single market, which will be considered in Section 1.6.7.

The budget contributions have remained a long-running point of disagreement. During the negotiations for the second major reform of the Communities—and in particular economic and monetary union introduced by the Treaty of European Union in Maastricht—Britain demonstrated once again just how out of line it was with its other partners. The UK opted out of the Social Policy Chapter, whereas all other member states agreed to this. The TEU agreed at Maastricht also provided a process and timetable for moving towards economic and monetary union. The UK negotiated another opt-out here in respect of the decision whether to join the final stage, in which a single currency would be established. Exacerbating the poor relationship with the other European partners was the fact that John Major's Conservative government (1992–97) was so clearly and publicly split on the issue of Europe that almost any decision that was needed on the Communities was one that was close to impossible to achieve. Hence, the idea that any progress could be made by all of the then 15 member states of the Communities was an unrealistic idea. Thankfully, that abysmal state of affairs did not continue beyond 1997. The change of government in the UK on 1 May 1997 also saw an immediate change in the relationship with Europe. In 1997, whilst the delayed negotiations for the TEU were still ongoing, the new Labour government announced its intention to sign up to the Social Chapter, which was carried through soon afterwards, and generally to take a more positive participatory role in Europe. The UK opposition to economic and monetary union seemed to have been removed, at least in principle, although 18 years on, the likelihood that the UK will actually join is very unlikely. This is very much an issue which has been affected by the severe economic crises in Greece, Spain, and other countries and which has undermined the euro, although in 2014, a slow recovery was taking place.[18]

The negotiations for the Amsterdam and Nice Treaties, the Convention and IGC for the Constitution for Europe, the expansion to 28 states by 2013, and the changing political relationships between the leading EU states (notably France, Germany, and the UK) have led to a far more complex Union now than previously. Inevitably, in an EU that now has a membership of 28 states, each individual state will have less prominence. However, France, Germany, and the UK remain the largest and most economically powerful three states in the Union; each of them can still play a leading role in EU affairs, both positive and negative. The UK's attitude remains somewhat ambivalent, on the one hand expressing itself to be at the heart of Europe and on the other showing a reluctance to commit as deeply as other member states. In 2007, in the negotiations for the 2007 Lisbon Treaty,

[17] I. Ward, *A Critical Introduction to European Law*, 3rd edn, Cambridge University Press, Cambridge, 2009, p 108.

[18] The end of 2014 and beginning of 2015, however, saw that progress disappear and with the election in Greece of an anti-austerity government, the economic prospects at the time of writing look far from clear, although Spain, which also suffered greatly, appears to be making a slow recovery.

further opt-outs were secured by the UK government, in particular from the Charter of Fundamental Rights, which will not apply internally in the UK, and opt-outs from full participation in the Area of Freedom, Security and Justice (Protocol 21) and the Schengen area.[19] A change of government in 2010 had not changed things and it seems that the UK is no less a reluctant partner in 2015 than it has been for a number of decades previously, despite having had the most pro-European of the major UK parties in the coalition government to 2015. In particular, three developments serve to highlight and confirm this renewed lack of enthusiasm for the EU. The first is the enactment of the European Union Act 2011, which introduces measures to ensure that any future transfer of competences or treaty amendments must be subject to a ministerial statement in the House of Commons as to their impact and whether they require a further transfer of competences or powers. If that is the case, then either an Act of Parliament would be required to allow the transfer, or if the treaty proposals were substantial and not, for example, only approving the accession of a new member state, then a referendum would first be required in which, of course, a majority would have to approve the changes for them to be ratified.

The second development was the stance taken by David Cameron, the UK coalition government prime minister, in Brussels in December 2011 by refusing to participate in the economic and fiscal treaty proposals, wielding in effect the UK veto and blocking a new treaty between all 27 (at the time) member states. The long-term political consequences have yet to be felt, but it is clear that the UK is in a far less influential position in the EU than it has been for a long time. This position has been further undermined by the position taken by the Cameron-led UK government in the collapsed 2012 EU budget negotiations.[20] The third is the promise, after being elected to a Conservative majority government in 2015, to re-negotiate terms and hold a referendum on EU membership by 2017. The UK's present self-distancing, even before any negotiations or referendum and France's present quietness, leave only one leading EU member state and that is Germany. Whether this is a healthy or positive outcome for the EU is not clear.[21]

1.5 The Basic Objectives and Nature of the European Union

Whilst the formal aims of the Union can readily be seen by looking at the preambles to the treaties, there is a deeper underlying debate about the overall goal of the Communities and now Union. The stated general aims include the creation of the common market, which was to be achieved by abolishing obstacles to the freedom of movement of all the factors of production: namely, goods, workers, providers of services, and capital. The original EEC Treaty also provided for the abolition of customs duties between the member states and the

[19] Although purely internal application of the EU rights' Charter was never intended, with the Charter impacting only on matters within the scope of activity of the EU itself and its application in the member states but not to member state activity itself. These topics are further considered in Sections 1.6.8 and 1.6.9 and in Chapter 4, Section 4.4.4.

[20] However right the UK and Cameron may be, it is the poor standing in the EU that prevents the UK from building a larger coalition of states sharing the same views as the UK. Alternatively, it could be argued that, in view of European history, the cost of the EU is cheaper than the cost of war. On the budget negotiations refer to **http://www.bbc.co.uk/news/world-europe-20457065**.

[21] For various debates around these themes see **http://www.euromove.org.uk/index.php?id=6330**, **http://esharp.eu/big-debates/the-uk-and-europe/131-separation-or-divorce-for-the-uk-and-the-eu/** and **http://www.bbc.co.uk/news/uk-politics-26515129.** At the time of writing, there was only speculation as to what might be achieved. See amongst many comments: **http://www.bbc.com/news/world-europe-32660871.** There will clearly be a lot of TV and press coverage over the coming months and years.

application of a common customs tariff to imports from third countries. There were to be common policies in the spheres of agriculture and transport, and a system ensuring that competition in the common market would not be distorted by the activities of cartels or market monopolists. An embryonic social policy and regional policy also appeared. Apart from these formally set-out objectives, there has been a debate older than the Communities themselves as to whether there was a grand or master plan for the integration of Europe. Even if it were not originally clear that the 'pooling of resources', as then termed, by a transfer of sovereign powers meant that the Communities would take over in certain agreed areas, this was made clear not long afterwards by the Court of Justice of the European Union (CoJ) in its landmark decisions in *Van Gend en Loos* and *Costa v ENEL*.[22] The debate has continued over whether the Communities were supposed to integrate only in the specific areas, as originally set out in the ECSC and the then EEC Treaty, and arguably confined largely to free trade, or whether something more dynamic was intended. Many terms have been used to describe these developments. It was originally considered that, because there was success in certain policies, this would automatically lead to a spillover from one area to another to lead to increasing integration. This is termed 'functional integration', or 'neo-functionalism'. Others have described this as 'creeping federalism'. In fact, it was considered that, in order for the original policies to work properly, there had to be continuing integration, otherwise the whole project would probably first stagnate, and then roll backwards to collapse. Thus, sector-by-sector integration and the process of European union were regarded as an inexorable process. For example, the setting of common trade tariffs and the establishment of the common market for the free circulation of goods would require and lead to exchange rates being stabilized to ensure that production factors and costs in the member states were broadly equal. This, in turn, requires monetary union to be established to ensure that exchange rates do not drift apart. And this requires full economic union to be achieved, so that the value of different components of the common currency is not changed by different economic and fiscal policies in different countries. Obviously, then, the fiscal policies must be integrated and this economic integration would require that the political integration would have to follow in order to provide stable and consistent policy control over the economic conditions applying in the Community, and now Union. According to this view, federalism, in some form, would thus seem to be the probable outcome of this process. Such an outcome is a vehemently contested one and it is argued that the failure to result in federalism and the periodic resort to national self-interest by some states is evidence that neo-functionalism is not a given in EU development. Equally though, it is not entirely discredited and, as will be considered further in Section 1.6, the spillovers from widening to deepening and vice versa can also be regarded in the light of neo-functionalism.

Before discussing this further, a number of other terms that will be used need to be defined both now and in Section 1.5.1 following:

- A *free trade area* involves the removal of all customs and tariffs between members, but is usually regulated by the unanimous agreement of all members.
- A *customs union* involves a free internal area and a common policy on tariffs of all the member states and third-party states.
- A *common market* includes the previous two points, plus the free movement of all factors of production.
- An *economic union* also includes the establishment of a common economic policy and fiscal policy.

[22] This will be fully explored in Chapter 3.

1.5.1 **Intergovernmentalism, Supranationalism, and Federalism**

The following terms are employed to describe the form of integration undertaken by the EU:

- *Intergovernmentalism* is the hitherto traditional way in which international organizations work, the decisions of which require unanimity and are rarely enforceable; if enforceable, they are usually only so between the signatory states and not the citizens of those states.
- *Supranationalism* describes the fact that the decision-making is made at a new and higher level than that of the member states themselves and that such decisions replace or override national rules.

The term *federalism* itself is a rather flexible term, in that it can refer to a fairly wide band of integration models. But essentially, for the purposes of this discussion, it means that there would also be a form of political integration whereby the member states would transfer sovereign powers to the federation, which would control the activities of the members from the centre. There are plenty of examples of states set up on a federal basis, including the USA, Germany, Canada, Australia, Switzerland, and Belgium. Certain local issues are still regulated by the constituent states, such as education, culture, and land management, but most economic and political power is transferred to the centre including, most notably, defence and trade.

Finally the term *multilevel governance* needs to be outlined as another term which seeks to explain the dynamic and evolving nature of the EU, given that no one of the above three terms on their own, or indeed together, accurately explain its nature. In particular as the arguments about the consequences of the increasing competences of the EU evolved, so too did the realization that the EU was governed at a number of levels. This will also be explored by the discussions of competences, subsidiarity, and the increasing role of national parliaments in Chapter 3. So overall, in deciding the policies and the details of putting those policies into action, the regional authorities, the national parliaments, the states, and the institutions of the EU are involved, hence multilevel governance.

1.5.2 **Progress to a Federal Europe?**

Is federalism the goal of European integration? Only a few persons have argued openly for this degree of integration, although some of the founding fathers of the Community—Monnet, Schuman, and Spaak—had expected that sector-by-sector functional integration would lead slowly to ever greater degrees of federalism. It is also arguable that an agenda of federalism has been buried under the euphemism 'a closer', or 'ever closer', union and that, to make the progress to the possible ultimate destination of the Union more acceptable, these terms have been used in the EEC Treaty (which became the EC Treaty in 1993) and in the TEU. The latest version, that is, 'to continue the process of creating an ever closer union', can be found in the preamble to the TEU, as amended by the Lisbon Treaty. It is, though, unclear, and arguably deliberately so, whether these refer to federalism or something short of that. The original plans put forward by Monnet for the ECSC may have been much more federal in nature and openly so, particularly because, as planned, the Community was to be governed by a supranational High Authority only, but it was at the insistence of the member states that the original ECSC was also governed by a Council of Ministers, clearly intergovernmental, and by a Parliamentary Assembly. This mixed model was followed in both the EURATOM and EEC Treaties. Therefore,

while the Union and some of its institutions do operate on the supranational level, it does not signify an inevitable move to federalism. Only as future developments unravel will its final destination become clearer.

The Constitutional Treaty, which was ultimately abandoned in June 2007, was seen, particularly by some states, as a very distinct further step in the direction of a federal Europe—hence the resistance in particular to the term 'Constitution for Europe', which appeared to imbue the EU with the appearance of a federal state or some form of statehood. With hindsight a single treaty named the Consolidated EU and EEC Treaty or something similar might have been better employed. The 2007 Lisbon Treaty removed the term 'Constitution' and the other more symbolic references in the treaty to a flag and an anthem, etc. and can be regarded as a softer form of the Constitutional Treaty.[23] Hence the debate is not stale and continues, as the EU and member states continue getting ever closer, but without spelling out where they might ultimately be going. Whilst the euro crises may have brought calls from some states for even greater economic and political integration, it has produced the opposite effect in other member states, notably the UK; hence, more than ever, there is no single opinion of all member states on where the EU should be going in the future, in terms of the degree of integration.

Despite the failure of the EDC and EPC proposals for significant further integration in the mid-1950s, the ECSC remained successful and was joined in 1957 by the other two communities. EURATOM was not particularly successful, because it was originally designed under the assumption that there would be extreme difficulty in the energy market, but that proved not to be the case as the world energy market stabilized itself considerably in the late 1950s (although with current future energy concerns, it may find more relevance). The EEC proved immediately to be a success under the leadership of the first EEC Commission President, the German Walter Hallstein. It was far more political in outlook, despite the contrary view of de Gaulle as to how the Communities should be organized and governed. It is particularly noteworthy in view of the failure of the original member states to agree on the EDC and EPC. The success of the EEC seemed to give support to the neo-functionalist view that success in one sector would lead inevitably to success in other sectors and assist the process of European integration. Indeed, the success in the area of the common customs tariff appeared to work as envisaged by the neo-functionalists/federalists and led to spillover into other areas, in particular to further pressure for the reform of the CAP. This form of functionalism was adopted deliberately by the High Authority and the EEC Commission as the way in which to achieve further progress with European integration, and these bodies put forward a linked package deal of reforms for the Communities. However, such reforms were quickly thwarted by a boycott of the Community institutions by de Gaulle in 1965[24] and his fierce defence of state nationalism. Previous signs of the stance to be adopted by de Gaulle had already been seen by his unilateral veto of British entry to the Communities in 1963, despite the fact that entry negotiations had been ongoing for two years. Since those days, and despite periods of stagnation, the Union has moved on with numerous treaty revisions and most recently the 2007 Lisbon Treaty. These developments will be considered in the following sections and returned to at the end of the chapter in respect of the Lisbon Treaty.

[23] Although some of the member states appear to like those elements: see Declaration 52 attached to the treaties.

[24] This is further considered in Section 1.6.6.2 and Chapter 2, Section 2.3.3.4.

1.6 The Widening and Deepening of the Communities and Union

This section concerns the parallel developments of the Communities by which they have increased not only in terms of the number of member states and external interfaces with the outside world, but also the extent to which the member states have gone in integrating economically, socially, and politically within the Communities and now Union.

In 1969, a fresh start for the Communities appeared to take place. Whilst in itself it did not lead to massive or immediate change, it did allow for a new agenda for change to be constructed. As much as anything, it was allowed to happen because of the resignation of de Gaulle as French president and his disappearance from the European political scene. The member states held a summit in The Hague in 1969, to try to get the Communities moving again after the setbacks they had suffered. Notable were the 1963 and 1965 crises caused by de Gaulle: the former being the first of the rejections of UK membership; and the latter, the boycott of the European institutions. The 1969 Hague Summit set as its goals the completion, widening, and deepening of the Communities.

Although the completion of the common market, which should have been fully achieved by 1969, took considerably longer and actually had to wait until 1992, the widening and deepening of the Communities were processes that were always going to be ongoing. The terms 'widening' and 'deepening' are the ones that were used then and still survive in Union jargon, describing its development in two ways:

- *Widening* refers primarily to the process of the expansion of the Union to include new member states, but can also apply to the extension of the EU into new policy areas and in developing new sectors for integration.
- *Deepening* refers to the degree of integration that takes place. By this is meant the extent to which integration is intergovernmental or supranational—but deepening could also apply to integration in new policy areas, because it would consider the extent to which the Union has encroached into areas of the member states' competences previously held exclusively.

So, to some extent, the terms are overlapping and the same development can be argued to fit into both categories. At a fairly simple level, though, they refer in turn to the quantitative and qualitative changes over the years.

1.6.1 The Widening of the Union

The Paris IGC of 1972 finally paved the way for the first expansion of the member states, which took place in 1973 when the UK, Ireland, and Denmark joined. Were it not for de Gaulle, this would have happened sooner and might have been better for the Community if it had. Norway was also to have joined at this time, but a referendum of the Norwegian electorate on the eve of membership resulted in a majority against and Norway failed to become a member—not for the last time.

A second expansion took place in 1981, when Greece joined, and a third in 1986 after protracted negotiation periods for Spain and Portugal. Whilst none of these three countries were economically in a strong position in relation to the existing member states, and in view of this were regarded by some as unfit for membership, politically their acceptance into the Communities without delay was regarded as crucial. This was considered both to support the recently emerged democracies in all of these countries after varying

periods of authoritarian or dictatorial right-wing rule, and to act as a counterforce to any possible violent reaction to the left and possible establishment of governments sympathetic to Moscow or a return to authoritarianism.[25] The Cold War still featured prominently in this period of history, hence entry was facilitated sooner than the economic conditions might have permitted.

A smaller automatic expansion took place in 1990, with the unification of West and East Germany as the first tangible change to result from the fall of the communist regimes in the Soviet Union and East European countries. It woke up the institutions to the possibility of a number of the former East European states seeking membership and prompted a longer-term evaluation of the conditions required of aspirant member states which, in turn, led to a set of criteria being agreed at the Copenhagen Summit in June 1993. The requirements included the need for stable government and institutions guaranteeing democracy, the rule of law, human rights, and the protection of minorities. Economically, applicant states would have to have a functioning market economy and the ability to cope with life in the single market. The applicants would have to accept the *acquis communautaire*[26] in its entirety, including the overall political, economic, social, and monetary aims of the Union—no easy task, even for the present member states.

The next and fourth enlargement took place sooner than expected as a result of the changes in Eastern Europe and the economic success facilitated by the SEA, discussed in Section 1.6.7.

1.6.2 **The European Economic Area and the 1995 Expansion**

After observing in the late 1980s the economic benefits of the SEA enjoyed by the member states of the then Communities, other European states, most of which had cooperation or association agreements with the Communities and were members of the EFTA, started to make overtures for greater cooperation and some for possible membership. Initially, further expansion was not favoured by the Commission of the European Communities, because it was thought that it would stifle plans for deeper integration of the then existing member states, in particular progress on the single market and possible further progress to economic and monetary union. Additionally, prior to the collapse of communism in Europe in the late 1980s, for varying reasons, some of the EFTA member states were uncertain about the appropriateness of full membership. Hence, a lesser form of integration was proposed by the European Commission, in which the participants could benefit from the advantages of the single market and the competition policy, but not be involved in the other economic or political aspects of the Communities, including decision-making. This offer was open to all the then existing members of the EFTA. However, the negotiations for this new form of cooperation were very drawn-out and subject to considerable delays during their course. They were also taking place against the backdrop of the collapse of communism in Eastern Europe. One of the consequences of

[25] Support for new democracies in Greece, Portugal, and Spain in the 1980s is the second of the five achievements of the EU which was cited as justifying the award of the Nobel Peace Prize.

[26] *Acquis communautaire* is the term used to describe the accumulated body of EU law, including treaties, secondary legislation, and judicial developments. There was an exhibition in Brussels (2004) that graphically displayed the EU's *acquis communautaire*. It ran to over 80,000 pages and took up approximately 8 metres when stretched out in display cases in the exhibition! Actually, according to the Commission's own figures, at the end of 2002, the number of pages of binding legislation in the OJ was 97,000 and further provided in 2011 that the *acquis* of the EU consisted of 8,862 regulations and 1,885 directives in addition to the primary law (the treaties). See **http://ec.europa.eu/eu_law/infringements/infringements_annual_report_29_en.htm** (COM (2011) 588 final).

this was that the previous objections or difficulties that might be raised by Eastern-bloc countries and the Soviet Union in particular, that full membership of militarily neutral countries of the Communities (namely, Austria, Finland, and Sweden) would not be compatible with their status as neutral countries, were significantly undermined, if not completely negated. Regardless, in October 1991, the EFTA member states of Austria, Finland, Iceland, Liechtenstein, Norway, Sweden, and Switzerland signed an agreement with the EEC on the creation of the European Economic Area (EEA). The agreement reached was that the EFTA members were not represented in the Community institutions and would take no part in the decision-making processes of the Community. They would be subject to all Community law relating to the single market, as defined by the Court of Justice. However, an additional problem was encountered whilst negotiations were being finalized and shortly before the treaty was to come into force on 1 January 1993. The Swiss electorate rejected membership of the EEA in a referendum in December 1992, which caused considerable political and legal difficulties because Liechtenstein, with which Switzerland has a monetary union, had agreed to join. The remaining six EFTA states went on to sign the agreement in March 1993 and it came into force on 1 July 1993. It was soon clear, though, that, as far as business confidence was concerned, full membership of the EU was the condition that attracted investment and not membership of the EEA. Indeed, both the concept and the consequences of the EEA might not, in any case, have been fully understood by outside interests. Hence, almost before the ink had dried on the signatures to the EEA Treaty, Austria, Finland, Norway, and Sweden applied for full membership of the European Communities. In view of the fact that most of the bargaining had already been done for the EEA, entry terms were easily and rapidly decided, and the four applications were quickly accepted. On 1 January 1995, therefore, the Community was joined by Austria, Finland, and Sweden, bringing the number of member states to 15. The Norwegian electorate once again, though, chose to reject membership in a referendum held in December 1994 and again Norway failed to join the Communities. The entry of the three former EFTA members means that Iceland, Norway, and Liechtenstein are the only remaining EFTA members of the EEA, and one of these has a membership application pending. Iceland's membership is presently on hold at the request of the Icelandic government since May 2013. Switzerland remains outside both the EC and the EEA but remains a member of EFTA. Its application for full membership, lodged in 1992, was put on hold following the EEA rejection and this remains the case today. A special series of bilateral agreements have been negotiated with Switzerland instead, covering many, if not most, aspects of the EEA.[27]

1.6.3 **The 2004 and 2007 Expansions**

The expansion that took place on 1 May 2004 was the largest in the history of the EU; ten new states joined, namely the Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia.

Despite the fact that the negotiations were rather oddly conducted, with some states being given priority, this manner of proceeding was changed and discussions proceeded on the basis of a 'big bang' of ten new states entering at the same time. As a result, the overall time taken to resolve terms of entry was surprisingly quick considering the number

[27] Although its refusal to accept Croatian migrants and generally limit EU inward migration in breach of its free Movement of Persons Agreement has brought reaction from the EU affecting the free movement of students and the opening of the Swiss electricity market. Further measures may be taken in the future: see **http://www.swissinfo.ch/eng/swiss-confirm-eu-s-key-decision-on-free-movement/40521130**.

of states involved, and their differing economic and social circumstances. The haste was fuelled by the political events unfolding in the world, in particular by the break-up of the Soviet Union and the bloody fragmentation of the Republic of Yugoslavia. For reasons that had similarly prompted the rapid entries of Greece, Spain, and Portugal in the 1980s, which were also regarded as premature due to the economic weakness of those countries, the ten new countries were brought into the fold much quicker than the economic conditions alone would have permitted, because of the political desire to lock these countries into a Western liberal-democratic club of nations. Hence, the Eastern expansion took over the agenda and Commission time.[28] The accession agreements with all the member states were concluded and the entry terms settled for the Treaty of Accession, which was signed in Athens on 16 April 2003. The ten new member states duly joined on 1 May 2004, with celebrations across Europe—albeit low-key in some member states such as the UK.

After the successful conclusion to the accession negotiations in December 2004, a favourable Commission Opinion in February 2005, and the conclusion of the Accession Treaty in April 2005, in September 2006 the EU Commission expressed its view that Bulgaria and Romania were ready for accession as originally planned in the Accession Treaty. Entry into the Union of these two countries took place on 1 January 2007, but equally subject to criticisms that entry for these countries was also economically premature and that other issues such as corruption had not been satisfactorily tackled prior to membership. For similar reasons as previous expansions regarded as premature, the policies of new-member entry prevailed. It is easier also to encourage and enforce change from within, rather than for the EU to impose pressure externally on non-member states. On 1 July 2013 Croatia became the twenty-eighth member state but just three days before entry amended the law on the European Arrest Warrant (EAW) to effectively give immunity from prosecution to an ex secret police chief and 20 others suspected of a 1983 assassination in Germany. That decision has now been reversed but was not the best of membership starts, with the Commission threatening sanctions on its newest member state within days of EU membership.

1.6.4 **Future Widening**

At present, there are six countries that are official candidate states: Iceland, the former Yugoslav Republic (FYR) of Macedonia, Turkey, Montenegro, Serbia, and Albania.

With regard to Turkey, the Commission recommended on 6 October 2004 that the EU should open entry negotiations; in December 2004, the Brussels European Council Summit approved this position, with 3 October 2005 seeing the start of entry negotiations. Without doubt, these negotiations are the most controversial in the history of the Union, mainly because of the recognition of Cyprus and the predominantly Muslim population of Turkey, but also in view of the human rights record of Turkey, and the fact that, quite simply, geographically most of the Turkish land mass lies in Asia and not in Europe. Its economic situation is also regarded as problematic as is its failure to recognize fully and politically an existing member state, Cyprus. However, it may be argued that Turkish membership is exactly what the EU should come to terms with: the creation of a multi-ethnic, multicultural, and multi-religious Union.[29] Albeit slowly, accession negotiations have been ongoing

[28] Support for former communist states in the 1990s is the third of the five achievements of the EU which was cited as justifying the award of the Nobel Peace Prize.

[29] Support for the modernization of Turkey is the fourth of the five achievements of the EU which was cited as justifying the award of the Nobel Peace Prize. The latest position with regard to Turkish membership can be found at **http://ec.europa.eu/enlargement/candidate-countries/turkey/index_en.htm** or **http://ec.europa.eu/enlargement/countries/detailed-country-information/turkey/index_en.htm**. For a balanced view of

since 2005 to discuss various topic chapters—13 so far from 35 now identified—all of which have to be agreed before an Accession Treaty can be finalized. In view of the fact that Turkey has not added Cyprus to the customs union with the EU, the Council of the EU has decided that no new chapters will be commenced and the existing ones will not be provisionally closed. In 2012, there was an initiative to re-launch negotiations to break the stalemate that had arisen.[30] Once accessions negotiations are successfully achieved, candidate countries become known as acceding states. There is no fixed timetable for the negotiations, Accession Treaty, or entry, and the process is expected to take at least ten years, especially as some member states have expressed strong doubts about the wisdom of this expansion, in particular Austria, France, and Germany. The entry of Turkey remains both contentious and a long way off.

The FYR of Macedonia made an application to join in March 2004 and was considered as of 16 December 2005 to be a candidate country. Entry negotiations had been recommended in October 2009 but have not yet commenced. Its name remains a problem which has to be resolved.[31]

Following Iceland's change of opinion about EU membership, which was prompted by its financial crises in 2007–8, events moved quite quickly at first, also assisted by present EEA membership. In July 2009, it applied for full membership; entry negotiations were recommended in June 2010 and commenced in July 2010. At the start of 2013, 11 chapters had been provisionally closed with a further 16 open and being negotiated. However, in the same year, Iceland requested its application be put on hold and that remains the case at the time of writing.

Montenegro applied for membership in 2009 and was granted candidate status in December 2010. Access negotiations commenced in June 2012. Serbia was granted candidate status on 1 March 2012[32] but negotiations could not commence until Serbia's relations with Kosovo have been normalized.

Albania was granted official candidate status on 27 June 2014 but entry negotiations have not commenced. Clearly its relations with other Balkans states have to be normalized and formalized before membership can be granted, especially under the 'good neighbour' requirement of new states briefly considered in Section 1.4.6.1. The process too may take a long time.[33]

As to other possible members, the rest of the Balkan states[34] are considered to be potential candidate countries. Thus, the countries of Bosnia-Herzegovina and Kosovo have all been formally recognized by the EU as eligible for future EU membership, but only if they prove themselves to the satisfaction of the EU and existing member states to be fit for membership.[35]

all of the challenges to Turkish membership, see K. Dervis et al, *The European Transformation of Modern Turkey*, Centre for European Policy Studies, Brussels, 2004.

[30] At the time of writing (January 2015) things remain at a standstill.

[31] For the latest refer to **http://ec.europa.eu/enlargement/countries/detailed-country-information/fyrom/index_en.htm**.

[32] For further details on Montenegro and Serbia refer to **http://ec.europa.eu/enlargement/countries/detailed-country-information/montenegro/index_en.htm**.

[33] **http://ec.europa.eu/enlargement/countries/detailed-country-information/albania/index_en.htm**

[34] Peace-building in the Western Balkans is the final of the five achievements of the EU which was cited as justifying the award of the Nobel Peace Prize. For the full statement of the Peace Prize Committee go to **http://www.nobelprize.org/nobel_prizes/peace/laureates/2012/press.html**.

[35] For full details of this process and the requirements, see **http://ec.europa.eu/enlargement/the-policy/countries-on-the-road-to-membership/index_en.htm**, **http://ec.europa.eu/enlargement/countries/check-current-status/index_en.htm**, and **http://ec.europa.eu/enlargement/potential-candidates/index_en.htm**.

Less likely as possible future candidate states, in the short to medium term, are the states of the former Soviet Union that border the EU, because of the political controversy and impact on relations with Russia—and while it is to be noted that some of those countries (notably the Ukraine) have expressed their desire for future membership, this opinion appears to vary internally in the Ukraine and the conflict which developed in 2014 will curtail this process regardless of how pro-EU the legitimate Ukrainian government happens to be.[36]

One or two other countries have previously made applications, but have either withdrawn them or put them on hold. Norway has twice concluded entry negotiations only for entry to be rejected by the Norwegian electorate at the eleventh hour both times. At present, it has no application pending but the possibility of future membership remains on the political agenda, although recent opinion polls show mixed results in favour of full membership.[37]

The rejection by the Swiss of membership of the EEA in 1992 also led to the suspension of its application for full membership. Even though Swiss governments have expressed the view that Switzerland will eventually apply for full membership, that aim has been severely dented on two occasions now following referenda.[38] The first was a categorical rejection by the Swiss electorate of even starting entry negotiations for EU membership in a private initiative referendum in March 2001, in which 77 per cent of those voting said 'no'. Secondly, the Swiss voted to restrict Croatian migrant entry and to control immigration generally including that from the EU despite the fact that there was a free movement of persons agreement with the EU.[39] There are, then, presently no plans to reactivate the dormant application by Switzerland, although significant governmental and other elements consider membership of the EU as necessary and indeed inevitable, if not today, then at some stage in the future.[40]

An exhibition in Brussels in October 2004 presented some, not entirely serious but also in view of developments not too far wide of the mark in some respects, prophecies for the future, including the following:

> In 2010, the EU will expand to include Albania, Armenia, Belarus, Bosnia and Herzegovina, Georgia, Macedonia, Moldova, Montenegro, Serbia, and the Ukraine. Following this, in 2015, the EU will take in Morocco, Algeria, Egypt, Tunisia, Libya, Jordan, Israel, Palestine and change its name from the EU to simply 'The Union'.

Moving from fantasy to reality, the fact that the EU is opening accession negotiations with Turkey invites a final consideration in respect of further widening and enlargement. What is the limit? The answer to this is as much driven by the answer to the question: what is Europe, politically and geographically? Already, two Mediterranean island states have pushed the geographical border of the EU further. Cyprus lies closer to the Middle East and is nearer to Asia than Europe, and Malta is not much further away from Africa than it

[36] See **http://ec.europa.eu/external_relations/ukraine/index_en.htm**; for a press opinion on the issue, see **http://www.signandsight.com/features/1708.html**. For a background study, see inter alia: **http://rt.com/tags/ukraine/** or **http://www.washingtonpost.com/blogs/worldviews/wp/2014/01/30/9-questions-about-ukraine-you-were-too-embarrassed-to-ask/**.

[37] For further details, see **http://eeas.europa.eu/norway/index_en.htm**, **http://www.euractiv.com/enlargement/norwegians-eu-membership-ahead-g-news-529950**.

[38] See the Swiss sites for their Volksabstimmungen: **http://www.swissvotes.ch/** although this is not up to date. Similar is **http://www.atlas.bfs.admin.ch/maps/12/map/mapIdOnly/0_de.html**.

[39] The vote was approved by 50.3% on a turn-out of 56.6%: see **http://www.bfs.admin.ch/bfs/portal/de/index/themen/17/03/blank/key/2014/013.html**.

[40] For further details, see **http://eeas.europa.eu/switzerland/index_en.htm**.

is from other parts of Europe. Indeed, there are existing parts of some member states that are clearly beyond any usual definition of Europe. The Canaries (Spain) lie off the west coast of Africa; French Guyana is in South America; the Azores and Madeira (Portugal) are in the middle of the Atlantic; and the French islands of Guadeloupe, Martinique, and Reunion lie in the Caribbean. Greenland was part of the EU until it was granted home rule from Denmark in 1979 and left the EU in 1985.

In fact, there are not many European states left to apply, depending on the definition given to 'Europe'—only Norway, Liechtenstein, the smaller states of Andorra, Monaco, and perhaps parts of the former Soviet Union, such as Ukraine, Belarus, and Moldova, but no mention of these countries is made in the present enlargement strategy. An application to join by Morocco in 1987 was rejected, though on the geographical ground that Morocco was in Africa and could not be considered as coming within Europe. There is also perhaps now the more focused question of whether the present citizens of the EU want a bigger Europe. At the time of writing, there appears to be more resistance to than support for further expansion.[41]

1.6.4.1 Accession Preconditions

Regardless of which new state is a candidate, under Art 20(4) TEU, all new states are required to accept and adopt the entire body of EU law, the *acquis communautaire*,[42] as contained in the treaties, protocols, declarations, conventions, agreements with third countries, secondary legislation, and the judgments of the Court of Justice. Since the TEU, the criteria for membership have been much more clearly spelled out. Article 49 TEU provides that 'Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union.'

These principles are human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, including the rights of persons belonging to minorities outlined in Art 2 TEU. In addition, potential member states will be required to satisfy a number of criteria that have been revised over the years from those provided at Copenhagen in 1993 and later refined at the time when possible applications of the newly emergent democracies in Eastern Europe were anticipated. The criteria were essentially a refinement of previous practice and have been further refined in subsequent summit meetings since the 1999 Helsinki European Council Summit added a form of 'good neighbour' requirement for entrant states, that disputes with neighbouring countries be resolved before entry, and expressed in Art 8 TEU.[43] It might have been a good idea, but the most visible case requiring the application of that policy was Cyprus. However, the Greek and Turkish parts of the island were not able to resolve their differences fully prior to the entry of Cyprus to the EU on 1 May 2004. Thus, although the whole island of Cyprus is in the EU, EU law is applied only in the southern Greek half of the island despite the fact that a referendum vote in Cyprus to reunite the island was approved by the Turkish side, but rejected by the Greek Cypriot electorate. Note, though, that Turkish Cypriots are citizens of a member state, the Republic of Cyprus, even though they live in the northern part of Cyprus; therefore their personal rights as EU citizens are not affected. Potential border disputes existing between Estonia and Latvia and the Russian Federation were also not resolved

[41] For the EU's overall enlargement strategy and progress, see **http://ec.europa.eu/enlargement/** or **http://ec.europa.eu/enlargement/countries/strategy-and-progress-report/index_en.htm**.

[42] See n 26 and **http://ec.europa.eu/enlargement/policy/conditions-membership/chapters-of-the-acquis/index_en.htm**.

[43] See the EU Neighbourhood policy website: **http://ec.europa.eu/enlargement/neighbourhood/overview/index_en.htm**.

prior to accession, and a dispute between Slovenia and Croatia is yet to be resolved. The Helsinki Summit also marked a realization that the Copenhagen criteria could not be strictly applied and that some flexibility had to be exercised. The Laeken European Council Summit in December 2001 also emphasized that membership was dependent on candidate countries ensuring that their judicial institutions were capable of meeting the requirements of EU membership. The applicability of the criteria for deciding whether an eligible candidate can become an admissible one was confirmed at the Copenhagen Summit, which took place in December 2002, and in relation to Turkish membership the member states emphasized the need to meet the political criteria.

1.6.5 **The EU and the World: External Relations**

The EU has diverse roles to play in the world orders. Not surprisingly given the more limited original political scope of the Communities at the outset, trade relations with the rest of the world featured most prominently, but not exclusively. However, these roles and obligations in the area of external relations were spread over the various treaties, making an overview difficult to obtain. Also the competences to undertake external relations were granted in different terms under the three original treaties. For example, the ECSC Treaty expressly granted the legal capacity to make external agreements generally in pursuit of the objectives of the treaty; the EURATOM (EAEC) Treaty also allowed for general agreements to be concluded; and the EC Treaty (Art 281) provided that the European Community had been given legal personality and was provided with powers to conclude specific types of agreements only, such as commercial agreements under the common customs tariff (ex Arts 131–3 EC, now Arts 205–7 TFEU) or the association agreements. The original Treaty on European Union did not, though, possess legal personality. This has now been corrected by the Lisbon Treaty and Art 47 TEU provides that 'The Union shall have legal personality', which thus allows the EU to participate in international actions and agreements across all areas of external relations. The member states did, however, add a declaration (Declaration No 24) to make it clear that this does not mean that a new general power has been provided to the Union and that it continues to be constrained in its competences by the existing grant of powers to the Union by the member states. The Lisbon Treaty has also gone a long way in rationalizing and ordering external relations in the treaties, and the range of external relations and activities has now been better coordinated between the TEU and TFEU. Given the breadth of this very wide and far-ranging subject, which is not usually treated in any depth in EU courses, this section will simply outline the range of external activities undertaken by the EU and make brief mention of the commercial activities.[44]

The external relations of the EU are set out in general in the TEU and in more detail in the TFEU. Listed under the competences in Art 3 TFEU is the exclusive competence under Art 3(2) of the Union to conclude international agreement if provided for with the treaties or necessary to enable the Union to exercise its internal competence. Article 3(5) TEU refers to the Union's relations with the wider world and Art 8 TEU sets out the basics of the European Neighbourhood Policy (see Section 1.6.4.1 above and n 43). Article 21 TEU outlines the general provisions on the range of external involvements of the EU and, in particular, the CFSP. Article 21 also provides a series of guiding principles by

[44] For a more detailed look at the range of external relations conducted by the EU, refer to **http://ec.europa.eu/policies/external_relations_foreign_affairs_en.htm**.

which all external policies and actions shall be pursued, including democracy, the rule of law, and respect for fundamental, human, and equality rights.

The European Council is now formally confirmed in the role of formulating and pursuing external action (Art 22 TEU) and shall take decisions on either a proposal from the Council, or jointly from the High Representative[45] and Commission in the areas of their prime interest.

Outside the general tidying up of external relations and their placement within the TFEU is the area of CFSP, which remains in the TEU (Arts 23–46), although oddly Art 2(4) TFEU provides the basic competence for the Union in this area. Hence, the TEU contains all the foreign policy aspects and the TFEU everything else. Article 23 TEU and Art 205 TFEU respectively subject the EU in those areas to the principles contained in Art 21 TEU. Association agreements for countries and territories that have special relations with some of the member states are covered by Part Four of the treaty, Arts 198 et seq TFEU, and the countries are listed in Annex II attached to the TFEU. Part Five of the TFEU (Arts 205–22), entitled 'External Action by the EU', groups together the major planks of EU external action in a series of titles. Article 205 TFEU provides generally that international actions shall be guided by the principles set out in Art 21 TEU.

1.6.5.1 **Commercial Activities**

In view of the increasing share of world trade that the Union has, it is no wonder that external relations in this area are very important. Even at the start of the Communities, part of the role envisaged was to contribute to the harmonious development of world trade and the liberalization of international trade. From the start, therefore, the Community was given the competence to forge economic ties with the outside world (ex Art 131 EC). Particularly under the common customs tariff, where it was clear that this could only sensibly be done by the EU as a whole, the EU has slowly assumed the competences to negotiate on behalf of the member states, including representing the EU in the important trade institutions set up in the world and committing them to the GATT and World Trade Organization (WTO) negotiations. The EU now participates in the WTO on behalf of the member states and has been recognized as replacing the authority of the formal members, which are the individual member states, as far as the competence of the EU over the Common Commercial Policy (CCP) is concerned.[46] Such activity has been challenged in the past, but the capacity to enter into international commitments was approved by the Court of Justice: for example, in Case 22/70 *Commission v Council (ERTA)* and in Opinion 1/76.[47] The CoJ further outlined this position in its Opinion 1/94, which held that where the Community has internal exclusive competence in a matter, this is transferred into powers to negotiate exclusively with non-member countries externally and extends to where, although not exclusive, the EU has achieved complete harmonization of a particular area.

The CCP is now contained in Arts 206–7 TFEU, which cover the customs union and the common external tariff for goods entering the EU from outside the EU, now including commercial aspects of intellectual property. Although this is an exclusive competence of the Union, if international agreements are needed in pursuit of this policy, the process by

[45] A section on the High Representative can be found in Chapter 2, Section 2.4.2.

[46] For further details, see Y. Devuyst, *The European Union Transformed: Community Method and Institutional Evolution from the Schuman Plan to the Constitution for Europe*, Peter Lang, Brussels, 2005, pp 133–40.

[47] Case 22/70 *Commission v Council* [1971] ECR 263, [1971] CMLR 335, and Opinion 1/76 [1977] ECR 741; see also comments on these cases in Chapter 3.

which they may be negotiated can be carefully controlled by the Council of the Union. The Council grants the initial power to open negotiations and appoints a special committee to which the Commission should report on the state of negotiations. Depending on the subject matter, set out in Art 207(3) and (4) TFEU, the Council will either act by qualified majority or unanimity.

1.6.6 **The Deepening of the Union**

This section charts the increasing degree of integration entered into by the member states, starting with the original treaties establishing the Communities and following this to the present position after the Lisbon Treaty amendments.

1.6.6.1 **The Primary Treaties and Early Amendments**

The first and fundamental movement on the path of integration was, of course, the ECSC Treaty, now expired, which was soon followed by the agreement and ratification of the EEC and EURATOM Treaties. It was clear at the time of negotiation that a transfer of sovereign powers from the member states to the Community to be established was involved, particularly in the climate of the time and the clear federalist intentions of the main protagonists of the plan, Schuman and Monnet.

The only amendments that were made to the primary treaties for the first two decades were minor ones brought about, first, by the decision to merge the institutions of the three Communities and, secondly, by the accession treaties required for the new member states. Prior to the Merger Treaty of 1965, each of the Communities had its own Council and High Authority/Commission; however, the Court of Justice and the Parliamentary Assembly had both been shared by all three Communities from the outset. The merger of the institutions was a practical step to provide common coordination and to cut out a duplication of effort and resources. The first accession treaties for Denmark, Ireland, and the UK dealt specifically with the details of accession of the new member states or merely made the changes to the treaties considered necessary for it to continue working in the same way as previously, but with adjustments to reflect the increase in member states and the composition of the institutions: for example, Council voting numbers and Commission membership. The fundamental constitutional core of the Communities and how they worked remained untouched until 1986.

1.6.6.2 **The 1960s and the Luxembourg Accords**

Initially, the Communities were very successful in achieving the aims set out and promoting economic growth in the member states in contrast with countries such as the UK. The dismantling of customs duties was achieved by the original six member states before the target date set down in the EEC Treaty. Additionally, competition policy was seen to be working and the CAP was clearly successful in terms of guaranteeing production. It was, however, the subject of criticism because its price-support mechanisms led, over time, to the massive overproduction and stockpiling of commodities such as milk, butter, sugar, and wine, which not only cost the Community a great deal of money to dispose of, but also incurred political ill-favour worldwide because developing world agricultural products had no chance of entering the heavily protected European Community market.

However, following this initial period of success and achievement, any chance of either further expansion or deeper integration was stifled. The brake on such progress was most effectively applied to the Commission and the Communities in 1965 by French President de Gaulle's boycotting of the Community institutions, which caused damage that lasted for decades. In 1965, the Commission proposed that the Communities move

to a system of own resources and that the Council move to majority voting, which was no more than as originally envisaged by the Treaty of Rome. It was further proposed that the Parliamentary Assembly should have some control over the expenditure of the Communities. These proposals were categorically opposed and vetoed by de Gaulle who, when the other member states were not opposed, adopted a policy of non-attendance at the Community institutions by the French representatives, which became known as 'the institutions boycott' or the 'empty chair' policy. All progress, indeed, all business, in the Communities simply halted. The compromise agreement to break the deadlock was the infamous Luxembourg Accords—in essence, an agreement to disagree. This basically provided that where the member states were not able to agree a proposal and where a vital national interest of any member state was at stake, discussions, according to the French, should continue until agreement was reached but ultimately as all six member states did not agree, the reality was that a member state could veto the proposal in Council. There was no definition of a vital interest, so member states were left to define a vital interest themselves. Thus, until the political demise of de Gaulle, the planned moves for deeper integration were prevented.

1.6.6.3 **Stagnation and 'Eurosclerosis'**

The whole unfortunate episode surrounding the Luxembourg Accords resulted in stagnation in the decision-making process for many years. It led to the long, slow, painful period of the Communities that has become known as the period of 'Eurosclerosis', which lasted from 1966 until the mid-1980s. The basic problem was the near inability of the member states to reach decisions on legislation and widespread dissatisfaction at the slow pace at which the goals of the EEC were being achieved. Whilst a lot of the blame can be laid at the door of the French boycott and the Luxembourg Accords, the ability to reach decisions was made much more difficult by the doubling of the member states between 1973 and 1985. Trying to obtain the unanimous agreement of first 6, then 9, then 10, and then all 12 members proved at times to be simply impossible. Amongst the main concerns were the time taken by the Community institutions to make new laws and the amount of work with which the Council was faced, partly because particular provisions were presented many times as the Commission made amendments to make them acceptable to all member states. A notorious example exists of a directive that did nothing more controversial than harmonize the training requirements for architects,[48] but which took the institutions 17 years to agree and finally enact. Further concerns related to the lack of representative democracy in the decision-making process of the Community and the delays experienced by litigants in the Court of Justice. It was clear to everyone that changes had to happen. Whilst it was true that some adjustments had been made in the form of amendments to the original treaties, these were of a limited nature. More significantly, but restricted to a specific process, was the increase in powers of the European Parliament in the budgetary process by the Budgetary Treaties of 1970 and 1975. Otherwise, little further progress had been achieved in this period.

1.6.6.4 **Revival Attempts**

In 1969, following the resignation of de Gaulle and the change of government in West Germany to a Social Democrat-led one, a summit of the heads of government was arranged in The Hague expressly to re-launch European integration. The 1969 Hague Summit established the system of European political cooperation (EPC), but it was

[48] Directive 85/384 (OJ 1985 L223/15).

deliberately intergovernmental in nature and sat outside the formal treaty set-up. As such, it can be regarded as another move away from supranationalism and the neo-functionalists' dream of progress on European integration. It was also unfortunate, but the reforms and the re-launching of the Communities envisaged at The Hague were severely disrupted by the world economic situation that grew steadily worse in the early 1970s. The Middle East wars and ensuing oil crises led to very high inflation and stagnation in the world economies, and to the unwinding of the first attempt at some sort of monetary union, namely economic and monetary union (EMU), which bound European currencies into a flexible relationship with one another and established the European monetary unit.[49] The year 1973 also saw the entry of three new member states, two of which—the UK and Denmark—were even then the least federal-minded member states in the European Communities. There were nevertheless further attempts to revive the flagging fortunes of the Communities. A further summit in Paris in 1974 led to the formalization of the previously informal European Council summit meetings to provide an overriding political guide to the Communities. This, however, tended to strengthen further the intergovernmental hand of control over the Communities rather than to provoke deeper integration. The Paris Summit also, for the first time, allowed the Commission a role in the summitry, something pressed for by the then new Commission President Roy Jenkins. The summit also made the decision that the European Parliament should be directly elected as from 1978, although this could not take place until 1979 due to difficulties in the UK in preparing the legislation. Finally, the European Monetary System (EMS) was established in 1978, despite the collapse of the previous attempt (the EMU). The EMS proved to be stable and, with the establishment of the European currency unit (ECU), became the precursor to monetary union and the euro.

These limited successes, however, did little to counter the generally prevailing malaise that hung over the Communities and institutions. This was not helped by the attitude and activities of certain member states. Even when de Gaulle disappeared from the international scene, in 1979, new UK Prime Minister Thatcher appeared to take up the baton of intergovernmentalism and the bolstering of purely national interests. Whilst the UK may well have had a case in arguing for a more equitable budget contribution, and neither Mrs Thatcher nor indeed anyone else has gone as far as de Gaulle in disrupting the work of the Communities, her negotiating style and public pronouncements left much to be desired. These budget wrangles and sheer lack of progress generally in the Community dragged on seemingly endlessly into the mid-1980s. The stagnation and intergovernmentalism not only thwarted any moves to more federalism, but also engendered a period of national protectionism that itself was threatening to undermine some of the basic goals of the European Communities already achieved—notably the common market itself, which was simply not being completed as envisaged and, if anything, was becoming more fragmented. It was abundantly clear and understood that reform, and, indeed, radical reform, of the Community and institutions was necessary.

Numerous reports and studies were conducted by the different Community institutions and, additionally, many external reports had been commissioned over the years that had all recommended changes. A number of areas in which improvements were required had already been identified by those reports in the lifetime of the Communities.[50] The

[49] This was not a currency like the present day euro, but an accounting unit based on the average of the basket of member currencies.

[50] Amongst them were: the Vedel Report of 1972, with proposals by the Commission to strengthen the powers of the European Parliament; the Tindemans Report on 'European Union' of 1976; the Report of the Three Wise Men of 1979; the Spierenburg Report of 1979; the Columbo/Genscher Initiative of 1981; and the Stuttgart European Council of 1983, which made a 'Solemn Declaration' that there should be greater

fact that there were so many of these speaks volumes for their effectiveness (or, more accurately, *in*effectiveness) in tackling the deep-rooted problems of European stagnation. However, whilst individually they did not provide a solution, collectively all of them, especially the latter ones, helped finally to establish and develop the climate for the eventual changes brought about by amendment and in particular by the SEA, which led in turn to the TEU, the Treaties of Amsterdam and Nice, and the Treaty for a Constitution for Europe and its replacement, the 2007 Lisbon Treaty. In 1985, a sufficient head of steam had built up for the member states to accept, albeit some reluctantly, that the necessary changes were ones that could only effectively be undertaken by treaty revision. It was finally accepted that the founding treaties should be substantively amended.

1.6.6.5 **The Contrasting Positive Role Played by the Court of Justice**

An observation that needs to be made at this stage, but which will be repeated in Chapters 2 and 4, is that whilst the Community institutions were busily going nowhere on the path to European integration, the Court of Justice appeared not to be affected by the 'Eurosclerosis' and had, from a very early date, adopted a very supranational tone in its judgments, with the far-reaching decisions on direct effects and supremacy in Case 26/62 *Van Gend en Loos* and Case 6/64 *Costa v ENEL*. These judgments contributed greatly not only in terms of building a separate Community and now EU legal system, but also by enhancing the supranational status of the new European legal order and constitutionality of the Communities.

1.6.7 **The First Radical Change: The Single European Act**

The SEA was the first significant amendment of the primary treaties. It is an important watershed in the historical development of the Union and is not to be underestimated in its importance, although it was at the time, not only by external observers and commentators, but also the heads of state and government who signed up to it. It is sometimes difficult to grasp its importance because it is the first of a series of package-deal changes to the treaties that not only add new areas of competence, but also simultaneously make various institutional changes and policy amendments.

The situation in the middle of the 1980s was that both the stagnation of the Communities and the lack of international competitiveness of Europe in relation to US and Japanese industrial and commercial progress had been clearly recognized. These concerns were taken up by Commission President Jacques Delors, who brought a package of reforms to the member states based on the Dooge Committee report, together with a new report prepared by the British Vice-President of the Commission, Lord Cockfield, dealing with the measures considered necessary for the completion of the single market. Whilst there remained opposition to any significant institutional changes recommended, especially by the UK, the single market completion was the carrot that brought the Eurosceptic governments on board, particularly the UK and Germany, as the proposals were hailed as a shining example of trade liberalization. Whilst the other member states were undoubtedly also interested in the trade and economic aspects of the reforms proposed, the smaller states in particular had a greater desire to see the institutional reforms recommended. All of these matters were put on the agenda for the 1985 IGC, itself initially opposed by

European integration towards a European Union. There was also the prescient European Parliament publication *Draft Treaty of the European Parliament Establishing the European Union* of 1984 and, finally, the Dooge Committee set up by the Fontainebleau Summit of 1984.

the UK. The single-market reforms were linked to the institutional changes and it is fair to say that the far-reaching political consequences of these were seriously downplayed by the EC Commission. It was also true that the far more radical changes proposed by the European Parliament a year or so earlier in its draft Constitution had caused a lot more consternation in and opposition by the member states. The European Parliament proposals were not ones that could be accepted by the Council at the time, hence the SEA proposals, which put the primary focus on market liberalization and were far more modest and much more acceptable to the member states. Even the title underplays the significance of the matter. An 'Act' suggests something less than a new treaty. It suggests secondary status rather than primary treaty material. So, in 1985, the draft SEA was put to and debated at the IGC. It was agreed by the ten member states in December 1985 and came into force in the EEC in May 1987, after signature and ratification by all 12 states (Portugal and Spain having joined the Communities in January 1986).

The SEA amended the EEC Treaty in several important respects and whilst the changes were not massive in themselves, they proved to be a catalyst to further European integration. Apart from the proposals to complete the internal market, perhaps most important was the change to the legislative process affecting ten treaty Articles and generally the extension of the Community's competence and concern in new policy areas. The SEA also introduced provisions that made it possible to make changes to the judicial structure in the future by supplementing the Court of Justice with an extension that was regarded as being vital to cope with the significant increases in the number of cases reaching the Court and the increased delay being caused as a result. The decision, in 1988, on the establishment of a Court of First Instance of the European Communities (CFI) was the result,[51] with the CFI being set up in October 1988.

Before considering in further detail the changes brought about by the SEA, it needs to be stressed here generally what was being done by the SEA. It was the first substantive amendment of the original treaties. Although this has happened on a number of occasions since then and thus has the appearance of being something that can easily be done, at the time it was, without doubt, a significant development. For most, if not all, of the states, especially the UK, signing up to and joining the Communities in the first place was a massive and historic commitment. Changing that original deal was not something to be taken lightly, and could even be regarded as being as important as the recent attempts to reform the EU by the abandoned Constitutional Treaty and its replacement, the 2007 Lisbon Treaty. The very substance of the original treaties was being altered and, in order to amend a treaty, another treaty is needed; so, despite its name, the SEA is a true amending treaty agreed by the member states. The preamble to the SEA states that it is 'a step towards European Union'.

1.6.7.1 The Internal Market and '1992'

In 1985, the Commission had identified 279 areas in which directives or other provisions were considered necessary to complete the internal market. The SEA set a new date of 31 December 1992 for the completion of the internal common market, which had been delayed previously by the member states. This programme proved to be a success not only in itself, because the member states did get on with enacting the needed legislation, but also because it gave a clear signal to European business that 'Europe meant business', a catchphrase that was employed at the time. By the end of October 1992, 282 directives had been proposed and drafted, and by the end of December 1992 all but 18 had been

[51] Decision 88/591 (OJ 1988 L319/1).

adopted by the Council. The system of QMV in the Council, for the completion of the internal market was highly instrumental in this success. Company mergers and investment increased dramatically and considerable economic progress was made in these years. It was the promise of economic gains to be made that had convinced the member states to accept the other proposals agreed in the SEA and, as it turned out, proved by and large to be true, although the exact amount of economic benefit to be gained might have been forecast on the high side.[52]

1.6.7.2 SEA Institutional and Policy Changes

The SEA also made formal the existence of the European Council of Heads of State and Government, which was originally established as European political cooperation (EPC). The SEA reintroduced and extended QMV in the Council; introduced the cooperation procedure in law-making, which provided the European Parliament with more than just a consultative role for the first time; paved the way for the CFI; and increased Commission powers—all of which are further considered in Chapter 2.

The SEA also added economic and social cooperation under which the European Regional Development Fund was established. This was designed to help to redress regional imbalances between various areas of the Communities by financing infrastructure developments. It also set up the Social Fund to finance employment initiatives and the European Investment Bank, which operates as a commercial bank lending money to finance projects in the promotion of which the Community has an interest.

Further new policy areas were added to the EEC Treaty, including research and technology (Arts 163–73), which set out the framework for the pursuit of research and development cooperation, and environmental protection, under Art 174(1), and introduced the objective of, and initial measures towards, monetary union.

1.6.7.3 Evaluation of the SEA

Whilst the SEA had its critics and was condemned by some parties,[53] its success lay not in what it actually changed, although there was considerable progress with the internal market; its true success lay in its longer-term influence in reinvigorating integration. It is certainly the case that it did not represent a radical shift to supranational or federal integration. In contrast to the original treaties, the member states were the ones constructing the agenda for it and not the federalist visionaries of the immediate post-war period. Also, in view of the preceding 15–20 years that had seen a complete stand-still on any such progress, it is not surprising that the changes introduced by the SEA can be regarded as modest and even disappointing. There is a saying that 'an inch is better than a mile, in the right direction'. To view the limited, mainly intergovernmental changes brought by the SEA as a backward step on the integration road misses the point somewhat. It represented forward movement at a time of massive political conservatism in Europe, and perhaps as important was the fact that, for the first time, the original primary treaties had been substantively amended. The original legal and constitutional base was shown not to be cast in stone and thus set for all time to come. It could be altered—and not just once, but as many times as deemed necessary. The SEA allowed that to happen and, after a 20-year

[52] *Completing the Internal Market*, White Paper from the Commission to the European Council (Milan, 28–9 June 1985), COM (85) 310, 14 June 1985 and the later Cecchini Report, which forecasted the cost of non-Europe to be €200 billion. See P. Cecchini et al, *The European Challenge 1992: The Benefits of a Single Market*, Wildwood House, Aldershot, 1998.

[53] I. Ward, *A Critical Introduction to European Law*, 3rd edn, Cambridge University Press, Cambridge, 2009, p 8.

delay, it did introduce real majority voting in the Council of Ministers with clear and obvious benefits, albeit within limited fields. It allowed the member states to get comfortable with QMV and thus prepared the ground for the future use of majority voting which was incrementally introduced into many other areas.

The success of the SEA and the benefit to the Communities was also observed, externally at that time, as other European states on the outside of the Communities were able to witness the increase in investment from beyond Europe into the EC and, indeed, away from their own countries. They wanted in and initially plans were made to accommodate them in association agreements with the European Communities and, in an extended form of these, the EEA, as noted in Section 1.6.2. It led much more quickly than originally envisaged to the further widening of the Communities, also noted earlier.

1.6.7.4 **Post-SEA**

It was realized very soon after the signing of the SEA that it was only part of the answer and further institutional changes were advocated, largely by the Commission. As a result, even before the deadline of 1992 had passed, plans were being put forward by Commission President Delors for further treaty reform, especially on economic and monetary union and social policy. A further IGC was planned and set up to debate the adoption of common monetary and fiscal policies. The UK opposed both this further proposal for integration and that the IGC should debate it at all.

However, external political events were moving rapidly in the world. UK Prime Minister Thatcher was deposed by her own party as Conservative leader, and, thus, as UK prime minister. Along with the 'Iron Lady',[54] the 'Iron Curtain' was also being dismantled, changing the political situation in Europe radically and leading very quickly to German reunification. The IGC planned for 1991, to discuss and provide for greater economic integration, was supplemented by a parallel second IGC as it was considered necessary that political decision-making should also be integrated in order to lock in any decisions reached on monetary union. Otherwise, it was feared that any gains or decisions reached for monetary and economic union would be lost if the political decisions supporting them could still be taken independently by each member state. This, in turn, would lead to a drifting apart of the economic conditions in the member states. This is a clear example of functionalist integration in action, in which integration in one area demands or inevitably leads to integration in another area in order to prevent the first area from unravelling.

The parallel IGCs commenced work in December 1990 but, like the later EEA negotiations, they were also subject to delays as a result of the considerable political, social, and economic change taking place across Europe at that time.

1.6.8 **The Maastricht Treaty on European Union**

The single treaty that was drafted following the two IGCs and eventually accepted by the member states, however, considerably complicated the constitutional base of the Communities and Union because it not only amended the existing treaties, but it also added another treaty to remain in force alongside the existing treaties. It also proved to be a huge compromise, with opt-outs in a number of matters for some of the member states. It is also criticized for its complex three-pillar construction established to govern the

[54] One of the nicknames given to Margaret Thatcher, allegedly by the Soviet *Red Star* and *TASS* party newspapers.

Communities and the various policies of the Union, involving a mix of intergovernmental and supranational elements.[55]

The main changes introduced by the treaty were the timetable and convergence criteria to move to a single economy and monetary union, complete with a single currency.[56] It provided more political cooperation, especially in the areas of foreign policy, security, home affairs, and justice (Arts 11–45 old TEU). The EEC Treaty name was changed to 'European Community (EC)' to represent the changes that had taken place and the huge expansion in the range of topics and policies covered by the treaty. A new overall term, the 'European Union', was introduced under Art 1 TEU, and described the extension by the member states into additional policies and areas of cooperation. The Union, as constituted by the TEU, comprised three pillars: the then existing Communities (the three original treaties), a CFSP, and cooperation in the fields of Justice and Home Affairs (JHA). The TEU also started a trend that was continued at Amsterdam in the attachment to the treaties of numerous protocols and declarations that help, in many cases, to define further some provisions of the treaties themselves and to outline the reservations of some member states. Justifiably, these have been criticized for making Community and EU law too opaque and too splintered.

Apart from the complexity of the new constitutional base, a large part of the problem facing European governments when trying to sell this treaty at home was that the European public had not been taken on board during the period of negotiation. Whilst there was some lip service paid to the idea of European citizenship and what this meant for the personal right of free movement of Union citizens, which was really only given teeth later by the Court of Justice, the European public had largely been left out of the reform process. There were further minor improvements for the European Parliament in the law-making process, but the TEU also represented a backward step as far as progress towards deeper integration was concerned. The other two pillars, as first established, were intergovernmental in nature, with decisions having to be taken unanimously by the member states. Very little had been done to increase the democratic credentials of the Communities: in fact, the powers of the Council were left largely untouched, even strengthened, in respect of the two new pillars, whereas the European Parliament had virtually no say.

The treaty did contain an expression of commitment to the rule of law and democracy but failed to provide for any significant democratic accountability of the EU and the rule of law itself. There was also an attempt to define the relationship between the Union and the member states by the introduction of the term 'subsidiarity' that was written in the new treaty (Art B) and which was further defined in Art 5 EC (now 5 TEU). It was supposed to delineate the respective powers of the Union and the member states, but instead has merely confused them and, as such, is regarded as somewhat reflective of the ambivalence of the member states at the time.[57]

The TEU was also supposed to redress concerns about the democratic deficit in the Communities by increasing the power of the European Parliament through the

[55] In particular, see D. Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces' (1993) 30 CML Rev 17. This form of amendment was seen again later by the way in which the 2007 Lisbon Treaty also amended the existing treaties. See also the Online Resource Centre at **www.oxfordtextbooks.co.uk/orc/foster5e/**.

[56] The eurozone, **http://www.eurozone.europa.eu/**, of which there are 19 members. Despite the severe eurozone economic difficulties in 2012–13, Latvia became the eighteenth member on 1 January 2014 and Lithuania became the nineteenth member on 1 January 2015 (**http://www.consilium.europa.eu/en/policies/joining-euro-area/latest-country-to-join-euro-area/**).

[57] Subsidiarity is discussed in further detail in Chapter 3. See also I. Ward, *A Critical Introduction to European Law*, 3rd edn, Cambridge University Press, Cambridge, 2009, p 47.

introduction of the co-decision procedure to a limited number of treaty Articles. This had the effect of increasing, once again, the range and complexity of law-making procedures in the Community, which are considered in detail in Chapter 4.

The TEU also brought into the Union structure the Schengen Agreement of 1985 on free movement and security measures, relating to such free movement in the area of the member states which had signed up to it, but not including the UK, Ireland, and Denmark.

The TEU was agreed by the member states in February 1992 and was due to come into force on 1 January 1993; however, the process was thrown into confusion by its rejection by a slim Danish majority in a referendum. As a result, further compromises had to be found in order to appease the Danish electorate. The Edinburgh Summit in December 1992 agreed to allow Denmark various protocols and declarations to opt out of participation in Stage III of EMU, the single currency, and the defence arrangements of Maastricht, whilst not actually changing the treaty itself. It came into force in November 1993, but this treaty creation was clearly an unhappy experience that the European leaders promised was going to be handled better next time. However, there was little time in which to learn the lessons from Maastricht, because the next time was just around the corner. Already in 1992, with the visible political changes in Europe, further expansion had been contemplated, so the Copenhagen Summit laid down criteria that would have to be met by aspiring member states (noted earlier in Section 1.6.4.1).

Whilst politically the TEU was also supposed to be an attempt to tidy up the constitutional base of the Communities, the end result was far from this goal. All in all, the revised constitutional base was far too fragmented, with the establishment of a three-pillared Union and the numerous protocols and declarations allowing various member state opt-outs and positions. Furthermore, the Union that was established was only an 'ever closer one'. It was not the federal union originally mooted and which suggested far greater integration than the reality that was agreed by the member states; hence, the end-product was more intergovernmental cooperation.

The TEU and the aftermath also led to new jargon in the Community political and legal order, which was the result of the new complex shape of the Union and the difficulties in getting the treaty ratified in all member states, and reflected the frustrations of some member states not being happy about the more reluctant states. Hence, the terms 'European architecture' to describe the new three-pillar structure and 'variable geometry' to describe the way in which a central core of states might integrate deeper. This is also described by the term 'multi-speed Europe'.

1.6.9 **The Amsterdam Intergovernmental Conference and Treaty**

As a part of the agreement for the TEU and specified in the treaty itself in Art 48, a timetable was pre-planned for the further revision of the treaties by providing that another IGC be constituted in 1996 with a view to signing another amending treaty in Amsterdam in 1997. The objectives were to reform the institutional structure for enlargement, to consider the role of the individual in relation to the Union, to revise social policy, and to review the intergovernmental pillars. However, due to the delays in ratifying the TEU, the agenda was increasingly hijacked by new items. The political landscape of the Union had changed greatly in a very short time. One of the few things on which enough member states were agreed was the opening up of entry negotiations with the new democracies of Eastern Europe. Hence, the focus of attention soon shifted to further institutional reform for the next, much larger expansion of the Union. The focus thus became narrowly concentrated on the size of the Commission, the European Parliament, QMV, and the rotation of the presidency of the Council of Ministers. The negotiations were highly problematic; the UK

government was even seeking to reopen previous treaties, curb the powers of the Court of Justice, and reverse some decisions not favoured by the UK. Hence, in this climate, the IGC dragged on into early 1997. This might have been deliberate, because the UK general election had been set for 1 May 1997 and the Labour Party looked to be in a strong position to win. Labour did win and there was a new UK government, which quickly removed some of the objections that the Conservative Party had raised in the negotiations, and offered a promise to opt in to the social policy. As a result, final negotiations were soon wrapped up and the treaty was concluded in Amsterdam in June 1997. It was signed by all member states at a late-night summit in October 1997 and, following a slow but less troublesome ratification by all member states, entered into force on 1 May 1999.

1.6.9.1 The Treaty of Amsterdam

The Treaty of Amsterdam did introduce some changes, some of which have further complicated the structure of the Union and the treaties. A clear failure was the lack of significant institutional reform, which had become the main focus for the IGC and supposedly indispensable for future expansion.

What could be agreed, following the landslide Labour victory in the UK, was that the Agreement on Social Policy, previously lying outside the treaty structure, was accepted by all 15 member states and therefore a Chapter on Social Policy could be incorporated into the EC Treaty. A new section on employment was introduced which provided, as one of the first examples of a more open method of coordination (see Chapter 4, Section 4.7), that the member states can develop cooperative ventures to combat unemployment. It was agreed that the EU would incorporate the Schengen Agreement on the elimination of all border controls for 12 states into a new Title IV in the EC Treaty, but not for the UK, Ireland, or Denmark, which secured opt-outs in this area. The Court of Justice and the European Parliament were also given a greater role in the JHA pillar, now renamed the 'Provision on Police and Judicial Cooperation in Criminal Matters' (PJCC).

The institutional reforms were far more modest. The proposals to extend QMV in Council were severely restricted, notably by Germany, amongst others. However, the variety of legislative procedures, which were getting out of hand, was slightly reduced and the European Parliament's powers were modestly increased by the moderately extended use of the co-decision procedure. The number of Commissioners was capped at 20, although subsequent IGCs and enlargement reopened this issue along with other institutional matters, considered in detail later and in Chapter 2.

The various changes were consolidated within both the EC and EU Treaties and, unhelpfully, these were renumbered as a result—something that has done little to promote the clarity of Union law. The treaties were renumbered again following the entry into force of the Lisbon Treaty. Regrettably, the Treaty of Amsterdam added even more protocols, thus making even more obscure an overall picture of EC and EU law. The Treaty of Amsterdam, according to some, did very little; others regard it as a needed consolidation of European political union, although the tangible benefits and progress are hard to discern. Additionally, the Treaty of Amsterdam seemed to throw a spanner in the works of further integration by the replacement of further supranational integration with the possibility of allowing some member states to cooperate further, without all member states having to do so. It introduced Art 11 into the EC Treaty, and into the TEU a section (Arts 43 et seq, now Art 20 TEU) on 'closer cooperation' that allows any number of member states that so wish to integrate in other areas. This seemed to make the fragmentation of the Communities even more possible and to allow for the possibility that the body of Community law known as the *acquis communautaire*, which applies in all member states

in the same way, could be undermined as different combinations of member states go their own way with particular policies. Thus far, this has not been taken advantage of, but it has been further defined and regulated, albeit rather untidily, by the Lisbon Treaty (Art 20 TEU and Arts 326–34 TFEU), but with no minimum number of states required.

The Treaty of Amsterdam, as finally agreed, proved to be far from the solution needed for preparing for enlargement, consolidating the political union and establishing a firm basis for European governance. It did too little to restore public faith and confidence in the Union. As a result of the fact that Amsterdam failed to resolve the institutional reforms considered essential for the next big enlargement of the EU, there was so much left over that had to be addressed before enlargement could take place that yet another IGC was deemed necessary and was called to deal with the leftovers.

1.6.10 **The Nice Intergovernmental Conference and Treaty**

The IGC was convened in February 2000 with the more tightly drawn objectives of institutional change ahead of enlargement. The summit in December 2000 proved to be the most difficult and drawn-out thus far. It was finally agreed at 5.00 am on 11 December 2000, prompting some of the heads of state to declare at the end that such an IGC and Council should not be allowed to happen again'.[58] The member states wrangled mainly over the extension of QMV and voting weights in Council, and the conclusions reached were neither conclusive nor satisfactory, despite the various statements of success following the summit. The size of the Commission was also a contentious issue. QMV was extended to 27 more treaty Articles, but not in as many areas as proposed by the Commission because of the various red lines drawn by countries which, cumulatively, significantly reduced the extension.

The discussions were also drawn-out because of the arguments over the combinations of country votes to get a qualified majority or a blocking minority, and even qualifications on a majority were devised, combining a minimum number of states and/or a percentage (62 per cent) of population of the EU required. In particular, the big three member states, France, Germany, and the UK, were fighting to keep their level of influence against the wishes of many of the smaller states, and whilst agreement was reached at Nice on the voting formula, it was very much an imperfect one as was soon shown to be the case. The co-decision procedure was extended again for the European Parliament and the ultimate maximum size of the Commission was also postponed again.

The Treaty of Nice was signed by the member states in February 2001, but did not enter into force until 1 February 2003, because of its rejection by a single member state once again. This time, the Irish electorate decided to show its Eurosceptic credentials and, in June 2001, voted against ratification of the Treaty of Nice, on a 35 per cent turn-out of the electorate. When the government was returned to power with an increased majority, a second referendum was organized which resulted in a far more positive endorsement of the treaty by the Irish electorate (about 63 per cent in favour). At the same time, the Irish introduced a second question that asked for approval for future moves on integration to be put to a referendum only if the Irish Parliament considers that the changes are so great as to necessitate an amendment to the Constitution. Ireland did, however, in 2008, put the Lisbon Treaty to a referendum and rejected it, as considered further in Section 1.6.12.

[58] See the comments in particular by Tony Blair and French President Jacques Chirac: **http://news.bbc.co.uk/1/hi/not_in_website/syndication/monitoring/media_reports/1065523.stm**.

The Nice Treaty did not bring about any further radical change to the Union, but further defined certain policies previously adopted and made other adjustments in preparation for the 'big bang' expansion of the Union with ten additional members.

One policy that was tightened was the 'closer cooperation' provision introduced by the Treaty of Amsterdam, so that there was a minimum requirement of eight states for those which wished to pursue this cooperation and, more importantly, they were required to adhere to the *acquis communautaire*. Note, though, that the requirement for a minimum of eight states has not been retained by the Lisbon Treaty.

It was agreed that a Charter of Fundamental Human Rights should be included within the Union, although the member states did not, or could not, agree that it should formally be a part of the treaty or of the Union, so it was not therefore legally binding within the legal order. The Union was still committed to the respect for and observation of human rights and fundamental freedoms (Art 6 TEU) and, in any case, the Court of Justice had already built up a considerable body of case law upholding fundamental rights in the Community legal order. The Nice Treaty also introduced a provision designed to do something about the situation in which there was a clear risk of a serious breach by a member state of one of the respected principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law contained in Art 6 TEU. This change was provoked as a result of the lack of anything originally contained within the treaties to deal with such a situation when this very prospect looked threatening. At the start of 2000, an Austrian government was formed containing the right-wing Freedom Party (FPÖ) led by Jörg Haider, who has been known over the years for making inflammatory racist statements. Whether there was a real threat or not, the inclusion of this party in the government of one of the member states of the EU was not appreciated by the other member states, which took political sanctions against Austria and sent an expert there to assess the situation. None of the moves were authorized, though, by any provision in the treaties. Now, Art 7 TEU provides that a risk of breach can be determined and recommendations to deal with the situation can be agreed by a majority decision, including suspension of voting rights of the member state concerned.

The Nice Council Summit provided, finally, a 'Declaration on the Future of the Union' that was to address a number of issues for the next IGC, which was planned for 2003. These were to include a better definition and understanding of 'subsidiarity', to determine the status of the Charter, and to simplify the treaties (a final admission of the complexity of the treaties as they have accumulated, and indeed even been added to, by the agreements at Nice). Other issues to be addressed were the use of so many protocols and declarations, and how national parliaments feed their legitimacy into the Union. It also provided that a Convention on the Future of Europe be established to draft a 'Constitutional' Treaty for the EU.

To that end, the Laeken Summit was held in December 2001 to set up formally and prepare the agenda for the Convention. It laid out in a declaration the goals for making the EU more democratic, transparent, and efficient. In particular, attention would be paid to the governance of the Union, institutional preparations for the forthcoming expansion, the division of competences, and democratic participation in decision-making processes of the Union.[59]

[59] See the presidency conclusions of the Laeken Summit at **http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/68827.pdf**; and on the division of competences, see Chapter 3, Section 3.5.

1.6.11 **The Constitutional Treaty for Europe**

Whilst, strictly considered this whole topic should be regarded as historical interest only, an appreciation of this tortured period in the EU's history and development is helpful to understand the position in which the EU finds itself now.

A Constitutional Convention was set up in March 2002, headed by a praesidium of 12 members and led by Valerie Giscard d'Estaing, the former French president. It consisted of representatives of the heads of state and government of the 15 member states and the 13 candidate countries, 30 representatives of the national parliaments and 26 from the candidate countries, 16 Members of the European Parliament (MEPs), and two members from the Commission. It was intended to involve the peoples of Europe, and be a new and different way of preparing change in comparison with the usual government-only IGCs. It was charged with looking at how the EU related to its citizens (and vice versa), how competences should be divided between the Union and the constituent states, and, within the Union, how competences were shared between the institutions. It was also to look at the question of democratic legitimacy. The Convention presented a Constitutional Treaty to the European Council in Greece on 18 July 2003, and the draft Constitutional Treaty was presented to the Heads of State and Government Summit in December 2003.

Whilst the vast majority of changes were accepted by all member states, they could not agree on voting figures in Council, and the summit broke down on this point. The failure, at the time, was the most public and notable failure in the history of the Union. The recriminations started immediately afterwards and the finger of blame pointed most notably at the large states of Poland, Germany, France, Spain, Italy, and the UK. Ironically, agreement had been reached on every other issue but, by not reaching agreement on this last matter and instead walking away and abandoning the attempt to agree, everything in the draft Constitutional Treaty was potentially up for renegotiation and further disagreement in the future. What was agreed included: transferring power to the EU on 15 new policy domains; transferring 40 Article bases from unanimity to QMV; making the Charter of Fundamental Rights legally binding; giving the EU the status of a legal person to negotiate international agreements for all member countries; creating a common EU foreign minister to lead a joint foreign ministry with ambassadors, a fixed presidency of the Council, and qualified majority voting for the election of all high-position officials; commencing the project of a common EU defence; and entitling the new treaty 'Constitution', with the express statement that it should have primacy over the national constitutions. In all, it would have been no mean feat, but in December 2003, it was a failure.

After the failed Rome Summit, ten new member states joined on 1 May 2004, on the basis of the Nice Treaty. This event, and the low turn-out in the European Parliament elections in early June 2004, seemed to refocus the attention of the member states on reaching agreement on the Constitution, which was finally signed in October 2004 by the member states in Rome and handed over to each of the member states to ratify by parliamentary approval or referendum, or both, according to the constitutional or legal requirements of each state.

After 14 member states had ratified, the process of ratification was interrupted by the rejection of the treaty by the electorates of France and Holland in June 2005. It was agreed that there should be a period of reflection, but that the ratification process should continue. In the meantime, therefore, the Treaty of Nice and any protocols and declarations on transitional measures remained in force.

1.6.12 **The 2007 Lisbon Treaty**

Following the two-year period of reflection about the Constitutional Treaty, the member states returned to considering the next move in Brussels in June 2007. The Constitutional Treaty was officially abandoned and an agreement was reached for a new amending treaty, called then the 'Reform Treaty', but now most commonly referred to as the 'Lisbon Treaty', which did not replace the existing treaties, but instead amended them. A new IGC was convened in July 2007 to hammer out the details. Many of the features agreed for the Constitutional Treaty were incorporated into the Lisbon Treaty, which was agreed in December 2007. Unfortunately, however, the amendment of the then existing treaties was considerable.

The main changes can be summarized as follows.

- The TEU was turned more into an overview treaty and the EC Treaty was renamed the 'Treaty on the Functioning of the European Union (TFEU)' dealing with substantive issues; both, however, still concern the institutions. The Union obtained legal personality and the term 'Community' was replaced throughout by 'Union'.
- The proposed Union Minister for Foreign Affairs is called instead the 'High Representative of the Union for Foreign Affairs and Security Policy'.
- The European Council was made an official institution with a president appointed for a term of office of two and a half years to replace the six-month rotating presidency. The rotation of the Council presidency remains six-monthly. Both were envisaged by the Constitutional Treaty.
- The Lisbon Treaty retained the simplified procedure by which the treaty can be revised in new Art 48 TEU.
- The Charter on Fundamental Rights became legally binding, but with an opt-out for the UK and Poland on the application of the Charter in purely domestic situations, and by a later political deal also for the Czech Republic.[60]

Hence, far from consolidating the treaty, protocols, and declarations, the European leaders have made the constitutional architecture of the Union even more complicated and fragmented. The treaty was signed in Lisbon on 13 December 2007 by all 27 member states and was planned to enter into force on 1 January 2009, provided that all member states ratified it. However, that ratification process was thrown into confusion by the rejection by the Irish electorate.

At the Brussels Summit in December 2008, in exchange for agreement by Ireland to hold a second referendum, EU leaders agreed to provide legal guarantees relating to Ireland's taxation policies, its military neutrality, and ethical issues. More controversially, they also agreed that each state should maintain one Commissioner each, keeping the present total at 27, with the hope that the Irish electorate would subsequently agree to ratify the treaty. These agreements were formalized in an agreement at the June 2009 European Council Summit.[61] Following the positive vote in favour of the Lisbon Treaty at the beginning of October 2009, Ireland and Poland ratified the treaty, followed by the Czech Republic, after securing an exemption from the Charter of Fundamental Rights, noted earlier, and after hearing from the Czech Constitutional Court that the treaty did not conflict with the Czech Constitution. The treaty then, after such a long delay, quickly

[60] Now contained in Declaration 53 attached to the treaties, although it has to be stated it was never intended to apply in purely domestic situations, only those concerned with EU matters.

[61] **http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/108622.pdf**. Now officialized in the 2013 Irish protocol attached to the treaties, OJ 2013 L60/131.

entered into force on 1 December 2009 and the many changes that it brought in are noted in this text in the following chapters.

1.7 Future Developments and Conclusions

The two most immediate concerns are ones that continue the themes already identified earlier—that is, the further widening and deepening of the Union. The further widening of the Union has already been considered in detail, but does represent a serious challenge for the cohesion of the Union—particularly in respect to the attitudes already voiced about possible Turkish membership. The process of further deepening is also continuing following the entry into force of the Lisbon Treaty. Does this mean that we are any nearer a true federal union? Of course, as noted earlier, there is not a single and fixed view of what is a 'federal state'; rather, there are many, but the question is whether the EU displays enough of the characteristics of a state that is federally organized to be considered one. And if not now, then just how much more is necessary and to what extent, if any, was the Lisbon Treaty a step in this direction?

At present, the EU enjoys the transfer of considerable powers from the member states, its own institutions and law-making powers, an internal market, a division of powers and competences, the supremacy of EU law, its own binding catalogue of fundamental rights, its own parliament, and also some of the more symbolic external trappings of statehood, such as a currency, a flag, an anthem, and a national day (although these have been removed from the treaties under the Lisbon Treaty).[62] It has a citizenship,[63] but no *demos*; that is, no coherent European population that identifies itself with an embryonic European state.

It has been shown that the path to European unity is not straight and wide, and is far from certain. It is not planned in advance and any plans that are put in place can easily be hijacked by rapidly evolving European and world political events, such as oil price increases, world economic crises, currency collapses, the collapse of communism in Europe, the terrorist attacks of 11 September 2001, and more recently the world-wide banking crisis leading to the continuing euro difficulties. The widening and deepening of the EU, whilst considered under separate headings, are inextricably linked matters. The Union has been deepened in order to cope with forthcoming planned widenings (for example, the first expansion) and deepenings have prompted subsequent widenings (as with the SEA prompting the EFTA expansion). Expansion reveals difficulties that have to be addressed at the next opportunity, which has to be an IGC set up to discuss measures either to deepen the Union or to widen it. Whilst the 25 member states were able to agree on the Constitutional Treaty, they were not able to ratify it and, following the rejection by the Irish of the Lisbon Treaty, that too was in doubt for a while. The Union of 28, and possibly more in the future, will play an increasingly important role in world affairs, not only economically, but also politically, and if for no other reason than because of its economic size. It needs to adapt to do this and, internally also, it still needs to address the issues of governance and democracy—not dealt with properly to date.

However, European integration was regarded from the beginning as a process and not an end in itself. The Constitutional Treaty and its replacement, the Lisbon Treaty, have

[62] Note, though, that 16 member states agreed Declaration 52 attached to the treaties that the flag, anthem, motto, euro, and Europe Day would continue as symbols to express the community of the people in the EU and their allegiance to it.

[63] To be explored in Chapter 9.

been regarded as both an example of further deeper integration, because they represent a far more comprehensive ordering of the Union and member states, and also as a brake on further unwelcome integration, because of their clearer delineation of competences. The Lisbon Treaty makes matters clearer and sets discernible boundaries on the exercise of Union power. It remains an unfolding story and the end is not yet written, but quite what the end is will no doubt also continue to be the subject of considerable debate.[64]

Further Reading

Books

Bache, I. et al *Politics in the European Union*, 4th edn, Oxford University Press, Oxford, 2014.

Blair, A. *The European Union since 1945*, Pearson Longman, Harlow, 2005.

Cini, M. and Borragan, N. *European Union Politics*, 3rd edn, Oxford University Press, Oxford, 2009.

Craig, P. *The Lisbon Treaty: Law, Politics and Treaty Reform*, Oxford University Press, Oxford, 2010.

Devuyst, Y. *The European Union Transformed: Community Method and Institutional Evolution from the Schuman Plan to the Constitution for Europe*, rev'd and updated edn, Peter Lang, Brussels, 2006.

Duchene, F. *Jean Monnet: The First Statesman of Interdependence*, W. W. Norton & Co., New York, 1996.

Eeckhout, P. *EU External Relations Law*, 2nd edn, Oxford University Press, Oxford, 2011.

Hillion, C. (ed) *EU Enlargement: A Legal Approach*, Hart Publishing, Oxford, 2004.

Nicholls, A. 'Britain and the EC: The Historical Background' in S. Bulmer et al (eds) *The UK and EC Membership*, Pinter Press, London, 1992.

Prechal, S. *Reconciling the Deepening and Widening of the European Union*, Cambridge University Press, Cambridge, 2008.

Rosas, A. and Armati, L. *EU Constitutional Law: An Introduction*, Hart Publishing, Oxford, 2010.

Schütze, R. *European Constitutional Law*, Cambridge University Press, Cambridge, 2012.

Szyszczak, E. and Cygan, A. *Understanding EU Law*, 2nd edn, Sweet & Maxwell, London, 2008.

Tatham, A. *Enlargement of the European Union*, Kluwer Law International, London, 2009.

Wall, S. *A Stranger in Europe: Britain and the EU from Thatcher to Blair*, Oxford University Press, Oxford, 2008.

Ward, I. *A Critical Introduction to European Law*, 3rd edn, Cambridge University Press, Cambridge, 2009 (in particular chs 1, 2, and 7).

Articles

Barrett, G. '"The King is Dead, Long Live the King": The Recasting by the Treaty of Lisbon of the Provisions of the Constitutional Treaty Concerning National Parliaments' (2008) 33 EL Rev 66.

[64] A final footnote needs to be added here that in view of the new 2015 UK Conservative Government's promise to re-negotiate membership and hold a referendum on membership by 2017, this will inevitably cause a long period of further uncertainty about the EU and its future.

Dreissen, B. 'Delegated Legislation after the Treaty of Lisbon: An Analysis of Article 290 TFEU' (2010) 35 EL Rev 837.

Dougan, M. 'The Treaty of Lisbon 2007: Winning Minds, Not Hearts' (2008) 45 CML Rev 17.

Majone, G. 'Unity in Diversity: European Integration and the Enlargement Process' (2008) 33 EL Rev 457.

Martinico, G. 'Dating Cinderella: On Subsidiarity as a Political Safeguard of Federalism in the European Union' (2011) 17 EPL 649.

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

Web-based Materials

http://europa.eu/index_en.htm
The European Union website

http://europa.eu/pol/enlarg/index_en.htm
On enlargement of the EU

http://eiop.or.at/eiop/
The European Integration Online Papers website

http://www.fedtrust.co.uk
The Federal Trust for education and research

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