# Introduction

Do not cite or quote any part of this draft without prior permission. Any comments should be forwarded to the chief reporters for the project - Professors George Bermann, bermann@law.columbia.edu, Charles Koch, chkoch@wm.edu, and Jim O'Reilly, joreilly@fuse.net.

Introduction

# FOUNDATIONS OF EUROPEAN GOVERNMENT AND LAW

Charles Koch, Jr.

## I. Perspective and History

### 1. Basic documents

The basic or constitutional documents of the EU have been created by the various treaties signed by European nations admitted into the Union ("Member States"). These treaties have been consolidated into one unified document.[1] The treaty citations below are to that document.

The European Council meeting in Laeken Belgium announced in December 2001 the intention to convene a "European Convention on the Future of Europe." The result of that convention has been a constitutional "treaty," which is generally referred to as the European Constitution.[2] Although a number of Member States have approved the Constitution, its referendum defeats in France and the Netherlands have suspended adoption efforts. Probably the best prediction is that a Constitution will one day be ratified but it may not be soon and may not be precisely this one. If it is this version, it will not much change the legal apparatus described below.

Quick access to the treaties, legislation, case law, and other documents may be found at http://europa.eu.int/eur-lex/en/.

### 2. Evolution of the EU

[1] http://europa.eu.int/abc/treaties_en.htm .

[2] http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/misc/81243.pdf .

Originally, there were three communities. The first was the European Coal and Steel Community (ECSC) established in 1951, creating the structure upon which the current EU is built. Treaties signed in Rome created the European Economic Community (EEC) and the European Atomic Energy Community (Euratom) in 1957. These communities had six original members: Germany, Belgium, France, Italy, Luxembourg and the Netherlands. The communities were officially merged in 1965 through what is commonly known as the Merger Treaty. The Treaty of European Union (TEU, commonly called the "Maastricht Treaty") created the "European Union" in 1992.

Over the years the EU has enlarged through the "accession" of new European states. Ten new states were added in 2004 to bring the current member list to 25: Germany, Belgium, France, Italy, Luxembourg, the Netherlands, United Kingdom, Ireland, Denmark, Greece, Spain, Portugal, Austria, Finland, Sweden, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic, and Slovenia. This recent enlargement added some 75 million new EU citizens raising the population to 450 million. The EU considers as "candidate countries:" Bulgaria, Romania and Turkey but others may join their ranks. In addition, the EU has instituted a "neighbors" program to improve relations with several countries, not necessarily neighbors or European, through liberalization of trade. These countries are also members of the **Council of Europe** (discussed below), compising 46 countries whose ministers come together to promote democracy and human rights in Europe and around the world.

The TEU established a "three pillar" structure, which pushes the EU beyond commercial confederation and toward a true supranational government. The existing, trade oriented community forms the first pillar. The second pillar authorizes the establishment of "common positions" on foreign affairs and security policy. The third pillar covers criminal justice and home affairs. The powers of the EU institutions vary according to which pillar an action falls under. The discussion below focuses on actions under the first pillar, the basic European Community. Indeed, at present "EU law" is something of a misnomer and the law discussed is actually the law of the Community.

### 3. Institutions

The EU has four key institutions: the Council of the European Union (Council), European Commission (Commission), European Parliament (Parliament), and the European Court of Justice (ECJ). However, there are several related or lesser institutions, some of which are relevant to this study. Chapter 4 of this book, transparency, describes the openness requirements increasingly imposed on these institutions and chapter 5, oversight, elaborates on the operational role of these institutions in the administration of EU law.

In a sense, the EU has no individual who can be identified as the **head of state**. The Council presidency rotates among the states, each holding that office for 6 months according to a schedule. Therefore, the Commission's president tends to be the **individual** identified with the EU. (The new Constitution, if ratified, would establish a president of a separate institution, the European Council (discussed below).)

The "Council of the European Union," **Council**, exercises the final legislative authority and hence to some extent is the top of the EU hierarchy. It usually meets in Brussels (in April, June and October it meets in Luxembourg). Each state (currently 25) is represented on the Council by a minister, often their foreign minister, who is authorized to commit their government. While each state is represented, the vote is weighed in rough approximation of the states population (voting described under "legislation" below). Most of the votes are by "qualified majority," a carefully worked out assignment of votes to avoid control by certain blocks, for example the small members or the large members.

The Council has its own General Secretariat staffed by permanent officials. It is similar to, but much smaller than, the Commission staff, discussed below. It is divided into Directorates General and head by a Secretary General.

The Committee of Permanent Representatives, known by its French acronym "**COREPER**," is made up senior national officials and to some extent represents the national governments. Article 207 provides "A committee consisting of the Permanent Representatives of the Member States shall be responsible for preparing the work of the Council and for carrying out the tasks assigned to it by the Council." COREPER plays an important part in legislation in part because it will consider and digest draft legislative proposals from the Commission and in part because it helps to set the Council's agenda. It is supported by a large number of working groups, at present between 150 to 250, made up of experts. It also receives views from other committees.

The **European Council**, technically distinct from the Council of the European Union, is made up of the ministers of the Member States. TEU Article 4 provides: "The European Council shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof." This Council meets in nine different configurations depending on the subjects being examined so that the justice ministers will meet in one configuration; the foreign affairs ministers will meet in another and so on. All the work of this Council is prepared or co-ordinated by COREPER.

The **Commission** is the hub of the EU, having significant legislative powers along with most of the administrative responsibilities. The term is used in two senses: the "College of Commissioners", made up of members appointed by the Member States and

approved by Parliament, and the bureaucracy which supports the legislative and executive functions. As discussed below, the Commission must initiate all legislation and plays an important role throughout the legislative processes. Most of its offices are in Brussels, making that city the de facto capital of the EU. Each Member State has at least one commissioner, with the larger ones having more (for now). Any further enlargement may mean that states will lose their automatic right to a commissioner. Considering that it constitutes the EU main bureaucracy, it is surprising small, staffed by some 25, 000 permanent employees, many of whom are translators and interpreters. This lean bureaucracy is possible because much of the administrative work devolves to the Member States.

Appointments are made by the Council. Upon the expiration of a Commission, a new president is selected and asked to "form a government," to fill out the "College of Commissioners." As would be expected, this selection process is extremely sensitive, requiring mollifying the Member States and yet also finding able commissioners. Member States often have particular interests and seek appointment of the commissioner engaged with that interest. Still, the Commissioners are duty bound to represent the interests of the EU and not their state. Finally, the entire Commission–President and other members–must be approved "as a body" by the Parliament. Parliament can remove a Commission as a body only and may not remove individual commissioners.

The Commission is divided into departments known as Directorates General. Each Directorate General is responsible for a specific policy area and is headed by a Director General who is responsible to the Commissioner assigned that policy area. There are also a number of specialized services, most prominent being "Legal Service," which gives legal advice to all Directorates General and represents the Commission in legal proceedings. Each Commissioner is assisted by a "cabinet," a group of officials personally appointed by and directly responsible to the Commissioner. The head of the cabinet (Chef de Cabinet) is a special advisor to the Commissioner. The heads meet regularly to co-ordinate activities and prepare for the Commission meetings. If the heads reach unanimous agreement on a question, their decision is normally adopted by the Commission without debate.

The Commission itself makes decisions by a simple majority. It often makes decisions through a written procedure, whereby draft decisions are circulated and adopted if there are no objections. Where it exercises powers delegated by the Council, it usually must submit draft measures to a special committee under a process called "comitology," discussed below and in chapter 5.

International trade agreements are negotiated by the Commission upon prior Council authorization and upon consultation with a special advisory committee appointed

by the Council, known as "the Article 133 Committee." Under Article 300, the Council concludes the agreements by qualified majority. That article excepts trade agreements from the general requirement that Council consult with Parliament before concluding an international agreement.

The **Parliament** is the only directly elected institution but has the least power of the three legislative institutions. It is mainly located in Brussels but holds some plenaries in Strasbourg. A consistent criticism of EU government is that it has a "democracy deficit." To address that problem, Parliament over the years has been given increasing power. The complex legislative process created to do so is described below. Even after these reforms, it still lacks the power to initiate legislation and in essence can do little more than obstruct the actions adopted by the Council.

Elections of the "Members of the European Parliament" (MEP) are governed by national election rules although an effort has been made to create uniform rules. The enlarged parliament has 786 MEP allocated according to national affiliation and the apportionment does not reflect the actual share of the European population. Article 191 expressly observes that "political parties at the European level are important as a factor for integration within the Union." MEPs, in fact, sit according to their parties and not according to their national affiliation.

The courts, including the highest court, the **European Court of Justice**, located in Luxembourg, will be discussed separately below. The **European Central Bank** (ECB), in Frankfurt, controls the EU's monetary policy. The **Court of Auditors** is the financial watchdog. Article 195 provides for a **ombudsman** appointed by Parliament.

**Intergovernmental conferences** have been held at crucial points to work out larger questions. They are generally held at the initiative of the Member States through the Council of Europe. They are held with a view to amending the Treaty. They play a major role in European integration and institutional change. These conferences may be convened, at the initiative of a member or the Commission, by the Council (upon consultation with Parliament).

The **Council of Europe**, meeting in Strasbourg, is not an institution of the EU but all the EU Member States are members of this Council. The Council of Europe is in essence a permanent summit arrangement in which the leaders of European states meet to work out issues of common interest. It should not be confused with the Council of the European Union or the European Council. This Council includes 46 countries (the US has "observer status"). It lists as it aims: "defend human rights, parliamentary democracy and the rule of law; develop continent-wide agreement to standardize member countries' social and legal practices; and promote awareness of a European identity based on shared

values and cutting across different cultures." Its component parts are: a committee of the 46 Foreign Ministers, an Assembly from the 46 national parliaments, "the Congress of Local and Regional Authorities" and a secretariat.

The **European Court of Human Rights** (ECtHR), also in Strasbourg, adjudicates cases enforcing the European Convention of Human Rights of 1950 (ECHR or Convention). The Court may fine states and force changes in domestic practices or procedures. If the state's response is unsatisfactory, the Committee of Ministers of the Council of Europe may bring pressure and ultimately may expel the state. The EU is also bound by its own "Charter of Fundamental Rights of the Union" distinct from the Convention. While historically there has been some tension, the ECJ and ECtHR can generally be seen as working in concert to further human rights in Europe.

## Additional Basic Reading

**Treaty:**
Consolidated treaty: http://europa.eu.int/abc/treaties_en.htm

Draft constitution: http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/misc/81243.pdf

**Research tools:**

EU in the US: http://www.eurunion.org/

EU data bases: http://europa.eu.int/

Quick definitions: http://europa.eu.int/ select: tab "documents" then select: "glossary."

GEORGE A. BERMANN ET AL., CASES AND MATERIALS ON EUROPEAN UNION LAW xvii-xxii (2002).

**General electronic data bases:**

http://europa.eu.int/eur-lex/en/

Official documents: http://europa.eu.int/eur-lex/en/ select "Official Journal"

http://www.law.harvard.edu/library/services/research/guides/international/eu/index.php

Westlaw
Lexis

**Internet connection to the institutions:**

European Union in the US - http://www.eurunion.org/
EU Commission - http://europa.eu.int
EU Council - http://ue.eu.int
European Council - http://ue.eu.int/showPage.asp?id=429&lang=en&mode=g
ECJ - http://www.curia.eu.int
European Parliament - www.europarl.eu.int
ECB - www.ecb.int
Ombudsman - http://europa.eu.int select: "ombudman"
ECtHR - http://www.echr.coe.int
Council of Europe - http://www.coe.int

**General references on EU:**

GEORGE BERMANN ET AL., CASES AND MATERIALS ON EUROPEAN UNION LAW chap 2 & 4 (2d ed 2002).

PAUL CRAIG & GRAINNE DE BURCA, EU LAW: TEXT, CASES, AND MATERIALS (3d ed. 2003).

ANTHONY ARNULL, THE EUROPEAN UNION AND ITS COURT OF JUSTICE (1999).

T.C. HARTLEY, THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW (5th ed. 2003).

NORBERT REICH ET AL., UNDERSTANDING EU LAW: OBJECTIVES, PRINCIPLES AND METHODS OF COMMUNITY LAW (2003).

**History:**

DESMOND DINAN, EUROPE RECAST: A HISTORY OF EUROPEAN UNION (2004).

WIM F.V. VANTHOOR, A CHRONOLOGICAL HISTORY OF THE EUROPEAN UNION, 1946-2001 (2002).

PAUL CRAIG & GRAINNE DE BURCA, THE EVOLUTION OF EU LAW (1999).

## II. Basic Substantive Law

A massive body of legislative and judicial law has evolved in the 50 year history of the EU and this body is too extensive to even summarize in this short work. However, the basic substantive principles created by the treaties can be summarized.

The core of the substantive law is the "four freedoms:" the free movement of goods, workers, capital and the freedom of establishment and services. Of course, the law for each has developed differently but with some fundamental principles in common. The basics will be useful in understanding the functioning of the EU and its institutions.

**Free movement of goods.** The key freedom is the free movement of goods. Accomplishing this goal can be broken down into two large parts, one relatively simple part and the other much more complex. The simple task was to create a customs union to eliminate costs in crossing the borders. The more complicated undertaking was to eliminate discrimination against the goods of other members and ultimately to eliminate all obstacles to a "single market" for Europe.

Article 25 provides: "Customs duties on imports and exports and *charges having equivalent effect* shall be prohibited ...." (emphasis added). The first prohibition is a relatively straightforward implementation of the custom union goal set by Article 23. The phrase "charges having equivalent effect" took a bit more work. For example, Italy had a tax to discourage the exporting of its antiquities. The antiquities were considered "goods" and the tax was prohibited despite its cultural purpose.[3] Inspection fees generally have been prohibited despite their health and safety purpose because they have the equivalent effect of a duty.[4] Even though those fees did not discriminate, they still constituted an obstacle to the free movement of goods. As we will see, each freedom has witnessed a shift from preventing discrimination to the larger objective of eliminating obstacles to a "single market."

This protection has developed in conjunction with the prohibition against "internal tax" that disadvantages cross-border activity. Article 90 contains two such prohibitions. Its first paragraph prohibits any internal tax that discriminates in favor of "similar domestic products." Its second paragraph prohibits any tax that would constitute an

---

[3] Commission v. Italy, [1968] ECR 423.

[4] E.g., Bresciani v. Amministrazione Italiana delle Finanze, [1976 ECR 129] (The fees constituted an obstacle because the border inspections benefit everyone and not just the importers.).

"indirect protection." The first paragraph then requires a comparison of domestic products with a group of imports and the law surrounding it deals largely with defining the market in which domestic products might compete with imports. The second paragraph is said to look more to the motives of the tax.

The cornerstone of the EU substantive law is the provision eliminating "quantitative restrictions" on goods from and to other members. Article 28 prohibits restrictions on imports and Article 29 prohibits restrictions on exports. Direct quantitative restrictions were relatively easy to ferret out. But both articles also prohibit "measures having equivalent effect" ("MEQR"). This phrase raised two categories of questions: what is a "measure" and what has the "equivalent effect" of a quantitative restriction.

The term "measure" has been given a very broad application by the ECJ. Actions not directly attributable to the government have been included. A leading early example is the Irish Goods Council case.[5] The Council promoted Irish goods so that it engaged in an activity that discriminated against the goods of other members. The Court ruled that the fact that the government appointed some of it members and provided some financial support was sufficient to bring Council's action under the prohibition. This case also made it clear that promoting domestic products could constitute a "restriction."

Coverage of the phrase "equivalent effect" has evolved over the years. At first, it was primarily used to prevent discrimination against goods from other members. The seminal *Dassonville* opinion, for example, focused attention on the discriminatory effect.[6] The later *Cassis de Dijon* opinion shifted the inquiry to whether the measure might constitute an obstacle to the single European market even if not discriminatory.[7] That case fundamentally change the nature of the inquiry. So, for example, any measure that hindered access to an internal market violated the treaty. Even a state's action which disadvantaged its own citizens could be covered.

Member States may, nonetheless, justify measures that would otherwise be an

[5] Commission v. Ireland, [1982] ECR 4005.

[6] Procureur du Roi v. Dassonville, [1974] ECR 837.

[7] Rewe-Zentral v. Bundesmonopolyverwaltung fur Branntwein, [1979] ECR 649.

illegal obstacle to the free movement of goods. *Cassis* recognized several justifications: "fiscal supervision, the protection of public health, the fairness of commercial transactions and the defense of the consumers." Much of the subsequent jurisprudence has revolved around whether one of these justifications takes a measure outside the coverage of Articles 28 and 29. The scope of such justifications is confused by the expressed exclusions in Article 30 of measures justified on the grounds of: "public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic, or archaeological values; or the protection of industrial and commercial property." To some extent, the two are redundant but the *Cassis* exceptions might be said to mean that the measure never fell under the prohibition while the Article 30 exceptions might mean the measure is covered but excused. Also, the Court has accepted justification that do not appear on either list, such as environmental protection (also covered in Articles 174-176). Often the Court does not make clear the focus of its inquiry into the justifications. Generally, the Court has been skeptical of any excuse for a measure that creates an obstacle or hinders access to all European markets.

**Free movement of capital.** The original Treaty of Rome provided less stringent protection for the free movement of capital. It envisioned a gradual transition toward a single internal capital market. The current treaty, Article 56, still provides a more conditional protection for the movement of capital than the other "freedoms." Hence, national governments find it easier to regulate in this area. Article 58 tells the member to "take all requisite measures to prevent infringement." The European Monetary Union (EMU) and the Euro facilitate the single capital market. The shift from national banks to the European Central Bank (ECB) centralizes monetary policy.

The agreement on a single currency, the "euro," was a major step toward integration. Of the 15 members at the time, only Britain, Denmark and Sweden refused to give up their national currency. Several new members have expressed interest in adopting the euro. To become a member of the "Euro Zone," an EU member must meet certain "stability" requirements regarding inflation and debt. A major controversy developed when the EU finance ministers suspended the stability rules for France and Germany.

**Free movement of workers.** The second most crucial freedom is the free movement of workers. Workers, being economic actors, have treaty rights not available to mere "persons", although the increasing recognition of the concept of European citizenship has blurred the line.[8] Americans will pause over the term "migrant workers."

[8] Article 18 in particular provides: "Every citizen of the Union shall have the right to move and reside freely ...."

Any type of worker moving from one state to another will have the freedoms of a migrant worker. The free movement means that a worker should not be disadvantaged by seeking employment in another country. Therefore, all benefits accruing to a domestic worker must be afforded a migrant worker. This protection also covers the worker's immediate family and may even accrue to former family members, such as an ex-spouse. In addition, migrant workers do not have to have a job or keep the job that brought them to the other country so long as they are seeking work in that country. The ECJ established that employment means that "for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration."[9] On the other hand, the work cannot be "marginal and ancillary."[10] As with the other freedoms, the presumption is strongly in favor of protection. Also, as with the other freedoms, the protection goes beyond discrimination and aims to protect access to the entire European labor market. Public employment is treated differently under Article 39, which expressly excludes "employment in the public service," but the ECJ has interpreted this phrase so as to exclude all but policymaking type government positions.[11]

**Right of establishment and free movement of services.** The right of establishment and freedom to provide services are similar but separated in the treaty. Rights, however, may ride on which covers a business. Generally, the right of establishment implies a greater integration into the national economy; whereas providing services is temporary. Establishment is said to exist for a business which has equipped itself with some form of infrastructure in the host Member State. For both, a major consideration is the integrity of qualifications. This tends to be ruled by the doctrine of "mutual recognitions": the host state must accept those qualified to engage in an activity in their own state. Generally, as with the other freedoms, these protections are not limited to eliminating discrimination but are aimed at assuring access to all markets.

**Competition.** Another area of substantive law is enhancement of competition. Articles 81-89 establish an extremely pro-competition policy. Competition law has been an important aspect of the EU since its earliest days. Consequently, the law is extremely

[9] E.g. Lawrie-Blum v. Land Baden-Wurttemberg, [1986] ECR 2121.

[10] Levin v. Staatssecretaris Van Justitie, [1982] ECR 1035 ¶ 17.

[11] Commission v. Belgium, [1980] ECR 3881.

well-developed. It suffices here to say that US lawyers will find the general principles to be familiar. One aspect worth noting here is that the EU's administrative arm, the Commission, has even more power in antitrust enforcement that in the other aspects of EU law.

**Gender discrimination.** The EU developed a special law with respect to equal treatment of men and women. Article 141 establishes "the principle of equal pay for male and female workers." Of the realities of the body of law created by this provision, Craig and De Burca observed: "It is evident that EC sex-equality law is a highly complex field whose aims are mixed and whose impact is inevitably confined, not only by the inherent limits of the formal concepts of equality..., and by the essential focus on employment-related discrimination, but also by the limits of law's capacity to bring about change particularly in the face of entrenched social patterns and gender roles."[12] They end, however, with an expression of optimism.

**International trade agreements.** The EU and its members have been vigorous participants in global trade agreements, including those within the jurisdiction of WTO. Article 133 has increasingly moved towards a stronger and more inclusive Common Commercial Policy (CCP). Legislation covers such matters as import quotas and surveillance and safeguard measures. Generally, exports to "third countries" must be free of quantitative restrictions.

**Sector reports.** This study produced reports on sectors as they relate to adjudication and rulemaking: competition law, food safety, state aids, telecommunication, trade remedies, environmental regulation, pharmaceutical licensing, labor/employment, trademarks, and financial services. These sector reports may be found at: http://www.abanet.org/adminlaw/eu/home.html.

**References:**

http://europa.eu.int - select desired language and then tab "activities."

## III. Legislative Process

These basic substantive principles are implemented through the EU legislative process. This process results in "secondary legislation" to distinguish them from the basic

[12] CRAIG & DE BURCA, EU LAW: TEXT, CASES, AND MATERIALS, 934 (3d 2003) ("Broader policy developments in recent years, however, show some cause for optimism.").

law embodied in the treaty. Nonetheless, the treaty has taken near constitutional dimension (especially as the adoption of a constitution is more and more in doubt.) Thus, Americans will understand "secondary legislation" as the equivalent to statutes. These are increasingly implemented by "delegated legislation" and "soft law," the equivalent of legislative rules and guidance documents respectively in the US administrative process. Chapter 2, rulemaking, elaborates on this hierarchy. Below is a summary of the process for enacting statutory type instruments.

**1. Process for statutory type instruments**

The EU legislative process is extremely complex. First, legislation has different effects and is denominated by terms likely to be confusing to Americans. Second, three institutions share power over legislation. Third, there is more than one legislative process, and there is no magic formula for determining which applies. Fourth, the legislative product may vary from generally applicable to applicable to only to those named. Fifth, delegated legislation by the Commission has many of the aspects of true legislation.

Article 249 creates three types of legislation: "regulation," "directive" and "decision." Regulations are most like US statutes. They have binding force directly on Europeans without further action by the Member States. In contrast, directives are binding on the Member States only and each Member State must take some action for them to affect citizens. Directives often require states to "harmonize" their laws and hence allow states freedom in the way they implement EU law. Decisions are binding only on those named, implying individual action. However, "collective decisions" may have somewhat general application. The impact of all three is affected by the doctrine of "direct effect" discussed below.

Legislative authority is divided among three institutions: Commission, Council and Parliament. Parliament has the weakest role, although that role has increased over the years. All legislation must be proposed by the Commission.[13] The Council considers the Commission's proposal and ultimately adopts the legislation. Parliament critiques the legislative proposal and has some authority to block passage. Generally, passage is a coordinated effort between Parliament and the Council with the Commission as facilitator.

[13]. The Commission's proposals are preceded by study and consultation, usually quite extensive as described in chapter 2. It often develops a "Green Paper," a document intended to begin discussion, particularly within the EU institutions and/or "White Paper," a document, which may or may not follow a Green Paper, containing a proposal for specific action.

The concept that the Commission proposes and the Council adopts has been a consistent feature. Complication have entered the process as Parliament's role has expanded. In the early years, Parliament was little more than a debating society and had no real role in actual adoption. This process was known as "consultation." It has not totally disappeared but has been generally replaced.

Most legislation today follows one of two processes: "co-decision" or "cooperation." The former provides parliament with more real power than the latter. The two processes are illustrated by the chart below.

Article 251 sets out the "co-decision" process. The Commission proposes all legislation. Its proposal is sent to the Council and Parliament. The Council "consults" with Parliament. If the two agree, the Council may adopt the measure by a "qualified majority" described below. If things go this smoothly, such adoption would be the equivalent of the "consultation process." If there is no agreement, the Council adopts a "common position" and informs Parliament of that position with its reasons. Parliament must act within three month or the common position is adopted. If within that period, Parliament votes by absolute majority to reject the common position, then the measure fails. If Parliament offers amendments, then the Commission delivers an opinion on the amendments. The Council may adopt Parliament's amendments, and the measure is deemed adopted but the Council must act unanimously if it approves any position opposed by the Commission. If the Council does not approve all the amendments then the Council President, with Parliament President, within six weeks convenes a "Conciliation Committee" with equal members from the Council and Parliament. This Committee is to develop a "joint text" representing the Council and a majority of Parliament. The Commission advises and facilitates reconciliation. If the Committee agrees on a joint text, it may be adopted within six weeks by a qualified majority of the Council and an absolute majority of Parliament. If either does not approve the joint text, the measure fails. The deadlines may be extended but only if strictly necessary.

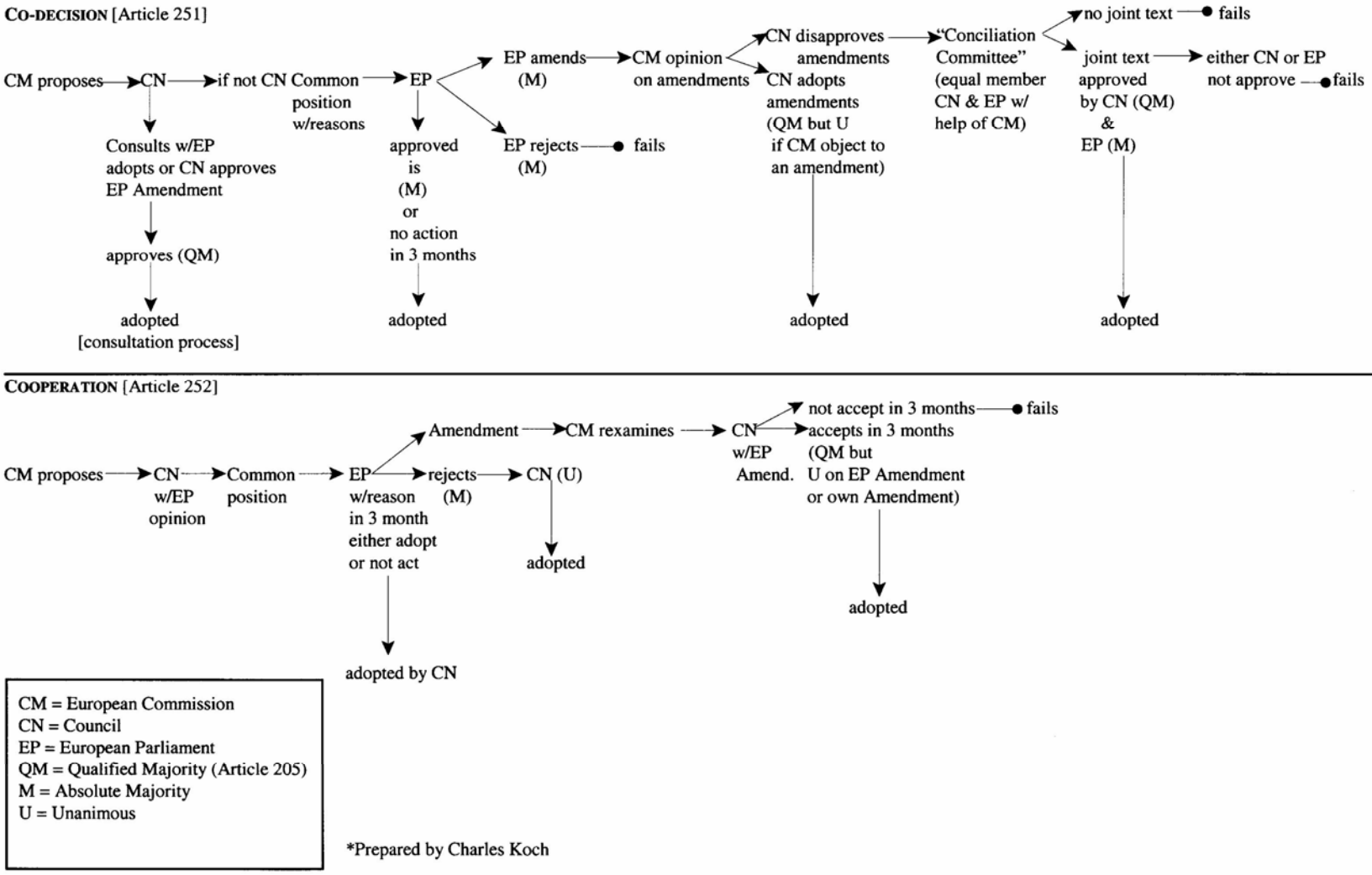
Article 252 establishes the "cooperation" process which provides a lesser role for Parliament, including denying it the "third reading" of the above. Again the Commission proposes. The Council may approve as above with the agreement of Parliament. If not, the Council adopts a common position and informs Parliament with reasons. If Parliament approves or takes no action, the Council may adopt the common position. If Parliament rejects the common position, the Council may adopt it but must do so unanimously. If Parliament proposes amendments by absolute majority within three months, then the Commission has a month to reexamine the original proposal in light of the amendments and express an opinion on them. The Council may unanimously adopt the amendments. The Council may adopt the reexamined proposal by qualified majority but by unanimous

vote for amending the proposal. If it does not act within three months, the measure fails. Again the deadlines may be extended but only if strictly necessary.

Article 254 establishes the "Official Journal of the European Union" as the official publication of EU legislation and other instruments.[14]

[14] http://europa.eu.int/eur-lex/en/, select: "official journal."

## EU LEGISLATIVE PROCESS*




*Prepared by Charles Koch

The voting rules are also complex. Those rules are designed to prevent voting blocks, protect small members from large and visa versa, and allocate to some extent power by population. Basically, the Council must approve legislation under one of three voting options: unanimity, simple majority, and qualified majority. Many actions require qualified majority which is specifically designed to allocate power among the states and their populations.

Currently, a qualified majority is expressed by specific numbers. The "Protocol on the Enlargement of the European Union" revised the requirements of Article 205 so that as of January 2005 the number of votes each country can cast (including the new Member States) is as follows:

| | | |
|---|---|---|
| Germany, France, Italy and the United Kingdom | | 29 |
| Spain and Poland | | 27 |
| Netherlands | | 13 |
| Belgium, Czech Republic, Greece, Hungary and Portugal | | 12 |
| Austria and Sweden | 10 | |
| Denmark, Ireland, Lithuania, Slovakia and Finland | | 7 |
| Cyprus, Estonia, Latvia, Luxembourg and Slovenia | | 4 |
| Malta | 3 | |
| Total | | 321 |

As of November 2004, a qualified majority means at least 232 votes (or 72.3% of the total votes) representing at least a majority of the Member States are cased in favor.[15] In some

[15] The Constitution would establish a different formula. Article I-25:

"1. A qualified majority shall be defined as at least 55% of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65% of the population of the Union.

A blocking minority must include at least four Council members, failing which the qualified majority shall be deemed attained.

2. By way of derogation of paragraph 1, when the Council is not acting on a proposal from the Commission or from the Union Minister of Foreign Affairs, the qualified majority shall be defined as at least 72% of the members of the Council, representing Member States comprising at least 65% of the population of the Union."

cases, a favorable vote of two-thirds of the Member States is required along with the requisite number of votes. In addition, a Member State may request verification that the qualified majority represents at least 62% of the population and if it does not the measure fails.

The treaty incorporates two major committees directly into the legislative process. The Council or Commission may be directed to consult the "Economic and Social Committee" established by Article 257. It provides that "The Committee shall consist of representatives of the various categories of economic and social activity." Article 263 establishes a "Committee of Regions" which is intended to represent regional and local bodies, even though representatives are designated along national lines. This committee must be consulted whenever legislation touches upon: economic and social cohesion, trans-European infrastructure, health, education, and culture.

A new governing concept, "open method of coordination" (OMC), has emerged. Under OMC, the European Council establishes guidelines or "soft law" in a particular area, and the states are obliged to take the guidelines into account in establishing their domestic policies in those areas. In doing so, the states are to cooperate and learn from each other's experience. This process appears to have been effective and states are cooperating to develop and propagate "best practices" based on the guidelines.[16]

**2. Process for promulgating "implement legislation"**

As in all modern governments, the EU relies on its bureaucracy to provide the implementing detail, known in parliamentary systems as "delegated legislation" and in

---

[16] This process has been somewhat incorporated throughout the new constitution. One example is Article III-107 which provides in part: "With a view to achieving [social objectives], the Commission shall encourage cooperation between Member States and facilitate the coordination of their action in all social policy fields [listing seven]."

the US as "rules." Chapter 2, rulemaking, elaborates on the subordinate legislative process. These measures may be issued under three basic types of procedures. First, the Commission may be delegated authority to issue rules. This authority was more prevalent in early EU legislation. Second, the Council itself may have the authority to issues rules based on a proposal from the Commission. Third, the Commission may issue rules under the indirect control of the Council through supervisory committees under the comitology procedures. The Council becomes involved only if the Commission and the appropriate committee, after negotiation, are unable to agree.

Perhaps, the most surprising aspect of the European legislative process for Americans is the prominence of committees and the process of "comitology." Special committee monitor the Commission exercise of delegated power to promulgate "implementing measures." The committees are forums for discussion and dialogue with the Commission. The procedures which govern relations between the Commission and the committees are based on models set out in the Council's "comitology decision" of June 28, 1999.[17] This system is criticized for adding even more complexity and actually decreasing both accountability and transparency. The Commission has called for reform of the procedures and the curtailment of the role of committees.

Currently, there are some 247 committees broken into three major categories: advisory committees, management committees, and regulatory committees.[18] Under the "advisory procedure," the Commission must submit its proposal to a committee but a negative reaction does not affect the Commission's powers. Under the "management procedures," the relevant committee must approve the Commission's draft by a qualified majority. Or, the Commission may adopt the committee recommendations and the amended proposal proceeds. Even if the Commission does not adopt the committee's recommendations, the Commission's proposal may still go forward but the Council is notified. Under the "regulatory procedure," if the committee disagrees, the Commission must put its draft before the Council, which may reject it.

[17]. Council Decision 99/468/EC.

[18] The actual number is in doubt but the magnitude is somewhere in this range.

Comitology was intended to increase accountability but many observe that in fact it has decreased transparency and added to the democracy deficit. For example, Ward described the comitology as a "network [that] strengthens its own power whilst further distancing governance from the principles of democracy, accountability and transparency."[19] Bignami described the comitology process as "shrouded in secrecy" because it prevents MEP from checking bargaining within the committees.[20] In the Rothmans Case, the CFI attacked the problem of transparency by ruling that the committees were under the Commission's control.[21] Such actions have done little to eliminate secret bargaining and US interests are likely to be particularly disadvantaged by these secret bargains.

**3. Participation in the legislative process**

There are a variety of opportunities for interests inside and outside Europe to participate in the legislative process. Nonetheless, as in the US, the EU struggles with both transparency and accountability. As discussed in chapter 4, "transparency" for Europeans connotes not only access to information as it does in the US but also a broad range of open government and participatory values.

---

[19] Ian Ward, A CRITICAL INTRODUCTION TO EUROPEAN LAW, 68 (2d ed. 2003).

[20] Francesca Bignami, *The Democracy Deficit in European Community Rulemaking: A Call for Notice and Comment in Comitology*, 40 HARV. INT'L L.J. 451 (1999). The Second Comitology Decision sought open up the process but with little success. *see* CARL FREDRIK BERGSTROM, COMITOLOGY: DELEGATION OF POWERS IN THE EUROPEAN UNION AND THE COMMITTEE SYSTEM, § 4.4.2.4 (2005)..

[21] Rothmans International v. Commission, [1999] ECR II-2463 ¶ 59.

Legislation is influenced through the Member State governments because they are directly represented in the legislative institutions. Legislation is also subject to traditional private interest lobbying. The EU is evolving two expansive participatory opportunities: "comitology" and utilization of the "civil society" (public interest NGOs).

**Lobbying.** Lobbying, of course, is an important aspect of the legislative process. It is not nearly as regulated as in the US. However, there is an increasing demand for such regulation and efforts are underway to come to grips with lobbying.[22]

[22] E.g. Working Paper: Lobbying in the European Union: Current Rules and Practices, Constitutional Affairs Series (2003).

**Participation of the civil society.** European governments, including the EU, have formally invited and facilitated participation by the public interest community, the "civil society" or public interest Non-government organizations (NGOs). The Commission has included in this category organizations that: are not-for-profit, are voluntary, have some institutional or otherwise formal existence (as opposed to ad hoc and/or informal), are independent (particularly of government), and are not pursuing the commercial or professional interests of their members.[23] To date, much of these organizations' influence occurs inside the Commission. Thus, the dialogue within a specialist directorate may include certain private organizations.[24] Special access to Parliament and the Council is more problematic but growing.[25]

In addition to national support, many of these organizations receive support from

[23] Commission Discussion Paper, "The Commission and Non-governmental Organizations: Building a Stronger Partnership" (Prodi & Kinnock 1/18/00) [Transnational Associations, V. 52#3 135-50 (May/June 2000) (?)]

[24] Giampiero Alhadeff & Simon Wilson, "European Civil Society Coming of Age," Global Policy Forum (May 2002).

[25] *Id.*

the EU.[26] In its White Paper on European Governance , the Commission committed itself to contribute to a reinforced culture of consultation and dialogue in the EU.[27] The draft constitution is said to affirm this commitment in § I-147: "The institutions shall, by appropriate means, give citizens and *representative associations* the opportunity to make know and publicly exchange their views in all areas of Union action." (emphasis added).

[26] European Citizen Action Service, "The Financial Relationship between NGOs and the European Commission (Oct. 2004) (But: "The question the sector is now asking is whether the Commission is likely to continue to fund NGOs at the level at which it has done in the past and, by the same token, to continue to develop its partnership with them." 3

[27] Communication for the Commission, "Consultation document: Towards a reinforced culture of consultation and dialogue - Proposal for general principles and minimum standards of consultation of interested parties by the Commission" (COM (2002) 277 final).

US lawyers should be aware of the potential influences which may result from the formal inclusion of the civil society. Those organizations substantially funded by Member States are likely to promote a state or regional point of view within the EU legislative machinery and the relevant committees. Those funded by an EU institution are likely to be supportive of that institution.[28] While government support encourages effective representation of a wide range of society, such support also has the potential for coopting these organizations.

### Additional Reading on European Legislative Process

**EU legislation:**

CARL FREDRIK BERGSTROM, COMITOLOGY: DELEGATION OF POWERS IN THE EUROPEAN UNION AND THE COMMITTEE SYSTEM (2005).

GEORGE BERMANN ET AL., CASES AND MATERIALS ON EUROPEAN UNION LAW, chap. 3 (2d ed. 2002).

Francesca E. Bignami, *The Democratic Deficit in European Community Rulemaking: A Call for Notice and Comment in Comitology*, 40 HARV. INT'L L.J. 451 (1999).

Naomi Roht-Arriaza, *The Committee on the Regions and the Role of Regional Governments in the European Union*, 20 HASTINGS INT'L & COMP. L. REV. 413 (1997).

**General reading on parliamentary government:**

YVES MENY, GOVERNMENT AND POLITICS IN WESTERN EUROPE: BRITAIN, FRANCE, ITALY, GERMANY (2d ed. 1993).

MICHAEL GALLAGHER ET AL., REPRESENTATIVE GOVERNMENT IN MODERN EUROPE (3d ed. 2002).

## IV Judicial Process

The judicial power of the EU is vested in the European Court of Justice (ECJ) and the Court of First Instance (CFI). The latter was created to relieve the ECJ of some of its workload but now has its own jurisdiction. Otherwise, the EU has no "inferior" courts.

[28] "A rigged dialogue with society," The Economist (US) 373.8398 (Oct. 23, 2004).

Many cases come from the national courts, and hence Member State courts are an integrated part of the European judicial apparatus. Below is a summary of the judicial process. Chapter 3, judicial review, elaborates on this process and chapter 1, adjudication, elaborates on administrative adjudications.

## 1. Jurisdiction

The ECJ has six types of jurisdiction. The three major types of actions are: those against EU institutions, those against Member States and those in which a national court has asked for guidance on European law. The Court has jurisdiction in "staff cases," and "plenary jurisdiction." In addition, the ECJ has found that international agreements entered into by the EU form an integral part of EU law, with the result that the Court itself has the right to interpret them. It may also give advisory type opinions on some external agreements.

Article 230 establishes "actions to annul" acts by EU institutions. Action may be brought by Member States, the Council, or the Commission "on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or any rule of law relating to its application, or misuse of power." At one time the European Parliament could only bring actions to protect its "prerogatives," now it has the same rights as the other institutions. Private parties may bring action against a decision directed at them or "of direct and individual concern." Article 231 provides: "If the action is well founded, the Court of Justice shall declare the act concerned to be void." Under Article 232, EU institutions and Member States may bring an action against the Parliament, Council or Commission charging failure to act.

Articles 226 and 227 authorize suits against Member States for "infringing" on their EU obligations. Article 226 authorizes the Commission to bring such enforcement actions. Article 227 allows other Member States to bring actions through the Commission. Most of these enforcement actions have been brought by the Commission. Commission actions have three formal phases. Before the formal enforcement action begins, however, the Commission usually sends a warning letter and most often that settles the matter. If that does not work, the Commission begins with the first phase by formally asking the member to explain its actions. If the Commission is still dissatisfied, it will issue a "reasoned opinion" which also often results in settlement. If settlement efforts fail, the Commission takes the second level formal action by bringing an action in the EU Court. If this does not result in settlement, the Court issues a judgment. The Member State is required to take the necessary measures to comply with the judgment. If state does not comply, the Court may go so far as to impose a lump sum or penalty payment.

US lawyers find most surprising the ECJ's jurisdiction over references from the national courts. Article 234 provides that "any court or tribunal of a Member State" may refer a question of EU law. The founders of the European Community made the choice not to create an inferior court system in contrast to the US founders. Under the circumstance, European question must come through **any** national court or tribunal.[29] Courts as lowly as traffic courts may refer a question directly to the European Court.

Three types of jurisdiction of less importance to US lawyers are staff cases, "plenary jurisdiction" and those involving international agreements. Staff cases are actions by employees who have complaints concerning their employment. Plenary jurisdiction derives from French law and allows the Court to exercise its fullest powers. It has power under Article 229 "with regard to penalties," so that it can not only cancel such penalties but also may alter the amount. Articles 300¶6 authorizes the ECJ to review international agreements to assure that the agreement complies with the Treaty.

The CFI was established in 1988 to take some of the burden from the ECJ. Increasing categories of cases are heard by this court subject to right of appeal to the ECJ. Article 225 provides: "the Council, acting unanimously, shall determine the classes of action and proceeding." Initially, the CFI had a clearly derivative and secondary role. Currently, however, Article 220 suggests two parallel courts each having its own jurisdiction. Initially, the CFI considered staff cases, certain competition cases, and cases under the coal and steel treaty. Gradually, the Council has given it jurisdiction over other types of cases. Currently its authority extends to "direct actions" brought by an EU institution. Article 225 authorizes the CFI to hear references from state courts "in specific areas laid down by the Statute."

Article 220 has now added a third judicial layer, "judicial panels," to take specialized cases. These panels were originally established to hear staff cases which were originally to be the business of the CFI. They are increasingly employed in other matters. Article 225a provides that specialized panels to determine at first instance "certain classes of action" or "proceeding brought in specific areas" may be established by the Council. With the growing number of cases, the jurisdiction of these special panels can be expected to grow. In the future, these may even result in systems of "inferior" courts, still distinguished from the US federal system by the fact that their jurisdiction will be determined by subject matter rather geography.

---

[29]. Under 28 U.S.C. § 1257, the U.S. Supreme Court may review the decisions of the highest state court. *see* Lance v. Dennis, 126 S.Ct. 1198, 1201 (2006).

## 2. Procedures

The procedures of the ECJ were modeled after continental appellate courts in general and the French Council of State in particular. The CFI follows essentially the same procedures and hence the following description will apply to it.

The number of ECJ judges equals the number of Member States, currently 25. Usually, the judges sit in chambers of 7 judges. They are appointed "by common accord" of the members which means that each state controls one appointment. Nonetheless, the judges are instructed to act independently and all evidence suggests that they do. Basically, a judge must be qualified to be a judge under national rules. They serve for 6 years with the possibility of reappointment. Over the years, it has proven to be an extremely able and diverse court.

The Court is assisted by two types of judges, not known in the US but often found in Continental appellate processes. One is the judge-reporter (reporter) who prepares the record for the Court. The other is the "Advocate-General" who advises the Court and is an important part of the decisionmaking process.[30] The Advocate-General's function will be described below.

The procedure has four stages: (1) the written proceedings; (2) the investigation or preparatory inquiry; (3) the oral proceedings including the advocate-general's opinion; (4) deliberation and judgment. The proceeding begins by the filing of an application (requete) with the Registrar.

This application is not just pleadings but must contain the applicant's whole case. The applicant has the choice from among the official languages. The application is served on the defendant by the Registrar by registered mail. The defendant has one month to respond. The defendant's submission usually has two parts: admissibility and substance.

Upon receiving the application, the case will be assigned by the Court's president to one of his colleagues to act as reporter. Although all the papers will have previously been distributed to the entire Court, only the reporter is likely to have read them closely. The three-judge chamber to which that judge belongs will conduct the investigation. With the pleadings closed, the Court takes over the case and the process shifts from adversarial to inquisitorial. The hearing of witnesses is part of the investigative stage and not part of the oral proceeding. After the witnesses have given their evidence, they may be

[30] Article 222.

questioned by the judges. Or the witnesses may be examined by a judicial authority in the state where they permanently reside. Witness are in fact rarely heard and the Court usually asks the parties to respond to questions.

Now the cases move to the oral stage. Sometime before the hearing, the reporter issues a report which is communicated to the parties in advance and made public on the day of the hearing. The report sets out the facts of the case and summarizes the arguments. The oral proceedings generally include the presentations by opposing lawyers, questions from the Bench, very brief replies to opposing statements and the Advocate-General's opinion.

The Court is "assisted" by a type of judicial officer with no counterpart in the US legal system, the Advocates-General. Advocates-General are judicial officers and they are expected to act "with complete impartiality and independence." These judicial officers give their opinion on the case after considering the arguments and the record compiled by the reporter. Their opinions discuss the facts and expound on the law. Since the Advocates-General are judges, their opinion are part of the judicial deliberation, and hence the parties are given no opportunity to comment of the Advocates-General's opinion unless they ask to reopen the case for that purpose. Because the Court's own opinions are so terse, the Advocates-General's opinions offer the best insight into the various issues in a case.

The Court then deliberates. Only the judges are admitted to the Deliberation Room; neither the Advocate-General nor the registrar is present. The Court is required to give reasons for their decision. The decisions are collegial, meaning that there are no separate opinions. The authenticate version of the judgment is in the language of the case. The operative part of the judgment is read at the next available public hearing either by the President or the reporter.

## Additional Reading on European Judicial Process

**Judicial review generally:**

GEORGE BERMANN ET AL., CASES AND MATERIALS ON EUROPEAN UNION LAW, chap. 5 (2d ed. 2002).

L. NEVILLE BROWN & TOM KENNEDY, THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITY (5th ed 2000).

KOEN LENAERTS & DIRK ARTS, PROCEDURAL LAW OF THE EUROPEAN UNION (1999).

ANNE-MARIE SLAUGHTER ET AL., THE EUROPEAN COURTS & NATIONAL COURTS: DOCTRINE AND JURISPRUDENCE (1998).

**Continental legal systems:**

MARTIN VRANKEN, FUNDAMENTALS OF EUROPEAN CIVIL LAW AND IMPACT OF THE EUROPEAN COMMUNITY (1997).

JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA (2d ed. 1985).

F.H.LAWSON, A COMMON LAWYER LOOKS AT THE CIVIL LAW (1953).

BERNARD SCHWARTZ, FRENCH ADMINISTRATIVE LAW AND THE COMMON-LAW WORLD (1954).

L. NEVILLE BROWN & JOHN S. BELL, FRENCH ADMINISTRATIVE LAW (4th ed. 1993).

## V. The Administrative Process

Whereas the US administrative system is largely hierarchical, the EU system is best envisioned as a network, a web of interrelationships among EU, national and non-governmental organizations. Walter Van Gerven observed: "While public authority was traditionally organized pyramidally along hierarchical lines, it is now *also* organized through numerous networks of public and private nuclei of power, making power move both vertically and horizontally."[31] These organizations may combine in a nearly infinite variety of forms. Unlike the US, the central authority of the EU is executed largely through the national governments. So much so, that nationals often do not understand that the moving force behind an applicable national law is the implementation of EU law. A US lawyer, then, must begin the process of understanding EU administrative law by understanding this network and the unfamiliar questions it presents.

The first step is to envision an administrative system built on a coordination between national governmental institutions and European institutions. National agencies (which European scholars tend to lump together as "national regulatory agencies" or

[31] VAN GERVEN, THE EUROPEAN UNION: A POLICY OF STATES AND PEOPLES, 159 (2005) (emphasis added) (also noting recognition of this fact by the Commission n.7).

"NRAs") perform much of the European administrative functions. A growing number of EU agencies (which Europeans call "European agencies" or "EAs") have taken on some of the administrative responsibility but even so they tend to coordinate with NRAs.

**1. Growth of EU agencies**

Chiti notes an "explosion of the agency model" in the EU.[32] Nonetheless, only recently have European scholars begun to pay attention to this trend. The last few years have seen an scholarly explosion to match the reality of European administrative practice. EAs have increased from four in 1993 to fifteen in 2003. It is expected that this number will continue to increase.

**2. National implementation of EU laws**

The US Supreme Court has absolutely prohibited the "commandeering" of state and local legislative and executive branches. *New York v. United States*[33] invalidated federal efforts to direct state legislatures and *Printz v. United States*[34] invalidated federal efforts to command state and local executive officials. Thus, a federal administrative system cannot co-opt state authorities.

In contrast, the European system relies on the legislatures and executive officials to implement EU law. This approach results in a quite different configuration of the European administrative system. As discussed below, while "regulations" have "direct effect" whereby they apply directly to citizens and may be enforced by citizens, "directives" are directed to the Member States. Thus, EU structure counts on "commandeering" state governmental institutions. [35]

Moreover, the crucial legislative institutions, Council and Commission, are not directly elected but represent the Member States governments. Thus, policymaking is

---

[32] Chiti, *The Emergence of a Community Administration: the Case of European Agencies*, 37 Common Market L. Rev. 309 (2000).

[33] 505 U.S. 144 (1992).

[34] 521 U.S. 898 (1997).

[35] In his dissent in Printz v. United States, Justice Breyer noted this contrast and observed: "They do so in part because they believe that such a system interferes less, not more, with the independent authority of the 'state,' member nation, or other subsidiary government, and helps to safeguard individual liberty as well." 521 U.S. at 976.

largely controlled by the states. The EU policymaking network then necessarily incorporates government entities and officials in the Member States.

Thus, a crucial question for EU administrative law is the allocation of EU executive authority between national and EU authorities. Chiti characterizes this debate as between the "indirect administration model" and the "co-administration model." [36] Under the indirect model, the EU authorities are not vested with any power and instead rely on the national bodies to attain EU objectives. Under the co-administrative model, competences are shared between the EU and the national administrations. He observes that the latter has come to be considered the accepted framework.

**3. The non-delegation doctrine**

Early in the EU's history, delegation of policymaking authority to independent agencies was prohibited. Thus, theoretically at least, agencies implement EU legislation but do not have policymaking authority. The EU is finding this restriction increasingly debilitating and some change is inevitable.

The ECJ in the 1958 case of *Meroni v. the High Authority* severely limit delegations.[37] This case was decided very early in the history of the European community and hence set the parameters in a much simpler governmental context. The Court held that institutions may not "confer upon the authority, powers different from those which the delegating authority itself received under the Treaty." In addition, the Court held that the delegation must involve "clearly defined executive powers the exercise of which can, therefore, be subject to strict review in the light of criteria determined by the delegating authority." It clearly prescribed that the exercise of this power "must be *entirely* subject to the supervision of the [delegating institution]." If all these conditions are not met then the delegation would upset institutional balance envisioned in the Treaty. In the case at hand, the Court that the delegation "gives those agencies a degree of latitude which implies a wide margin of discretion and cannot be considered as compatible with the requirements of the Treaty."

---

[36] Chiti, *Decentralization and Integration into the Community Administration: A New Perspective on European Agencies*, 10 The European L.J. 402 (2004).

[37] [1958] ECR 11 (1957-1958)] & [1958] ECR 53 (1958).

European scholars suggest that limitations on delegation are not overly restrictive of the authority allocation of administrative authority. Indeed, the *Meroni* opinion might suggest to US administrative lawyers no more restriction than the current state of the US nondelegation doctrine. For example, the Court could be requiring "criteria determined by the delegating authority." This requirement smacks of the "intelligible principles" first announced at the beginning of the 20th Century.[38] On the other hand, *Meroni* might be read to require that the delegating institution itself ultimately make the decision; hence the language "subject to strict review ... by the delegating authority."

It is also urged that the practical impact of the *Meroni* decision is overstated. Geradin and Petit, for example, assert "that the implications of the *Meroni* doctrine should not be exaggerated."[39] They reason that the Court's reliance on institutional balance naturally leads to acceptance of delegation to improve the quality of the decisionmaking both by lowering the workload on the delegating entity and by transferring technical issues to experts.

In that sense *Meroni* might be seen as the equivalent to *The Brig Aurora v. US* in our early years in which the Supreme Court upheld a statute which gave the President authority to impose retaliatory tariffs upon a finding that US businesses were being treated unfairly.[40] The actual opinion could be said to similarly limit delegation because it found that the President "was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect." Perhaps it presages European development to note that this opinion has, over time, been characterized as an early recognition that Congress can make extensive delegations.

Comitology, discussed above, has also weakened the actual effect of the *Meroni* doctrine. The ECJ has accepted the delegation of the authority to adopt "implementing measures," an increasingly large category, so long as the delegation is to either to the Commission or the Council itself under Article 202.[41] Most delegation are to the Commission under committee supervision. The virtual exclusion of Parliament creates an

---

[38] KOCH, ADMINISTRATIVE LAW AND PRACTICE, second § 12.13 (1997).

[39] Geradin & Petit, "The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform," Monet Working Paper 01/04 at 15

[40] 11 U.S. (7 Cranch) 382 (1813).

[41]. CARL FREDRIK BERGSTROM, COMITOLOGY: DELEGATION OF POWERS IN THE EUROPEAN UNION AND THE COMMITTEE SYSTEM, §2.4.5 (2005).

area of extreme tension and adds substantially to the democracy deficit.[42]

In the end, the practical pressures of modern government will create acceptance of broad delegations. It appears that the ECJ has pursued a doctrine of the liberalizing European non-delegation doctrine. The Commission, however, believes that only an amendment to the treaty will clear the way for delegations.

**4. Classification of agencies**

A variety of agencies have been established with specially designed mandates and processes. As in US administrative law, understanding these diverse structures requires a search for common principles.

[42]. Bergstrom, *id.* at § 5.3.2.

General understanding might be built around Geradin's identification of seven common features.[43]

1. Agencies generally have a limited mandate, which is laid down by the establishing legislation and consists of tasks of a technical, scientific and managerial nature.
2. Most have very limited powers, usually relating to information and coordination, and may not issue binding decisions;
3. All operate under the direction of an executive director;
4. They have an administrative or management board, usually made up of representative from the Member States;
5. They generally function through committees or committees form some part of their structure;
6. They are decentralized in the sense both that they are withdrawn from the centralized responsibility of the Commission and they are located in various parts of the EU; and
7. Most are created under Article 308, the generalized "necessary and proper" provision of the Treaty, sometimes in conjunction with more specific authority.

Although not all agencies have all these characteristics, identification of these actual or potential characteristics creates some coherence.

[43] Damien Geradin, *The Development of European Regulatory Agencies: What the EU Should Learn from American Experience*, 11 Col. J. of European L. 1, 24-27 (2004).

Those who seek to create some order have proposed various systems of classification. Several commentators seek order by identifying functional categories. Xenophon Yataganas of the Commissions Legal Service Department, for example, divided existing agencies into four functional categories: 1) agencies serving the operation of the internal market (regulatory model); 2) agencies providing information through a network of partners (monitoring model); 3) agencies promoting social dialogue (cooperation model); and 4) agencies operating as subcontractors to the European public service (executive model).[44]

Geradin and Petit assert that such "functional typology" cannot be the basis on which to propose reforms. Rather, they propose a classification based on the intensity of the prerogatives entrusted to the agencies for carrying out their missions.[45] "Executive agencies" include agencies that are responsible for (1) purely managerial tasks; (2) observatory roles; and (3) missions of cooperation. "Decisionmaking agencies" include all agencies that have the power to enact "legal instruments" or enjoy considerable influence over the adoption of Commission decisions, even though they lack formal decisionmaking authority. "Regulatory agencies" include those EU agencies that have the same powers as NRAs, "including the power to translate broad legislation guidelines into concrete instruments." This last might not be permissible under the current nondelegation doctrine.

US administrative lawyers may expect Europeans to have the same difficulty agreeing on a classification as they do, even more considering the interrelationship between EAs and NRAs. Nonetheless, practical pressure to find some homogeneity continues to intensify.

## 5. Uniform procedures

As in the US, EU agencies perform a variety of functions through specially designed processes. Indeed, the confusion is greater in the EU because it has no EU-wide procedural law to compare with the US's Administrative Procedure Act (APA). The

---

[44] Xenophon A. Yataganas, "Delegation of Regulatory Authority in the European Union," Jean Monnet Working Paper 3/01, *available* at http://www.jeanmonnetpgrogram.org/papers/01/010301.html.]

[45] Damien Geradin & Nicolas Petit, "The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform," Monet Working Paper 01/04 at circa 48

Commission and scholars have been investigating a uniform law but it has yet to emerge. Adding difficulty is the fact that EU procedural law must deal with both a cooperative network of EAs and NRAs.

Basically, European system is in much the same developmental phase as the US system at the time of the AG's Final Report in 1941.[46] Agencies have become much more important to European government and have an increasing impact on citizens. The drive for some uniformity will be irresistible. On the other hand, as in the US, uniformity must accommodate necessary diversity in process and mandate. In short, the nature of a uniform law is difficult to predict.

Like the US, uniform administrative law in Europe must cope with EU federalism, discussed further below. European, however, has two overarching federalism complications largely absent in the US. Unlike the US, Member State agencies have been incorporated into the administrative/executive body of EU government. While US state agencies are brought into federal programs, they are not the primary instrument for carrying forward federal policy as they are in Europe. Secondly, European federalism is unstable. The tension between intergovernmentalism and supranationalism creates a continuum of conceptions of federalism. Governmental integration, even more than public policy integration, ebbs and flows.[47]

Moreover, European administrative law must satisfy very different legal traditions and cultures. On one hand, it must satisfy the common law sense of justice as it has been translated into UK and Irish administrative law. On the other hand, it must satisfy civil law principles as translated into the administrative law of the other Member States.

**Additional Reading on European Administrative Process**

**Agencies:**

Symposium, *The Administrative Law of the European Union*, 68 L. & Comp. Prob. 1 (Francesca Bignami &Sabino Cassesse ed.) (2004).

---

[46] FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE (1941).

[47] Herwig C.H. Hofmann & Alexander Turk, "The Challenges of Europe's Integrated Administration," LAW, DEMOCRACY AND SOLIDARITY IN EUROPE'S POST-NATIONAL CONSTELLATION, (Eirksen, Joerges & Rodl eds. 2006) (forthcoming).

Damien Geradin, *The Development of European Regulatory Agencies: What the EU Should Learn from American Experience*, 11 Colum. J. of Eur. L. 1 (2004).

Damien Geradin & Nicolas Petit, "The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposal for Reform," Jean Monnet Working Paper 01/04.

Edoardo Chiti, *Decentralization and Integration into the Community Administrations: A New Perspective on European Agencies*, 10 European L. J. 402 (2004).

Edoardo Chiti, *The Emergence of a Community Administration: The Case of European Agencies*, 37 Common Market L. Rev. 309 (2000)

**Delegation**

Xenophon A. Yataganas, "Delegation of Regulatory Authority in the European Union," Jean Monnet Working Paper 3/01, *available* at http://www.jeanmonnetpgrogram.org/papers/01/010301.html..

Keon Lenaerts, *Regulating the Regulatory Process: "delegation of powers" in the European Community*, 18 European L. Rev. 23 (1993).

**European administrative law generally:**

ADMINISTRATIVE LAW OF THE EUROPEAN UNION, ITS MEMBER STATES AND THE UNITED STATES: A COMPARATIVE ANALYSIS (Rene Seerden & Frits Stroink ed., 2002).

JURGEN SCHWARZE, EUROPEAN ADMINISTRATIVE LAW (1992)

HANNS PETER NEHL, PRINCIPLES OF ADMINISTRATIVE PROCEDURE IN EC LAW (1999).

CAROL HARLOW, EUROPEAN ADMINISTRATIVE LAW & GLOBAL CHALLENGE IN THE EVOLUTION OF EU LAW (Paul Craig & Grainne de Burca ed.) (1999).

Paul Craig, "The Constitutionalization of Community Administration", Jean Monnet Working Paper 2/03

Jurgen Schwarze, *Tendencies Towards a Common Administrative Law in Europe*, 16 E.L.REV. 3 (Feb. 1991).

Jurgen Schwarze, *Judicial Review of European Administrative Procedure*, [Spring 2004]

Public Law 146.

Koen Lenaerts & Jan Vanhamme, *Procedural Rights of Private Parties in the Community Administrative Process*, 34 Common Market Review 531 (1997).

## VI. European Federalism

The overarching tension in the EU is between intergovernmentalism and supranationalism. Many see the EU as a confederation of independent states joined for limited purposes mostly related to economics, i.e. "intergovernmentalismt." Others see the EU as a supranational sovereign state encompassing the Member States, i.e. "supranationalists." The degree to which Member States have ceded their sovereignty affects the nature of EU legal and political doctrine.

### 1. Supremacy of EU law

The basic law does not contain a supremacy clause as does the US Constitution. However, the EU Court, in an early display of its activism, established the supremacy of EU law within its area of interest. *Costa v. Ente Nazionale Per L'Engergia Elettrica (ENEL)*, in 1964, firmly established that principle and has not been seriously challenged.[48] The Court ruled:

> "The transfer by the states from their domestic legal system to the Community legal system of the rights and obligations arising under the treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail. Consequently Article 177 is to be applied regardless of any domestic law, whenever questions relating to the interpretation of the Treaty arise."[49]

Another significant step was the Court's willingness to assert authority to derive "general principles of law." This lawmaking is loosely based on EU Treaty Article 220's admonition that the Court "shall ensure that ... the law is observed." Nonetheless, the assumption of this power expanded the opportunity for judicially created EU law. T. C. Hartley wrote: "The general principles of law are, therefore, an independent source of law and there can be little doubt that the Court would have applied them even if none of the

[48] [1964] ECR 1141.

[49] [1964] ECR at .

Treaty provisions ... had existed."[50]

[50] T.C. HARTLEY, THE FOUNDATION OF EUROPEAN COMMUNITY LAW 135 (5th ed. 2003).

Acceptance, however, has been controversial. The Member States and particularly the Member State courts have accepted the notion at different rates and with varying degrees of skepticism.[51] US lawyers must remember that continental systems have parallel judicial systems each with its own highest court. Therefore, even within one Member State the degree of acceptance of European law may vary by court system. The two members state which at one time were leaders, France and Germany, are important examples.

France has, in essence, three court systems headed by: Cour de Cassation (general courts), judicial section of Conseil d'Etat ("Council of State," or administrative courts), and Conseil Constitutionel (constitutional court, called a council for conceptual reasons). For various political and jurisprudential reasons each accepted supremacy at different rates. Supremacy was accept readily by the general courts, the Cour de Cassation. Various reasons are given, including a sense that European law enhanced their influence. On the other hand, the Council of State perhaps saw the ECJ as a threat to its power. It resisted supremacy for some time. The Constitutional Council was likewise reluctant to concede too much power to the ECJ.

Germany has five court systems and a constitutional court. The tax court and the labor court were slow to accept supremacy of European law in those areas. The German Constitutional Court was particularly resistant to ECJ supremacy. Indeed, even though a detente of sorts has been reached, the Constitutional Court has not accepted complete supremacy. In a body of cases, known as the Solange ("so long as") opinions, the Constitutional Court resisted ECJ authority over conflict between European law and the German Basic Law (constitution), particularly regarding human rights. In the end, it was mollified by the development of EU human rights laws. It ultimately said that "so long as" the ECJ and European law adequately protected human rights, it would not assert independent authority. However, it has not irrevocably conceded authority.

Other Member States and their various courts have also shown a reluctant acceptance of supremacy. It might be that a growing Euroskepticism, as evidenced by the rejection of the Constitution, may embolden Member State courts to challenge ECJ supremacy. For now, supremacy can be considered a well-established principle.

---

[51] *See generally*, SLAUGHTER, SWEET & WEILER, THE EUROPEAN COURTS & NATIONAL COURTS: DOCTRINE AND JURISPRUDENCE (1998).

Particularly controversial is jurisdiction to determine jurisdiction or in Europe "Kompetenz-Kompetenz." Various Member State courts have shown particular reluctance to concede to the ECJ the power to allocate competence between Member State courts and the EU courts. Several Member State courts, e.g. the German Federal Constitutional Court, insist on the power to engage in ultra vires review EU measures.[52] Yet, this fight has been avoided by the simple fact that Member State courts do not find EU measures ultra vires. Here the detente between the ECJ and the Member States judiciary is especially fluid.

**2. Direct effect**

The doctrine of "direct effect" determines the extent to which EU law operates directly on its citizens without action by the Member States. This doctrine expresses a "highly political idea" that the EU is an organization of persons and not states. Not only Member States then but individuals must be considered the subject of EU law. The direct effect of the treaty and the various categories of legislation raise separate analytical questions. A general test, summarized below, has emerged for determining the direct effect of laws within these categories.

Many **treaty** articles may have direct effect and hence persons may derive rights and duties directly from those articles. Especially in the early years, this authority was important because both the EU and Member State institutions were slow to enact implementing legislation. Rights derived directly from the treaty could be enforced without this legislation.

The direct effect of "secondary legislation" listed in Article 249 varies. **Regulations** are given direct effect. As with treaty provisions, direct effect of regulations allowed EU legislation to take effect regardless of state action or inaction. Direct effect for regulations is based on expression provision of Article 249, which states that they are "directly applicable in all Member States." **Decisions** were also given direct effect because Article 249 provides that a decision is "binding in its entirety upon those to whom it is addressed." **Directives**, however, created a special problem. By definition, directives are only binding on the Member States and they are not effective until the Member States takes the necessary action. Nonetheless, the Court has given directives direct effect if the action can somehow be traced back to the state. **International**

[52] SLAUGHTER, SWEET & WEILER, THE EUROPEAN COURTS & NATIONAL COURTS: DOCTRINE AND JURISPRUDENCE, 95-98 (1998).

**agreements** are also generally given direct effect. However, the ECJ has ruled that GATT norms generally lack direct effect in national courts on account of "the spirit, the general scheme and the terms of the general agreement" but this ruling is not without exceptions.

The Court's basic test for direct effect is fairly straightforward: the measure must be clear and unambiguous, it must be unconditional, and its operation must not necessitate further action by the EU or national authorities. Over time, the Court has further developed these factors. The Court demand for precision under the first factor has varied. As to the second factor, the Court has held that a right is not considered conditional just because the provision establishes some objective factors or event. Rather, the right is conditional if its effect depends on the judgment or discretion of any EU institution, national body or some other independent authority. Inaction may satisfy the third element. Thus, for example, a measure may have direct effect after the time limit for the further action has passed whether the required action has been taken or not.

Direct effect may be either horizontal or vertical. Vertical direct effect means that the effect comes down through the state and hence if the direct effect is vertical it must be based on Member State measures. Horizontal direct effect means that European citizens have rights and duties relative to each other. The treaty and regulation because they have direct application have horizontal direct effect without regard for the action of a Member State. Decisions have direct effect as to the party named in the decision. Directives, since they apply only to the Member States, should not have horizontal direct effect. However, the ECJ has given directives some horizontal direct effect where the action can be said to involve an "organ of the state." If a national court is considered an organ of the state then that court must give a measure direct effect and hence apply it to the private parties. It may be that an administrative tribunal must give a directive horizontal direct effect because the administrative tribunal is under the state's duty to comply with the directive.

National courts are less reluctant to adopt an expansive application of direct effect than they are to concede supremacy. Therefore, they will give EU measures the direct effect ordered by the ECJ.

### 3. Loyal cooperation

Treaty Article 10 imposes a "duty of loyalty" on the Member States. Member States "shall take all appropriate measures, whether general or particular, to ensure fulfilment of [their EU] obligations;" "shall facilitate the achievement of the Community's task,"and "abstain from any measure which could jeopardize the attainment of the objectives of this Treaty." The ECJ has based specific and concrete obligations on this Article. Obligations recognized by the Court include assurance of effective, deterrent and proportional enforcement of EU law, judicial protection of EU rights; and assumption of liability for any loss or damages to individuals as a result of breaches of EU

obligations.

**4. Subsidiarity**

The EU, despite the pressure for an ever-closer union, has not been immune from the global devolution movement. The EU has embodied these notions in the doctrine of "subsidiarity." The subsidiarity doctrine manifests a growing sense that the EU unduly infringes on Member State sovereignty.[53] In short, it expresses a preference for social policy decisionmaking at the level nearest those who will be affected while still achieving the desired shared goal. Article 5 now expressly provides:

> In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore . . . be better achieved by the Community.

[53] The doctrine began to emerge from several different venues in the early 1980s. The 1992 "Maastricht Treaty," formally the Treaty on European Union (TEU), incorporated the concept into the basic law. For a discussion of the Amsterdam Treaty's treatment of subsidiary and the experience with that principle between the TEU and the Amsterdam Treaty, *see* Christian Timmermans, *Subsidiarity and Transparency*, 22 FORDHAM INT'L L.J. 106 (1999) (concluding: "Judge Pescatore . . . feared that subsidiarity would set us back into the dark times of anarchy of the nation states. I am happy to say now in 1998 that after five years of subsidiarity, the Community is still very much alive").

The EU "federalism" controversy is very familiar to US lawyers but US federalism and subsidiarity contrast. Bermann distinguished the two concepts: "U.S. federalism places greater emphasis on the presence of an overall balance of power between the federal government and the states than on respect for any single rule for allocating competences among the different levels of government."[54] US federalism principles may look to an array of justifications for centralized decisionmaking in a particular area of public policy. The federal government may decide that a solution should be sought at the national level without having to formally justify that choice. The EU subsidiarity doctrine focuses only on: "the relative capacities of federal and state government to deal effectively or adequately with the problem or policy at hand."[55] Subsidiarity is a formal restraint in which the central government may take action only if it can demonstrate that it is the better actor. Otherwise, the solution to a perceived problem must be left to the local authority. Therefore, EU subsidiarity places the burden on the EU institutions, including the EU Courts, to demonstrate that centralization is superior. US federalism, on the other hand, leaves to the US Congress the choice between federal and state authority. EU subsidiarity then both empowers a reviewing court to restrain central authority and restrains the central adjudicative bodies from themselves asserting power. US federalism provides no such clear constraint on political choice.[56]

**5. Substate independence**

The 25 Member States are in reality themselves often confederations of various nationalities, ethnic groups and language groups. In some, these groups and regions have attained some degree of autonomy. In others, the groups are part of the national fabric and are subsumed in the national identity. Still in others, these groups and regions hunger for some independence. Many groups cannot be defined easily within existing national boundaries. The EU's federal structure then actually brings together and must govern a variety of "peoples."

**Additional Reading in Federalism**

KAREN J. ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW (2001).

---

[54]. George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 450 (1994).

[55] *Id*. at 451.

[56] US federalism has not been immune from the devolution movement and hence the Supreme Court increasingly protects state sovereignly.

THE EUROPEAN COURTS & NATIONAL COURTS: DOCTRINE AND JURISPRUDENCE (ANNE-MARIE SLAUGHTER, ALEC STONE SWEET & JOSEPH H. H. WEILER, 1998).

ADMINISTRATIVE LAW OF THE EUROPEAN UNION, ITS MEMBER STATES AND THE UNITED STATES: A COMPARATIVE ANALYSIS (Rene Seerden & Frits Stroink eds, 2002)

JOLANDE M. PRINSEEN & ANNETTE SCHRAUWEN, DIRECT EFFECT: RETHINKING A CLASSIC OF EC LEGAL DOCTRINE (2002).

KALYPSO NICOLAIDIS & ROBERT HOWSE, THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION (2001).

George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331 (1994).