



# The ABC of Community law

by Dr Klaus-Dieter Borchardt



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**European Commission**

Directorate-General for Education and Culture

Publications Unit, rue de la Loi/Wetstraat 200, B-1049 Brussels

Cataloguing data can be found at the end of this publication.

Luxembourg: Office for Official Publications of the European Communities, 2000

ISBN 92-828-7803-1

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*Printed in Belgium*

PRINTED ON WHITE CHLORINE FREE PAPER

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**Fifth edition**

by Dr Klaus-Dieter Borchardt

Manuscript completed in September 1999

Cover: Graphic design by Mario Ramos

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# INTRODUCTION: FROM PARIS VIA ROME TO MAASTRICHT AND AMSTERDAM

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

In overall terms, moves towards unification in Europe since the Second World War have created a confusing mixture of numerous and complex organisations that are difficult to keep track of. For example, the OECD (Organisation for Economic Cooperation and Development), WEU (Western European Union), NATO (North Atlantic Treaty Organisation), the Council of Europe, the European Union (which started life as the European Coal and Steel Community, the European Atomic Energy Community and the European Community) coexist without any real links between them. The number of member countries in these various organisations ranges from 19 (WEU) to 40 (Council of Europe).

This variety of institutions only acquires a logical structure if we look at the specific

aims of these organisations; these can be divided into three main groups:

- **The Euro-Atlantic organisations**

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

In 1949, NATO was founded as a military alliance with the United States and Canada. In 1954, the Western European Union (WEU) was created to strengthen security cooperation between the countries of Europe. It brought together the

countries that had concluded the Brussels Treaty (United Kingdom, France, Belgium, Luxembourg and the Netherlands) with the addition of the Federal Republic of Germany and Italy. Portugal, Spain and Greece are now also members of the WEU. The organisation offers its members a platform for close cooperation on security and defence, and thus serves both to strengthen Europe's political weight in the Atlantic alliance and to establish a European identity in security and defence policy.

### • The Council of Europe and the OSCE

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

These organisations include the Council of Europe, which was founded as a political institution on 5 May 1949. Its Statute does not make any reference to moves towards





a federation or union, nor does it provide for the transfer or merging of sovereign rights. Decisions on all important questions require unanimity, which means that every country has a power of veto; the same set-up is to be found in the United Nations (UN) Security Council. The Council of Europe is therefore designed only with international cooperation in mind. Numerous conventions have been concluded by the Council in the fields of economics, culture, social policy and law. The most important — and best known — of these is the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 4 November 1950. The Convention not only enabled a minimum standard for the safeguarding of human rights to be laid down for the member countries; it also established a system of legal protection which enables the bodies established in Strasbourg under the Convention (the European Commission on Human Rights and the European Court of Human Rights) to condemn violations of human rights in the member countries.

This group of organisations also includes the Organisation for Security and Cooperation in Europe (OSCE), founded in 1994 at the Conference on Security and Cooperation in Europe. The OSCE is bound by the principles and aims set out in the 1975 Helsinki Final Act and the 1990 Charter of Paris. Alongside measures to build up trust between the countries of Europe, these aims also include the creation of a ‘safety net’ to enable disputes to be settled by peaceful means. As events of the recent past have shown, Europe still has a long way to go in this respect.

## • The European Union

The third group of European organisations comprises the European Union, which itself has grown out of the European Coal and Steel Community, the European Atomic Energy Community and the European Community.

The feature that is completely new in the EU and distinguishes it from the usual type of international association of States is that the Member States have ceded some of their sovereign rights to the EC at the centre and have conferred on it powers to act independently. In exercising these powers, the EC is able to issue sovereign acts which have the same force as laws in individual States.

The foundation stone of a European Community was laid by the then French Foreign Minister, Robert Schuman, in his declaration of 9 May 1950, in which he put forward the plan he had worked out with Jean Monnet to pool Europe’s coal and steel industries. This would, he declared, constitute a historic initiative for an ‘organised and vital Europe’, which was ‘indispensable for civilisation’ and without which the ‘peace of the world could not be maintained’. The ‘Schumann Plan’ finally became a reality with the conclusion of the founding Treaty of the European Coal and Steel Community (ECSC) by the six founding States (Belgium, Germany, France, Italy, Luxembourg and the Netherlands) on 18 April 1951 in Paris (Treaty of Paris) and its entry into force on 23 July 1952. A further development came some years later with

the Treaties of Rome of 25 March 1957, which created the European Economic Community (EEC) and the European Atomic Energy Community (Euratom); these began their work when the Treaties entered into force on 1 January 1958.

The creation of the European Union (EU) by means of the Treaty of Maastricht marked a further step along the path to the political unification of Europe. Although the Treaty was signed in Maastricht on 7 February 1992, a number of obstacles in the ratification process (approval by the people of Denmark only after a second referendum; legal action in Germany to have Parliament's approval of the Treaty declared unconstitutional) meant that it did not enter into force until 1 November 1993. The Treaty refers to itself as 'a new stage in the process of creating an ever closer union among the peoples of Europe'. As well as making a number of changes to the E(EC) Treaty and the Euratom Treaty, it contains the instrument establishing the European Union — although it does not bring this process to completion. Like the creation of the EC, it is a first step on the path leading ultimately to a European constitutional system which will embrace the EC as such. The EU saw a further development in the form of the Treaty of Amsterdam which was signed on 2 October 1997 and entered into force on 1 May 1999 after completion of the ratification process in the Member States. One innovation which deserves special mention here is the new provisions of the EU Treaty concerning flexibility, whereby Member States which intend to establish closer cooperation may

make use of the institutions, procedures and mechanisms laid down in the Treaties, subject to the provisos specified. This ultimately opens the way for a multi-speed Europe, albeit with restrictions. The resultant European Union does not, contrary to some accounts in the media, replace the European Communities but instead places it under the same umbrella as the new 'policies and forms of cooperation' (Article 47 EU). Hence the 'three pillars' upon which the European Union is built: the European Communities; common foreign and security policy; and justice and home affairs. These will be considered in some detail in a separate chapter on the constitution of the EU.

The Member States of the EU comprise first of all the six founder members of the EC, namely Belgium, Germany (including the territory of the former GDR following the reunification of the two Germanys on 3 October 1990), France, Italy, Luxembourg and the Netherlands. On 1 January 1973, the United Kingdom, Denmark (now excluding Greenland, which in a referendum in February 1982 voted by a narrow majority not to remain in the EC) and Ireland joined the Community; Norway's planned accession was rejected in a referendum in October 1972 (53.5 % against EC membership). In 1976 and 1977, Greece, Portugal and Spain applied for membership. This 'enlargement to the south' was completed on 1 January 1986 with the accession of Portugal and Spain; Greece had already been a member of the Community since 1 January 1981. The next enlargement took place on 1 January 1995 when Austria, Finland and Sweden

joined what had by then become the European Union (EU), thanks to the Treaty of Maastricht that had entered into force on 1 November 1993. In Norway, a referendum led to a repeat of the outcome 22 years before, with a small majority (52.4 %) against Norwegian membership of the EU. The EU has therefore comprised 15 Member States since 1 January 1995. Applications for membership have also been received from Turkey (1987), Cyprus (1990), Switzerland (1992 — the application is not being processed at the moment), Hungary (1994), Poland (1994), Romania (1995), Latvia (1995), Slovakia (1995), Estonia (1995), Lithuania (1995), Bulgaria (1995), the Czech Republic (1996), Slovenia (1996) and Malta (application renewed in 1998). In its 'Agenda 2000' document, the Commission in July 1997 set out for the Council of the EU its position regarding the applications. The European Council met in Luxembourg in December 1997 and laid down the overall framework for the enlargement process, which encompassed all applicant countries (except Switzerland). This process consists of three stages:

- The European Conference, which met for the first time on 12 March 1998 in London, provides a multilateral framework encompassing the 10 central and east European countries (CEECs), Cyprus and now also Malta. It will offer a forum for political consultations on questions of common foreign and security policy (CFSP), justice and home affairs, economic cooperation and collaboration between regions.

- The accession process has been launched with the 10 CEECs, Cyprus and Malta. The idea is that these countries should become members of the EU on the basis of the same criteria, and should be subject to the same conditions for participation in the accession process. A special 'pre-accession strategy' is to be used to enable all applicants to bring themselves, as far as possible, into line with EU law prior to their accession. As part of a review procedure, the Commission provides the Council with regular reports (the first of which was submitted at the end of 1998) on the progress being made by the CEECs on their way towards membership, where appropriate with recommendations on the start of accession negotiations.

- Accession negotiations began on 31 March 1998 with the six countries recommended by the Commission (Cyprus, Hungary, Poland, Estonia, the Czech Republic and Slovenia). Negotiations are being conducted bilaterally with the individual applicant countries and may be concluded at different times.

The legal order created by the European Community has already become an established component of our political life. Each year, on the basis of the Community Treaties, thousands of decisions are taken that crucially affect the Member States and lives of their citizens. The individual has long since ceased to be merely a citizen of his country, town or district; he is also a Community citizen. For this reason alone it is of crucial importance that the Community citizen should be informed

about the legal order that affects his daily life. Yet the complexities of the Community and its legal order are not easy to grasp. This is partly due to the wording of the Treaties themselves, which is often somewhat obscure, with implications which are not easy to appreciate. An additional factor is the unfamiliarity of many

concepts with which the Treaties sought to break new ground. The following pages are an attempt to clarify the structure of the Community and the supporting pillars of the European legal order, and thus help to lessen the incomprehension prevailing among the citizens of the EU <sup>(1)</sup>.

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<sup>(1)</sup> Following the Treaty of Amsterdam, the articles of the Treaty were renumbered. The new numbering has been used in this booklet. The table of equivalences in the appendix is intended to help locate familiar articles which are now numbered differently.

# FUNDAMENTAL VALUES OF THE EUROPEAN UNION

The foundations of a united Europe were laid on fundamental ideas and values to which the Member States also subscribe and which are translated into practical reality by the Community's operational institutions. These acknowledged fundamental values include the securing of a lasting peace, unity, equality, freedom, security and solidarity. The EU's declared aims are to safeguard the principles of liberty, democracy and the rule of law which are shared by all the Member States (Article 6(1) EU). Together with the protection of human rights and basic freedoms, these principles have been reinforced in the EU Treaty in that, for the first time, it makes provision for measures to be taken if these principles are violated (Articles 7 and 8 EU). In practical terms, this means that if the Heads of State and Government, acting on a proposal by one third of the Member States or by the Commission, and after obtaining the assent of the European Parliament, declare that a serious and persistent breach of the EU's underlying principles has occurred, the Council may, acting by a qualified majority, suspend certain of the rights deriving from the application of the EU Treaty and EC Treaty to the Member State in question, including voting rights in the Council. When doing so, however, the Council must give particular consideration to the possible consequences of such a decision for the rights and obligations of natural and legal persons. On the other

hand, the obligations on the Member State in question under the EU Treaty and EC Treaty continue to be binding.

- THE EU AS GUARANTOR OF PEACE

There is no greater motivation for European unification than the desire for peace. In Europe this century, two world wars have been waged between countries that are now Member States of the European Community. Thus, a policy for Europe means at the same time a policy for peace, and the establishment of the Community simultaneously created the centrepiece of a framework for peace in Europe that renders a war between the Community's Member States impossible. More than 40 years of peace in Europe are proof of this.

- UNITY AND EQUALITY AS THE RECURRING THEME

Unity is the recurring theme. Present-day problems can be mastered only if the European countries move forward along the path that leads them to unity. Many people take the view that without European integration, without the European Community, it would not be possible to secure peace (both in Europe and worldwide), democracy, law and justice, economic prosperity and social security, and guarantee them for the future. Unemployment, inadequate growth and environmental pollution have long ceased to

be merely national problems; nor can they be resolved at national level. It is only in the context of the Community that a stable economic order can be established and only through joint European efforts that we can secure an international economic policy that improves the performance of the European economy and contributes to social justice. Without internal cohesion, Europe cannot assert its political and economic independence from the rest of the world, win back its influence in the world and retrieve its role in world politics.

Unity can endure only where equality is the rule. No citizen of the Community may be placed at a disadvantage or discriminated against because of his nationality. Discriminatory treatment on the grounds of gender, race, ethnic origin, religion or beliefs, disability, age or sexual orientation must be stopped. All Community citizens are equal before the law. As far as the Member States are concerned, the principle of equality means that no State has precedence over another and natural differences such as size, population and differing structures must be addressed only in accordance with the principle of equality.

- **THE FUNDAMENTAL FREEDOMS**

Freedom results directly from peace, unity and equality. Creating a larger entity by linking 15 States immediately affords freedom of movement beyond national frontiers. This means, in particular, freedom of movement for workers,

freedom of establishment, freedom to provide services, free movement of goods and freedom of capital movements. These fundamental freedoms under the founding Treaties guarantee businessmen freedom of decision-making, workers freedom to choose their place of work and consumers freedom of choice between the greatest possible variety of products. Freedom of competition permits businessmen to offer their goods and services to an incomparably wider circle of potential customers. Workers can seek employment and change their place of employment according to their own wishes and interests throughout the entire territory of the EU. Consumers can select the cheapest and best products from the far greater wealth of goods on offer that results from increased competition.

- **THE PRINCIPLE OF SOLIDARITY**

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

- **RESPECT OF NATIONAL IDENTITY**

The national identities of the Member States is respected (Article 6(3) EU). The idea is not for the Member States to be



‘dissolved’ into the EU, but rather for them to contribute their own particular qualities. It is precisely this variety of national characteristics and identities that lends the EU its moral authority, which is in turn used for the benefit of the Community as a whole.

- **THE NEED FOR SECURITY**

Lastly, all these fundamental values depend on security. In the most recent past, a period of movement and change — and one in which many unknown challenges had to be faced — security has become a basic need which the Community must also try to satisfy. Every action by Community institutions must bear in mind that people and firms need constancy, consistency and reliability in terms of job security, general economic

and business conditions and social security.

- **FUNDAMENTAL RIGHTS IN THE EU**

Against the background of fundamental values and the concepts that underlie them, the question necessarily arises of the fundamental rights of individual citizens of the Community, especially since the history of Europe has, for more than 200 years, been characterised by continuing efforts to enhance the protection of fundamental rights. Starting with the declarations of human and civil rights in the 18th century, fundamental rights and civil liberties have now become firmly anchored in the constitutions of most civilised States. This is especially true of the EU Member States, whose legal systems are

constructed on the basis of the rule of law and respect for the dignity, freedom and right to self-development of the individual. There are also numerous international conventions on the protection of human rights, among which the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 4 November 1950 is of very great significance.

A search through the Community Treaties for express provisions concerning the fundamental rights of individual Community citizens is disappointing. In contrast to the legal systems of the Member States, the Treaties establishing the European Communities do not contain any enumeration of fundamental rights. However, the European Parliament, the Council and the Commission, as the policy-making bodies of the EU, solemnly issued a joint declaration on fundamental rights on 5 April 1977. They underscored the importance of securing these rights in the Community and undertook to preserve them in the exercise of their powers and in the pursuit of the Community's objectives. At the Copenhagen European Council on 7 and 8 April 1978, the Heads of State or Government of the Member States issued a declaration on democracy in which they endorsed the 1977 declaration. The two declarations may not generate directly exercisable rights for the Community's citizens, but they are of great political significance as evidence of the status accorded to human rights in the Community. The EU Treaty now also gives this commitment legally binding form by stipulating that the EU shall respect 'fundamental rights, as

guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law' (Article 6(2) EU).

However, a Community legal order safeguarding fundamental rights was relatively late in coming; it was not until 1969 that the Court of Justice of the European Communities had established a body of case law to serve as a basis. This was because in the early years the Court had rejected all actions relating to basic rights on the grounds that it need not concern itself with matters falling within the scope of national constitutional law. The Court had to alter its position not least because it was itself the embodiment of the primacy of Community and its precedence over national law; this primacy can only be firmly established if Community law is sufficient in itself to guarantee the protection of basic rights with the same legal force as under national constitutions.

The starting point in this case law was the 'Stauder' judgment, in which the point at issue was the fact that a recipient of welfare benefits for war victims regarded the requirement that he give his name when registering for the purchase of butter at reduced prices at Christmas time as a violation of his human dignity and the principle of equality. Although the Court of Justice came to the conclusion, in interpreting the Community provision, that it was not necessary for recipients to give their name so that, in fact, consideration



of the question of a violation of a fundamental right was superfluous, it declared finally that the general fundamental principles of the Community legal order, which the Court of Justice had to safeguard, included respect for fundamental rights. This was the first time that the Court of Justice recognised the existence of a Community framework of fundamental rights of its own.

Initially, the Court developed its safeguards for fundamental rights from a number of provisions in the Treaties. This is especially the case for the numerous bans on discrimination which, in specific circumstances, address particular aspects of the general principle of equality. Examples are the prohibition of any discrimination on grounds of nationality (Article 12 EC), preventing people being treated differently on the grounds of gender, race, ethnic origin, religion or beliefs, disability, age or sexual orientation (Article 13 EC), the equal treatment of goods and persons in relation to the four basic freedoms (freedom of movement of goods — Article 28 EC; freedom of movement of persons — Article 39 EC; the right of establishment — Article 43 EC; and freedom to provide services — Article 50 EC), freedom of competition (Article 81 f. EC) and equal pay for men and women (Article 141 EC). The four fundamental freedoms of the Community, which guarantee the basic freedoms of professional life, can also be regarded as a Community fundamental right to freedom of movement and freedom to choose and practise a profession. Specific guarantees are also provided

for the right of association (Article 137 EC and Article 48(1) ECSC), the right to petition (Article 21 EC and Article 48(2) ECSC) and the protection of business and professional secrets (Article 287 EC, Article 194 Euratom and Article 47(2) and (4) ECSC).

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

One particularly important principle, regularly invoked in disputes with the Community, is the principle of equal treatment. Put simply, this means that like cases must be treated alike, unless there is some objectively justifiable ground for distinguishing them. But the Court of Justice has held, contrary to international custom, that this principle does not preclude nationals and home-produced goods from being subjected to stricter requirements than citizens or products from other Member States. This 'reverse discrimination' is the inevitable result of the limited scope of the Community's powers. Under the Court's judgments issued up to now, the Community rules requiring liberalisation, which flow from the fundamental freedoms, apply only to cross-border trade. Rules regulating the production and marketing of home-produced goods or the legal status of nationals in their own Member State are affected by Community law only if the Community has introduced harmonisation measures.

The cases decided by the Court of Justice have given the Community an extensive body of quasi-constitutional law. In practical terms, the principle of proportionality is foremost among these. What this means is that the objectives pursued and the means deployed must be weighed up and an attempt made to keep them in proper balance so that the citizen is not subjected to excessive burdens. Among the other fundamental principles underlying Community law are the general principles of administrative law and the concept of

due process: legitimate expectations must be protected, retroactive provisions imposing burdens or withdrawing legitimately acquired advantages are precluded and the right to due legal process — natural justice is the traditional term for this — must be secured in the administrative procedures of the Commission and the judicial procedures of the Court of Justice. Particular value is also attached to greater transparency, which means that decisions should be taken as openly as possible, and as closely as possible to the citizen. An important aspect of this transparency is that any EU citizen or legal person registered in a Member State may have access to Council or Commission documents.

With all due respect for the achievements of the Court of Justice in the development of unwritten fundamental rights, this process of deriving 'European fundamental rights' has a serious disadvantage: the Court of Justice is confined to the particular case in point. The result of this can be that it is not able to develop fundamental rights from the general legal principles for all areas in which this appears necessary or desirable. Nor will it be able to elaborate the scope of and the limits to the protection of fundamental rights as generally and distinctively as is necessary. As a result, the Community institutions cannot assess with enough precision whether they are in danger of violating a fundamental right or not. Nor can any Community citizen who is affected judge in every case whether one of his fundamental rights has been infringed.

For a long time, EC accession to the ECHR was regarded as a way out of this situation. In its Opinion 2/94, however, the Court held that, as the law now stands, the EC has no competence to accede to the Convention. The Court stated that respect for human rights was a condition for the lawfulness of Community acts. However, accession to the Convention would entail a substantial change in the present Community system for the protection of human rights in that it would involve the Community entering into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order. The Court took the view that such a modification of the system for the protection of human rights in the EC, with equally fundamental institutional implications for the Community and for the Member States, would be of constitutional significance and would therefore go beyond the scope of the dispositive

powers provided for in Article 308 of the EC Treaty.

The only possible way to solve once and for all the question of fundamental rights in the EC is to create a body of such rights applying specifically to the EU by means of amendments to the existing EC and EU Treaties. The European Parliament's 'Declaration of fundamental rights and freedoms', which set out a comprehensive catalogue of human rights, could serve as a basis for this. This is the only way to effectively enhance the protection of human rights in the EU — assuming, of course, that all Member States are in agreement about the nature and scope of these rights. It is quite obvious that this consensus has been lacking up to now; the Member States have not gone any further than a general, but nevertheless binding, commitment to respect and safeguard fundamental freedoms in the context of the EU.

# THE 'CONSTITUTION' OF THE EUROPEAN UNION

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

Unlike most of the constitutions of its Member States, the EU constitution is not laid down in a comprehensive constitutional document, but arises from the totality of rules and fundamental values by which those in authority perceive themselves to be bound. These rules are to be found partly in the founding Treaties or in the legal instruments produced by the Community institutions, but they also rest partly on custom.

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

of the Member States and their institutions, and the position of the citizen.

What answers, then, does the Community order afford to these questions concerning its structure, its fundamental values and its institutions?

- STRUCTURE OF THE EUROPEAN UNION: THE 'THREE PILLARS'

## **First pillar: the European Communities**

The first pillar is made up of the three European Communities (E(E)C, Euratom, ECSC), which have been deepened and enlarged by economic and monetary union. When the EU was established, the 'European Economic Community' was renamed the 'European Community'. The EEC Treaty became the EC Treaty. This change was intended to give expression to the transition from a purely economic community to a political union. However, this change of name did not affect the three existing Communities (ECSC, Euratom, EC) since it did not entail any formal unification of them. In the course of the establishment of the EU, some institutions of the EC changed their names. The 'Council of the European Communities' has since 8 November 1993 been referred to as the 'Council of the European Union'. The 'Commission of the European Communities' has become the 'European

# The European Union

## First pillar: the European Communities

### EC

- Customs union and single market
- Agricultural policy
- Structural policy
- Trade policy

### New or amended provisions on:

- EU citizenship
- Education and culture
- Trans-European networks
- Consumer protection
- Health
- Research and environment
- Social policy
- Asylum policy
- External borders
- Immigration policy

Euratom  
ECSC

## Second pillar: common foreign and security policy

### Foreign policy

- Cooperation, common positions and measures
- Peacekeeping
- Human rights
- Democracy
- Aid to non-member countries

### Security policy

- Drawing on the WEU: questions concerning the security of the EU
- Disarmament
- Financial aspects of defence
- Long-term: Europe's security framework

## Third pillar: cooperation in justice and home affairs

- Cooperation between judicial authorities in civil and criminal law
- Police cooperation
- Combating racism and xenophobia
- Fighting drugs and the arms trade
- Fighting organised crime
- Fighting terrorism
- Criminal acts against children, trafficking in human beings

Commission'. On 17 January 1994, the 'Court of Auditors' was renamed the 'European Court of Auditors'. However, the legal acts of the respective bodies still constitute legal acts of the Community at any given time.

The first pillar embodies Community jurisdiction in its most highly developed form. Within the framework of the EC, the Community institutions may draw up legislation in their respective areas of responsibility which applies directly in the Member States and may claim precedence over national law. At the heart of the EC is the single market with its four basic freedoms (free movement of goods, free movement of workers, freedom to provide services and free movement of capital and payments) and its rules on competition. Policy areas for which the Community is responsible include: economic and monetary affairs (centred around the single European currency, the euro); agriculture; visa requirements, asylum and immigration; transport; taxation; employment; trade; social welfare, education and youth welfare; culture; consumer protection and health; trans-European networks; industry; economic and social cohesion; research and technology; the environment; and development aid.

### **Second pillar: common foreign and security policy**

Before the Treaty on European Union came into being, political cooperation between the Member States was on the basis of the 'European political cooperation' (EPC) arrangements set up in 1970,

which were enhanced and expanded upon under the Single European Act in 1986/87. These arrangements involved regular consultations between foreign ministers and ongoing contacts between their government departments. The aim of EPC was to bring about better communication and greater convergence of the Member States' positions on all major foreign policy issues and, if possible, a joint course of action. All decisions had to be taken unanimously, however. When security-related issues were involved, cooperation was limited to the political and financial aspects. Recent political crises (the Gulf War, the civil war in former Yugoslavia, the break-up of the Soviet Union) made it very apparent that this foreign and security policy instrument was not sufficient to enable the EU, as the largest trading power in the world, to bring its weight properly to bear on world affairs. In the EU Treaty, the Heads of State or Government have now agreed to gradually develop a common foreign and security policy with the following declared aims:

- safeguarding the commonly held values, fundamental interests and independence of the EU;
- strengthening the security of the EU and its Member States;
- securing world peace and increasing international security in line with the principles set out in the Charter of the United Nations, and the principles and aims of the 1975 Helsinki Final Act and the 1990 Charter of Paris, which in

1994 were embodied in the Organisation for Security and Cooperation in Europe (OSCE);

- promoting international cooperation;
- promoting democracy and the rule of law, and safeguarding human rights and basic freedoms.

Since the EU is not an individual State, these aims can only be achieved step by step. Traditionally, foreign and especially security policy are areas in which the Member States are particularly keen to retain their own (national) sovereignty. Another reason why common interests in this area are difficult to define is that only France and the United Kingdom have nuclear weapons. Another problem is that some Member States are not in NATO (Ireland, Austria, Finland, Sweden) or the WEU (Denmark, Greece, Ireland). Most 'common foreign and security policy' decisions are therefore still currently taken on the basis of cooperation between States. In the meantime, however, a range of tools has emerged in its own right; this was reflected in the Treaty of Amsterdam and has acquired a firm legal framework through cooperation between States. For example, decisions of principle are passed in the context of the second (and third) pillars, common positions are set out, joint actions and measures carried out and framework decisions passed. Framework decisions in particular are similar in essence to an EC directive although, like the other tools available to the EU, they

are not valid or directly applicable in the Member States. Nor can these decisions and measures be challenged before the European Court of Justice.

### **Third pillar: cooperation in justice and home affairs**

The aim underlying cooperation between police and judicial authorities is to afford citizens freedom, security and justice by jointly preventing and combating crime (especially terrorism, trafficking in human beings, illicit drug and arms trafficking, corruption and fraud), racism and xenophobia (Articles 29 and 30 EU). The directive on money-laundering and the creation of a European police authority, Europol, which has been operative since 1998, are two very positive steps that have been taken.

Judicial cooperation is also concerned with facilitating and accelerating cooperation in relation to proceedings and the enforcement of decisions, facilitating extradition between Member States, establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking (Articles 31 and 32 EU).

As with foreign and security policy, cooperation in this area takes place outside the decision-making procedures of the EC and on the basis of collaboration between individual countries.

- **THE LEGAL CHARACTER OF THE EC AND EU**

Any consideration of the legal nature of the EC and the EU must start by looking at their respective characteristic features.

- 1. The legal character of the EC**

The legal nature of the EC was set out in two precedent-setting judgments by the European Court of Justice in 1963 and 1964.

- ***Van Gend & Loos***

In this legal dispute, the Dutch transport company Van Gend & Loos filed an action against the Netherlands customs authorities for imposing an import duty on a chemical product from Germany which was higher than duties on earlier imports. The company considered this an infringement of Article 12 of the EEC Treaty (now Article 25 of the EC Treaty), which prohibits the introduction of new import duties or any increase in existing customs duties between the Member States. The court in the Netherlands then suspended the proceedings and referred the matter to the European Court of Justice for clarification as regards the scope and legal implications of the abovementioned Article of the Treaty establishing the EC.

The European Court of Justice used this case as an opportunity to set out a number of findings of a fundamental nature concerning the legal nature of the EC. In its judgment, the Court stated that:

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

- ***Costa/ENEL***

Just a year later, the ‘Costa/ENEL’ case gave the Court an opportunity to set out its position in more detail. The facts of this case were the following: in 1962, Italy nationalised the production and distribution of electricity and transferred the assets of the electricity undertakings to the National Electricity Board (ENEL). As a shareholder of Edison Volt, one of the companies that was nationalised, Mr Costa considered that he had been deprived of his dividend and consequently refused to pay an electricity bill for ITL 1 926. In proceedings before the arbitration court in Milan, one of the arguments put forward by Mr Costa to justify





his conduct was that the nationalisation infringed a number of provisions of the EC Treaty. In order to be able to assess Mr Costa's submissions in his defence, the court requested the European Court of Justice to interpret various aspects of the EC Treaty. In its judgment, the Court stated the following in relation to the legal nature of the EC:

'By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which ... became an integral part of the legal systems of the Member States and which their courts are bound to apply. By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the

international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights ... and have thus created a body of law which binds both their nationals and themselves.'

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

'It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived

of its character as Community law and without the legal basis of the Community itself being called into question. The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.'

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

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

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

## ***2. The legal nature of the EU***

The EU is no longer merely a planned objective of the integration process, but rather an international organisation in its own right established by the Treaty of Maastricht.

What is unusual about this organisation is its function as an 'umbrella' for the three European Communities, its complementary policies and the forms of cooperation between the Member States.

The EU's legal order nevertheless falls a long way short of that of the EC. For example, the principles of autonomy, direct applicability and primacy of Community law, which are so essential to the legal order of the EC, do not apply to the other two pillars of the EU. Instead, these pillars basically consist of programmes and declarations of intent which are translated into practice through cooperation between governments and are deliberately not allowed to go beyond the preliminary stage of a subsequent, 'institutionalised' Union. The fact that the

EU uses the institutions of the EC when carrying out its tasks does not alter this situation because, as ‘institutions of the Union’, these may only act in accordance with the Treaty on European Union, i.e. only in the context of cooperation between the Member States in the second and third pillars. The Treaty on European Union does not constitute an ‘EU constitution’ regulating all aspects of that Union.

### ***3. Distinctness from other types of political organisation***

The EC and the EU have, by their very nature, certain features in common with the usual kind of international organisation or federal-type structure, and a number of differences.

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

The only feature that the EU has in common with other international organisations is that it, too, came into being as a result of an international treaty. However, the anchoring of the EC within the EU’s organisational structure has in itself made the EU a considerable departure from the traditional kind of international ties. This is because, although the Treaties establishing the EC were based on international treaties, they led to the creation of independent Communities with their own sovereign rights and responsibilities. The Member States have ceded some of their

sovereign powers to these Communities. In addition, the tasks which have been allotted to the EC are very different from those of other international organisations. While the latter mainly have clearly defined tasks of a technical nature, the EC has areas of responsibility which together constitute essential attributes of statehood.

Through these differences between the EC and the normal type of international organisation, the EC and thus also the EU, is in the process of acquiring a status similar to that of an individual State. In particular, the Member States’ partial surrender of sovereign rights was taken as a sign that the EU was already structured along the lines of a federal State. However, this view fails to take into account that the EU’s institutions only have powers in certain areas to pursue the objectives specified in the Treaties. This means that they are not free to choose their objectives in the same way as a sovereign State; nor are they in a position to meet the challenges facing modern States today. The EU has neither the comprehensive jurisdiction enjoyed by sovereign States nor the powers to establish new areas of responsibility (‘jurisdiction over jurisdiction’).

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

## • THE TASKS OF THE EU

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

Under the EC Treaty, the task of the EU is, by establishing a common market that unites the national markets of the Member States and on which all goods and services can be offered and sold on the same conditions as on an internal market, and by the gradual approximation of national economic policies in all sectors, to weld the Member States into a community.

The concept of establishing a common market was revitalised by the programme aimed at completion of the internal market by 1992. This programme was born of the realisation that, on the one hand, there remained a series of national obstacles to the full establishment of the freedoms on which the common market is based and that, on the other, important sectors of the economy such as telecommunications and public procurement were not included in the common market. In its White Paper on the completion of the internal market, the European Commission presented the Heads of State or Government of the (then) 10 Member States in June 1985 with some 300 proposals for legal instruments, complete with a detailed timetable, designed to remove all intra-Community barriers by the end of 1992. At the Milan

Summit in the same year, the Heads of State or Government entrusted the Commission with the political task of implementing the single market programme. However, to achieve in just seven years what the original Member States had failed to achieve in nearly three decades, a mere declaration of political intent and the adoption of a programme was not enough: the substance of Project 1992 had to be incorporated into the Treaties of Rome. This was done by the Single European Act, which added to the E(E)C Treaty various new provisions, including an Article stipulating that the Community should take all the necessary measures to establish the internal market progressively by 31 December 1992 (Article 14, ex Article 7a EU, and prior to that Article 8a EC). In all major respects, this was achieved within the required time frame, with the Community institutions succeeding in laying down a legal framework for a properly functioning single market. This framework has now been fleshed out very largely by national transposition measures, with the result that the single market has already become a reality. This single market also makes itself felt in everyday life, especially when travelling within the EU, where identity checks at national borders were long since discontinued.

The Treaty on European Union represented a step into a new economic and social dimension for the EC. The introduction of the euro (Article 121(4) EU) as the single European currency in 11 of the 15 Member States (Denmark Sweden and the United Kingdom declined to participate,

whilst Greece is still trying to meet the criteria for eligibility) on 1 January 1999 was another clear sign of the interpenetration of the Member States' economies and further strengthened the EU. As the only legal currency within the EU, the euro will, on 1 January 2002, replace the national currencies in all general payment transactions, thereby becoming the currency of all EU citizens. The introduction of the concept of citizenship of the Union (Article 17 ff. EC) further enhanced the rights and interests of nationals of the Member States within the EU. Citizens enjoy the right to move freely within the Union (Article 18 EC), the right to vote and stand as a candidate in municipal elections (Article 19 EC), entitlement to protection by the diplomatic and consular authorities of any Member State (Article 20 EC), the right to petition the European Parliament (Article 21 EC) and, in the context of the general ban on discrimination, the right to be treated by all Member States in the same way as they treat their own nationals (Article 17(2) in conjunction with Article 12 EC). The unemployment situation in the EU, which has been a source of concern for a number of years, has meant that the need to devise an employment strategy has become a priority task. With this in mind, a separate new Title relating to employment (Title VIII, Articles 125–130) was added to the EC Treaty. This calls on the Member States and the EC to develop a strategy for employment and particularly to promote a skilled, trained and adaptable workforce, in addition to which labour markets should be made adaptable to economic change. Employment promotion is

regarded as a matter of common concern, and requires Member States to coordinate their national measures within the Council. The EC will contribute to a high level of employment by encouraging cooperation between Member States and, if necessary, complementing their action while respecting their competences.

The EU Treaty also provides for new policies and forms of cooperation on foreign and security policy, and on police and judicial cooperation.

#### • THE POWERS OF THE EU

Neither the Treaties establishing the EC nor the Treaty on European Union confer on the Community and its institutions any general power to take all measures necessary to achieve the objectives of the Treaty, but lay down in each chapter the extent of the powers to act (principle of specific conferment of powers). This method has been chosen by the Member States in order to ensure that the surrender of their own powers can be more easily monitored and controlled. The range of matters covered by the specific conferments of power varies according to the nature of the tasks allotted to the EC and EU.

In the EC, the scope of the powers is very far-reaching. For instance, in the common transport policy any appropriate provisions may be enacted (Article 75(1) EC) and in agricultural policy (Article 34(2) EC) and in the sphere of freedom of movement of workers (Article 40 EC) all necessary measures may be taken. On the other

hand in competition law (Article 81 ff. EC), culture and education (Articles 150 and 151 EC), public health and consumer protection (Articles 152 and 153 EC) and environment policy (Article 175 EC), the scope for discretion on the part of the Community and its institutions is limited by narrowly defined conditions.

In addition to these special powers to act, the Community Treaties also confer on the institutions a power to act when this proves necessary to attain one of the objectives of the Treaty (Article 308 EC, Article 203 Euratom, Article 95(1) ECSC — subsidiary power to act). These articles do not, however, confer on the institutions any general power enabling them to carry out tasks which lie outside the objectives laid down in the Treaties, and the subsidiarity principle further debars the Community institutions from extending their powers to the detriment of those of the Member States. In practice, the possibilities afforded by this power have been used with increasing frequency since the EC has, over time, been faced repeatedly with new tasks that were not foreseen at the time the founding Treaties were concluded, and for which accordingly no appropriate powers were conferred in the Treaties. Examples are the protection of the environment and of consumers, the numerous research programmes concluded since 1973 outside the European Atomic Energy Community, or the establishment of a European Regional Fund as a means of closing the gap between the developed and underdeveloped regions of the Community. Now, however, the Single European Act and the

EU Treaty specifically give the Community jurisdiction in the abovementioned fields. These specific provisions on the powers of the EC have meant that the practical importance of the subsidiary power to act has very much declined.

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

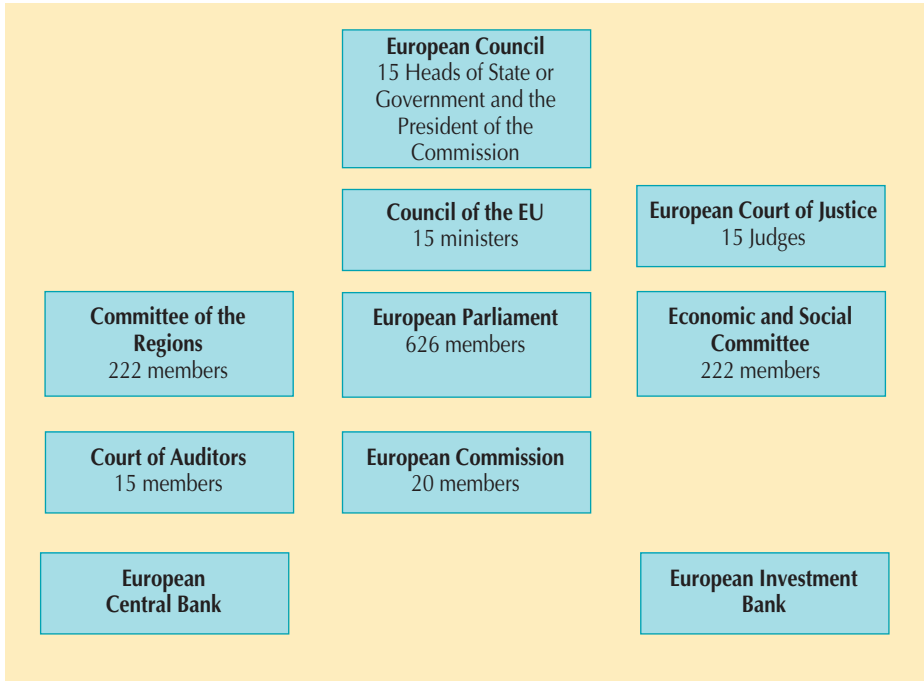
But the exercise of these powers by the EC is governed by the subsidiarity principle, taken over from Roman Catholic social doctrine, which has acquired virtually constitutional status through being embodied in the EC Treaty (Article 5). There are two facets to it: the affirmative

statement that the EC must act where the objectives to be pursued can be better attained at Community level, which enhances its powers; and the negative statement that it must not act where objectives can be satisfactorily attained by the Member States acting individually, which constrains them. What this means in practice is that all Community institutions, but especially the Commission, must always demonstrate that there is a real need for Community rules and common action. To paraphrase Montesquieu, when it is not necessary for the Community to take action, it is necessary that it should take none. If the need for Community rules is demonstrated, the next question that arises concerns the intensity and the form that they should take. The answer flows from the principle of proportionality that has entered Community law through the decisions of the Court of Justice. It means that the need for the specific legal instrument must be thoroughly assessed to see whether there is a less constraining means of achieving the same result. The main conclusion to be reached in general terms is that framework legislation, minimum standards and mutual recognition of the Member States' existing standards should always be preferred to excessively detailed Community rules. The applica-

tion of the subsidiarity principle was further clarified in a Protocol annexed to the Treaty of Amsterdam. The Protocol sets out all the procedural and material requirements deriving from the principle of subsidiarity which have to be met by the Community's legal acts. Very specific criteria for the application of this principle now exist, and at the same time the Community institutions' task of monitoring compliance with it has been made easier.

Under the second and third pillars of the EU (common foreign and security policy, and cooperation between police and judicial authorities in criminal matters) the powers of the Community institutions are limited to encouraging and supporting collaboration agreed on between the Member States themselves in the Council. There has been no transfer — either in whole or in part — of powers from the Member States to the Community institutions; instead, the Member States remain directly responsible for their joint foreign and security policy and for cooperation between their police and judicial authorities in fighting crime. They have nevertheless also given undertakings to cooperate further and pursue joint courses of action at EU level while working within the Community's institutional framework.

• THE INSTITUTIONS OF THE EU



	Votes in the Council of Ministers	Percentage of total votes	Percentage of total population	Members of the Commission
Germany	10	11.36	21.96	2
France	10	11.36	15.63	2
Italy	10	11.36	15.39	2
United Kingdom	10	11.36	15.75	2
Spain	8	9.09	10.53	2
Belgium	5	5.68	2.72	1
Greece	5	5.68	2.81	1
Netherlands	5	5.68	4.16	1
Portugal	5	5.68	2.66	1
Austria	4	4.54	2.16	1
Sweden	4	4.54	2.37	1
Denmark	3	3.41	1.41	1
Ireland	3	3.41	0.97	1
Finland	3	3.41	1.37	1
Luxembourg	2	2.27	0.11	1



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

The main actors on the Community stage are the European Council and the EC institutions — the European Parliament, the Council of the EU, the European Commission, the European Court of Justice and the Court of Auditors. There are also a number of ancillary bodies: the European Central Bank and the European Investment Bank, and also the Economic and Social Committee and the Committee of the Regions. Of these institutions the Court of Justice and Parliament, or 'Assembly' as it used to be called, were from the outset common to the three Communities. This was provided for in a Convention between the original six Member States that was signed in 1957 at the same time as the Rome Treaties. The process of creating common institutions was completed in July 1967 by the Treaty establishing a single Council and a single Commission of

the European Communities (the 'Merger Treaty'). Since then all three Communities have had one and the same institutional structure.

### **European Council (Article 4 EU)**

The European Council grew out of the Summit Conferences of Heads of State or Government. At the Paris Summit in December 1974 it was decided that meetings should be held three times a year and described as the European Council. In 1987, the Single European Act (Article 23) formally incorporated the European Council in the Community's institutional set-up. It is now a body of the European Union (Article 4 EU).

The Heads of State or Government and the President of the Commission meet at least twice a year in this context. They are accompanied by the Foreign Ministers and a Member of the Commission (Article 4(2) EU).

The function of the European Council is to establish policy guidelines for European integration in relation to both the EC and the EU. In the Community context, it does so by taking basic policy decisions and issuing instructions and guidelines to the Council or the Representatives of the Member States meeting in the Council. The European Council has in this way directed work on economic and monetary union, the European Monetary System, direct elections to Parliament and a number of accession applications.

## **European Parliament (Articles 189–201 EC)**

Under the Treaties, the European Parliament (EP) represents the peoples of the Member States of the Community (Article 189(1) EC). It is an amalgamation of the ECSC joint assembly, the EEC assembly and the Euratom assembly, which were combined to form an 'Assembly' under the 1957 convention on certain institutions common to the European Communities (first Merger Treaty). The name was not officially changed to 'European Parliament' until the EC Treaty was amended by the Treaty on European Union, although this step merely reflected what was already common usage dating back to the Assembly's own change of its name to 'European Parliament' in 1958.

### **• *Composition and election***

The EP is currently made up of 626 'representatives of the peoples of the Member States of the Community'. The number of seats may not exceed 700.

Before 1979 these representatives were selected from the membership of national parliaments and delegated by them. The direct general election of MEPs by the peoples of the Member States was provided for in the Treaties, but the first direct elections were not held until June 1979, a number of earlier initiatives having been fruitless. Elections are now held every five years, which corresponds to the length of a 'legislative period', but there is still no uniform electoral procedure as required by the Treaties. As in

1979, national systems continued to be used in the most recent direct elections in June 1999. The United Kingdom, for example, retained its 'first-past-the-post' system for European elections until 1994 and only joined the other Member States in 1999 elections in using proportional representation.

The composition of Parliament is shown in graphic form on page 34; this is the situation following the most recent elections in 1999.

The President, Vice-Presidents and Quaestors make up the Bureau, which is elected by Parliament for terms of two and a half years. Another body, the Conference of Presidents, also includes the chairmen of the political groups and is responsible for the organisation of Parliament's work, relations with the other EU institutions and with non-Union institutions.

The allocation of a given number of seats to each country means that, in purely mathematical terms, Germany has one MEP for every 808 000 citizens whereas Luxembourg has one representative in Parliament for about every 60 000 citizens.

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

making process must be transparent and the decision-making institutions representative; parliamentary control is required, and Parliament must lend legitimacy to the Community institutions involved in the decision-making process. It is precisely in this respect that the current organisation of the Community leaves something to be desired, despite the progress made over recent years. It is therefore rightly described as a still underdeveloped democracy. The European Parliament possesses only a few of the functions of a true parliament in a parliamentary democracy. Firstly, it does not elect a government. This is simply because no government in the normal sense exists at Community level. Instead, the functions analogous to government provided for in the Treaties are performed by the Council and the Commission, according to a form of division of labour. Nevertheless, the EU Treaty gave Parliament the power to influence appointments to the Commission and the appointment of its President ('right of investiture'). However, Parliament has no influence over the membership of the Council. The Council is subject to parliamentary control only in so far as each of its members, as a national minister, is answerable to the national parliament.

- **Tasks**

Parliament's functions can be divided up into three areas, as follows.

**Decision-making functions.** Parliament's role in the decision-making process was considerably strengthened by the introduction of two new legislative procedures,

namely the cooperation procedure (introduced by the Single European Act in 1987; Article 252 EC) and the co-decision procedure (introduced by the Treaty on European Union in 1993; Article 251 EC), both of which will be considered in greater detail in the section on the Community legislative process. These two procedures enable Parliament to not only put forward amendments to Community legislation at various readings and, within certain limits, get them accepted by the Council, but also to act as a co-legislator on an equal footing with the Council in the context of the co-decision procedure.

Traditionally, Parliament has also played a major role in the budgetary procedure. For example, it has the final say on 'non-mandatory EC expenditure', i.e. expenditure not specifically provided for under Community rules: the institutions' administrative expenses (especially the 'operational expenditure' on the structural funds), research policy, energy policy, transport policy or environmental protection. This expenditure accounts for almost half the EC budget (46.3 % in 1999). It also has a decisive influence on the way the Community develops in that it is a determining factor (among others) as regards progress and consolidation of fundamental Community policies (such as social, regional, research, environmental and transport policy) and is a basic prerequisite for new policy measures in the fields of education or consumer protection, for example. Parliament may make changes to the way in which this expenditure is allocated and, within limits, may increase its overall amount. This ensures

# EUROPEAN PARLIAMENT

President  
14 Vice-Presidents and 5 Quaestors

Group of the European People's Party,  
EPP (Christian Democrats), and European Democrats

Group of the Party of European Socialists, PES

Group of the European Liberal,  
Democrat and Reform Party, ELDR

The Green Group in the  
European  
Parliament/European Free  
Alliance, GREENS/EFA

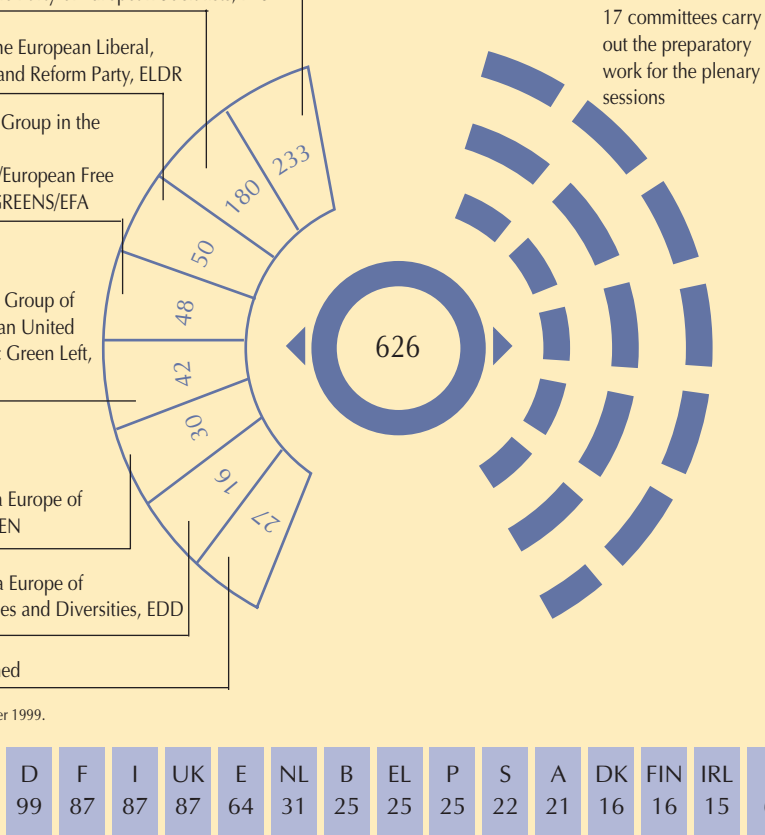
Confederal Group of  
the European United  
Left/Nordic Green Left,  
GUE/NGL

Union for a Europe of  
Nations, UEN

Group for a Europe of  
Democracies and Diversities, EDD

Non-attached

As at September 1999.



## 17 committees carry out the preparatory work for the plenary sessions

1. AFET: Committee on foreign affairs, human rights, common security and defence policy
2. BUDG: Budgets
3. CONT: Budgetary control
4. LIBE: Citizens' freedoms and rights, justice and home affairs
5. ECON: Economic and monetary affairs
6. JURI: Legal affairs and the internal market
7. INDU: Industry, external trade, research and energy
8. EMPL: Employment and social affairs
9. ENVI: Environment, public health and consumer policy
10. AGRI: Agriculture and rural development
11. PECH: Fisheries
12. REGI: Regional policy, transport and tourism
13. CULT: Culture, youth, education, the media and sport
14. DEVE: Development and cooperation
15. AFCO: Constitutional affairs
16. FEMM: Women's rights and equal opportunities
17. PETI: Petitions

that Parliament exerts a considerable influence on how funds are earmarked for Community policies financed by means of non-mandatory expenditure. The other half of the EC budget consists of 'compulsory expenditure', i.e. expenditure which is mandatory under Community rules (which basically means expenditure on the common agricultural policy). Parliament may propose amendments relating to this expenditure. Provided that the overall ceiling is not exceeded, these amendments are deemed accepted unless the Council rejects them by a qualified majority. Finally, Parliament is also entitled to reject the entire budget, and is responsible for granting formal discharge for the Commission's budget management for the previous year.

Parliament has a right of assent to all major international Treaties (Article 300(3) EC) and to the accession Treaties concluded with new Member States laying down the conditions of admission (Article 49 EU). Parliament's assent is also required for the appointment of the President and members of the Commission, any amendments to the Statute of the European Central Bank, and also for the decision on the standard procedure for Parliamentary elections.

**Advisory functions.** Parliament exercises advisory functions primarily through the Treaty provisions requiring it to be consulted by the Council and the Commission (mandatory consultation) or on the basis of optional consultation. Up until the introduction of the cooperation and co-decision procedures, this consulta-

tion ensured that Parliament was involved in the only Community legislative procedure existing at the time, namely the proposal procedure. Before a decision was passed by the Council, Parliament had to or could give its views. Now that the actual instances in which the proposal procedure is used have, as we will see, become less common, Parliament's advisory functions have tended to give way to its decision-making functions, at least as far as the formal legislative procedure is concerned.

**Supervisory functions.** Parliament has supervisory powers only over the Commission. These are exercised mainly through the fact that the Commission must answer parliamentary questions, defend its proposals before Parliament and present it with an annual report on the activities of the Communities for debate. Parliament can, by a two-thirds majority of its members, pass a motion of censure and thereby compel the Commission to resign as a body (Article 201 EC). Five motions of censure have so far been tabled (most recently in January 1999), three of which were put to the vote and rejected. Since the Treaty on European Union came into being, this motion of censure has increased in importance in that, by virtue of the right of investiture granted by the EU Treaty, Parliament is involved in the appointment of the Commission which has been the object of its criticisms. Since in practice the Council also answers parliamentary questions, Parliament has the opportunity for direct political debate with the two law-making institutions. The Treaty

on European Union substantially boosted Parliament's supervisory powers. It is now also empowered to set up special committees of inquiry to look specifically at alleged cases of infringement of Community law or maladministration. A committee of this kind was used, for example, to look into the Commission's responsibility for the delay in responding to 'mad cow disease' in the United Kingdom, which represented a threat to human life and health. Also written into the Treaties is the right of any natural or legal person to address petitions to Parliament, which are then dealt with by a standing committee on petitions. Finally, Parliament has also made use of its power to appoint an Ombudsman to whom complaints about maladministration in the activities of Community institutions or bodies, with the exception of the Court of Justice, can be referred. The Ombudsman may conduct enquiries and must inform the institution or body concerned of such action, and must submit to Parliament a report on the outcome of the inquiries.

#### • *Working procedures*

The basic rules governing the workings of Parliament are set out in its Rules of Procedure.

The MEPs form political groups. Given Parliament's status as a Community institution, these are Community-wide party-political groupings that cut across national lines.

Parliament also has 17 standing committees. The members of the Commission or their representatives must appear before the relevant committee for their area of responsibility in order to provide clarification about Commission decisions, documents for the Council and the position adopted by the Commission in the Council. This gives the committees a wide-ranging insight into the activities of the Commission and, given that the details of Commission meetings are not usually made public, Parliament thus acquires full access even to what is sometimes confidential information. The committees are thus able to monitor the Commission effectively. They are also responsible for preparing Parliament's opinions on proposals from the Commission, Parliament's proposed amendments to any 'common position' drawn up by the Council, and Parliament's resolutions drawn up on its own initiative. With this in mind, the Committees regularly consult independent experts or representatives of the organisations or economic sectors concerned.

Parliament holds its week-long plenary sessions in Strasbourg once every month, except in August. Additional sessions may also be held, particularly in connection with the budget. Shorter emergency sessions (lasting one or two days) may be held in Brussels to deal with current major issues, enabling Parliament to set out its position on matters of importance (such as Community affairs, international affairs, violations of human rights, etc.). All plenary sessions are open to the public.

### • *Decision-making*

An absolute majority of the votes cast is usually sufficient for a decision to be taken. As Parliament increases in importance, however, the Treaty imposes ever stricter requirements as regards MEPs' attendance. The Treaty now provides for a whole range of decisions which may only be adopted if supported by an absolute majority of all Members of Parliament. Following the increase in the number of MEPs to 626, this majority will in future be 314 votes. Finally, any motion of censure against the Commission must not only be backed by a majority of MEPs but also requires two-thirds of the votes cast to be in favour.

### • *Seat*

The Edinburgh European Council agreed that Parliament's seat was to be in Strasbourg and thus ended the provisional status of an arrangement that had been in place for 30 years. It had become established practice for plenary sessions to be held in Strasbourg and Brussels, meetings of the political groups and committees to be held in Brussels during weeks when Parliament was not sitting, and for Parliament's Secretariat-General to be based in Luxembourg. The decision on the location of the seats of the institutions taken at the Edinburgh European Council confirmed the validity of these arrangements subject to the proviso that the 12 periods of monthly plenary sessions should be held in Strasbourg. However, there is still a tendency within Parliament for an increasing number of plenary meetings to be held in Brussels, and it is therefore not

absolutely certain that Strasbourg will necessarily be the venue for all 12 sessions each year. Indeed, the decision taken at the Edinburgh European Council in principle allows sessions to be held at locations other than Strasbourg, i.e. primarily in Brussels.

## **Council of the European Union (Articles 202–210 EC)**

### • *Composition and Presidency*

The Council is made up of representatives of the governments of the Member States. All 15 Member States send one or more representatives — as a rule, though not necessarily, the departmental or junior minister responsible for the matters under consideration. It is important that these representatives are empowered to act with binding effect on their governments. The very fact that governments may be represented in various way obviously means that there are no permanent members of the Council; instead, the representatives sitting in the Council vary according to the subject under discussion. The Council of Foreign Ministers, which normally meets once a month, functions as a 'General Affairs Council' to deal with general policy questions. In addition, the various Councils of Ministers meet around 80 times a year to deal with matters in their respective areas of competence, which are referred to in the names by which they are known: Ecofin Council (Council of Economics and Finance Ministers), Council of Agriculture Ministers, Council of Transport Ministers, Council of Minis-



## COMPOSITION OF THE COUNCIL

One representative of each Member State at ministerial level, with composition varying according to the subject discussed, for example:			
General Affairs Council	Economic and Financial Affairs (Ecofin) Council	Transport Council	Agriculture Council

Permanent Representatives Committee 'Coreper I and II'	Special Committee for Agriculture
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Working groups

General Secretariat (approximately 2 200 officials)

### Tasks

Drawing up legislation	Coordination of economic policy	Budgetary control	Appointments	External relations
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ters for Social Affairs, Council of Environment Ministers, etc.

The Presidency of the Council is held in turn by each Member State for six months. The order in which the office of President is held is decided unanimously by the Council on the basis of the principle that large and small Member States should alternate. The Presidency changes hands on 1 January and 1 July each year. In 1999, it was first of all held by Germany, which was succeeded by Finland. In 2000, it is the turn of Portugal and France. Given this fairly rapid 'turnover', a modicum of continuity is ensured by the 'troika' consisting of the previous, current and next incumbents. The Presidency is mainly responsible for overall coordination of the work of the Council and the committees providing it with input. It is also important in political terms in that the Member State holding the EU Presidency enjoys an enhanced role on the world stage, and small Member States in particular are thus given an opportunity to rub shoulders with the 'major players' and make their mark in European politics.

The seat of the Council is in Brussels.

- **Tasks**

In the EC and Euratom, the Council's main task is to lay down and implement legislation (Article 202 EC). With regard to the ECSC, on the other hand, it is an endorsing body that has to deal with a few, especially important, decisions. The Council is also responsible for ensuring coordination of the economic policies of

the Member States (Article 202 EC). Action in this field may take the form of non-binding resolutions or legally binding decisions. The Council's powers in this area were considerably strengthened and their scope broadened as a result of moves towards the creation of a European economic and monetary union as provided for in the EU Treaty. For example, the Council's powers to enforce its 'broad guidelines of economic policies' were enhanced in that a procedure was introduced under which it may make recommendations to any Member State whose economic policies are inconsistent with those guidelines (Article 99(4) EC). The Council may also issue 'warnings' and even impose 'sanctions' (Article 104(9) and (11) EC). It also establishes the draft budget on the basis of the preliminary draft from the Commission (Article 272(3) EC), issues a recommendation to Parliament on giving discharge to the Commission in respect of the implementation of the budget (Article 276(1) EC), and is responsible for appointing the members of the Court of Auditors, the Economic and Social Committee and the Committee of the Regions. In addition, the Council is the supreme administrative authority for all officials and servants of the EC, and is responsible for concluding agreements between the Community and non-member countries or international organisations (Articles 300 and 310 EC).

- **Working procedures**

The Council's working procedures are set out in detail in its rules of procedure. In

practice, the Council's activities are basically made up of three stages, as follows.

### *1. Preparation for Council meetings*

Preparatory work for Council meetings is carried out by two permanent bodies within its organisational structure: the Permanent Representatives Committee and the General Secretariat.

The Permanent Representatives Committee, which is referred to as Coreper, a contraction of its French title *Comité des représentants permanents*, prepares the ground for the Council's work and performs the tasks assigned to it by the Council. To enable it to carry out these tasks, it is divided up into Coreper I (comprising the Deputy Permanent Representatives and primarily responsible for preparatory work on more technical matters dealt with by the various Councils) and Coreper II (comprising the Permanent Representatives themselves and basically responsible for all policy matters). Agriculture is the one area not subject to this division of tasks; a Special Committee for Agriculture (also known by its French abbreviation CSA — *Comité spécial de l'agriculture*) was set up in 1960 and assumed Coreper's tasks on agricultural matters.

Preparations for Council meetings by Coreper and the CSA are of two kinds: firstly, efforts are made to reach agreement at committee level, in connection with which the committees can draw on the assistance of around 100 permanent sector-specific working groups within the

Council. They may also call on the services of ad hoc groups which are assigned to deal with a particular problem within a specified period. Secondly, preparatory work must ensure that the issues to be discussed and decided on at Council meetings have been worked out in advance, and that the Council members are properly briefed. These dual approaches are reflected in the agenda of meetings: issues on which it was possible to reach agreement are referred to as 'A items' and those questions which are undecided and need to be discussed further are known as 'B items' (see below).

The General Secretariat provides administrative assistance to the Council (and also Coreper and the CSA). In particular, it handles the technical side of preparations for meetings of the Council, is in charge of providing interpretation facilities (the representatives of the Member States speak in their own languages), ensures that any required translations are provided, provides legal advice to the Council and the committees, and administers the Council's budget.

### *2. Meetings of the Council*

Meetings of the Council are convened by its President (the representative of the Member State holding the Presidency of the Council) on his own initiative, at the request of one of its members, or at the request of the Commission. The President draws up a provisional agenda for each meeting, consisting of a Part A and a Part B. Part A contains all items on which agreement has been reached in Coreper or

the CSA and which can be adopted without further debate. Part B contains those items with outstanding issues and differences of opinion which need further debate by the Council members themselves. It is possible that, in the course of a meeting, an A item turns into a B item if a Council member or the Commission presses for a discussion when the A item is in the process of being adopted. The item concerned is then removed from the agenda and appears as a B item at a subsequent meeting.

The Council only discusses and reaches decisions on documents and drafts which are available in all 11 official languages. If a matter is urgent, this rule may be dispensed with by unanimous agreement. This also applies to proposals for amendments tabled and discussed in the course of a meeting.

Apart from the meetings at which the Presidency presents its six-monthly work programme and the Commission its annual work programme, Council meetings are not open to the public.

It is in the Council that the individual interests of the Member States and the overall Community interest are balanced. Even though the Member States defend their interests in the Council, its members are at the same time obliged to take into account the objectives and needs of the Community as a whole. The Council is a Community institution and not an inter-governmental conference. Consequently it is not the lowest common denominator between the Member States that is sought

in the Council's deliberations, but rather an optimum balance between the Community's and the Member States' interests.

### *3. Decision-making*

Under the Community Treaties, majority voting in the Council is the rule. Unless otherwise specified, a simple majority is sufficient, and each member of the Council has one vote. Normally, however, the Treaties provide for 'other arrangements', namely qualified majority voting, whereby votes are weighted so that larger Member States have a greater influence.

The importance of majority voting lies not so much in the fact that it prevents small States from blocking important decisions, as such States could normally be brought into line by political pressure. What the majority principle actually does is to make it possible to outvote large Member States that would withstand political pressure. In what has become known as the 'Ioannina Compromise', however, a safety-net was introduced for the benefit of the 'large' Member States in the event of small majorities in a Council in which the number of 'small' Member States will probably increase in the future. If Council members accounting for 23 to 25 votes state that they will oppose a decision adopted by a qualified majority, the Council must, within an appropriate period, do everything in its power to find a satisfactory solution which can be approved with at least 65 votes in favour. In addition, the Luxembourg Agreement remains a major political factor, at least as

## THE COUNCIL: WEIGHTING OF VOTES

10	Germany	5	Portugal
10	France	4	Austria
10	Italy	4	Sweden
10	United Kingdom	3	Denmark
8	Spain	3	Ireland
5	Belgium	3	Finland
5	Greece	2	Luxembourg
5	Netherlands		

**Qualified majority: 62/87**

far as voting practice is concerned. It grants the right to veto a Community measure in cases where a Member State considers that its vital national interests are at stake. This was used to solve a crisis which arose in 1965 when France, afraid that its national interests in the financing of the common agricultural policy were threatened, blocked decision-making in the Council for over six months by a 'policy of the empty chair'.

In the case of decisions to be taken in especially sensitive political areas, the Treaties require unanimity, which means that all members of the Council must be present or represented by other members. The adoption of a decision cannot be blocked by means of abstentions. Unanimity is required for decisions on taxes, the free movement of workers, or the rights and obligations of employees.

**European Commission  
(Articles 211–219 EC)**

• **Composition (Articles 213 and 214 EC)**

Since the accession of Austria, Finland and Sweden on 1 January 1995, the Commission has consisted of 20 members (two members each from Germany, France, the United Kingdom, Italy and Spain, and one from each of the other Member States). The number of members may be changed by a unanimous decision of the Council.

The Commission is headed by a President who is assisted by two Vice-Presidents. The Treaty of Amsterdam considerably strengthened the President’s position within the Commission. He is no longer

‘first among equals’ and enjoys a prominent position in that the Commission must work ‘under the political guidance’ of its President (Article 219(1) EC). The President thus has a ‘power to provide guidance’, which is reflected in his organisational responsibilities, his right to take part in the selection of the other members of the Commission, and his membership of the European Council.

The members of the Commission are appointed ‘by common accord’ of the governments of the Member States for a renewable term of five years. Here the investiture procedure provided for in the EU Treaty comes into play, whereby the governments of the Member States must seek Parliament’s approval of any person they are envisaging appointing as

**COMPOSITION OF THE EUROPEAN COMMISSION**

**20 Members**  
including  
**1 President**  
2 Vice-Presidents

1	Belgium	1	Luxembourg
1	Denmark	1	Netherlands
2	Germany	1	Austria
1	Greece	1	Portugal
2	Spain	1	Finland
2	France	1	Sweden
1	Ireland	2	United Kingdom
2	Italy		

**Responsibilities**

Initiatives for the further development of Community policy	Monitoring observance and proper application of Community law	Administering and implementing Community legislation	Representing the Community in international organisations
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Commission President (Article 214(2) EC). In agreement with the President-designate they then designate the other members of the Commission. The President and members of the Commission are then subject as a body to a vote of approval by Parliament. Once Parliament has given its approval, they are then appointed by the governments of the Member States. Members of the Commission can serve more than one term of office.

The members of the Commission must be chosen 'on the grounds of their general competence' and be 'completely independent in the performance of their duties' (Article 213(2) EC). They may neither seek nor take instructions from any government.

The seat of the European Commission is in Brussels.

#### • **Tasks**

The Commission is first of all the 'driving force' behind Community policy. It is the starting point for every Community action, as it is the Commission that has to present proposals and drafts for Community legislation to the Council (this is termed the Commission's right of initiative). The Commission is not free to choose its own activities. It is obliged to act if the Community interest so requires. The Council (Article 208 EC) and Parliament (Article 197(2) EC) may also ask the Commission to draw up a proposal. Under the ECSC Treaty, however, the Commission also has law-making powers. In certain circumstances these are subject to

the assent of the Council, which enables it to overrule Commission measures. Under the EC Treaty and the Euratom Treaty, the Commission has primary powers to initiate legislation in certain areas (such as the EC budget, the Structural Funds, measures to tackle tax discrimination, the provision of funding, and safeguard clauses). Much more extensive, however, are the powers for the implementation of Community rules conferred on the Commission by the Council (Article 202, third indent, EC).

The Commission is also the 'guardian of the Community Treaties'. It monitors the Member States' application and implementation of primary and secondary Community legislation, institutes infringement proceedings in the event of any violation of Community law (Article 226 EC) and, if necessary, refers the matter to the Court of Justice. The Commission also intervenes if Community law is infringed by any natural or legal person and imposes heavy penalties. Over the last few years, efforts to prevent abuse of Community rules have become a major part of the Commission's work.

Closely connected with the role of guardian is the task of representing the Community's interests. As a matter of principle, the Commission may serve no interests other than those of the Community. It must constantly endeavour, in what often prove to be difficult negotiations within the Council, to make the Community interest prevail and seek compromise solutions that take account of that interest. In so doing, it also plays the role of medi-

ator between the Member States, a role for which, by virtue of its neutrality, it is particularly suited and qualified.

Lastly, the Commission is — albeit to a limited extent — an executive body. This is especially true in the field of competition law where the Commission acts as a normal administrative authority, checking facts, granting approval or issuing bans and, if necessary, imposing penalties. The Commission's powers in relation to the Structural Funds and the EC budget are similarly wide-ranging. As a rule, however, it is the Member States themselves that have to ensure that Community rules are applied in individual cases. This solution, chosen by the Treaties, has the advantage that citizens are brought closer to what is still to many of them the

'foreign' reality of the European system through the workings, and in the familiar form, of their own national system.

The Commission represents the Community in international organisations and is in charge of the day-to-day running of Community diplomatic missions outside and within the EU. On the basis of powers conferred on it by the Council, the Commission is responsible for negotiating agreements with international organisations and non-member countries, including accession treaties with applicant States. The Commission represents the Community in the courts of the Member States and — possibly together with the Council — before the European Court of Justice.



ADMINISTRATIVE STRUCTURE  
OF THE EUROPEAN COMMISSION

Commission (20 members)  
Cabinets

Secretariat General  
Legal Service  
Press and Communication Service

Economic and Financial Affairs DG	Trade DG
Enterprise	Development DG
Competition DG	Enlargement DG
Employment and Social Affairs DG	Common Service for External Relations
Agriculture DG	Humanitarian Aid Office
Transport DG	Eurostat
Environment DG	Personnel and Administration DG
Research DG	Inspectorate General
Joint Research Centre	Budget DG
Information Society DG	Financial Control DG
Fisheries DG	European Anti-Fraud Office
Internal Market DG	Joint Interpreting and Conference Service
Regional Policy DG	Translation Service
Energy DG	Publications Office
Taxation and Customs Union DG	
Education and Culture DG	
Health and Consumer Protection DG	
Justice and Home Affairs DG	
External Relations DG	

**European Court of Justice and Court of First Instance (Articles 220–245 EC)**

A system will endure only if its rules are supervised by an independent authority. What is more, in a community of States the common rules — if they were subject

to control by the national courts — would be interpreted and applied differently from one State to another. The uniform application of Community law in all Member States would thus be jeopardised. These considerations led to the establishment of a Community Court of Justice as soon as the ECSC was created.

COMPOSITION OF THE EUROPEAN COURT OF JUSTICE

Governments of the Member States appoint the **15 Judges** and **8 (9) Advocates-General** by common accord for a term of six years

**Types of proceeding**

**Actions for failure to fulfil obligations under the Treaties:**

Commission v Member State (Article 226);  
Member State v Member State (Art. 227)

**Actions for annulment and actions on grounds of failure to act**

brought by a Community institution or a Member State in connection with an illegal act or failure to act (Articles 230 and 232)

**Cases referred from national courts for preliminary rulings**

to clarify the meaning and scope of Community law (Article 234)

The Court of Justice currently consists of 15 Judges and 8 (9) Advocates General who are appointed 'by common accord of the governments of the Member States' for a renewable term of six years. Each Member State sends one Judge. In order to ensure a degree of continuity, partial replacement of half the Judges and Advocates General takes place every three years at the beginning of the judicial year on 6 October.

The Court is assisted by eight Advocates General whose term of office corresponds to that of the Judges; they enjoy judicial independence. Four of the eight Advocates General are always from the 'large' Member States (Germany, France, Italy and the United Kingdom) and the remaining four come from the remaining Member States on an alternating basis. The office of the ninth Advocate General was only created for the period from 1 January 1995 to 6 October 2000. This was because the accession of Austria, Sweden and Finland led to there being an odd number of Judges (15), which in turn meant that the additional Judge required when there were 12 Member States could no longer be retained. For this reason, the second Italian Judge, who had only been appointed as the 13th Judge in October 1994 for a term of six years, was made an Advocate General. The office of Advocate General is clearly based on that of the Commissaire du Gouvernement in the Council of State (Conseil d'État) and administrative courts in France. It was introduced in the Court to counterbalance the 'single-tier' nature of court proceedings, i.e. the absence of any appeal proce-

dures. The task of the Advocates General is to submit 'opinions' to the Court in the form of (non-binding) proposals for a Court decision based on a fully independent and non-partisan survey of the questions of law raised in the case concerned. The opinions are an integral part of the oral procedure (Article 59(1) and (2) of the rules of procedure of the Court of Justice) and are published together with the judgment in the Court reports. Advocates General can only influence judgment through the strength of the arguments in their opinions; they are not involved in any deliberations or voting on the judgment.

#### • *Selection of Judges and Advocates General*

The Judges and Advocates General are chosen from persons whose independence is beyond doubt, and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are legal experts of recognised competence (Article 223(2) EC). This means that Judges, public officials, politicians, lawyers or university lecturers from Member States may be appointed. The variety of professional backgrounds and experience is beneficial to the Court in that it helps to provide as comprehensive an assessment as possible of both the theoretical and practical aspects of the facts and points of law that have to be considered. In all Member States, the choice of who should be proposed by the government for appointment as a Judge or Advocate General, and the procedure by which this is done, is a



matter for the executive. The procedures differ greatly and range from the not-very-transparent to the totally impenetrable.

#### • *Procedure*

When a case has been referred to the Court, the President appoints a Judge Rapporteur who, until a final judgment is issued, is responsible for taking the necessary decisions and proposing solutions in the course of the proceedings. This includes the proposal as to the formation in which the Court should hear the case and give judgment. The Court sits in the following possible formations: the full Court (15 Judges), the ‘small plenum’ (11 Judges), two chambers of 7 Judges (of which only 5 pass judgment)s and 4 chambers of 3 or 4 Judges (of which only 3 pass judgment).

Apart from the cases which, if a Member State or Community institution so requests, must be heard by the full Court, the decision on which chamber will hear a case is taken when the written procedure is completed and the report of the Judge-Rapporteur and the views of the Advocate General have been considered. This decision is taken in accordance with internal rules laying down certain criteria, among which the legal complexity, the existence of firmly established precedents, and the financial implications of proceedings are of crucial importance. A case may be referred back to the plenary Court at any time — even during or following deliberations on judgment. If this happens, however, the oral procedure is reopened before the full Court.

#### • *Tasks*

The European Court of Justice is the highest and at the same time the sole judicial authority in matters of Community law. In general terms, its task is to ‘ensure that in the interpretation of (the) Treaty the law is observed’ (Article 220 EC).

This general description of responsibilities encompasses three main areas:

1. monitoring the application of Community law, both by the Community institutions when implementing the Treaties, and by the Member States and individuals in relation to their obligations under Community law;
2. interpretation of Community law;
3. further shaping of Community law.

In carrying out these tasks, the Court’s work involves both legal advice and adjudication. Legal advice is provided in the form of binding opinions on agreements which the EU wishes to conclude with non-member countries or international organisations. Its function as a body for the administration of justice is much more important, however. In exercising that function, it operates in matters that in the Member States would be assigned to different types of court, depending on the national system. The Court of Justice acts as a constitutional court when disputes between Community institutions are before it or legislative instruments are up for review for legality; as an administrative court when reviewing the administrative

acts of the Commission or of national authorities applying Community legislation; as a labour court or industrial tribunal when dealing with freedom of movement, social security and equal opportunities; as a fiscal court when dealing with matters concerning the validity and interpretation of directives in the fields of taxation and customs law; as a criminal court when reviewing Commission decisions imposing fines; and as a civil court when hearing claims for damages or interpreting the Brussels convention on the enforcement of judgments in civil and commercial matters.

Like all courts, the European Court of Justice is overburdened. The number of cases referred to it has increased steadily and will continue to grow, given the potential for disputes that has been created by the huge number of directives which have been adopted in the context of the single market and transposed into national law in the Member States. The signs are already there that the Treaty on European Union has raised further questions which will ultimately have to be settled by the Court. This is why, in 1988, a Court of First Instance (CFI) was established under the Single European Act to take the pressure off the Court of Justice.

## COMPOSITION OF THE COURT OF FIRST INSTANCE

Governments of the Member States appoint the  
**15 Judges**  
 by common accord for a term of six years

### Types of proceeding

**Actions for annulment and complaints of failure to act**  
 filed by natural and legal persons on the grounds of illegality or absence of Community legal acts  
 (Articles 230 and 232)

**Actions for damages**  
 on the grounds of contractual or non-contractual liability  
 (Articles 235 and 288(1) and (2))

**Actions by Community staff**  
 (Article 236)

The CFI is not a new Community institution but rather a constituent component of the Court of Justice. Nevertheless, it is an autonomous body separate from the Court of Justice in organisational terms. It has its own registry and rules of procedure. Cases handled by the CFI are identified by means of a 'T' (for tribunal), whilst those referred to the Court of Justice are coded with a 'C' (for court) (e.g. C-1/99).

The CFI consists of 15 members whose qualifications, appointment and legal status are subject to the same requirements and conditions as Judges at the Court of Justice. Although their main function is to sit as 'Judges', they may also be appointed as 'advocates general' on an ad hoc basis in cases before the full Court, or in cases before one of the chambers if the facts of the case or its legal complexity require this. This facility has been used very sparingly up to now.

The CFI may sit as a full Court (15 Judges) or in five chambers of 5 Judges or five chambers of 3 Judges. Cases are heard by the full Court only in exceptional circumstances; it is usually the chambers which hear cases and give judgment.

Although the CFI was originally responsible for only a limited range of cases, a review of its responsibilities carried out in 1993 means that it is now the court of first instance for all direct actions against Community legal acts brought by natural and legal persons, albeit subject to the legal supervision of the Court of Justice.

### **Court of Auditors (Articles 246–248 EC)**

The European Court of Auditors was set up by the Treaty of 22 July 1975 and began work in Luxembourg in 1977. It consists of 15

Members, corresponding to the present number of Member States; they are appointed for six years by the Council following consultation with the European Parliament.

The Court of Auditors' task is to examine whether all revenue has been received and all expenditure incurred in a lawful and regular manner and whether financial management has been sound. Unlike the courts of auditors or similar bodies in the Member States, it has no jurisdiction to enforce its control measures or to investigate suspicions of irregularity arising from its investigations. However, it is wholly autonomous in its decisions regarding what it examines and how. It can, for instance, examine whether the use made of Community financial support by private individuals is in compliance with Community law.

The chief weapon in armoury of the Court of Auditors is the fact that it can publicise its findings. The results of its investigations are summarised in an annual report at the end of each financial year, which is published in the *Official Journal of the European Communities* and thus brought to public attention. It may also make special reports on specific areas of financial management, and these are also published.

### **Other institutions**

#### ***Economic and Social Committee (Articles 257–262 EC)***

The purpose of the Economic and Social Committee (ESC) is to give the various economic and social groups (especially employers and employees, farmers,

carriers, businessmen, craftsmen, the professions and managers of small and medium-sized businesses) representation in a Community institution. It also provides a forum for consumers, environmental groups and associations.

The ESC is made up of 222 members (advisors), drawn from representative organisations in the individual Member States, who are appointed by the Council (following an opinion from the Commission) for four years.

The allocation of seats is:

Belgium	12
Denmark	9
Germany	24
Greece	12
Spain	21
France	24
Ireland	9
Italy	24
Luxembourg	6
Netherlands	12
Austria	12
Portugal	12
Finland	9
Sweden	12
United Kingdom	24

The members are divided up into three groups (employers, workers and 'various interests'). Opinions to be adopted at plenary sessions are drawn up by 'study groups' consisting of ESC members (in which their alternates may also participate as experts). The ESC also works closely with the committees of the European Parliament.

The ESC, which was established under the Treaty, must in certain circumstances be consulted by the Council acting on a proposal from the Commission. It also issues opinions on its own initiative. These opinions represent a synthesis of sometimes very divergent viewpoints and are very useful for the Commission and the Council because they show what changes the groups directly affected by a proposal would like to see. The ESC's own-initiative opinions have on a number of occasions had considerable political implications, one example being that of 22 February 1989 on basic social rights in the Community, which provided the basis for the 'Social Charter' proposed by the Commission (and adopted by 11 of the Member States).

### ***Committee of the Regions (Articles 263–265 EC)***

A new advisory body was set up alongside the ESC by the EU Treaty: the Committee of the Regions (COR). Like the ESC, it is not strictly a Community institution, as its function is purely advisory and it has no power to produce legally binding decisions in the same way as the fully fledged institutions (Council, Parliament, Commission, Court of Justice, Court of Auditors).

Like the ESC, the Committee of the Regions consists of 222 representatives of regional and local authorities in the Member States. Seats are allocated to the Member States using the same weighting as for the ESC. The members are appointed by the Council for four years acting unanimously on proposals from the



respective Member States (and following an opinion from the Commission).

There are a number of areas in which consultation by the Council or the Commission, is required ('mandatory consultation'): education; culture; public health; trans-European networks; transport, telecommunications and energy infrastructure; economic and social cohesion; employment policy; and social legislation. The Council also consults the Committee regularly, but without any legal obligation, in connection with various draft legislation ('non-mandatory consultation').

### ***European Investment Bank (Articles 266–267 EC)***

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

### ***European Central Bank (Articles 105–115 EC)***

The European Central Bank (ECB) is at the heart of economic and monetary union (EMU). Its task is to maintain the stability of the European currency, the euro, and control the amount of currency in circulation (Article 106 EC).

In order to carry out its task, the ECB's independence is guaranteed by numerous legal provisions. When exercising their powers or carrying out their tasks and duties, neither the ECB, nor a national central bank, may take instructions from Community institutions, governments of Member States or any other body. The Community institutions and the Member States' governments will not seek to influence the ECB (Article 108 EC).

The ECB consists of a Governing Council and an Executive Board. The Governing Council comprises the governors of the national central banks and the members of the Executive Board of the ECB. The Executive Board, which is made up of the President, the Vice President and four other members, is effectively in charge of running the ECB. Its President and members are appointed from among persons of recognised standing and experience in monetary or banking matters by common accord of the governments of the Member States, on a recommendation from the Council after it has consulted the European Parliament. Their term of office is eight years which, in the interests of ensuring the independence of the Executive Board members, is not renewable (Article 112 EC).

The European System of Central Banks (ESCB) is composed of the ECB and of the central banks of the Member States (Article 107 EC). It has the task of defining and implementing the monetary policy of the Community, and has the exclusive right to authorise the issue of banknotes and coins within the Community. It also

holds and manages the official foreign reserves of the Member States and

promotes the smooth operation of payments systems (Article 105(2) EC).

## THE COMMUNITY LEGAL ORDER

The constitution of the EU described above, and particularly the fundamental values it embodies, can be brought to life and given substance only through Community law. This makes the EU a legal reality in two different senses: it is created by law and it is a community based on law.

- THE EU AS A CREATION OF LAW AND A COMMUNITY BASED ON LAW

The European Union is an entirely new creation which is distinguished from earlier efforts to unite Europe in that it works, not by means of force or domination, but simply by means of law. Law is intended to succeed where 'blood and iron' have for centuries failed. For only unity based on a freely made decision can be expected to last: unity founded on fundamental values such as freedom and equality, and protected and translated into reality by law. That is the insight underlying the Treaties that created the European Communities and the European Union.

The EU is not merely a creation of law; it also pursues its objectives purely by means of law. It is a Community based on law. The common economic and social life of the peoples of the Member States is governed not by the threat of force but by the law of the Community. This is the

basis of the institutional system. It lays down the procedure for decision-making by the Community institutions and regulates their relationship to each other. It provides the institutions with the means — in the shape of regulations, general ECSC decisions, directives, ECSC recommendations and individual decisions — of enacting legal instruments binding on the Member States and their citizens. Thus the individual himself becomes a main focus of the Community. Its legal order directly affects his daily life to an ever-increasing extent. It accords him rights and imposes duties on him, so that as a citizen both of his State and of the Community he is governed by a hierarchy of legal orders — a phenomenon familiar from federal constitutions. Like any legal order, that of the Community provides a self-contained system of legal protection for the purpose of recourse to and the enforcement of Community law. Community law also defines the relationship between the Community and the Member States. The Member States must take all appropriate measures to ensure fulfilment of the obligations arising from the Treaties or resulting from action taken by the institutions of the Community. They must facilitate the achievement of the Community's tasks and abstain from any measure that could jeopardise the attainment of the objectives of the Treaties. The Member States are answerable to the citizens of the EU for any harm caused by violations of Community law.

## • THE LEGAL SOURCES OF COMMUNITY LAW

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

### Sources of Community law

- 1. Primary legislation:**
  - Treaties establishing the Communities
  - General principles of law
- 2. The EC's international agreements**
- 3. Secondary legislation:**
  - (Implementing) regulations
  - Directives/ECSC recommendations
  - General and individual decisions
- 4. General principles of administrative law**
- 5. Conventions between the Member States**

### The founding Treaties as the primary source of Community law

The first source of Community law in this sense is the three Treaties, with the various annexes and protocols attached to them, and later additions and amendments, i.e. the founding legal acts of the EC and EU. The founding Treaties and instruments amending and supplementing them — chiefly the Single European Act, the various accession treaties and the Treaties on European Union — contain the basic provisions on the EC's objectives, organisation and modus operandi, and the bulk of its economic law. They thus set the constitutional framework for the life of the EC, which is then fleshed out in the Community interest by legislative and administrative action by the Community institutions. The Treaties, being legal instruments created directly by the Member States, are known in legal circles as primary legislation.

### The Community legal instruments as the secondary source of Community law

Law made by the Community institutions in exercising the powers conferred on them by the Treaties is referred to as secondary legislation, the second great source of Community law.

It consists primarily of the legal acts listed and defined in Article 249 of the EC Treaty, Article 161 of the Euratom Treaty and Article 14 of the ECSC Treaty. As binding legal acts, these include both

general and abstract legal provisions on the one hand and specific, individual measures on the other. They also provide for the Community institutions to issue non-binding statements.

These lists are not exhaustive, however. Secondary legislation also encompasses other legal acts which do not fit into categories. Foremost among these are legal acts regulating the internal workings of the Community or its institutions, such as agreements or arrangements between Community institutions or bodies, or internal rules of procedure. The preparation and public announcement of Community action programmes should also be mentioned here. There are considerable differences between legal acts under secondary Community legislation in terms of the procedures involved, their legal effect and those to whom they are addressed; these differences will be dealt with in more detail in the section on the Community's range of tools.

The creation of secondary Community legislation is a gradual process. The emergence of secondary legislation lends vitality to the Community's 'constitution' deriving from primary legislation, and progressively generates and enhances the European legal order.

### **International agreements**

A third source of Community law has to do with the EC's role at international level. As one of the focal points of the world, Europe cannot confine itself to managing

its own internal affairs; it has to concern itself with economic, social and political relations with the world outside. The Community therefore concludes agreements in international law with non-member countries and with other international organisations; these range from treaties providing for extensive cooperation in trade or in the industrial, technical and social fields, to agreements on trade in particular products.

Three kinds of agreement between the Community and non-member countries are particularly worth mentioning.

#### ***Association agreements***

Association goes far beyond the mere regulation of trade and involves close economic cooperation and wide-ranging financial assistance from the EC for the country concerned (Article 310 (ex Article 238) EC). A distinction may be drawn between three different types of association agreement.

- *Agreements that maintain special links between certain Member States and non-member countries.*

One particular reason for the creation of the association agreement was the existence of overseas countries and territories with which some of the founding Member States maintained particularly close ties as a legacy of their colonial past. The introduction of a common external tariff in the Community would have seriously disrupted trade with these countries,

which meant that special arrangements were needed so that the system of unrestricted Community trade could be extended to them. At the same time, tariffs on goods originating in these countries were progressively dismantled. Financial and technical assistance from the Community was channelled through the European Development Fund.

- *Agreements as preparation for accession to the Community or for the establishment of a customs union.*

Association arrangements are also used in the preparation of countries for possible membership of the Community. The arrangement serves as a preliminary stage towards accession during which the applicant country can work on converging its economy with that of the Community. This proved successful in the case of Greece, which was associated with the Community from 1962. Another association agreement with a view to future accession was concluded with Turkey in 1964. The 'Europe Agreements' with Poland, Hungary, the Czech Republic, Slovakia, Bulgaria, Romania, Slovenia and the three Baltic States (Lithuania, Estonia and Latvia) make it clear that Community membership is the ultimate goal for these countries making the transition to a market economy. The purpose of the association with them is to help them meet the conditions required for membership within the foreseeable future. The EC has established customs unions with Malta (1971), Cyprus (1973) and Turkey (1996).

- *Agreement on the European Economic Area (EEA)*

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

### ***Cooperation agreements***

Cooperation agreements are not as far-reaching as association agreements, being aimed solely at intensive economic cooperation. The Community has such agreements with the Maghreb States (Morocco, Algeria and Tunisia), the Mashreq States (Egypt, Jordan, Lebanon and Syria) and Israel, for instance (Article 300 EC).

### ***Trade agreements***

The Community also has a considerable number of trade agreements with individual non-member countries, groupings of such countries or with international trade organisations relating to tariffs and trade policy. The most important trade agreements are: the Agreement establishing the World Trade Organisation (WTO Agreement) and the multilateral

trade agreements deriving from it, including in particular the General Agreement on Tariffs and Trade (GATT 1994), the Antidumping and Subsidies Code, the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Understanding on Rules and Procedures Governing the Settlement of Disputes.

### **Sources of unwritten law**

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

### ***General principles of law***

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

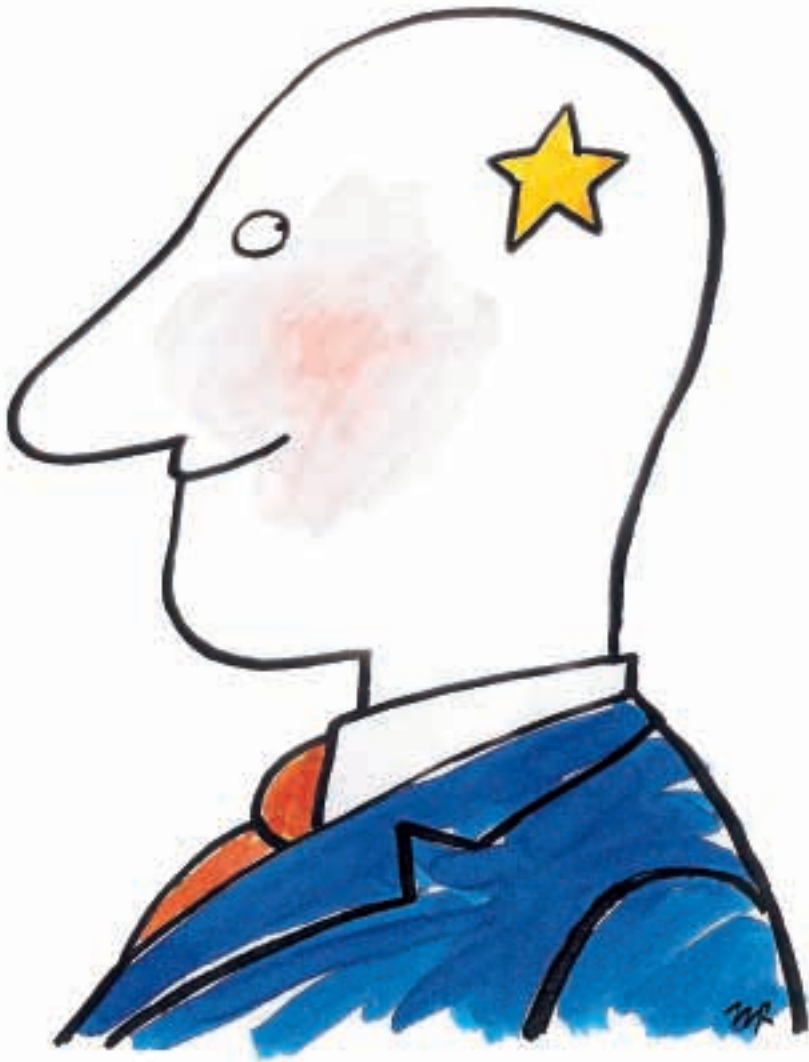
These principles are given effect when the law is applied, particularly in the judg-

ments of the Court of Justice, which is responsible for ensuring that 'in the interpretation and application of this Treaty the law is observed'. The main points of reference for determining the general principles of law are the principles common to the legal orders of the Member States. They provide the background against which Community rules can be developed.

Alongside the principles of autonomy, direct applicability and the primacy of Community law, other legal principles include the guarantee of basic rights, the principle of proportionality, the protection of legitimate expectations, the right to a proper hearing and the principle that the Member States are liable for infringements of Community law.

### ***Legal custom***

Unwritten Community law also encompasses legal custom. This is understood to mean a practice which has been followed and accepted and thus become legally established, and which adds to or modifies primary or secondary legislation. The possible establishment of legal custom in Community law is acknowledged in principle. There are considerable limitations on its becoming established in the context of Community law, however. The first hurdle is the existence of a special procedure for the amendment of the Treaties (Article 48 EU). This does not rule out the possible emergence of legal custom, but it does make the criteria according to which a practice is deemed to have been



followed and accepted for a substantial period much harder to meet. Another hurdle to the establishment of legal custom in the Community institutions is

the fact that any action by an institution may derive its validity only from the Treaties, and not from that institution's actual conduct or any intention on its part



to create legal relations. This means that, at the level of the Treaties, legal custom can under no circumstances be established by the Community institutions; at most, only the Member States can do this — and then only subject to the stringent conditions mentioned above. Practices followed and accepted as part of the law by Community institutions may, however, be drawn on when interpreting the legal rules laid down by them, which might alter the legal implications and scope of the legal act concerned. However, the conditions and limitations arising from primary Community legislation must also be borne in mind here.

### **Agreements between the Member States**

The final source of Community law comprises agreements between the Member States. Agreements of this kind may be concluded for the settlement of issues closely linked to the Community's activities, but no powers have been transferred to the Community institutions; there are also full-scale international agreements (treaties and conventions) between the Member States aimed especially at overcoming the drawbacks of territorially limited arrangements and creating law that applies uniformly throughout the Community (Article 293 EC). This is important primarily in the field of private international law. These agreements include: the convention on jurisdiction and the enforcement of judgments in civil and commercial matters (1968), the convention on the mutual recognition of

companies and legal persons (1968), the convention on the elimination of double taxation in connection with the adjustment of transfers of profits between associated enterprises (1990), the convention on the law applicable to contractual obligations (1980) and the convention on the Community patent (1989).

### **• THE COMMUNITY'S RANGE OF TOOLS**

The system of legislative acts had to be devised afresh when the Community was set up. It had to be decided first and foremost what forms Community legislation should take and what effects these should have. The institutions had to be able to align the disparate economic, social and not least environmental conditions in the various Member States, and do so effectively, i.e. without depending on the goodwill of the Member States, so that the best possible living conditions could be created for all the citizens of the Community. On the other hand, they were not to interfere in the domestic systems of law any more than necessary. The Community legislative system is therefore based on the principle that where the same arrangement, even on points of detail, must apply in all Member States, national arrangements must be replaced by Community legislation, but where this is not necessary due account must be taken of the existing legal orders in the Member States.

Against this background a range of tools was developed that allowed the Commu-

nity institutions to impact on the national legal systems to varying degrees. The most drastic action is the replacement of national rules by Community ones. There are also Community rules by which the Community institutions act on the Member States' legal systems only indirectly. Measures may also be taken that affect only a defined or identifiable addressee, in order to deal with a particular case. Lastly, provision was also made for legal acts that have no binding force, either on the Member States or on the citizens of the Community. These basic categories of legal act are to be found in all three Community Treaties. There are differences in the actual form they take, and in their titles, between the ECSC Treaty on the one hand and the EC and the Euratom Treaties on the other. The ECSC Treaty makes provision for only three types of legal act: decisions, recommendations and opinions (Article 14 ECSC); the EC

and Euratom Treaties provide for five forms: regulations, directives, decisions, recommendations and opinions (Article 249 EC and Article 161 Euratom). The changes in the pattern arose because it was recognised that the forms developed for the ECSC would not adequately meet the needs of the EC and Euratom. The new titles were intended to avoid the conceptual shortcomings in the legal acts provided for in the earlier Treaty. It was felt that the distinctions between the two sets of concepts would simply have to be tolerated until the merger of the three Communities, which was to take place at a later date.

If we look at the range of Community legal instruments in terms of the person to whom they are addressed and their practical effects in the Member States, they can be broken down as follows:

<b>ECSC Treaty</b>	<b>EC Treaty</b>	<b>Euratom Treaty</b>
Article 14	Article 249	Article 161
Decisions (general)	Regulation	Regulation
Recommendation	Directive	Directive
Decision (individual)	Decision	Decision
	Recommendation	Recommendation
Opinion	Opinion	Opinion

## **Regulations and ECSC general decisions**

The legal acts that enable the Community institutions to encroach furthest on the domestic legal systems are regulations in the EC and Euratom Treaties, and general decisions in the ECSC Treaty. Two features very unusual in international law mark them out.

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

The similarities between these legal acts and statute law passed in individual Member States are unmistakable. If they are enacted with the involvement of Parliament (as part of the co-decision

procedure — see next section), they may be described as ‘European legislation’. Parliament has no responsibility for regulations and general decisions, which are only enacted by the Council or the Commission and thus, from a procedural point of view at least, they lack the essential characteristics of legislation of this kind.

## **Directives and ECSC recommendations**

The EC/Euratom directive, which has the ECSC recommendation as its equivalent, is the most important legislative instrument alongside the regulation. Its purpose is to reconcile the dual objectives of both securing the necessary uniformity of Community law and respecting the diversity of national traditions and structures. What the directive aims for, then, is not the unification of the law, which is the regulation’s purpose, but its harmonisation. The idea is to remove contradictions and conflicts between national laws and regulations or gradually iron out inconsistencies so that, as far as possible, the same material conditions obtain in all the Member States. The directive is one of the primary means deployed in building the single market.

A directive is binding on the Member States as regards the objective to be achieved but leaves it to the national authorities to decide on how the agreed Community objective is to be incorporated into their domestic legal systems. The reasoning behind this form of legisla-

tion is that it allows intervention in domestic economic and legal structures to take a milder form. In particular, Member States can take account of special domestic circumstances when implementing Community rules. What happens is that the directive does not supersede the laws of the Member States but places the Member States under an obligation to adapt their national law in line with Community rules. The result is a two-stage law-making process.

First, at the Community stage, the directive lays down the objective that is to be achieved by any or all Member State(s) — or even by an individual Member State in the case of ECSC recommendations — to which it is addressed within a specified time-frame. The Community institutions can actually spell out the objective in such detailed terms as to leave the Member States with scant room for manoeuvre, and this has in fact been done in directives on technical standards and environmental protection.

Second, at the national stage, the objective set at Community level is translated into actual legal or administrative provisions in the Member States. Even if the Member States are in principle free to determine the form and methods used to transpose their Community obligations into domestic law, Community criteria are used to assess whether they have done so in accordance with Community law. The general principle is that a legal situation must be generated in which the rights and obligations arising from the directive can

be recognised with sufficient clarity and certainty to enable the Community citizen to rely on or, if appropriate, challenge them in the national courts. This normally involves enacting mandatory provisions of national law or repealing or amending existing rules. Administrative custom on its own is not enough since it can, by its very nature, be changed at will by the authorities concerned; nor does it have a sufficiently high profile.

Apart from cases where ECSC recommendations are specifically addressed to a firm, directives and ECSC recommendations addressed to one or more Member States do not as a rule directly confer rights or impose obligations on the Community citizen. They are expressly addressed to the Member States alone. Rights and obligations for the citizen flow only from the measures enacted by the authorities of the Member States to implement the directive or recommendation. This point is of no importance to the citizen as long as the Member States actually comply with their Community obligations. But there are disadvantages for the Community citizen where a Member State does not take the requisite implementing measures to achieve an objective set in a directive or recommendation that would benefit him, or where the measures taken are inadequate. The Court of Justice has refused to tolerate such disadvantages, and a long line of cases has determined that in such circumstances the Community citizen can plead that the directive or recommendation has direct effect in actions in the national courts to secure the

rights conferred by it. Direct effect is defined by the Court as follows:

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

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

of directives/ECSC recommendations in relations between citizens themselves ('horizontal direct effect') has not been accepted by the Court of Justice. The Court concludes from the punitive nature of the principle that it is not applicable to relations between private individuals since they cannot be held liable for the consequences of the State's failure to act. What the citizen needs to rely on is certainty in the law and the protection of legitimate expectations. The citizen must be able to count on the effect of a directive being achieved by national implementation measures.

Nevertheless, once the period allowed for transposition has expired, the directives acquire full legal force and effect in that all State bodies are obliged to interpret and apply national law in accordance with the directives ('interpretation in line with Community law').

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



The problem facing the Court was that, although the aim of the directive was to confer on employed workers a personal right to continued payment of remuneration from the guarantee funds, this right could not be given direct effect by the national courts, meaning that they could not enforce it against the national authorities, since in the absence of measures

transposing the directive the guarantee fund had not been established and it was not possible to ascertain who was the debtor in connection with the insolvency. The Court finally held that, by failing to implement the directive, Italy had deprived the employed workers in question of their rights and was accordingly liable to damages. Even if the duty to

compensate is not written into Community law, the Court of Justice sees it as an integral part of the Community legal order since its full effect would not be secured and the rights conferred by it would not be protected if Community citizens did not have the possibility of seeking and obtaining compensation for invasion of their rights by Member States acting in contravention of Community law.

### **Individual decisions**

A third category of Community legal acts consists of EC or Euratom decisions and individual ECSC decisions. In some cases the Community institutions may themselves be responsible for implementing the Treaties, or regulations and general ECSC decisions, and this will be possible only if they are in a position to take measures binding on particular individuals, firms or Member States. The situation in the Member States' own systems is more or less the same; legislation will be applied by the authorities in an individual case by means of an administrative decision.

In the Community legal order this function is fulfilled by the individual decision, which is the means normally available to the Community institutions to order that a measure be taken in an individual case. The Community institutions can thus require a Member State or an individual to perform or refrain from an action, or can confer rights or impose obligations on them.

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

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

Instances in which decisions are used include, for example, the granting or refusal of State aid (Articles 87 and 88 EC), the annulment of agreements or arrangements contrary to fair competition (Article 81 EC) and the imposition of fines or coercive measures.

## **Non-binding measures by Community institutions**

Non-binding measures consist of opinions and EC and Euratom recommendations. This category of legal measures is the last one explicitly provided for in the Treaties; they enable the Community institutions to express a view to Member States, and in some cases to individual citizens, which is not binding and does not place any legal obligation on the addressees.

In the EC and Euratom Treaties these non-binding legal measures are called recommendations or opinions, but under the ECSC Treaty only the term opinions is used. Unhappily, in the ECSC system, a 'recommendation' is a binding legal act, corresponding to the directive in the EC and Euratom Treaties. In any event, while EC and Euratom recommendations urge the addressees to adopt a particular form of behaviour, opinions are used where the Community institutions are called upon to state a view on a current situation or particular event in the Community or the Member States.

In recommendations, the party to whom they are addressed is called on, but not placed under any legal obligation, to behave in a particular way. For example, in cases where the adoption or amendment of a legal or administrative provision in a Member State causes a distortion of competition within the Community, the Commission may recommend to the State concerned such measures as are appropriate to avoid this distortion (Article 97(1), second sentence, EC).

Opinions, on the other hand, are issued by the Community institutions when giving an assessment of a given situation or development in the Community or individual Member States. In some cases, they prepare the way for subsequent, legally binding acts, or are a prerequisite for the institution of proceedings before the Court of Justice (Articles 226 and 227 EC).

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

## **Resolutions, declarations and action programmes**

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



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

**Declarations.** There are two different kinds of declaration: if a declaration is concerned with the further development of the Community, such as the Declaration on the EU, the Declaration on Democracy and the Declaration on Fundamental Rights and Freedom, it is more or less equivalent to a resolution. Declarations of this type are mainly used to reach a wide

audience or a specific group of addressees. The other type of declaration is issued in the context of the Council's decision-making process and sets out the views of all or individual Council members regarding the interpretation of the Council's decisions. Interpretive declarations of this kind are standard practice in the Council and are an essential means of finding compromises. Their legal significance should be assessed under the basic principles of interpretation, according to which the key factor when interpreting the meaning of a legal provision should in all cases be the underlying intention of its originator. This principle is only valid, however, if the declaration receives the necessary public attention; this is because, for example, secondary Community legislation granting direct rights to individuals cannot be restricted by secondary agreements that have not been made public.

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

## • THE LEGISLATIVE PROCESS

Whereas in a State the will of the people will usually be expressed in parliament, it was for a long time the representatives of the Member States' governments meeting in the Council who played the decisive role in expressing the will of the EC. This was simply because the Community does not consist of a 'European nation' but owes its existence and form to the combined input of its Member States. These did not simply transfer part of their sovereignty to the EC, but pooled it on the understanding that they would retain the joint power to exercise it. But as the process of Community integration has developed and deepened, this division of powers in the Community decision-making process, originally geared towards the defence of national interests by the Member States, has evolved into something much more balanced, with regular enhancements of the status of the European Parliament. The original procedure whereby Parliament was merely consulted was first of all broadened to include cooperation with the Council, and Parliament was eventually given powers of co-decision in the EC's legislative process. The Treaty of Amsterdam made these co-decision powers 'the general rule', thereby further enhancing the EC's democratic credentials. The long-established principle of division of powers used in the Member States has not, however, been applied to the EC's legislative system, which is instead based on the 'principle of institutional balance', which ensures that all the Community institutions involved in

expressing the will of the EC participate in the legislative process to an equal degree.

The EC legislative process operates on four main levels, with different procedures applying at each of them:

1. for instruments of general validity (regulations and directives), there is the consultation procedure, the cooperation procedure, the co-decision procedure and the approval procedure;
2. implementing measures are adopted by specific procedures;
3. there is a simplified procedure for binding individual decisions and non-mandatory instruments;
4. ECSC instruments are subject to their own specific procedures.

### **Consultation procedure**

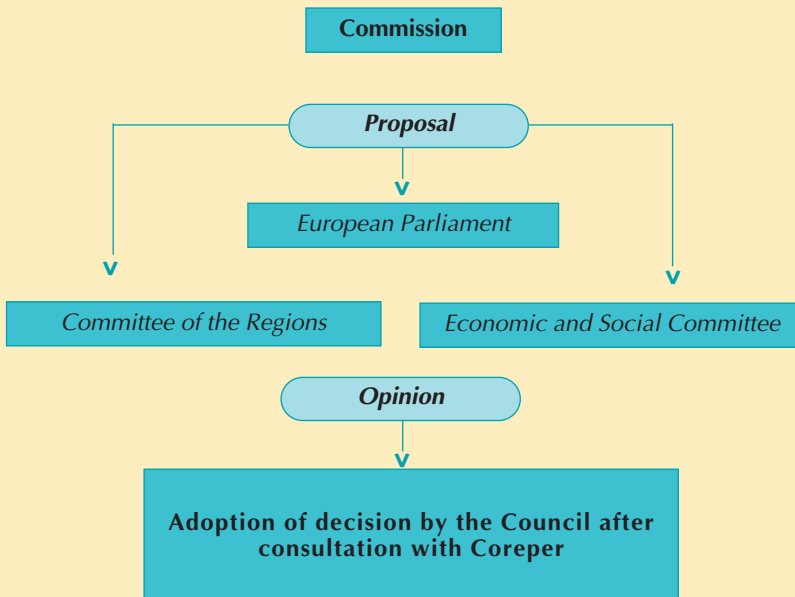
The consultation procedure was the earliest legislative process within the Community. It has become less and less important since the cooperation and co-decisions procedures came into being, and is now only used in instances where neither of the other two procedures are specifically required, including the adoption of provisions to combat discrimination on the grounds of gender, race, ethnic origin, religion or belief, disability, age or sexual orientation (Article 13 EC); strengthening and adding to the rights deriving from EU citizenship (Article 22(2)

EC); implementing the common agricultural policy (Article 37(2) EC); liberalising certain services (Article 52(2) EC); applying for a transitional period of five years in relation to visas, asylum and immigration (Article 67(1) EC); relating to competition (Articles 83 and 89 EC) and taxation (Article 93 EC); laying down guidelines for employment policies (Article 128(2) EC); extending foreign trade policy to include services and intellectual property rights (Article 133 EC); relating to social security, protection of workers' interests and the improvement of working conditions (Article 137(3) EC); on the establishment of joint undertakings for the execution of research, technological development and demonstration programmes (Article 172 EC); and provisions in the environmental field relating to

fiscal matters, town and country planning, land use or water management, as well as measures concerning a Member State's choice between different energy sources and the general structure of its energy supply (Article 175(2) EC).

The work involved in the consultation procedure is shared between the Commission and the Council: the Commission submits proposals and the Council makes the decisions. Before any decision is taken by the Council, however, various stages must be completed which, depending on the field concerned, also involve the European Parliament, the Economic and Social Committee and the Committee of the Regions in addition to the Commission and the Council.

## CONSULTATION PROCEDURE



### **Formulation stage**

The machinery is set in motion by the Commission, which draws up a proposal for the measure in question (known as the 'right of initiative'). A proposal is prepared on the responsibility of a Member of the Commission by the Commission department dealing with the particular field; frequently the department will also

consult national experts at this stage. This sometimes takes the form of deliberations in specially convened committees; alternatively, experts may have questions put to them by the relevant departments of the Commission. In practice, this consultation is particularly important in that it enables the Commission, while it is still in the process of drawing up a proposal, to assess its chances of being approved by

the Council and, if necessary, seek compromises at this early stage. However, the Commission is not obliged to accept the advice of national experts when drawing up its proposals. The draft drawn up by the Commission, setting out the content and form of the measure to the last detail, goes before the Commission as a whole, when a simple majority is enough to have it adopted. It is now a 'Commission proposal', and is sent to the Council with detailed explanatory remarks.

### ***Consultation stage***

The Council has to check whether it must consult other Community bodies before deciding on the proposal. The Treaties give the European Parliament the right to be consulted on all politically important measures (compulsory consultation). Failure to consult Parliament in such cases is a serious irregularity for which proceedings for cancellation may be instituted (Article 230 EC), which may result in the proposal being annulled. Apart from compulsory consultation of this kind, Parliament is in practice also consulted on the (now rare) draft legislation which may be passed by the Council alone on the basis of a proposal from the Commission (optional consultation). Examples of this type of proposal include harmonisation of the national systems for granting aid for exports to non-member countries (Article 132(1) EC) and fixing of Common Customs Tariff duties (Article 26 EC). By way of consultation, the Council officially forwards the Commis-

sion's proposal to the President of the European Parliament and formally requests Parliament to set out its position. The President passes the proposal on to a Parliamentary coordination committee for further consideration. The outcome of the committee's deliberations is then discussed at a plenary session of Parliament, and is set out in a report which may accept or reject the proposal or propose amendments. The Council is not legally obliged to take account of the opinions or amendments emanating from Parliament. These opinions are nevertheless of considerable political importance in that they enable Parliament to point out any legal shortcomings or call for further Community measures, thereby giving new impetus to the policy of European integration.

As well as the European Parliament, the Treaties in some cases oblige the Council to consult the Economic and Social Committee and the Committee of the Regions. As with Parliament, the opinions of the Economic and Social Committee and the Committee of the Regions regarding the proposal are sent to the Council and the Commission, and this ends their part in the process. However, the Committees' opinions, like that of Parliament, are not binding on the Council.

### ***Enactment stage***

After Parliament, the Economic and Social Committee and the Committee of the Regions have been consulted, the

Commission proposal is once more put before the Council, perhaps amended by the Commission in the light of the opinions of Parliament and the committees, where it is discussed by the Permanent Representatives Committee (Coreper). In the Coreper, all the technical details of decisions to be taken by the Council are worked out in advance by specialised working groups. As soon as a measure is 'ready for adoption', it is entered as an 'A item' on the agenda of the next Council meeting and is adopted without further debate. If, however, there are irreconcilable differences of opinion within the Coreper about the actual provisions of the measure concerned, the outstanding issues are entered on the agenda as 'B items' for further discussion by the Council in order to find a solution. Adoption of the proposal by the Council is the final stage in the legislative process.

### **Publication**

The final text, in all 11 official languages of the Community (Spanish, Danish, German, Greek, English, French, Italian, Dutch, Portuguese, Finnish and Swedish), is adopted by the Council, signed by the President of the Council, and then published or notified to the person to whom it is addressed (Article 254(1) and (3) EC).

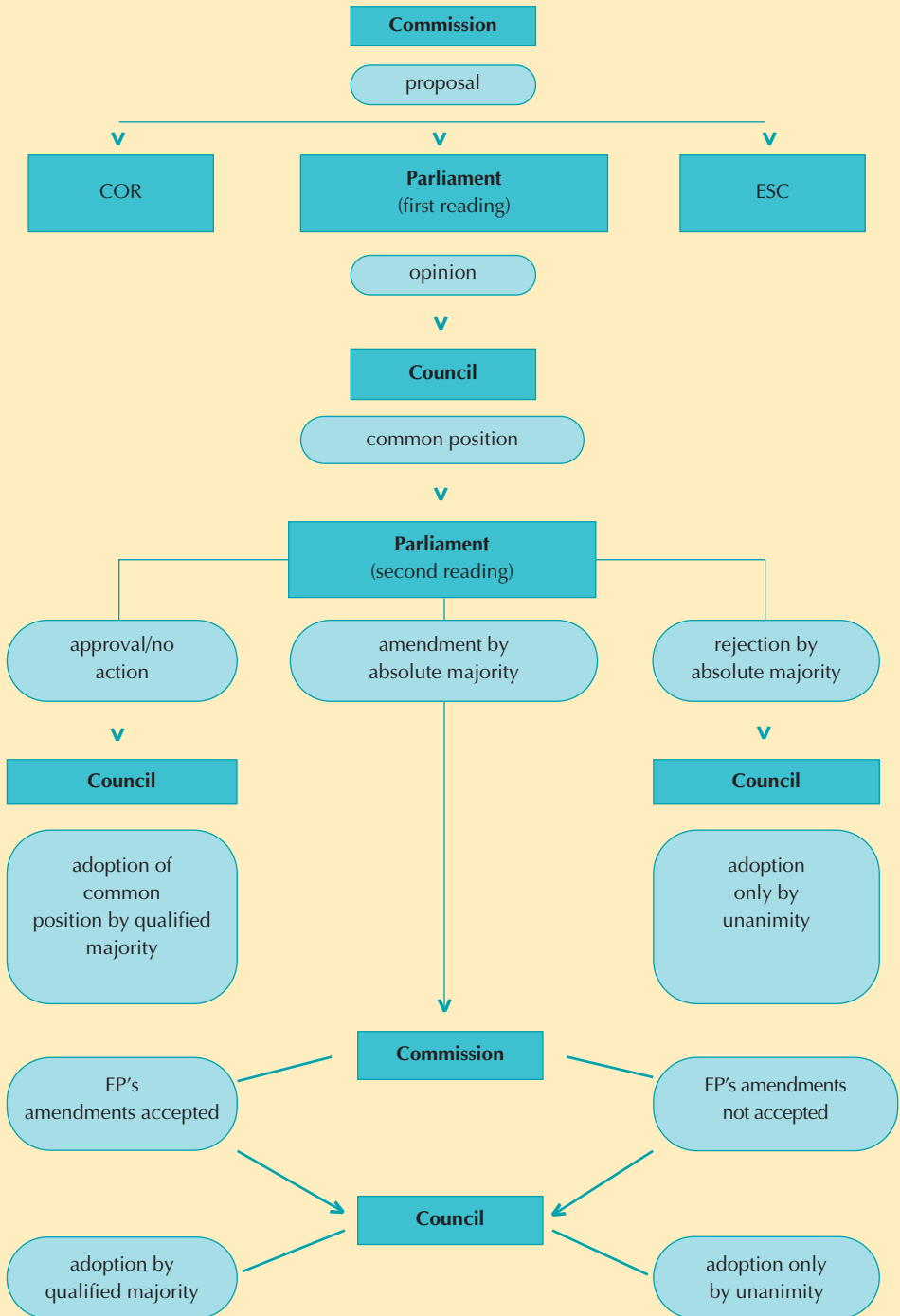
### **Cooperation procedure (Article 252 EC)**

The cooperation procedure largely follows the same lines as the proposal procedure described above, but involves a much stronger role for Parliament in the decision-making process and operates rather more quickly. In practice, this procedure is only relevant in relation to economic and monetary union (Articles 99(5) and 106(2) EC); in all other scenarios in which it used to be used, it has now been replaced by the co-decision procedure.

The cooperation procedure basically introduces a second reading by Parliament and the Council into the legislative process.

**First reading.** The procedure begins with a Commission proposal, which is sent not just to the Council, but also to Parliament. The idea behind Parliament's involvement at this early stage is to give it an opportunity, in the interests of effective participation in the legislative process, to give the Council its views on the Commission proposal before the 'common position' is drawn up. The Economic and Social Committee and the Committee of the Regions may also be consulted at this stage.

# COOPERATION PROCEDURE



On the basis of the opinions submitted, the Council then adopts, by qualified majority, a common position. This sets out the Council's position in the light of the Commission's proposal and the opinions. It is therefore not a compromise document but rather a reflection of the Council's view arrived at independently.

**Second reading.** The common position is then sent to Parliament for its second reading. Parliament has three months to take one of the following courses of action.

If Parliament accepts the common position or gives no response within the deadline, the Council then adopts the common position.

Parliament may, however, reject the common position or propose amendments. In either instance, the Council may proceed with its adoption, albeit in two different ways.

- If the common position is rejected, unanimity is required for adoption by the Council. Given the difficulty of achieving unanimity in the Council, the proposal is effectively blocked. Only rarely will Parliament block legislation in this way.
- Parliament usually proposes amendments. The question is then whether the Commission accepts its amendments. If it does, the Council may adopt the instrument in the usual way, by a qualified majority or (if it is departing from the Commission's

proposal) unanimously. If the Commission does not accept Parliament's amendments, their adoption by the Council requires a unanimous vote. Parliament has to get the Commission on its side in order to lend weight to its arguments. In any event, the Council may still exercise a veto by not taking any decision on the amendments proposed by Parliament or on the amended Commission proposal, thereby blocking the legislation in question.

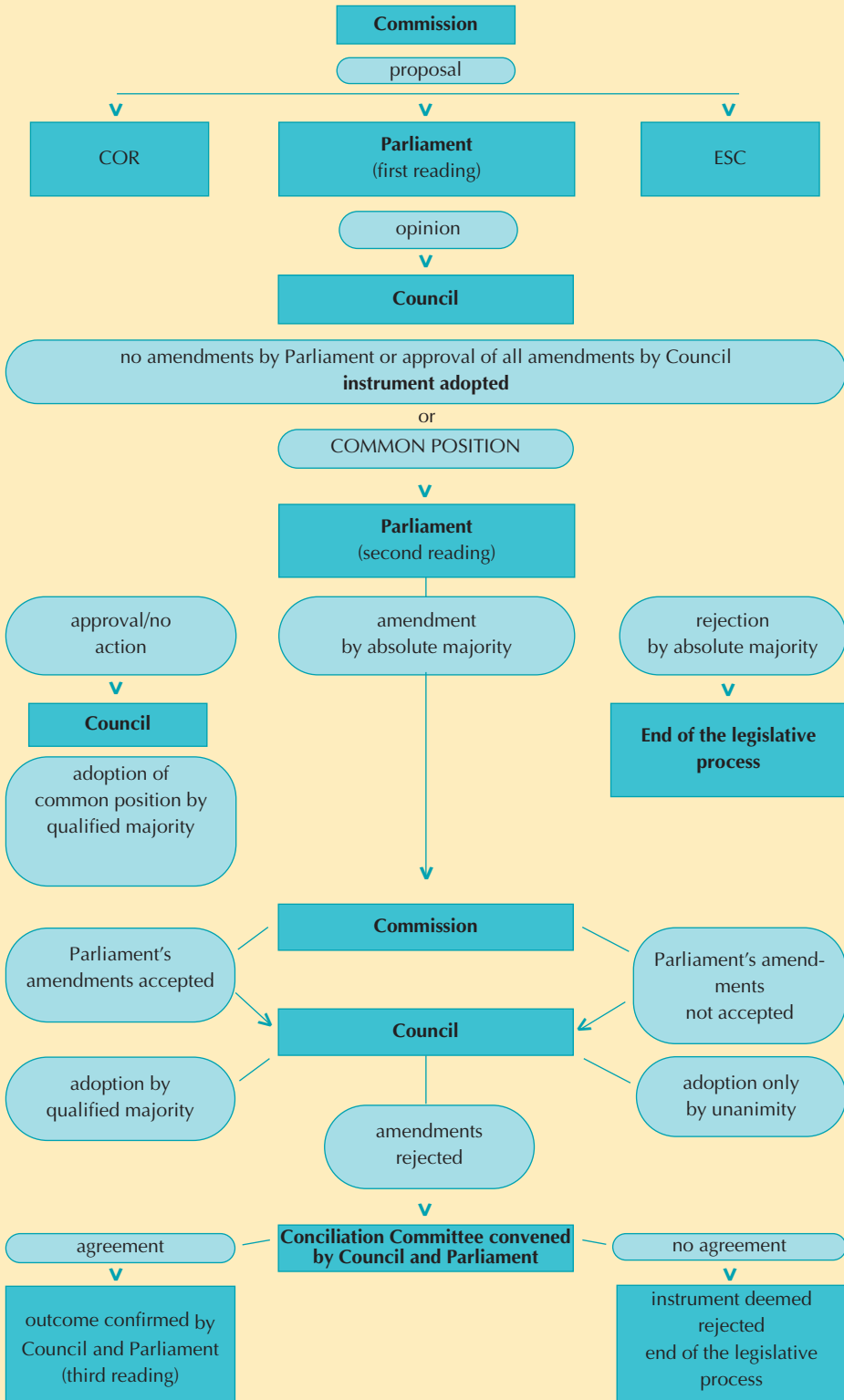
### **Co-decision procedure (Article 251 EC)**

The concept of the co-decision procedure is one step further on from the cooperation procedure. Whilst the Council may unanimously override Parliament's views under the cooperation procedure, the Treaty of Amsterdam designed the co-decision procedure to create 'equality of arms' between Council and Parliament. The co-decision procedure denies the Council the right to adopt its common position if efforts to reach agreement with Parliament fail. This increases the incentive to reach a compromise as the entire legislative process must otherwise be abandoned.

The co-decision procedure has become by far the most important element in the legislative process. It is used in connection with the ban on discrimination on grounds of nationality (Article 12 EC), provisions facilitating the exercise of the right of residence (Article 18(2) EC),



# CO-DECISION PROCEDURE



measures to bring about freedom of movement (Article 40 EC), measures to ensure social security when exercising the right to move freely (Article 42 EC), directives on freedom of establishment (Articles 44(2) and 47(1) EC), freedom to provide services (Article 55 EC), transport policy (Articles 71(1) and 80 EC), creation of a single market (Article 95 EC), social policy, including measures to bring about equality of the sexes (Articles 137, 141 and 148 EC), measures to promote education and vocational training (Article 149 EC), culture (Article 151 EC), public health (Article 152 EC), specific measures to protect consumers (Article 153 EC), guidelines and projects of common interest relating to trans-European networks (Article 156 EC), regional funds (Article 162(1) EC), research programmes (Article 172(2) EC), pursuit of the environmental protection objectives referred to in Article 174 EC (Article 175(1) EC) and implementation of environmental protection programmes (Article 175(3) EC), development cooperation measures (Article 179 EC), formulation of general principles on access to documentation (general principles of transparency, Article 280 EC), the production of statistics (Article 285 EC) and the establishment of an independent supervisory body to monitor data protection (Article 286 EC).

The following is a simplified description of the co-decision procedure.

**First reading.** Here again, the starting point is a Commission proposal that is sent to the Council, Parliament and any

committees to be consulted. Parliament takes its first reading and sends its opinion to the Council. The Economic and Social Committee and the Committee of the Regions are also given an opportunity to set out their position at this stage.

If Parliament does not make any amendments to the Commission's proposal, or the Commission accepts all amendments proposed by Parliament, the instrument may be adopted at this stage of the procedure. Otherwise, a second reading before Parliament is required.

**Second reading.** On the basis of the Commission's proposal and Parliament's and the committees' opinions and its own deliberations, the Council adopts a common position by a qualified majority. The common position is then sent to Parliament for its second reading. Parliament now has three months in which to do one of three things.

1. If it accepts the Council's common position or gives no response within three months, the instrument is deemed to have been adopted as set out in the common position.
2. If it rejects the common position outright (for which an absolute majority of MEPs would be required), the legislative process is at an end. The Council no longer has the option of convening the Conciliation Committee.
3. If it makes amendments to the Council's common position the following procedure is then used. The Council first of all

has the opportunity to adopt the common position as amended by Parliament, in which case all the proposed changes must be accepted. If, however, the Council rejects certain amendments or the majority needed for their adoption cannot be obtained (e.g. unanimity in the event that the Commission rejects Parliament's proposed amendments), then the President of the Council, acting in consultation with the President of the Parliament, must within six weeks convene a Conciliation Committee consisting of 15 representatives each from the Council and Parliament to consider the Council's common position in the light of Parliament's proposed amendments. The aim is to achieve a workable compromise which can be adopted by the required majorities in the Council and Parliament.

**Third reading.** If the Conciliation Committee accepts a joint draft of the legal instrument, the Council and Parliament must confirm its acceptance in a third reading within six weeks. Irrespective of the Commission's position regarding the draft compromise, a qualified majority in the Council is sufficient for its adoption (unless unanimity is required under the Treaties). Adoption by Parliament requires an absolute majority of the votes cast. The instrument is then deemed accepted by Parliament and the Council, which is also clearly indicated in its title (e.g. Parliament and Council regulation).

If the conciliation procedure fails, the instrument is deemed not to have been

accepted. The legislative process is then at an end. Failure of the procedure thus leads the same result as rejection of the common position by the Council and Parliament at the third reading. This arrangement does away with the procedure applying prior to the Treaty of Amsterdam whereby the Council was able to adopt its common position if the conciliation procedure ended in failure and Parliament could only prevent this by means of a blocking resolution which required an absolute majority of its members.

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

### **Approval procedure**

The principal form of Parliamentary involvement in the legislative process is the approval procedure, whereby a legal instrument can only be adopted with the prior approval of Parliament. This procedure does not, however, give Parliament any scope for directly influencing the

nature of the legal provisions. For example, it cannot propose any amendments or secure their acceptance during the approval procedure; its role is restricted to accepting or rejecting the legal instrument submitted to it.

Provision is made for this procedure in connection with the accession of new Member States (Article 49 EU), the conclusion of association agreements and other cornerstone agreements with non-member countries (Article 300(3), second paragraph, EC), the transfer of further specific tasks to the ECB (Article 105(6) EC), amendments to the Statute of ESCB (Article 107(5) EC) and the appointment of the President of the Commission and the members of the Commission as a body (Article 214(2) EC).

### **Simplified procedure**

Under the simplified procedure, no Commission proposal is needed to initiate the legislative process.

- This procedure applies to measures within the Commission's own powers (such as approval of State aid).
- The simplified procedure is also used for the adoption of non-mandatory instruments, especially recommendations and opinions issued by the Commission or the Council. The Commission is not restricted to what is expressly provided for in the Treaties, but can also formulate recommendations and deliver opinions where it considers it necessary (Article

211, second, indent, EC; Article 124 subpara. 2 Euratom). In the ECSC, on the other hand, only the Commission may deliver opinions.

### **Procedure for implementing measures**

The general rule is that the Council confers on the Commission the power to issue measures implementing its instrument. Only in special cases may the Council reserve implementing powers for itself (Article 202, third indent, EC). When exercising its implementing powers the Commission may neither amend nor supplement the Council instrument; compliance with the framework conditions laid down by the Council is ensured through committees. In 1999, the decision-making procedure was redesigned to make for greater simplicity and transparency, and not least greater Parliamentary involvement. The number of decision-making procedures was reduced from five to three. Parliament was brought into the procedures concerning the adoption of implementing measures with which it had been involved as part of the co-decision procedure. Parliament may, in these instances, deliver a reasoned opinion stating that the planned measure exceeds the scope of the legal instrument to be implemented, and may require the Commission to modify the implementing measure accordingly. In addition, the Commission is subject to wide-ranging obligations to keep Parliament informed and properly notified. The three committee procedures, whose application

is specified in the enabling instrument, are used as follows.

**Advisory Committee procedure.** This procedure applies chiefly to the implementation of Council instruments for the single market.

The Advisory Committee is made up of representatives of the Member States and chaired by a Commission representative.

The Commission representative presents a draft of the measures to be taken, and the Committee gives its opinion on them within a time limit set by the Commission according to the urgency of the matter. The Commission is expected, though not obliged, to take the fullest possible account of the opinion; it informs the Committee of the action taken on its suggestions and proposed amendments.

**Management Committee procedure.** This procedure has been used for measures implementing the common agricultural policy or the common fisheries policy, or programmes with serious budgetary implications.

Before adopting its planned measures, the Commission must first consult a Management Committee composed of representatives of the Member States, which gives an opinion by qualified majority (Article 205(2) EC). If the instrument was adopted by Parliament and the Council during the co-decision procedure, the Commission must also involve Parliament in the draft implementing measure. Parliament exam-

ines whether the planned measure falls within the scope of the Commission's dispositive powers. If this is not the case, Parliament must set out its position in a reasoned resolution. The Commission may then, while taking account of the points raised in the resolution, submit a new draft to the Committee, continue with the procedure, or transfer to Parliament and the Council the responsibility for passing the measure by means of a proposal to that effect. The Commission must notify Parliament and the Committee of the measures it intends to take in the light of Parliament's resolution. If it decides to continue with the procedure or if no resolution is passed by Parliament, it may adopt its planned measures with immediate effect. If these measures are not in line with the Committee's position, however, the Commission must notify the Council without delay about the measures taken and suspend their implementation for a maximum of three months. The Council has three months within which to take a different decision by a qualified majority.

**Legislation Committee procedure.** This procedure is used for measures of a general nature which are intended to implement basic provisions of the legal instrument concerned, e.g. measures to protect the health and safety of humans, animals or plants.

The Legislation Committee, like the Management Committee, consists of representatives of the Member States and gives its opinion on the Commission's

proposed implementing measures by qualified majority.

The difference between the Legislation Committee procedure and the Management Committee procedure lies in the Commission's much weaker position where the Legislation Committee rejects the proposed measures or fails to give an opinion. The Commission cannot put its measures immediately into effect but must propose them for a Council decision and notify Parliament accordingly. Parliament then looks at whether the proposed measure is within the scope of the instrument to be implemented, and notifies the Council of its position. The Council must decide on the Commission's proposal by qualified majority within three months while taking account of Parliament's position. If the Council rejects the proposal, the Commission must re-examine it, following which it may submit an amended proposal, resubmit the original proposal or present a proposal transferring responsibility for the measure to Parliament and the Council. If, after three months, the Council has neither adopted the proposed implementing measure nor rejected the proposal for it, the Commission may put the proposed measure into effect.

- **THE SYSTEM OF LEGAL PROTECTION**

At the heart of the system of legal protection are the European Court of Justice and the Court of First Instance attached to it. The Court of Justice is the highest judicial authority on all questions of Community law and, together with the Court of First Instance, the only such authority. The system of legal protection in the EC offers the following possibilities of recourse to the law.

### **Treaty infringement proceedings (Article 226 EC)**

Treaty infringement proceedings are procedures for establishing whether a Member State has failed to fulfil an obligation imposed on it by Community law. It is conducted exclusively before the European Court of Justice. Given the seriousness of the accusation, the referral of the Court of Justice must be preceded by a preliminary procedure in which the Member State is given the opportunity to submit its observations. If the dispute is not settled at that stage, either the Commission or another Member State (Article 227 EC) may institute an action in the Court. In practice the initiative is usually taken by the Commission. The Court investigates the complaint and decides whether the Treaty has been infringed. If so, the offending Member State is then required to take the measures needed to conform. If a Member State fails to comply with a judgment given against it, the Treaty on

European Union offers the possibility of a second court ruling ordering it to pay a lump-sum fine or a penalty (Article 228 EC).

### **Actions for annulment (Article 230 EC)**

The purpose of actions for annulment is to have binding legal instruments of the Council, Commission, Parliament or the European Central Bank annulled. If EU citizens or firms are involved in such an action as plaintiff or defendant, the action must be brought before the Court of First Instance (CFI). Disputes between institutions, however, must be conducted before the European Court of Justice.

The actions may be based on allegations of *ultra vires*, violation of essential procedural requirements, infringement of the Treaties or secondary legislation, or abuse of discretionary powers. They may be brought by a Member State, the Council or the Commission, but also by Parliament, the Court of Auditors or the European Central Bank in order to safeguard the rights invested in them. However, citizens and firms can only proceed against decisions that are personally addressed to them or, though addressed to others, have a direct individual effect on them. This is deemed by the Court of Justice to be the case if a person is affected in so specific a way that a clear distinction exists between them and other individuals or firms. This criterion of 'immediacy' is intended to ensure that a matter is only referred to the Court of Justice or the CFI

if the fact of the plaintiff's legal position being adversely affected is clearly established along with the nature of those adverse effects; this may present problems in cases where Community legal acts still have to be implemented by the Member States. The 'immediacy' requirement is also intended to prevent 'relator suits' from being filed.

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

### **Complaints for failure to act (Article 232 EC)**

Complaints for failure to act supplement the legal protection available against the Council, Commission, Parliament and the European Central Bank. There is a preliminary procedure whereby the complainant must first put the institution on notice to perform its duty. The order sought in an action by the institutions is a declaration that the body concerned has infringed the Treaty by neglecting to take a decision required of it. Where the action is brought by a citizen or a firm, it is for a declaration that the institution has infringed the Treaty by neglecting to address an individual decision to them. The judgment simply finds that the neglect was unlawful. The Court of

Justice/CFI has no jurisdiction to order that a decision be taken: the party against whom judgment is given is merely required in the usual way to take measures to comply with the judgment (Article 233 EC).

### **Actions for damages (Articles 235 and 288(2) EC)**

Citizens and firms — and also Member States — that sustain damage by reason of fault committed by EC staff can file actions for damages at the CFI (individuals and firms) or the Court of Justice (Member States). The basis for Community liability is not fully set out by the Treaties and is governed by the general principles common to the laws of the Member States. The Court has fleshed this out, holding that the following conditions must be satisfied before an award of damages can be made.

There must be an unlawful act by a Community institution or by a member of its staff in the exercise of his functions. Where the case turns on liability for a legislative instrument (regulation or directive) unlawfully made by the institution, it is not enough that the instrument be unlawful: it must be in substantial and manifest conflict with a superior rule of law having the purpose of protecting individual rights. It is no easy matter to determine when there is a serious enough violation of Community law. The Court tends to gear its findings to the narrowness of the category of persons affected by the offending measure and the scale of the

damage sustained, which must be in excess of the commercial risk that can be reasonably expected in the business sector concerned.

Actual harm must have been suffered.

There must be a causal link between the act of the Community institution and the damage sustained.

Intent or negligence do not have to be proved.

### **Actions by Community staff (Article 236 EC)**

The CFI has jurisdiction in disputes between staff members or their surviving family members and their employing institution arising from the employment relationship.

### **Appeals procedure (Article 225(1) EC, Art. 110 ff. of the rules of procedure of the Court of Justice)**

The relationship between the Court of Justice and the CFI is designed in such a way that judgments of the CFI are subject to a right of appeal to the Court of Justice on points of law only. The appeal may be on the grounds of lack of competence of the CFI, a breach of procedure which adversely affects the interests of the appellant or the infringement of Community law by the CFI. If the appeal is justified and procedurally admissible, the CFI's judgment is rescinded by the Court





of Justice. If the matter is ripe for a court ruling, the Court of Justice may issue its own judgment; otherwise, it must refer the matter back to the CFI, which is bound by the Court of Justice's legal assessment.

### **Provisional legal protection (Articles 242 and 243 EC)**

Actions filed with the Court of Justice or the CFI, or appeals lodged against their judgments, do not have suspensive effect. It is, however, possible to apply to the Court of Justice or the CFI for an order to suspend the application of the contested act (Article 242 EC) or for an interim court order (Article 243 EC).

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

Prospect of success on the main issue (*fumus boni juris*): this is assessed by the court in a preliminary summary examination of the arguments submitted by the appellant.

Urgency of the order: this is assessed on the basis of whether the order applied for by the appellant is necessary in order to ward off serious and irreparable harm. The criteria used for making this assessment include the nature and seriousness of the infringement, and its specific and irreversibly adverse effects on the appellant's property and other objects of legal protection. Financial loss is deemed to be of a serious and irreparable nature

only if it cannot be made good even if the appellant is successful in the main proceedings.

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

### **Preliminary rulings (Article 234 EC)**

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

The object of a preliminary ruling is to secure a uniform interpretation of Community law and, with it, the unity of the Community legal order. Alongside this

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

**Subject-matter.** The European Court of Justice rules on the interpretation of instruments of Community law and examines the validity of the Community institutions’ and the European Central Bank’s acts of legal significance. Provisions of national law may not be the subject of a preliminary ruling. In proceedings for a preliminary ruling, the Court of Justice is not empowered to interpret national law or assess its compatibility with Community law. This fact is often overlooked in the

questions referred to the Court of Justice, which is called on to look at many questions specifically concerned with the compatibility of provisions of national and Community law, or to decide on the applicability of a specific provision of Community law in proceedings pending before a national court. Although these questions are in fact procedurally inadmissible, the Court of Justice does not simply refer them back to the national court; instead, it reinterprets the question referred to it as a request by the referring court for basic or essential criteria for interpreting the Community legal provisions concerned, thus enabling it to then give its own assessment of compatibility between national and Community law. The procedure adopted by the Court of Justice is to extract from the documentation submitted — particularly the grounds for referral — those elements of Community law which need to be interpreted for the purpose of the underlying legal dispute.

**Capacity to proceed.** The procedure is available to all ‘courts of the Member States’. This expression should be understood within the meaning of Community law and focuses not on the name but rather on the function and position occupied by a judicial body within the systems of legal protection in the Member States. On this basis, ‘courts’ are understood to mean all independent institutions (i.e. not subject to instructions) empowered to settle disputes in a constitutional State under due process of law. According to this definition, the constitutional courts in the Member States and dispute-settling

authorities outside the State judicial system — but not private arbitration tribunals — are also entitled to refer cases. The national court's decision whether or not to make a reference will depend on the relevance of the point of Community law at issue for the settlement of the dispute before it, which is a matter for the national court to assess. The parties can only request, not require, it to refer a case. The Court of Justice considers the relevance of the point solely in terms of whether the question concerned is amenable to referral (i.e. whether it actually concerns the interpretation of the EC Treaty or the legal validity of an act by a Community institution) or whether a genuine legal dispute is involved (i.e. whether the questions on which the Court of Justice is to give its legal opinion in a preliminary ruling are merely hypothetical or relate to a point of law that has already been settled). It is exceptional for the Court to decline to consider a matter for these reasons because, given the special importance of cooperation between judicial authorities as provided for in the EC Treaty, the Court exercises restraint when applying these criteria. Nevertheless, recent judgments of the Court show that it has become more stringent as regards eligibility for referral in that it is very particular about the already established requirement that the order for referral contain a sufficiently clear and detailed explanation of the factual and legal background to the original proceedings, and that if this information is not provided it declares itself unable to give a proper interpretation of Community law and

rejects the application for a preliminary ruling as inadmissible.

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

legal relations while disregarding an existing provision of Community law.

Failure to discharge the obligation to refer constitutes an infringement of the EC Treaty, possibly making the Member State concerned liable to infringement proceedings. In practice, however, the effects of such a course of action are very limited given that the government of the Member State concerned cannot comply with any order issued by the European Court of Justice because the independence of its judiciary and the principle of separation of powers mean that it is unable to give instructions to national courts. Now that the principle of Member States' liability under Community law for failure to comply with it has been recognised (see next section), the possibility of individuals filing for damages, which may have arisen from the Member State concerned failing to meet its obligation to refer, offers better prospects of success.

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

- **LIABILITY OF THE MEMBER STATES FOR INFRINGEMENTS OF COMMUNITY LAW**

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

## **Member States' liability for legal acts or failure to act**

This form of liability is defined by three criteria which are largely the same as those applying to the Community in a similar situation.

1. The aim of the Community provision which has been infringed must be to grant rights to the individual.
2. The infringement must be sufficiently serious, i.e. a Member State must clearly have exceeded the limits of its discretionary powers to a considerable degree. This must be decided by the national courts, which have sole responsibility for ascertaining the facts and assessing the seriousness of the infringements of Community law. The Court of Justice's judgment nevertheless offers the national courts a number of basic guidelines.

'The factors which the competent court may take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law. On any view, a breach of Community law will

clearly be sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established, or a preliminary ruling or settled case-law of the Court on the matter from which it is clear that the conduct in question constituted an infringement.'

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

## **Liability for infringement of Community law by the courts**

The European Court of Justice makes it quite clear that the principles established by it for determining liability also apply to the last of the three central powers, namely the judiciary. Its judgments are now not only subject to review at successive stages of appeal; if they were delivered in disregard or infringement of Community law, they may also be the subject of an action for damages before the competent courts in the Member States. When ascertaining the facts surrounding a judgment's infringement of Community law, proceedings of this kind must also reconsider the questions relating to the substance of Community law, in the process of which the court concerned may not merely invoke the binding effects of

the judgment of the specialised court dealing with the case. The court to which the competent national courts have to refer questions of interpretation and/or the validity of Community provisions, and

also the compatibility of national liability regimes with Community law, is the Court of Justice, to which questions may be referred under the preliminary ruling procedure (Article 234 EC).

# THE POSITION OF COMMUNITY LAW IN RELATION TO THE LEGAL ORDER AS A WHOLE

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

- **AUTONOMY OF THE  
COMMUNITY LEGAL ORDER**

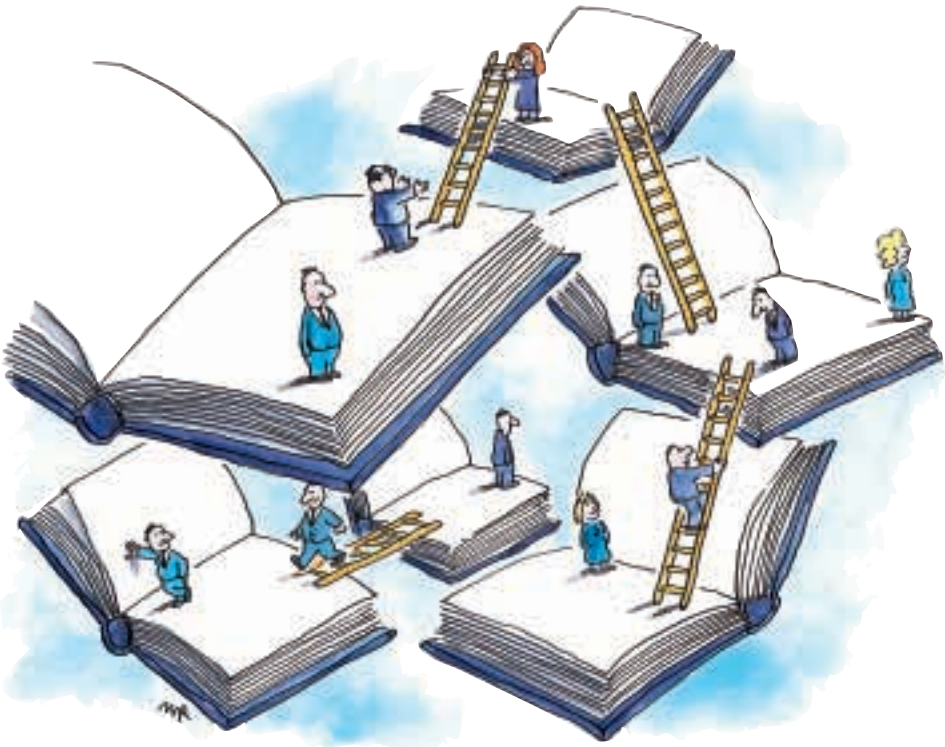
By establishing the Community, the Member States have limited their legislative sovereignty and in so doing have created a self-sufficient body of law that is binding on them, their citizens and their courts.

One of the best-known cases heard in the Court of Justice was 'Costa v ENEL' in 1964, in which Mr Costa filed an action against the nationalisation of electricity generation and distribution in Italy, and the consequent vesting of the business of the former electricity companies in ENEL, the new public corporation. The implications of this case are discussed below.

The autonomy of the Community legal order is of fundamental significance for the nature of the EC, for it is the only guarantee that Community law will not be watered down by interaction with national law, and that it will apply uniformly throughout the Community. This is why the concepts of Community law are interpreted in the light of the aims of the Community legal order and of the Community in general. This Community-specific interpretation is indispensable since particular rights are secured by Community law and without it they would be endangered. Each Member State could then, by interpreting provisions in different ways, decide individually on the substance of the freedoms that Community law is supposed to generate. As an example, consider the concept of the worker, on which the scope of the concept of freedom of movement is based. The specific Community concept of the worker is quite capable of deviating from the concepts that are known and applied in the legal orders of the Member States. Furthermore, the only standard by which Community legal instruments are measured is Community law itself, and not national legislation or constitutional law.

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





Even if Community law constitutes a legal order that is self-sufficient in relation to the legal orders of the Member States, this situation must not be regarded as one in which the Community legal order and the legal systems of the Member States are superimposed on one another like layers of bedrock. The fact that they are applicable to the same people, who thus simultaneously become citizens of a national State and of the EU, negates such a rigid demarcation of these legal orders.

Secondly, such an approach disregards the fact that Community law can become operational only if it forms part of the legal orders of the Member States. The truth is that the Community legal order and the national legal orders are interlocked and interdependent.

- **INTERACTION BETWEEN COMMUNITY LAW AND NATIONAL LAW**

The interaction between Community law and national law covers those areas where the two systems complement each other. Article 10 of the EC Treaty is clear enough.

‘Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community’s tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty’.

This general principle was inspired by an awareness that the Community legal order on its own is not able to fully achieve the objectives pursued by the establishment of the EC. Unlike a national legal order, the Community legal order is not a self-contained system but relies on the support of the national systems for its operation. All three branches of government — legislature, executive and judiciary — therefore need to acknowledge that the Community legal order is not a ‘foreign’ system and that the Member States and the Community institutions have established indissoluble links between themselves so as to achieve their common objectives. The EC is not just a community of interests; it is a community based on solidarity. It follows that national authorities are required not only to observe the Commu-

nity treaties and secondary legislation; they must also implement them and bring them to life. The interaction between the two systems is so thoroughly multi-faceted that a few examples are called for.

The first illustration of how the Community and national legal orders mesh with and complement each other is the directive, already considered in the chapter on legislation. All the directive itself fixes in binding terms is the result to be achieved by the Member State; it is for national authorities, via domestic law, to decide how and by what means the result is actually brought about. In the judicial field, the two systems mesh through the preliminary ruling procedure of Article 234 of the EC Treaty, whereby national courts may, or sometimes must, refer questions on the interpretation and validity of Community law to the European Court of Justice, whose ruling may well be decisive in settling the dispute before them. Two things are clear: firstly, the courts in the Member States are required to observe and apply Community law; and secondly, the interpretation of Community law and declarations as to its validity are the sole preserve of the Court of Justice. The interdependence of Community and national law is further illustrated by what happens when gaps in Community law need to be filled: Community law refers back to existing rules of national law to complete the rules it itself determines. This principle applies to the full range of obligations under Community law unless the latter has laid down rules for its own enforcement. In any such case, national authorities

enforce Community law by the provisions of their own legal systems. But the principle is subject to one proviso: the uniform application of Community law must be preserved, for it would be wholly unacceptable for citizens and firms to be judged by different criteria — and therefore be treated unjustly.

- **CONFLICT BETWEEN COMMUNITY LAW AND NATIONAL LAW**

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

## **Direct applicability of Community law**

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

One of the outstanding achievements of the Court of Justice of the European Communities is that it has enforced the direct applicability of Community law despite the initial resistance of certain Member States, and has thus guaranteed the existence of the Community legal order. Its case-law on this point started with a case already mentioned, that of the Dutch transport firm *Van Gend & Loos*, which brought an action in a Dutch court against the Dutch customs authorities, who had charged increased customs duties on a chemical product imported from the Federal Republic of Germany. In the final analysis, the outcome of these proceedings depended on the question of whether individuals too may rely on Article 12 of the EEC Treaty (now Article 25 EC), which specifically prohibits the introduction of new customs duties and the increase of existing duties in the common market. Despite the advice of numerous governments and its Advocate General, the Court ruled that, in view of the nature and objective of the Community, provisions of Community law were in all cases directly applicable. In the grounds for its judgment, the Court stated that ‘the Community constitutes a new legal order ... the subjects of which

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

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

The Court ruled that the former Article 12 EEC met these criteria, and that the firm Van Gend & Loos could therefore also derive rights from it which the court in the Netherlands was obliged to safeguard. As a consequence of this the Dutch court invalidated the customs duties levied in contravention of the Treaty. Subsequently, the European Court of Justice continued to apply this reasoning in regard to other provisions of the EEC Treaty that are of far greater importance to citizens of the Community than Article 12. The judg-

ments that are especially noteworthy here concern the direct applicability of provisions on freedom of movement (Article 39 EC), freedom of establishment (Article 43 EC) and freedom to provide services (Article 49 EC).

With regard to the guarantees concerning freedom of movement, the Court of Justice delivered a judgment declaring them directly applicable in the ‘Van Duyn’ case. The facts of this case were as follows: Miss van Duyn, a Dutch national, was in May 1973 refused permission to enter the United Kingdom in order to take up employment as a secretary with the Church of Scientology, an organisation considered by the Home Office to be ‘socially harmful’. Relying on the Community rules on freedom of movement for workers, Miss van Duyn brought an action before the High Court, seeking a ruling that she was entitled to stay in the United Kingdom for the purpose of employment and be given leave to enter the United Kingdom. In answer to a question referred by the High Court, the Court of Justice held that Article 39 was directly applicable and hence conferred on individuals rights that are enforceable before the courts of a Member State.

The Court of Justice was asked by the Belgian Conseil d’État to give a ruling on the direct applicability of provisions guaranteeing freedom of establishment. The Conseil d’État had to decide on an action brought by a Dutch lawyer, J. Reyners, who wished to assert his rights arising out of Article 43. Mr Reyners felt obliged to bring the action after he had been denied admission to the legal profession in Belgium because of his foreign nationality, despite the fact that he had passed the necessary Belgian examinations.

In its judgment of 21 July 1974, the Court held that unequal treatment of nationals and foreigners as regards establishment could no longer be maintained, as Article 43 had been directly applicable since the end of the transitional period and hence entitled Community citizens to take up and pursue gainful employment in another Member State in the same way as a national of that State. As a result of this judgment Mr Reyners had to be admitted to the legal profession in Belgium.

The Court of Justice was given an opportunity in the 'Van Binsbergen' case to specifically establish the direct applicability of provisions relating to the freedom to provide services. These proceedings involved, among other things, the question of whether a Dutch legal provision to the effect that only persons habitually resident in the Netherlands could act as legal representatives before an appeal court was compatible with the Community rules on freedom to provide services. The Court ruled that it was not compatible, on the grounds that all restrictions to which Community citizens might be subject by reason of their nationality or place of residence infringe Article 49 of the EC Treaty and are therefore void.

Also of considerable importance in practical terms is the recognition of the direct applicability of provisions on the free movement of goods (Article 28 EC), the principle of equal pay for men and women (Article 141 EC), the general prohibition of discrimination (Article 12 EC) and freedom of competition (Article 81 EC). As regards secondary legislation, the question of direct applicability only arises in relation to directives (ECSC recommendations) and decisions addressed to the

Member States given that regulations (ECSC general decisions) and decisions addressed to individuals (ECSC individual decisions) already derive their direct applicability from the Treaties (Article 249(2) and (4) EC), Article 14 ECSC). Since 1970 the Court has extended its principles concerning direct applicability to provisions in directives and in decisions addressed to the Member States.

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



### Primacy of Community law

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

Such a conflict between Community law and national law can be settled only if one gives way to the other. Community legislation contains no express provision on the question. None of the Community treaties contains a provision stating, for example, that Community law overrides, or is subordinate to, national law. Nevertheless, the

only way of settling conflicts between Community law and national law is to grant Community law primacy and allow it to supersede all national provisions that diverge from a Community rule and take their place in the national legal orders. After all, precious little would remain of the Community legal order if it were to be subordinated to national law. Community rules could be set aside by any national law. There would no longer be any question of the uniform and equal application of Community law in all Member States. Nor would the Community be able to perform the tasks entrusted to it by the Member States. The Community's ability to function would be jeopardised, and the construction of a united Europe on which

so many hopes rest would never be achieved.

No such problem exists as regards the relationship between international law and national law. Given that international law does not become part of a country's own legal order until it is absorbed by means of an act of incorporation or transposition, the issue of primacy is decided on the basis of national law alone. Depending on the order of precedence ascribed to international law by a national legal system, it may take precedence over constitutional law, be ranked between constitutional law and ordinary statutory law, or merely have the same status as statutory law. The relationship between incorporated or transposed international law and national law is determined by applying the rule under which the most recently enacted legal provisions prevail against those previously in place (*lex posterior derogat legi priori*). These national rules on conflict of laws do not, however, apply to the relationship between Community law and national law because Community law does not form part of any national legal order. Any conflict between Community law and national law may only be settled on the basis of the Community legal order.

Once again it fell to the Court of Justice, in view of these implications, to establish — despite opposition from several Member States — the principle of the primacy of Community law that is essential to the existence of the Community legal order. In so doing, it erected the second pillar of the Community legal order alongside direct

applicability, which was to turn that legal order at last into a solid edifice.

In 'Costa v ENEL', the Court made two important observations regarding the relationship between Community law and national law:

1. The Member States have definitively transferred sovereign rights to a Community created by them. They cannot reverse this process by means of subsequent unilateral measures which are inconsistent with the Community concept.
2. It is a principle of the Treaty that no Member State may call into question the status of Community law as a system uniformly and generally applicable throughout the Community.

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

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

The legal consequence of this rule of precedence is that, in the event of a conflict of laws, national law which is in



contravention of Community law ceases to apply and no new national legislation may be introduced unless it is compatible with Community law.

The Court has since consistently upheld this finding and has, in fact, developed it further in one respect. Whereas the 'Costa' judgment was concerned only with the question of the primacy of Community law over ordinary national laws, the Court confirmed the principle of primacy also with regard to the relationship between Community law and national constitutional law. After initial hesitation, national courts in principle accepted the interpretation of the Court of Justice. In the Netherlands, no difficulties could arise anyway because the primacy of Treaty law over national statute law is expressly laid down in the constitution (Articles 65 to 67). In the other Member States, the principle of the primacy of Community law over national law has likewise been recognised by national courts. However, the constitutional courts of Germany and Italy initially refused to accept the primacy of Community law over national constitutional law, in particular regarding the guaranteed protection of fundamental rights. They withdrew their objections only after the protection of fundamental rights in the Community legal order had reached a standard that corresponded in essence to that of their national constitutions. In its judgment of 12 October 1993 concerning the Treaty on European

Union (Treaty of Maastricht), however, the German constitutional court made it quite clear that it had not in any way 'surrendered' its jurisdiction in determining the applicability of secondary Community legislation in Germany; however, it would only exercise this judicial authority 'in collaboration' with the European Court of Justice, whereby the European Court would guarantee the protection of the basic rights of all individuals throughout the Community whilst the constitutional court in Germany would restrict itself to generally ensuring compliance with mandatory requirements regarding fundamental rights. The constitutional court also made it clear that it did not accept as valid within Germany any Community legal act which had been adopted merely because of the 'useful effect' of Community powers and on the basis of a broad interpretation of this concept, and also stated that government institutions in Germany were prevented from applying these legal acts for constitutional reasons. It was therefore the task of the constitutional court to examine whether legal acts of Community bodies and institutions remained within or exceeded the limits of their sovereign rights. Only when this thinking is put into practice will it become clear whether and to what extent the German constitutional court is actually undermining the primacy of Community law and the Court of Justice's exclusive power to reject illegal Community provisions.





## CONCLUSIONS

**W**hat overall picture emerges of the European Community's legal order?

The legal order is the true foundation of the Community, giving it a common system of law under which to operate. Only by creating new law and upholding it can the Community's underlying objectives be achieved. The Community legal order has already accomplished a great deal in this respect. It is thanks not least to this new legal order that the largely open frontiers, the substantial trade in goods and services, the migration of workers and the large number of transnational links between companies have already made the common market part of everyday life for some 380 million

people. Another, historically important, feature of the Community legal order is its peacemaking role. With its objective of maintaining peace and liberty, it replaces force as a means of settling conflicts by rules of law that bind both individuals and the Member States into a single community. As a result the Community legal order is an important instrument for the preservation and creation of peace.

The Community and its underlying legal order can survive only if compliance with and safeguarding of that legal order is guaranteed by the two cornerstones: the direct applicability of Community law and the primacy of Community law over national law. These two principles, the

existence and maintenance of which are resolutely defended by the Court of Justice, guarantee the uniform and priority application of Community law in all Member States.

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

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Case 120/86 Mulder (1988) ECR 2344.

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**THE ABC OF COMMUNITY LAW**

(Fifth edition)

**European Documentation series**

Luxembourg: Office for Official Publications of the European Communities

2000 — 115 pp. — 16.2 x 22.9 cm

ISBN 92-828-7803-1

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