

The Locus and Accountability of the Executive in the European Union

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1. Introduction

Locating executive power and determining the mechanisms by which it is held to account is important within any polity. This is especially so given the more general concerns about democracy and legitimacy within the EU.

The task of locating executive power and determining its scope is particularly difficult within the EU. The Rome Treaty as amended contains no neat legal category with the appellation 'executive', nor does the Constitutional Treaty. It will be seen that the legal and political reality is that executive power is shared within the EU. The Commission, the Council, and the European Council all exercise such power to varying degrees, and the manner of the division differs depending upon the particular type of executive power under consideration. The primary focus within the first half of the chapter will therefore be on the identification of different facets of executive power within the EU, and an analysis *de jure* and *de facto* as to how this power is shared between the primary players. This analysis will be undertaken primarily in relation to the Rome Treaty as amended, but consideration will also be given to the position under the Constitutional Treaty.

The discussion in the second half of this chapter turns to the different techniques for securing accountability for the exercise of executive power. This inquiry requires consideration of the extent to which the European Parliament has power to hold the executive to account, and the way in which this is used. We shall consider the roles played respectively by the Ombudsman and the Court of Auditors. The Community courts have developed principles of judicial review and these constitute a further mechanism for enforcing accountability. The analysis will also reveal the importance of constitutional principles of good administration that are enshrined within Community legislation, especially the Financial Regulation.

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2. The location and scope of executive power in the EU: the framework for analysis

(a) Preliminaries

This chapter is concerned with executive power in the EU on the basis of the Rome Treaty as modified by later Treaty amendments up to the Treaty of Nice 2000. The locus of executive power under the Constitutional Treaty is a complex topic in its own right. It will be dealt with in the course of this discussion, but fuller treatment can be found elsewhere.¹ In the light of the negative votes in the French and Dutch referenda the Constitutional Treaty has been 'put on hold' and is unlikely to be revived. Some discussion of the relevant provisions of the Constitutional Treaty nonetheless seems warranted in this chapter. The problems concerning matters such as the tenure of the European Council President, the internal organization of the Commission and the Council formations will not go away. The 'solutions' to these issues embodied in the Constitutional Treaty will at the least serve as a repository of ideas that may be drawn on in future reform exercises.

Identifying the locus of executive power in the Rome Treaty as amended is a challenging task. The nature of this challenge should be made apparent at the outset. Most nation states will have a written constitution, which will contain provisions naming the executive and stating with varying degrees of precision its powers. This will still of course leave a plethora of issues to be resolved such as the meaning of the constitutional provisions, and the extent to which they capture the reality of executive power within that state in the light of the fact that there may be agencies and the like that exercise such power.

Identifying the locus of executive power in the EU is considerably more difficult. The Rome Treaty as amended does not contain any chapter or title on the 'Executive', nor for that matter does the Constitutional Treaty. What we have in both instances are Treaty provisions dealing with the Community institutions. These Treaty articles coupled with others enable one to get a pretty good idea of the disposition of legislative power within the EU, and this is so even though there are various ways in which legislation can be made. It is therefore possible to identify the six ways in which legislation can be enacted, the respective contributions of the Council, European Parliament,² and the circumstances in which the different methods will be used. The formal Treaty provisions dealing with institutions provide much less indication of the locus of executive power, and that is before we even factor in the reality of how the system

¹ P. Craig, 'The Constitutional Treaty: Legislative and Executive Power in the Emerging Constitutional Order' (EUI Working Paper Law No. 2004/7); P. Craig, 'European Governance: Executive and Administrative Powers under the New Constitutional Settlement' (Jean Monnet Working Paper No. 5/04, 2004).

² Hereafter EP.

works or the existence of other Community bodies that possess a degree of executive authority.

We shall see that executive power in the EU is shared both *de jure* and *de facto*, and that the power sharing differs in relation to different aspects of the executive function. The Treaty articles must nonetheless be our starting point, before moving on to consider the reality of executive power within the EU.

(b) The Treaty articles

The major institutional players that are relevant for present purposes are the European Council, the Council, and the Commission. The bare Treaty articles concerning the functions of each of these institutions give little help for one who is on quest to locate executive power within the EU.

The European Council comprises the heads of the Member States assisted by their foreign ministers, and the Commission President assisted by a member of the Commission. Article 4 TEU provides that the European Council shall provide the EU with the necessary impetus for its development and shall define the general political guidelines thereof. Article 202 EC states that the Council, consisting of a representative of each Member State at ministerial level, shall ensure coordination of the economic policies of the Member States, has power to take decisions, and can confer implementing powers on the Commission. We are told by Article 211 EC that in order to ensure the proper functioning and development of the common market the Commission shall: ensure that the Treaty and norms made thereunder are applied; formulate recommendations or opinions when instructed by the Treaty or when it considers it necessary; have its own power of decision and participate in the shaping of measures taken by the Council and the EP in the manner provided for in the Treaty; and exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter.

(c) The structure of the analysis

It is clear that the bare Treaty articles do not take us very far in locating executive power in the EU. Read by themselves they address little of direct relevance for the topic at hand, although as we shall see they are not irrelevant. It is therefore necessary to broach the subject from a somewhat different angle. The ensuing analysis will consider the locus of executive power, both legally and factually, in relation to different facets of the executive function. This might be thought to beg the question of what the executive function actually is, and it can be accepted that this varies between nation states. We can nonetheless identify a core set of tasks that are commonly undertaken by the executive branch of government. The executive will usually play a central role in setting the overall priorities and agenda for legislation. It will develop the policy choices. The executive will have

responsibility for the effective implementation of agreed policy initiatives and legislation. It will normally have principal responsibility for foreign affairs and defence. The executive will have an important say in the structure and allocation of the budget. We can therefore focus on each of these issues in turn and identify which institution or institutions within the EU exercise this power.

3. The locus and scope of executive power: specific aspects

(a) Establishing priorities and planning the legislative agenda

The establishment of the EU's priorities and the planning of the legislative agenda exemplify the regime of shared executive power within the EU, with the Commission the Council, and the European Council all playing important roles.

The Commission produces its annual work programme in the autumn of the year before it is to take effect. While this programme is designed, *inter alia*, to influence the EU's policy agenda the extent to which it achieves this goal should not, as Nugent states, be exaggerated.³ This is in part because the work programme is determined by pre-existing commitments, and in part because Council Presidencies have their own work programme/priorities that influence the Commission agenda. The Council will establish its own annual work programme at the beginning of each year, although as Hayes-Renshaw and Wallace note this will be influenced by the Commission programme, and by external events.⁴ The Council has, since the Seville European Council,⁵ developed a multi-annual programme. The first such programme was produced in 2003,⁶ and the process is regulated by the Council's Rules of Procedure. These rules provide that the General Affairs Council recommends to the European Council a multi-annual programme for the next three years, which is based on a joint proposal drawn up by the Presidencies concerned in consultation with the Commission.⁷ In the light of this multi-annual programme, it is for the two Presidencies that hold office in the following year to submit jointly a draft annual programme for that year.⁸ The importance of the European Council in this process should not be underestimated, notwithstanding the paucity of Treaty references to it, or the fact that it lacks formal legal powers. It will react to the proposals submitted by the General Affairs Council concerning the multi-annual agenda, and it will also be proactive in shaping what appears on that agenda. The reality is that no developments of genuine importance for the Community's overall priorities will occur without having passed through one or more summit

³ N. Nugent, *The European Commission* (MacMillan, 2001), 223–4.

⁴ F. Hayes-Renshaw and H. Wallace, *The Council of Ministers* (MacMillan, 1997), 185–6.

⁵ POLGEN 52, 13463/02, *Seville European Council*, Annex II, Brussels 24 October 2002, 23–4.

⁶ POLGEN 76, 15047/03, *Multi-annual Strategic Programme*, Brussels 20 November 2003.

⁷ Council Decision of 22 July 2002 adopting the Council's Rules of Procedure, Dec. 2002/682, [2002] OJ L230/7, Art. 2(4).

⁸ *Ibid.*, Art. 2(5).

meetings. The European Council's role in this respect has been enhanced by the fact that the reports from its meetings have tended over the years to be longer, more detailed, and prescriptive.

The significance of the role played by the European Council in the planning of priorities for the EU can be exemplified by the initiation and development of the Open Method of Coordination, OMC. The OMC did not 'begin' with the Lisbon Summit in March 2000.⁹ Its intellectual origins can be traced to the strategy for dealing with Economic and Monetary Union post Maastricht, and to the European Employment Strategy developed post Amsterdam. The Lisbon Summit was nonetheless important, since the European Council gave its imprimatur to OMC as an approach to be used more generally within EU governance. The European Council assessed the EU's strengths and weaknesses, and concluded that it was necessary to 'undertake economic and social reforms as part of a positive strategy which combines competitiveness and social cohesion'.¹⁰ There was to be a new strategic goal for the coming decade. The EU was 'to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion'.¹¹ The more particular aspects of the plan were in part economic, such as a fully operational internal market, and in part social an active employment policy and the promotion of social inclusion.

The strategy was to be implemented by 'improving the existing processes, introducing a new open method of coordination at all levels, coupled with a stronger guiding and coordinating role for the European Council to ensure more coherent and strategic direction and effective monitoring of progress'.¹² The general features of OMC were said to be:¹³ fixing guidelines for the EU combined with specific timetables for achieving the goals; establishing quantitative and qualitative indicators and benchmarks as a means of comparing best practice; translating these European guidelines into national policies by setting specific targets and adopting measures, taking into account national and regional differences; and periodic monitoring, evaluation, and peer review organized as mutual learning processes. The Lisbon approach was developed at the Nice European Council in December 2000.¹⁴ The Commission, sectoral Council formations and the Member States were instructed or requested to take steps to fulfil the objectives set out.¹⁵ Thus the Commission was 'requested' to take the OMC forward by developing indicators against which employment policy or social exclusion could be judged, and to present an annual report to the European Council, detailing its initiatives and the contributions of the other actors to attaining the objectives of the social model. The Employment and Social Policy Council was 'instructed' to implement the social agenda, including in this respect the setting of benchmarks and indicators as part the OMC process.

⁹ Lisbon European Council, 23–24 March 2000.

¹⁰ *Ibid.*, para. 4.

¹¹ *Ibid.*, para. 5.

¹² *Ibid.*, para. 7.

¹³ *Ibid.*, para. 37.

¹⁴ Nice European Council, 7–9 December 2000.

¹⁵ *Ibid.*, Annex I, para. 32.

The discussion thus far has focused on the Rome Treaty as amended. The Constitutional Treaty¹⁶ contains important provisions relating to the locus of executive power concerning priorities and agenda-setting for the EU. The regime of shared executive power is readily apparent.

Article I-21 of the Constitution modifies Article 4 TEU by providing that the European Council shall define the EU's priorities, as well as defining its general political directions. This language is mandatory, and the additional task of defining the EU's priorities is not expressly qualified by the adjective 'general'.¹⁷ This is a classic example of law catching up with political reality, given that the European Council has been playing an important role in relation to priorities for some considerable time. The connection between the extended tasks of the European Council and the President's role is obvious: the President must, *inter alia*, chair the European Council and drive forward its work.¹⁸ The work of the European Council now includes setting priorities for the EU, and hence the President will have the obligation to drive this forward. The very fact that the President of the European Council is to hold the office for two and half years renewable once means moreover that the incumbent of the office will have time to develop a vision for the EU that was simply not possible under the previous six-monthly rotation system.

It is however clear that power in this respect is shared with the Commission. Article I-26(1) provides, *inter alia*, that the Commission shall initiate the EU's annual and multi-annual programming with a view to achieving inter-institutional agreements. Thus while the Commission is accorded a general right to initiate particular pieces of Union legislation,¹⁹ it also has the right and duty to initiate the Union's more general programming strategy. The language of Article I-26(1) serves to reinforce the sense of shared executive power: the Commission initiates the Union's annual and multi-annual programming with a view to achieving inter-institutional agreement.

(b) The development of policy choices

It might be thought that once priorities have been settled and the agenda set then we move from the realm of executive power to that of legislative power. Legislation will be enacted in accord with the established legislative procedure, which will normally be co-decision, with the Commission having the right of legislative initiative under the Rome Treaty as amended, this being affirmed by Article I-26(2) of the Constitutional Treaty. Matters are not however that simple. This picture is based on the assumption that once the agenda has been

¹⁶ *Treaty Establishing a Constitution for Europe* CIG 87/04, Brussels 6 August 2004.

¹⁷ Art. I-21(1): the operative phrase is 'shall define the general political directions and priorities thereof'.

¹⁹ Art. I-26(2).

¹⁸ Art. I-22(2).

agreed then we move straight to the legislative process, with the consequence that the holders of executive power have no influence on the development of the agreed choices. A moment's reflection will reveal that this is not how matters work even in many national systems, since the executive will commonly exert considerable influence over the development of more detailed initiatives. This is certainly true in the EU, both under the Rome Treaty as amended and the Constitutional Treaty.

Under the Rome Treaty, the General Affairs and External Relations Council, GAERC, has the obligation to prepare the European Council meetings *and* to ensure that they are followed-up. This obligation is embodied in the Council's Rules of Procedure.²⁰ The agenda for the European Council is drawn up by the GAERC on a proposal from the Presidency,²¹ and the Presidency would normally also submit position papers on the key issues placed on the agenda.²² This regime was incorporated in Article I-22(2) of the Constitutional Treaty. The position of the President of the European Council has been further strengthened by Article I-24(2), which provides that the General Affairs Council shall prepare and ensure follow-up to meetings of the European Council in liaison with the President of the European Council and the Commission. The follow-up to meetings of the European Council may often require work by the other sectoral Councils. The President of the European Council, when liaising with the GAC, will therefore be able to exert influence over the detailed initiatives required to carry European Council policy into action. It should be remembered that a significant number of legislative initiatives have their origin in suggestions from the Council, which are then routed to the Commission via Article 208 EC, or Article III-345.²³ The President of the European Council, reinforced by the constitutional obligation on the GAC to ensure follow up to meetings of the European Council, will be in a strong position to press other Council formations to take the necessary steps to carry through the detail of European Council policy.

(c) Implementation of legislation and policy

When legislation has been enacted or policy initiatives have been agreed they must be carried out. Implementation will normally fall to the executive branch of government, backed up by the established bureaucracy. Thus it will be common for departments dealing with different subject-matter areas to have responsibility for implementation of legislation that falls within their purview, and such departments will normally be headed by a minister who is a member of the executive and who takes ultimate responsibility for such matters. This paradigm can of course be qualified or modified by the existence of agencies and the like

²⁰ Council's Rules of Procedure, n. 7, Art. 2(2)(a).

²² *Seville European Council*, n. 5, Annex 1, para. 4.

²¹ *Ibid.*, Art. 2(3)(a).

²³ Ex Art. 152.

who are accorded responsibility for the oversight and execution of policy within particular areas.

In the EU it is the Commission that has the primary executive responsibility for implementation of Community legislation. Article 211 EC provides that the Commission shall ensure that the provisions of the Treaty and the measures taken by the institutions pursuant thereto are applied. This power is reaffirmed by Article I-26(1) of the Constitutional Treaty which provides, *inter alia*, that the Commission shall ensure the application of the Constitution and measures adopted by the institutions pursuant to the Constitution; that it shall execute the budget and manage programmes; and that it shall exercise coordinating, executive, and management functions as laid down in the Constitution.

If one stopped there one might conclude that executive power in relation to implementation of legislation lies squarely with the Commission, and that in this respect such power is not shared within the EU. This conclusion does not however comport with reality. The position is more complex. The Commission plays a major role when it comes to implementing Community norms, but executive power is shared, and it is shared in many different ways. This is a difficult subject and more detailed treatment can be found elsewhere.²⁴ Four brief examples serve to demonstrate the different ways in which implementing power is shared between the Commission and other players.

(i) *Delegated rule-making*

The first concerns power over the content and passage of secondary or implementing rules. This takes us into the world of Comitology, where implementing power is shared between the Commission and the Member States, with some input from the EP.²⁵ Comitology was born in the context of the Common Agricultural Policy.²⁶ It became clear that the administration of the CAP would require detailed rules in ever changing market circumstances. Recourse to primary legislation was impracticable. It was equally apparent that the Member States were wary of according the Commission a blank cheque over the making of implementing rules, especially given that power once delegated would

²⁴ P. Craig, *Law, Administration and Administrative Law in the EU* (forthcoming).

²⁵ R. Pedler and G.F. Schaefer (eds.), *Shaping European Law and Policy: The Role of Committees and Comitology in the Political Process* (European Institute of Public Administration, 1996); C. Joerges, K.-H. Ladeur and E. Vos (eds.), *Integrating Scientific Expertise into Regulatory Decision-Making: National Traditions and European Innovations* (Nomos, 1997); C. Joerges and E. Vos (eds.), *EU Committees: Social Regulation, Law and Politics* (Hart, 1999); *Third Report of the House of Lords' Select Committee on European Legislation: Delegation of Powers to the Commission: Reforming Comitology* (HL 23; 1999); E. Vos, *Institutional Frameworks of Community Health and Safety Legislation: Committees, Agencies and Private Bodies* (Hart, 1999); M. Andenas and A. Turk (eds.), *Delegated Legislation and the Role of Committees in the EC* (Kluwer Law International, 2000); C. Bergstrom, *Comitology, Delegation of Powers in the European Union and the Committee System* (Oxford University Press, 2005); Craig, n. 24, Chap. 4.

²⁶ C. Bertram, 'Decision-Making in the EEC: The Management Committee Procedure' (1967–68) 5 *CMLRev* 246; P. Schindler, 'The Problems of Decision-Making by Way of the Management Committee Procedure in the EEC' (1971) 8 *CMLRev* 184; Bergstrom, n. 25, Chap. 2.

generate legally binding rules without further possibility of Council oversight. This wariness was heightened by the tensions between the Council and the Commission in the mid-1960s leading to the Luxembourg Crisis and subsequent Accords. It would however be mistaken to see the birth of the committee system solely in terms of Council distrust of Commission. It was also conceived as a way of dealing with disagreements between the Member States themselves. It is readily apparent that Member States might agree on the general regulatory principles for a particular area, but disagree on the more detailed ramifications thereof. Involvement in the making of the implementing rules served moreover to facilitate interaction between national administrators who would be responsible for the application of the rules at national level. The net result was the birth of the management committee procedure, embodied in the early agricultural regulations. The committee composed of national representatives, normally those with expertise or understanding of the relevant area, would be directly involved with the Commission in the deliberations concerning the secondary regulations or directives. The secondary measure would be immediately applicable, subject to the caveat that it could be sent back to the Council if it was not in accord with the committee's opinion. It was then open to the Council to take a different decision by qualified majority within one month.²⁷

The committee methodology spread rapidly to other areas, and became a standard feature attached to the delegation of power to the Commission. It was moreover not long before the more restrictive version, known as the regulatory committee procedure, was created in the context of the common commercial policy.²⁸ On this version of the committee procedure, if the committee failed to deliver an opinion, or if it gave an opinion contrary to the recommended measure, the Commission would have to submit the proposal to the Council, which could then act by qualified majority. There was a safety net or *filet*, such that if the Council had not acted within three months of the measure being submitted to it, then the proposed provisions could be adopted by the Commission. The desire for greater political control reached its apotheosis in the modified version of the regulatory committee procedure, which embodied what became known as the *contre-filet*: the normal regulatory committee procedure applied, subject to the caveat that the Council could by simple majority prevent the Commission from acting even after the expiry of the prescribed period.

The Comitology regime gave rise to major battles over the years involving the Commission, Council, and EP. Some greater regularity was instilled through Community Decisions that attempted to systematize the process.²⁹ The apposite

²⁷ See, e.g. Council Regulation 19/62, *On the Progressive Establishment of a Common Organisation of the Market in Cereals* [1962] OJ 30/933, Arts. 25–26.

²⁸ See, e.g. Council Regulation 802/68, *On the Common Definition of the Concept of the Origin of Goods* [1968] OJ L148/1, Arts. 12–14.

²⁹ Council Decision 87/373, *Laying Down the Procedures for the Exercise of Implementing Powers Conferred on the Commission* [1987] OJ L197/33; Council Decision 99/468, *Laying Down the Procedures for the Exercise of Implementing Powers Conferred on the Commission* [1999] OJ L184/23.

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point for present purposes is that these Decisions preserved Member State input into the making of implementing rules. Power over implementation continued to be shared between the Commission and the Member States, with some increase in the influence of the EP.

It remains to be seen whether the Constitutional Treaty alters this. It does not in terms abolish or downgrade the Comitology committees, although it is clear that this is the Commission's objective. The Constitution provides for what are termed non-legislative acts.³⁰ The Commission is empowered to enact delegated regulations to 'supplement or amend certain non-essential elements of the law or framework law'.³¹ The objectives, content, scope, and duration of the delegation must be defined in the laws and framework laws, and the delegation may not cover the essential elements of the subject matter, which is reserved for the law or framework law. The European Parliament or the Council may decide to revoke the delegation; or the delegated regulation may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the law or framework law.³² The Commission's constitutional strategy has been to regard delegated regulations as a species of executive power exercised by the Commission, subject to the constraints above. It hopes that the new category of delegated regulations will lead to the demise of Comitology, or at least the removal of the management and regulatory committees. The idea is therefore for the Commission in its executive capacity to be able to enact the relevant regulations, subject to the possibility of call back by the Council or EP.

(ii) Shared management

The Committee of Independent Experts was a body established to consider allegations of fraud and mismanagement in the EU. Its initial report led to the downfall of the Santer Commission. In a second report it looked more broadly at the ways in which Community policy was delivered and provided a helpful definition of shared management. It connoted,³³

[M]anagement of those Community programmes where the Commission and the Member States have distinct administrative tasks which are inter-dependent and set down in legislation and where both the Commission and the national administrations need to discharge their respective tasks for the Community policy to be implemented successfully.

The administration of the CAP is shared in the sense that the various forms of price support payments are administered jointly by the Commission and the Member States.³⁴ This is done through the European Agricultural Guidance and Guarantee Fund (EAGGF). The Guidance section deals with EC expenditure relating to agricultural structures; the Guarantee section covers payments relating

³⁰ Art. I-33(1).

³¹ Art. I-36.

³² Art. I-36(2).

³³ Committee of Independent Experts, *Second Report on Reform of the Commission, Analysis of Current Practice and Proposals for Tackling Mismanagement, Irregularities and Fraud* (10 September 1999), Vol. I, para. 3.2.2. (Hereafter Second CIE).

³⁴ Second CIE, n. 33, Vol. I, para. 3.6.3.

directly to the regulation of agricultural markets, refunds on exports, and intervention payments.

Structural Fund also operates through shared management, which applies in different ways to project and programme selection, and to implementation and monitoring of selected projects and programmes. Shared management applies therefore both with respect to the input stage and the output stage. A number of principles run through Structural Fund regime, including partnership connoting the idea that Community operations shall be established through close consultations between the Commission, the Member State concerned, and the competent authorities designated by the latter at national, regional, local, or other level with each party acting as a partner in pursuit of a common goal. The partnership covers preparation, financing, monitoring, and assessment of the operations. More recent Community legislation has delegated greater responsibility to the Member States for the implementation and monitoring of particular programmes.³⁵

(iii) Administration of the open method of coordination

The administration of the programmes covered by the Open Method of Coordination varies, the constant theme being that multiple actors are involved. Consider by way of example the way in which coordination operates within the European Employment Strategy (EES).³⁶

The European Council each year considers the employment situation in the Community and adopts conclusions based on the joint report from the Commission and the Council. The conclusions reached by the European Council then form the basis for the Council, acting by qualified majority on a proposal from the Commission, and after consulting the EP, ECOSOC, the Committee of the Regions, and the Employment Committee, to draw up guidelines which the Member States shall take into account in their employment policies. It is then for each Member State to provide the Council and the Commission with an annual report on the principal measures taken to implement its employment policy in the light of these guidelines. The Council considers these reports and the opinion of the Employment Committee and forms a view on the implementation of the guidelines at national level. It is open to the Council acting on a recommendation from the Commission to decide to make recommendations to a particular Member State. Having completed their examination of the reports from the Member States, the Council and the Commission make their joint report to the European Council on the employment situation in the Community and the implementation of the guidelines for employment. The annual process then begins once again. The Employment Committee assists in this process.³⁷ It is composed of two persons from each Member State, plus two members of the Commission. It acts in an advisory capacity to promote coordination between

³⁵ Craig, n. 24, Chap. 3.

³⁶ Art. 128 EC.

³⁷ Art. 130 EC.

the Member States on employment and labour market policies and more particularly to monitor the employment situation and policies in the Member States and in the Community, and to formulate opinions to contribute to the preparation of the Council proceedings described above. In fulfilling its mandate the Employment Committee is instructed to consult management and labour.

(iv) Agencies

The EU has also begun to make greater use of agencies for the administration of Community policy. Two agencies were established in 1975, and there are currently sixteen.³⁸ They possess legal personality; have management boards on which Member State influence predominates, although there is some supranational representation; they operate outside the Commission and Council; and they were normally established by a regulation made under Article 308.³⁹ Some of the agencies are concerned with the collation and dissemination of information, while others have de facto executive/regulatory powers in relation to matters such as Community trademarks and plant variety rights. In formal terms, the degree of agency autonomy is constrained by ECJ jurisprudence which limits the delegation of power to bodies which are not mentioned in the constituent Treaties.⁴⁰ In substantive terms, the degree of autonomy possessed by each agency varies considerably, depending upon the composition of its governing board, its financing, and the subject matter with which it deals.⁴¹

(d) Foreign and security policy

The conduct of foreign policy and defence are quintessential features associated with executive power. It is clear that so far as the EU has competence in these areas it is the European Council and the Council that possess the power.

The relevant provisions are contained in the Treaty on European Union, Title V of which contains the provisions on Common Foreign and Security Policy, CFSP. It is the European Council that defines the principles and general guidelines for the CFSP, and it is the European Council that decides on common strategies to be implemented by the EU where the Member States have

³⁸ European Centre for the Development of Vocational Training, European Foundation for the Improvement of Living and Working Conditions, European Environment Agency, European Training Foundation, European Monitoring Centre For Drugs and Drug Addiction, European Medicines Agency, Office for Harmonization in the Internal Market, European Agency for Safety and Health at Work, Community Plant Variety Office, European Translation Centre for Bodies of the EU, European Monitoring Centre on Racism and Xenophobia, European Agency for Reconstruction, European Food Safety Authority, European Maritime Agency, European Aviation Safety Agency, European Network and Information Security Agency.

³⁹ A. Kreher, 'Agencies in the European Community—A Step Towards Administrative Integration in Europe' (1997) 4 *JEPP* 225.

⁴⁰ K. Lenaerts, 'Regulating the Regulatory Process: 'Delegation of Powers' in the European Community' (1993) 18 *ELRev* 23; M. Everson, 'Independent Agencies: Hierarchy Beaters?' (1995) 1 *ELJ* 180.

⁴¹ Kreher, n. 39, 238.

important interests in common.⁴² It is the Council that takes the decisions necessary for defining and implementing the CFSP on the basis of the general guidelines defined by the European Council.⁴³ It is the Council that makes recommendations as to common strategies to the European Council, and implements them, in particular through adopting joint actions and common positions.⁴⁴ Joint actions address specific situations where operational action by the EU is required. The terms of the joint action will lay down its objectives, scope, and the means available to the EU.⁴⁵ Common positions define the EU's approach to a particular matter of a geographical or thematic nature, and Member States are to ensure that their national policies conform to the common positions.⁴⁶ The prominence of the European Council is even more marked in relation to defence policy.⁴⁷

The Member State that holds the Presidency of the Council also chairs the meetings of the European Council.⁴⁸ The Presidency represents the EU in matters coming within the CFSP, and has the responsibility for implementing decisions under the CFSP Title.⁴⁹ The Presidency is assisted by the Secretary-General of the Council who exercises the function of High Representative for the CFSP.⁵⁰ The High Representative assists the Council through contributing to the formulation, preparation, and implementation of policy decisions.⁵¹

The reins of power are therefore firmly in the hands of the Member States as represented in the European Council and the Council. The Commission is however to be 'fully associated' with the Presidency's tasks,⁵² and more generally with the work carried out in the CFSP field.⁵³ The EP must be consulted by the Presidency on the 'main aspects and basic choices' of the CFSP, the Presidency must ensure that the EP's views are duly taken into consideration, and the EP can ask a question of the Council or make recommendations to it.⁵⁴

It is clear that under the Constitutional Treaty executive authority continues to reside with the European Council and the Council. It is the European Council that identifies the strategic interests and determines the objectives of the CFSP through strategic guidelines.⁵⁵ It is primarily the Council that adopts the decisions to implement the strategic guidelines of the European Council.⁵⁶ It is the Council that adopts decisions that define the EU's approach to a particular matter of a geographical or thematic nature.⁵⁷ The primacy of place accorded to the European Council is even more marked in relation to defence.⁵⁸ Executive authority within the EU in relation to CFSP continues to rest primarily with institutions of an intergovernmental nature, the European Council and the Council. This must however be qualified to some extent because the principal constitutional innovation in this area is the creation of the post of EU Minister

⁴² Art. 13(1)-(2) TEU.⁴³ Art. 13(3) TEU.⁴⁴ Arts 13(3), 14, 15 TEU.⁴⁵ Art. 14(1) TEU.⁴⁶ Art. 15 TEU.⁴⁷ Art. 17 TEU.⁴⁸ Art. 4 TEU.⁴⁹ Art. 18 TEU.⁵⁰ Art. 18(3) TEU.⁵¹ Art. 26 TEU.⁵² Art. 18(4) TEU.⁵³ Art. 27 TEU.⁵⁴ Art. 21 TEU.⁵⁵ Art. I-40(2) and Art. III-295(1).⁵⁶ Art. I-40(3) and Art. III-295(2).⁵⁷ Arts. III-297-298.⁵⁸ Art. I-41.

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for Foreign Affairs, who is to 'conduct' the Union's common foreign and security policy.⁵⁹ The idea that executive power within the Union is divided between the European Council and the Commission is personified in this post. The Minister for Foreign Affairs is appointed by the European Council by qualified majority, with the agreement of the Commission President.⁶⁰ The EU Foreign Minister is one of the Vice Presidents of the Commission, and is responsible for handling external relations and for co-ordinating other aspects of the Union's external action.⁶¹ The EU Foreign Minister therefore wears a 'shared hat'. The holder of the office takes part in the work of the European Council,⁶² chairs the Foreign Affairs Council,⁶³ and is also a Vice-President of the Commission.

(e) Resources and budget

The direction of EU policy is not wholly dependent on money. The EU is rightly regarded as a regulatory state, and many initiatives do not require expenditure from EU funds. This can be readily accepted, while at the same time acknowledging that control over the EU's resources and its budget are also matters of importance.

In relation to resources, Article 269 EC provides that the budget shall be financed wholly from the EU's own resources. The system for the EU's resources is laid down in provisions made by the Council, acting unanimously on a proposal from the Commission, and after consulting the EP. These provisions are then recommended for adoption by the Member States in accord with their constitutional requirements. The Constitutional Treaty largely preserves this position.⁶⁴

In relation to the budget, Article 272 EC stipulates the procedure to be applied for the annual budget. The procedure is complex, but in effect it is a modification of the co-decision procedure, with a proposal coming from the Commission and input from the Council and the EP. Implementation of the budget is for the Commission,⁶⁵ which is to act in accord with more detailed financial regulations.⁶⁶ The EP, acting on a recommendation from the Council, has the power to give discharge to the Commission for its implementation of the budget, and the EP can question the Commission in this regard, having considered the accounts in the light of the report by the Court of Auditors.⁶⁷

The provisions of the Constitutional Treaty in relation to the budget distinguish between the multi-annual financial framework and the annual budget. The multi-annual financial framework, which is to be established for a period of at least five years, is designed to ensure that EU expenditure develops in an

⁵⁹ Art. I-28.

⁶⁰ Art. I-28(1).

⁶¹ Art. I-28(4).

⁶² Art. I-21(2).

⁶³ Art. I-28(4).

⁶⁴ Art. I-54(3).

⁶⁵ Art. 274 EC.

⁶⁶ Art. 279 EC; Council Regulation 1605/2002, *on the Financial Regulation Applicable to the General Budget of the European Communities* [2002] OJ L248/1.

⁶⁷ Art. 276 EC.

orderly manner and within the limits of its resources.⁶⁸ It determines the amounts of the annual ceilings for commitment and payment appropriations. This framework is laid down in a European law made by the Council acting unanimously after obtaining the consent of the EP.⁶⁹ The European Council acting unanimously may adopt a European decision allowing the Council to act by qualified majority when adopting subsequent multi-annual frameworks.⁷⁰ The annual budget must comply with the multi-annual financial framework.⁷¹ Executive power in relation to setting of the financial framework is therefore shared between the Commission, Council, and the EP, since the European law made by the Council will be based on a proposal from the Commission.⁷² The annual budget is made through a European law jointly by the EP and the Council on a proposal from the Commission.⁷³ The procedure is a modification of the ordinary legislative procedure, the successor to the co-decision procedure. The EP's powers have been increased because the distinction between 'compulsory' and 'non-compulsory' expenditure has been abolished.

4. Executive power and accountability in the EU

(a) Executive power and accountability to the legislature

It is common within national political systems that the legislature will exercise some control over the executive. The way in which this control is structured will vary as between different systems, as will its effectiveness. Indeed the very meaning of the word control can connote different things in the context of legislative-executive relations in different political systems. This issue is especially complex within the EU, because legislative power is divided between the Commission, EP, and the Council, and executive power is shared between the Commission, Council, and European Council. Notwithstanding these complexities there are a number of ways in which the EP in its capacity as legislature exercises control over the Commission when the latter exercises executive power. These controls vary, but they are all provided for in the Treaty.

The EP has the 'nuclear strike weapon' whereby it can dismiss the Commission. This is provided in Article 201 EC, which stipulates that if a two-thirds majority of the votes cast vote in favour of a censure motion tabled against the Commission then the Members of the Commission shall resign as a body. This is by its nature an extreme weapon. The threat that it would be exercised was however part of the reason why the Santer Commission resigned in 1999. There had been concern for some considerable time about fraud, and mismanagement, as revealed by, *inter alia*, the Court of Auditors. The European Parliament repeatedly expressed its dissatisfaction with the management of the Community's

⁶⁸ Art. I-55(1) and Art. III-402(1).

⁷¹ Art. I-55(3).

⁷² Art. I-26(2).

⁶⁹ Art. I-55(2).

⁷³ Art. I-56 and Art. III-404.

⁷⁰ Art. I-55(4).

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financial resources. This culminated in a resolution of 14 January 1999 which called for a Committee of Independent Experts to be convened under the auspices of the European Parliament and the Commission with a mandate to detect and deal with fraud, mismanagement, and nepotism. It was for the Committee to decide how far the Commission as a body, or individual Commissioners, had responsibility for such matters. The Committee was also to conduct a fundamental review of the Commission's practices in the award of all financial contracts. The Committee produced its first report within two months, by March 15 1999.⁷⁴ Exigencies of time meant that the Committee could investigate only a limited number of Community policies. It nonetheless produced a 146-page report by the stipulated date, which was highly critical of the way in which the Commission exercised its executive power in relation to the implementation of Community policy and programmes. This had an immediate, dramatic effect: the Commission resigned en bloc. It 'jumped' before it could be 'pushed' by a censure motion from the EP.

The EP also has more finely-tuned tools to investigate particular instances of maladministration. It has the power to establish a temporary Committee of Inquiry to investigate alleged contraventions or maladministration in the implementation of Community law, except where the alleged facts are being examined before a court and while the case is still subject to legal proceedings.⁷⁵ Committees of Inquiry were established in relation to matters such as the Community transit system and the BSE crisis. Corbett, Jacobs, and Shackleton are of the view that these committees were a success and had a visible impact on the work of the institutions investigated, in particular the Commission: 'the committees served to show that the Parliament could serve as a focus for public concern on issues transcending national boundaries and could organise the obtaining of evidence from witnesses across Europe in a way that few, if any, national institutions or parliaments could hope to match'.⁷⁶ They were however mindful of weaknesses in the powers of such committees.

The EP can receive petitions from a Community citizen on a matter that comes within the Community's field of activity where the matter affects the citizen directly.⁷⁷ Such petitions will commonly be lodged by citizens affected by Community administration. They are deemed admissible if they are formally in order and if they fall within the Union's sphere of activities. Petitions have since 1987 been dealt with by a special committee established for this purpose. The Committee of Petitions can 'draw up reports on matters referred to it, organise hearings, send MEPs to investigate on the spot, or request information or action from the Commission and, to a more limited extent, the Member States'.⁷⁸

⁷⁴ Committee of Independent Experts, *First Report on Allegations regarding Fraud, Mismanagement and Nepotism in the European Commission* (15 March 1999). ⁷⁵ Art. 193 EC.

⁷⁶ R. Corbett, F. Jacobs and M. Shackleton, *The European Parliament* (John Harper Publishing, 4th edn., 2000), 264. ⁷⁷ Art. 194 EC.

⁷⁸ Corbett, Jacobs and Shackleton, *The European Parliament*, n. 76, 276.

The Committee prepares an annual report for debate in plenary session.⁷⁹ The number of petitions submitted varies, but it is around 1,300 per annum. The majority of petitions are concerned either with expressions of view on particular policy issues, where there will commonly be many signatories, or with the redress of grievances, where there will normally be one petitioner. There may however be little that the Committee can do in relation to the former, and the European Ombudsman will now often be preferred if the matter concerns individual grievance.

The EP also has important power over the discharge of the budget. We have already seen that the EP plays a role in the approval of the budget and that this has been increased under the Constitutional Treaty. Implementation of the budget is the Commission's responsibility. The EC Treaty accords the EP important power over the discharge of the budget. The accounts must be submitted to the Council and the EP, and the EP acting on a recommendation from the Council gives discharge over the budget. It has the power to examine the Commission over aspects of budgetary implementation. The EP has used this power to put pressure on the Commission concerning the manner in which the latter has implemented the budget, more especially when there has been an adverse report from the Court of Auditors. It was pressure exerted by the EP in this manner that led to the establishment of the Committee of Independent Experts, whose report led to the downfall of the Santer Commission.

(b) Executive power and accountability through the Ombudsman

The European Ombudsman plays an important role in controlling the exercise of executive power in the EU. The Ombudsman is appointed by the EP after each election for the duration of its term of office. The holder of the post is eligible for reappointment,⁸⁰ and is to be completely independent in the performance of his duties, taking no instructions from any body.⁸¹

The Ombudsman can receive complaints from any EU citizen or natural or legal person residing or having its registered office in a Member State. The complaints must relate to instances of maladministration in the activities of the Community institutions and bodies, with the exception of the Community courts acting in their judicial role.⁸² The Ombudsman has power to conduct inquiries on his own initiative, or he can deal with matters referred by a MEP, but he cannot investigate matters that are or have been subject to legal proceedings. Where maladministration has been found the Ombudsman refers the matter to the relevant institution, which has three months in which to respond. The Ombudsman then forwards a report to the EP and the institution concerned, and the complainant is informed of the outcome of the proceedings. The

⁷⁹ *Report on the Deliberations of the Petitions Committee during the Parliamentary Year 2003–2004* AG-0040/2005.

⁸¹ Art. 195(3) EC.

⁸² Art. 195(1) EC.

⁸⁰ Art. 195(2) EC.

Ombudsman must also submit an annual report to the EP on the outcome of the inquiries.

The complaints will often relate to the activities of the Commission concerned with the implementation of EU policy, and therefore the Ombudsman is a valuable additional mechanism for ensuring accountability in the exercise of executive power in the EU. This is particularly so given that from the perspective of the private individual a complaint to the Ombudsman will be less daunting than the initiation of formal legal proceedings.

Limits of space preclude detailed analysis of the contribution made by the European Ombudsman. Suffice it to say for the present that the office is important in three related respects. Firstly, and most obviously, it functions as a mechanism for the resolution of individual grievances without recourse to court. Secondly, investigation into individual complaints will not infrequently lead to the publication of special reports in which the European Ombudsman will recommend a change of rule or policy by the Commission or Council that gave rise to the initial problem. Thirdly, the European Ombudsman has published a Code of Good Administrative Behaviour designed to flesh out the meaning of the right to good administration contained in Article 41 of the Charter of Fundamental Rights.

(c) Executive power and accountability through the Court of Auditors

The Court of Auditors is another institution that provides a check on executive power in the EU, more especially in relation to financial matters. The members of the Court of Auditors must be those who have expertise in matters of audit and they will normally have belonged to audit bodies within their Member State.⁸³ They are appointed for six years by the Council after consulting the EP. The members are eligible for reappointment,⁸⁴ and they, like the Ombudsman, must be completely independent in the performance of their duties and must not seek or take instructions from any other body.⁸⁵ The Court of Auditors helps to foster executive accountability in two ways.

The Court has a *general duty to examine the accounts for all revenue and expenditure for the EU*. We have already seen that it is the Commission that has the general duty to implement the EU's budget. The Court of Auditors' duty amounts therefore to an audit on the way in which the Commission has implemented Community policies in that year. The Court of Auditors must provide the EP and the Council with a statement of assurance as to the regularity of the accounts, and the legality and regularity of the underlying transactions.⁸⁶ To this end the Court of Auditors examines whether all revenue and expenditure

⁸³ Art. 247(1) EC.

⁸⁴ Art. 247(3) EC.

⁸⁵ Art. 247(4) EC.

⁸⁶ Art. 248(1) EC.

has been incurred in a lawful and regular manner and whether financial management has been sound, and it must report on cases of irregularity. The audit must be carried out before the closure of the accounts for the relevant year.⁸⁷ The Court of Auditors will normally undertake these duties on the basis of written records, but it also has the power to conduct on the spot investigations in other Community institutions, and in Member State institutions that manage revenue or expenditure on behalf of the Community.⁸⁸ The Court of Auditors will draw up an annual report at the close of each financial year.

The Court of Auditors' general duty to examine revenue and expenditure for the EU has been a powerful tool. It has not been uncommon for the Court to refuse to give the Council and the EP an assurance as to the reliability of the accounts and the legality and regularity of the underlying transactions where it forms the view that this is not warranted by the records. It has been common for the Court's annual report to be highly critical of aspects of Community administration. A succession of such critical reports was an important factor in the establishment of the Committee of Independent Experts that led to the downfall of the Santer Commission. It should however also be noted that the succession of adverse reports from the Court of Auditors did not suffice in itself to secure reform in the Commission. This only occurred after the fall of the Santer Commission precipitated by the first report of the Committee of Independent Experts.

The Court of Auditors also *has the power to make special reports on particular topics*.⁸⁹ The Court makes regular use of this power. The reports bring a more laser-like scrutiny to bear on an issue, which will often be one about which the Court has expressed concern in its annual report on the EU's accounts. The reports are instructive and go beyond mere financial regularity. They will commonly take the form of wider-ranging administrative audits designed to highlight shortcomings in the administration of a particular policy, coupled with recommendations for improvement. The power to make special reports can be especially significant when the Court returns to the same topic in subsequent years to determine whether improvements that it has recommended have been implemented.⁹⁰

(d) Executive power and legal accountability: judicial review

Judicial review provides an important mechanism for holding executive power to account. It can be used to challenge any Community act that has legal effect.

⁸⁷ Art. 248(2) EC.

⁸⁸ Art. 248(3) EC.

⁸⁹ Art. 248(4) EC.

⁹⁰ See, e.g., Court of Auditors, Special Report 21/98, *Concerning the Accreditation and Certification Procedures as Applied to the 1996 Clearance of Accounts for EAGGF—Guarantee Expenditure* [1998] OJ C389/1; Court of Auditors, Special Report 22/2000, *On Evaluation of the Reformed Clearance of Accounts Procedure* [2000] OJ C69/1.

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This covers regulations, decisions, and directives, which are listed in Article 249. The ECJ has, however, also held that this list is not exhaustive, and that other acts which are *sui generis* can also be reviewed, provided that they have binding force or produce legal effects.⁹¹ Applicants can seek judicial review of Community action either directly or indirectly.

(i) *Direct and indirect actions*

The *direct action* for judicial review is based on Article 230 EC.⁹² This provides the substantive criteria for review and also delineates the rules of standing that apply in the context of direct actions.

The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission, and of the ECB other than recommendations and opinions, and acts of the European Parliament intended to produce legal effects vis-à-vis third parties.

It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on the grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.

The Court shall have jurisdiction under the same conditions in actions brought by the Court of Auditors and by the ECB for the purpose of protecting their prerogatives.

Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or decision addressed to another person, is of direct and individual concern to the former.

The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

Article 230 has been preserved in the Constitutional Treaty as Article III-365. It has been modified to make it clear that it is applicable against EU agencies and bodies and also against the European Council. The other significant change concerns the rules of standing provided for in Article 365(4), which have been liberalized to a limited extent such that it will no longer be necessary to show individual concern in relation to regulatory acts that do not require implementing measures.

Indirect challenge to the legality of Community action is through Article 234 EC. This Article establishes a mechanism whereby a national court can seek a preliminary ruling on a point of Community law where that is necessary for the resolution of the case. Article 234 reads as follows.

⁹¹ Case 22/70, *Commission v. Council* [1971] ECR 263; Case 60/81, *International Business Machines Corporation v. Commission* [1981] ECR 2639; Case C-39/93P, *Syndicat Français de l'Express International (SFEI) v. Commission* [1994] ECR I-2681; Case C-57/95, *France v. Commission (Re Pension Funds Communication)* [1997] ECR I-1627.

⁹² There is also an action for failure to act, Art. 232 EC.

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of the Treaty;
- (b) the validity and interpretation of acts of the institutions of the Community and of the ECB;
- (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decision there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

It is for the national court to decide whether to seek a preliminary ruling, and in that sense, Article 234 creates a reference system, not an appellate one. The individual has no right to take the case to the ECJ from the national court, should the latter refuse to make a reference. Preliminary rulings are important as a method of indirect challenge to the legality of Community action. Article 234(1)(b) allows national courts to refer to the ECJ questions concerning the 'validity and interpretation of acts of the institutions of the Community'. This provision has assumed an increased importance for private applicants because of the Court's narrow construction of the standing criteria under Article 230.⁹³ This has meant that a reference under Article 234 is often the only mechanism whereby such parties may contest the legality of Community norms. It may be helpful to set out a paradigm case in order to understand how Article 234 is used in this context. A common situation is of a Common Agricultural Policy (CAP) regulation, which cannot be contested under Article 230, either because the applicant lacks standing, or because of the time limit. The regulations will normally be applied at national level by a national intervention agency. A regulation may, for example, require in certain circumstances the forfeiture of a deposit that has been given by a trader. The trader believes that this forfeiture and the regulation are contrary to Community law, because it is disproportionate, or discriminatory. If the security is forfeited the trader may then institute judicial review proceedings in the national court, claiming that the regulation is invalid.⁹⁴ It will be for the national court to decide whether to refer the matter to the ECJ under Article 234(1)(b). An alternative way in which the action can arise is where there is a regulation, under which a trader is liable to pay a levy, which it believes to be in breach of EU law. The trader might decide to resist payment, be sued by the national agency, and then raise the alleged invalidity of the regulation

⁹³ P. Craig and G. de Burca, *EU Law, Text, Cases and Materials* (Oxford University Press, 3rd edn., 2002), Chap. 12; Case C-50/2000 P, *Union de Pequenos Agricultores v. Council* [2002] ECR I-6677; Case C-263/02 P, *Commission v. Jago-Quere & Cie SA* [2004] ECR I-000.

⁹⁴ See, e.g., Case 181/84, *R v. Intervention Board for Agricultural Produce, ex p. E. D. & F. Man (Sugar) Ltd* [1985] ECR 2889.

on which the demand is based by way of defence. It would then be for the national court to decide whether to refer the matter to the ECJ.

(ii) *The principles of judicial review*

The principles of judicial review applied by the ECJ and the CFI are eclectic. They are derived from the Treaty, Community legislation, the jurisprudence of the Community courts, and soft law. These will be considered in turn.

The *EC Treaty* contains certain Articles that deal with principles, both procedural and substantive, that are directly relevant for judicial review. Thus, for example, Article 253 EC establishes a duty to give reasons that applies to regulations, decisions, and directives adopted either by the Council, Commission, and Parliament, or by the Council and Commission alone. It is noteworthy that Article 253 imposes a duty to give reasons not only for administrative decisions, but also for legislative norms, such as regulations or directives. Article 255 EC deals with access to information. It provides that any citizen of the Union, and any natural or legal person residing or having their registered office in a Member State, shall have a right of access to European Parliament, Council, and Commission documents, subject to certain principles and conditions. Non-discrimination provides an example of a substantive principle within the Treaty that is of direct relevance for judicial review. Thus Article 12 contains a general proscription of discrimination on the grounds of nationality, and this same proscription is to be found in the specific Treaty articles dealing with free movement of workers, freedom of establishment, and the provision of services. Non-discrimination on the grounds of gender is dealt with by Articles 137 and 141 EC. There are also provisions dealing with non-discrimination as between producers or consumers in the field of agriculture, Article 34(2), and specific provisions such as Article 90, prohibiting discriminatory taxation.

Community legislation made pursuant to the Treaty may also deal with the principles of judicial review. This legislation may flesh out a principle contained in a Treaty article. This was the case in relation to the legislation adopted pursuant to Article 255 EC, dealing with access to information.⁹⁵ Community legislation may also establish a code of administrative procedure that is to apply in a particular area, as exemplified in the context of EC competition policy.

It has however been the *Community courts* that have made the major contribution to the development of a set of administrative law principles that are to govern the legality of Community decision-making. The ECJ and the CFI have read principles such as proportionality, fundamental rights, legal certainty, legitimate expectations, equality, and procedural justice into the Treaty, and used them as the foundation for judicial review, under Articles 230 or 234. It is important at this juncture to understand in juridical terms how these principles

⁹⁵ S. Peers, 'The New Regulation on Access to Documents: A Critical Analysis' (2002) 21 *YBEL* 385.

were read into the Treaty. The ECJ used the 'window' of Article 230(2). This sets out in general terms the grounds of judicial review. The administrative law principles adumbrated above were read into the Treaty more specifically through the provision in Article 230(2) that allows for review on the ground of infringement of any rule of law relating to the application of the Treaty. This open textured provision allowed the Community courts to fashion a detailed administrative law jurisprudence that it had lacked hitherto. In developing these principles the Community courts drew upon administrative law doctrine from the Member States. The ECJ and CFI did not systematically trawl through the legal systems of each of the Member States in order to find principles that they had in common, which could then be transferred to the Community context. Their approach was rather to consider principles found in the major legal systems of the Member States, to use those that were felt to be best developed and to fashion them to suit the Community's own needs. German law was perhaps the most influential in this regard. It was German jurisprudence on, for example, proportionality and legitimate expectations that was of principal significance for the development of Community law in these areas.

It should also be recognized that *soft law* has played a role in the evolution of the principles of Community administrative law. This is exemplified by Inter-Institutional Agreements, which are agreements between the Council, Commission, and the Parliament. Such agreements have been made on topics of constitutional significance such as subsidiarity, transparency, and participation rights.

(iii) *Intensity of judicial review*

The Community courts apply the principles of judicial review with varying degrees of intensity. The intensity of review may be evident at different stages of judicial review.

It can be apparent in relation to the *jurisdictional conditions* that apply to the exercise of the relevant power. The initial decision-maker, which will normally be the Commission, will be accorded power to do certain things on certain conditions. The conditional grant of power may be contained in a Treaty article, or in Community legislation. A claimant will contend that the Commission has committed an error in the interpretation of the conditions that establish its jurisdiction over the relevant topic. It will be for the Community courts to decide on the existence of this error, and it will be for the Community courts to decide on the appropriate test for review to be used in such circumstances. Courts may apply a correctness test, whereby they substitute judgment on the meaning of the contested term. They can alternatively apply a less intrusive test, framed in terms of rationality, and only overturn the contested decision if it fails to meet this criterion. There is, in EU law, no case equivalent to *Chevron*⁹⁶ in the

⁹⁶ *Chevron USA Inc v. NRDC* 467 US 837 (1984).

USA, in which the ECJ has articulated a general approach to problems of this kind. A reading of the case law makes it clear nonetheless that the ECJ has in fact adopted a variable test for review when dealing with cases of this kind. In some situations it will simply substitute judgment on the matter at hand, specifying the interpretation that the contested words must have, and striking down the measure if it fails to accord with that interpretation. In other situations the ECJ has however adopted a test for review that is equivalent to rationality scrutiny. It has moreover done so for the same type of reasons that have influenced national courts in this respect. The subject matter, the relative expertise of the initial decision-maker, and the specificity of the jurisdictional condition have been of particular importance in this respect.

This can be exemplified by the case law on state aids. The basic principle is that state aid is contrary to EU law, since it distorts the ideal of a level playing field between competitors in different Member States. The Commission is however afforded power to authorize state aid in certain circumstances. Thus Article 87(3)(a) provides that 'aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious under-employment' may be considered to be compatible with the common market. The meaning of this provision came before the ECJ in the *Philip Morris Holland* case.⁹⁷ The Dutch government gave aid to a tobacco manufacturer. The Commission found that the aid did not come within Article 87(3)(a), and this was challenged by the applicant. It argued, *inter alia*, that the Commission was wrong to hold that the standard of living in the relevant area was not 'abnormally low', and was wrong to conclude that the area did not suffer serious 'under employment' within the meaning of Article 87(3)(a). The ECJ rejected the argument. It held that in the assessment of what was a jurisdictional condition the Commission had a discretion, the exercise of which involved economic and social assessments that had to be made in a Community context.⁹⁸ The Commission had advanced good reasons for assessing the standard of living and serious under-employment in the relevant area, not with reference to the national average in the Netherlands but in relation to the Community level. The same judicial approach is evident in other decisions concerning state aids.⁹⁹

The *relative intensity of judicial review is also apparent in the jurisprudence on proportionality*. It is a general principle of Community law, which has been brought into the Community legal order in the manner explicated above. The principle is also enshrined in Article 5 EC, which provides that action by the

⁹⁷ Case 730/79, *Philip Morris Holland BV v. Commission* [1980] ECR 2671.

⁹⁸ *Ibid.*, para. 24.

⁹⁹ Cases 62 and 72/87, *Executif Régional Wallon and Glaverbel SA v. Commission* [1988] ECR 1573; see also in the context of the Common Agricultural Policy, Case 74/74, *CNTA SA v. Commission* [1975] ECR 533; Case 78/74, *Deuka, Deutsche Kraftfutter GmbH, B. J. Stolp v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1975] ECR 421, 432. See also Case 57/72, *Westzucker GmbH v. Einfuhr- und Vorratsstelle für Zucker* [1973] ECR 321; Case 98/78, *Firma A. Racke v. Hauptzollamt Mainz* [1979] ECR 69.

Community shall not go beyond what is necessary to achieve the objectives of the Treaty, and its requirements are further fleshed out in a protocol to the Treaty. Proportionality can be used to challenge Community action, and the legality of state action that falls within the sphere of application of Community law. The proportionality inquiry will normally require the Court to decide whether the measure was suitable to achieve the desired end; whether it was necessary to achieve the desired end; and whether the measure imposed a burden on the individual that was excessive in relation to the objective sought to be achieved, (proportionality *stricto sensu*). The ECJ may apply all three steps of the inquiry. It will not do so where the case can be resolved at one of the earlier stages. Moreover, in some cases the ECJ may distinguish stages two and three of the inquiry, in others it may in effect 'fold' stage three of the inquiry back into stage two. The ECJ will decide how intensively to apply the proportionality test. As de Burca states, 'the way the proportionality principle is applied by the Court of Justice covers a spectrum ranging from a very deferential approach, to quite a rigorous and searching examination of the justification for a measure which has been challenged'.¹⁰⁰ The courts express this deference through a number of juridical devices.¹⁰¹

The ways in which a court may defer in such circumstances range from deeming the measure to be non-justiciable, to refusing to look closely at the justification for the restrictive effects of the measure, to placing the onus of proof on the challenger who is claiming that the measure is disproportionate. Courts tend to be deferential in their review in cases which highlight the non-representative nature of the judiciary, the limited evidentiary and procedural processes of adjudication, and the difficulty of providing a defined individual remedy in contexts which involve complex political and economic policies.

Three broad types of case can be distinguished, and the intensity of proportionality review differs in these types of case.

There are cases concerning rights, which prompt the most intensive scrutiny. In *Hauer*¹⁰² the applicant challenged a Community regulation that placed limitations on the planting of new vines. The Court found that this did not, in itself, constitute an invalid restriction on property rights. It then considered whether the planting restrictions were disproportionate, 'impinging upon the very substance of the right to property'.¹⁰³ The Court found that they were not, but it carefully examined the purpose of the general scheme within which the contested regulation fell. The objects of this scheme were to attain a balanced wine market, with fair prices for consumers and a fair return for producers; the eradication of surpluses; and an improvement in the quality of wine. The disputed regulation, which prohibited new plantings, was part of this overall plan.

¹⁰⁰ G. de Búrca, 'The Principle of Proportionality and its Application in EC Law' (1993) 13 *YBEL* 105, 111.

¹⁰² Case 44/79, *Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727.

¹⁰¹ *Ibid.*, 112.

¹⁰³ *Ibid.*, para. 23.

It was not disproportionate in the light of the legitimate, general Community policy for this area. This policy was designed to deal with an immediate problem of surpluses, while at the same time laying the foundation for more permanent measures to facilitate a balanced wine market. In *Hautala*¹⁰⁴ an MEP sought access to a Council document concerning arms exports. The Council refused to grant access, on the ground that this could be harmful to the EU's relations with third countries, and sought to justify this under Article 4(1) of Decision 93/731,¹⁰⁵ governing access to Council documentation. The ECJ held that the right of access to documents was to be broadly construed so as to include access to information contained in the document, not just the document itself. The principle of proportionality required the Council to consider partial access to a document that contained information the disclosure of which could endanger one of the interests protected by Article 4(1). Proportionality also required that derogation from the right of access be limited to what was appropriate and necessary for achieving the aim in view.

There are cases where the attack is on the penalty imposed, the claim being that it is excessive. The Community courts are reasonably searching in this type of case too, since they can normally strike down a particular penalty without thereby undermining the entirety of the administrative policy with which it is connected. In *Man (Sugar)*¹⁰⁶ the applicant was required to give a security deposit to the Board when seeking a licence to export sugar outside the Community. The applicant was then late, but only by four hours, in completing the relevant paperwork. The Board, acting pursuant to a Community regulation, declared the entire deposit of £1,670,370 to be forfeit. The Court held that the automatic forfeiture of the entire deposit in the event of any failure to fulfil the time requirement was too drastic, given the function performed by the system of export licences.

The third type of case is where the individual argues that the policy choice made by the administration is disproportionate, because, for example, the costs are excessive in relation to the benefits, or because the measure is not suitable or necessary to achieve the end in view. The Community courts will often be more circumspect in this type of case, especially where the contested measure relates to social and economic regulatory policy.¹⁰⁷ Proportionality still applies in such instances, but the judicial tendency is only to overturn the policy choice if it is clearly or manifestly disproportionate. This is exemplified by the *Fedesa* case.¹⁰⁸

¹⁰⁴ Case C-353/99P, *Council v. Hautala* [2001] ECR I-9565.

¹⁰⁵ [1993] OJ L340/43.

¹⁰⁶ Case 181/84, *Man Sugar*, n. 94. See also Case C-365/99, *Portugal v. Commission* [2001] ECR I-5645.

¹⁰⁷ C. Vajda, 'Some Aspects of Judicial Review within the Common Agricultural Policy—Part II' (1979) 4 *ELRev* 341, 347–8; T. Tridimas, *The General Principles of EC Law* (Oxford University Press, 1999), Chap. 3.

¹⁰⁸ Case C-331/88, *R v. Minister for Agriculture, Fisheries and Food, ex parte Fedesa* [1990] ECR 4023.

The applicants were manufacturers and distributors of veterinary medicine who challenged the validity of national legislative measure implementing a Directive that prohibited the use in livestock farming of certain hormonal substances. They argued that the Directive infringed, *inter alia*, the principle of proportionality. The applicants contended, more specifically, that the prohibition on the hormones was inappropriate to attain the declared objectives, since it would be impossible to apply in practice and would lead to the creation of a dangerous black market. They argued further that the prohibition was not necessary, because consumer anxieties could be allayed by the dissemination of information and advice. In relation to the third part of the proportionality inquiry, the applicants contended that the prohibition entailed excessive disadvantages to the concerned traders, who would suffer considerable financial loss, and that this outweighed the alleged benefits to the general Court acknowledged that proportionality was one of the general principles of Community law. The lawfulness of the prohibition of an economic activity was therefore subject to the condition that the prohibitory measures were appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation. When there was a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued. The ECJ then continued in the following vein.¹⁰⁹

However, with regard to judicial review of compliance with those conditions it must be stated that in matters concerning the common agricultural policy the Community legislature has a discretionary power which corresponds to the political responsibilities given to it by ... the Treaty. Consequently, the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue.

The applicants had therefore to show that the measure was manifestly inappropriate and the Court concluded that they had not discharged this burden.¹¹⁰ The prohibition, even though it might have caused financial loss to some traders, could not be regarded as manifestly inappropriate. A similar judicial reluctance to engage in intensive review is also apparent in other areas in which the Commission is possessed of discretionary power requiring it to make complex evaluative choices, as in the case of state aids,¹¹¹ dumping,¹¹² and safeguard measures.¹¹³

¹⁰⁹ *Ibid.*, para. 14.

¹¹⁰ See also, e.g., Case C-8/89, *Vincenzo Zardi v. Consorzio Agrario Provinciale di Ferrara* [1990] ECR I-2515, 2532-3; Case T-30/99, *Bocchi Food Trade International GmbH v. Commission* [2001] ECR II-943, para. 92.

¹¹¹ Case T-380/94, *AIUFFASS v. Commission* [1996] ECR II-2169; Case T-358/94, *Compagnie Nationale Air France v. Commission* [1996] ECR II-2109.

¹¹² Case T-118/96, *Thai Bicycle Industry Co Ltd v. Council* [1998] ECR II-2991.

¹¹³ Case C-390/95P, *Antillean Rice Mills NV v. Commission* [1999] ECR I-769, para. 48.

(e) Executive power and accountability through principles for the exercise of Community administration

The principles of judicial review are not the only mechanism for holding the executive to account. There are also principles contained in the new Financial Regulation, which are significant for the present discussion in two ways.¹¹⁴

The Financial Regulation *established a constitutional framework for Community administration of the kind that had not existed hitherto*, and contains important provisions concerning the way that Community programmes are implemented and administered. The previous Financial Regulation was enacted in 1977, and had been amended on many occasions.¹¹⁵ The new Financial Regulation 2002¹¹⁶ provides a legal framework for the structure of Community administration.

This is dealt with in Title IV, Implementation of the Budget, Chapter 2 of which is concerned with Methods of Implementation. Article 53(1) of the Financial Regulation provides that the Commission shall implement the budget either on a centralized basis, or by shared or decentralized management, or by joint management with international organizations.

Centralized management covers those instances where the Commission implements the budget directly through its departments, or indirectly.¹¹⁷ The principles concerning indirect centralized implementation are set out in Article 54. The Commission is not allowed to entrust its executive powers to third parties where they involve a large measure of discretion implying political choices. The implementing tasks delegated must be clearly defined and fully supervised.¹¹⁸ There will clearly be problems in deciding whether the task allocated to third parties is *ultra vires*, in the sense that it involves 'a large measure of discretion implying political choices', within the meaning of Article 54(1). Within these limits the Commission can entrust tasks to the new breed of executive agencies, or Community bodies that can receive grants.¹¹⁹ It can also, within the limits of Article 54(1), entrust tasks to national public-sector bodies, or bodies governed by private law with a public service mission guaranteed by the state.¹²⁰ These national bodies can only be entrusted with budget implementation if the basic act concerning the programme provides for the possibility of delegation, and lays down the criteria for the selection of such bodies. It is also a condition that the delegation to national bodies is a response to the requirements of sound financial management, and is non-discriminatory. The delegation of executive tasks to these bodies must be transparent, and the procurement

¹¹⁴ P. Craig, 'The Constitutionalisation of Community Administration' (2003) 28 *ELRev* 840.

¹¹⁵ *Financial Regulation of 21 December 1977 Applicable to the General Budget of the European Communities* [1977] OJ L356/1.

¹¹⁶ Council Regulation 1605/2002, *on the Financial Regulation Applicable to the General Budget of the European Communities* [2002] OJ L248/1.

¹¹⁸ *Ibid.*, Art. 54(1).

¹¹⁹ *Ibid.*, Art. 54(2)(a) and (b).

¹¹⁷ *Ibid.*, Art. 53(2).
¹²⁰ *Ibid.*, Art. 54(2)(c).

procedure must be non-discriminatory and prevent any conflict of interest. There must be an effective internal control system for management operations, proper accounting arrangements, and an external audit.¹²¹ The Commission is not allowed to entrust implementation of funds from the budget, in particular payment and recovery, to external private-sector bodies, other than those which have a public service mission guaranteed by the state.¹²² The Commission is however empowered to entrust such private-sector entities with tasks involving technical expertise, and administrative, preparatory, or ancillary tasks involving neither the exercise of public authority, nor the use of discretionary judgment.¹²³

Where aspects of the budget are implemented by shared management tasks are entrusted to the Member States in accordance with specific provisions of the new Financial Regulation concerning the European Agricultural Guidance and Guarantee Fund (EAGGF), Guarantee Section, and the Structural Funds.¹²⁴

Cases of decentralized management cover those instances where funds are intended for third country beneficiaries. These funds can be disbursed directly by the Commission, or by the authorities of the beneficiary state.¹²⁵ In the latter instance the rules of the new Financial Regulation concerning separation of function between authorizing and accounting officers, internal and external audit, and procurement procedures are applicable.

The *Financial Regulation also contains the detailed rules concerning the budget*. The Treaty stipulates that financial regulations shall be made specifying the procedure to be adopted for establishing and implementing the budget and for presenting and auditing the accounts.¹²⁶ These rules are contained in the Financial Regulation, which also sets out more general principles to be observed in the pursuit of budgetary rectitude.

5. Conclusion

It may be helpful by way of conclusion to reflect more generally on political and legal accountability in relation to executive power within the EU.

(a) Political accountability

It can be accepted that political accountability within a regime of shared executive power will be more complex than in those systems where such power is concentrated within 'the executive'. A regime of shared executive power will not by definition have a single line of executive accountability.

¹²¹ *Ibid.*, Art. 56(1).

¹²⁴ *Ibid.*, Arts. 149–60.

¹²² *Ibid.*, Art. 57(1).

¹²⁵ *Ibid.*, Arts. 163–71.

¹²³ *Ibid.*, Art. 57(2).

¹²⁶ Art. 279 EC.

This means that in relation to *accountability for the overall political agenda* it is not be possible for the voters to express their dislike and put another party into office with a different agenda. The fact that executive power over agenda setting is shared between the Commission, Council, and European Council prevents such direct transmission of voter preferences. The multi-annual agenda is the result of a discourse between the major institutional players. This is the case under the Rome Treaty as amended and it remains so under the Constitutional Treaty. This discourse will incorporate voter preferences partly through consultation with the EP and under the Constitutional Treaty partly through the Commission President who will be indirectly elected.¹²⁷ The discourse will also include state interests as mediated through the European Council and the Council. The dialogue fostered by shared executive power can be healthy in making actors re-think their own pre-conceived positions concerning the direction of EU development. This process may be 'messier' than that in states with a single executive power. Such systems can foster electoral accountability, in the sense that the electorate can throw out the party whose policies they dislike. It should however also be recognized that systems with strong, unitary executive power can often lead to problems of political accountability between elections. Thus commentators in the UK have referred to the system as one of 'elective autocracy', in which a government elected with a reasonable majority has very considerable power and the legislature has little influence.

Political accountability in relation to the implementation and execution of policy choices raises a number of issues that must be disaggregated. The annual and multi-annual agenda will be developed in part through regulations and directives, henceforth to be European laws and framework laws under the Constitutional Treaty, which are commonly legitimated through the co-decision procedure initiated by the Commission. Secondary regulations, the new-style delegated regulations under the Constitutional Treaty, will also be used. There are problems in this latter respect, which are reflective of the difficulty of rendering secondary rule-making both workable and legitimate. In relation to accountability for the implementation/execution of agreed policy choices, the Commission is subject to a plethora of differing constraints. The EP can exercise control through a Committee of Inquiry, through scrutiny by its regular committees, with the long stop of forcing the entire Commission out. The Ombudsman can investigate cases of maladministration. The Commission is moreover subject to the important rules contained in the new Financial Regulation, which covers matters such as fiscal and policy responsibility, audit, delegation, contracting out, and the like.

¹²⁷ Under the Constitutional Treaty the Commission President is elected by the EP and the European Council must take account of the election results in deciding which person to put forward to the EP as Commission President. Thus, if the electorate dislike the direction of EU policy they can express this through a change in the EP, which will have some impact on the European Council's decision as to the candidate for Commission President.

(b) Legal accountability

Judicial review as applied by the Community courts covers the great majority of instances where policy is implemented by the Commission, whether this is in the form of individual determinations or secondary rules. The Community courts are however largely excluded from the CFSP. The Constitutional Treaty left the general structure of the courts' powers unchanged. The European Council has however been made subject to judicial review in relation to acts that are intended to produce legal effects vis-à-vis third parties,¹²⁸ with a similar amendment concerning failure to act.¹²⁹ It is clear that binding acts of the European Council could also be challenged indirectly through national courts via the preliminary ruling procedure. Inter-institutional disputes concerning the disposition of executive power might also end up before the ECJ. It should also be recognized that the detailed rules laid down in the new Financial Regulation concerning the way in which Community administration must be conducted will be enforceable through the courts, and this constitutes a further important element in legal accountability for executive power within the EU.

¹²⁸ Art. III-365(1).

¹²⁹ Art. III-367.

