Chapter 2: Development of the EU

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1. Introduction

This chapter charts the development of what is now the European Union. It is a complex and interesting story, and one that is still unfolding. It cannot be understood without an appreciation of the proximate connection between the rise of nationalism in the nineteenth century, its excesses in the twentieth, and the movement towards European integration. This is considered in the next section, which is followed by analysis of the first concrete steps towards European integration in the form of the European Coal and Steel Community in 1951 and the way in which this led towards creation of the European Economic Community in 1957, after the failure of more ambitious attempts at integration in the mid-1950s. The period thereafter was relatively stable, in the sense that there were no major amendments to the original EEC Treaty until the passage of the Single European Act 1986. The rationale for this reform is examined in part four, and is followed in part five by consideration of the Treaty amendments that occurred between 1986 and the end of the millennium, the Maastricht Treaty, the Treaty of Amsterdam and the Treaty of Nice. The dawn of the new century seemed at the time to herald the prospect of yet more piecemeal Treaty reform, but this

expectation was undermined by the determination to press forward with efforts at more comprehensive Treaty reform. The story of these reform efforts, including the drafting and demise of the Constitutional Treaty in 2004, followed by the successful ratification of the Lisbon Treaty in 2009, is told in part six. The hope that an expanded EU might develop in relative calm was, however, undermined by the financial crisis that sent shockwaves through the Union that continue to reverberate to the present day. No account of the development of European integration can be complete without being cognizant of this, which is discussed in part seven. The chapter concludes by introducing theories that seek to explain why integration has occurred.

There are a number of related themes that are central to the emergence and development of the EEC from its inception to the EU as it currently exists. Three are especially noteworthy. There is, firstly, discourse concerning the motivation behind European integration, and the relative influence in that respect of Member States and the very institutions that they created, which has been at the centre of much of the theorizing concerning the EU.

A second theme concerns the relative importance of what are termed output and input legitimacy. The former sees the EU's legitimacy primarily in terms of the beneficial outcomes that flow from its existence. This was the traditional conception of legitimacy that underpinned the vision of those who created the EEC, with peace and prosperity being seen as the positive outcomes from integration. By the 1980s political and academic commentators were increasingly concerned with input legitimacy. It was clear that the EC was wielding considerable power over significant areas, which was not purely economic. This led to greater attention being placed on the extent to which the choices thus made, whatsoever they might be, had democratic legitimacy. There was a growing literature on the EC's democratic

deficit, and the extent to which increase in the power of the European Parliament might alleviate this problem. Enlargement from an EEC with 6 Member States, to an EU of 28 was another factor in the shift to concern over input legitimacy, with discussion as to how decision-making procedures in the Commission, Council, and the European Parliament would have to be modified to render the EU governable and workable. The relative shift in focus from output to input legitimacy has been further fuelled by the financial crisis and subsequent Euro crisis, which has cast a long shadow over the promise that the EU will deliver prosperity.

The third theme is related to the second, albeit distinct. It concerns the balance between economic and social objectives within EU integration. There is little doubt that the initial focus of the EEC was on economic integration, as evidenced by the very name European Economic Community. The original Rome Treaty that established the EEC was not, however, solely concerned with economic matters, and this has been reinforced by many subsequent Treaty amendments that deal with matters that are as much social as they are economic, and by the subsequent change in nomenclature from EEC to EC, European Community, and then to EU, European Union. The balance between the economic and the social within the EU nonetheless remains contestable, ever more so in the light of the financial crisis, where austerity measures at EU and national level have had a significant impact on the social dimension of EU policies.

Alongside the five major amendments to the Treaties that are the foundation of EU law (and previously EEC/EC law), there have been seven enlargements of the EU over the years. These key steps in the EU's development can be visualised in the form of a timeline.[1]

[insert fig. 2.1 here]

2. Nationalism and the origins of the EU

There is no doubt that viewed from an historical perspective ideas of European unity can be traced to the late seventeenth century, when a prominent English Quaker, William Penn, called for a European Parliament.[2] There is however also little doubt that the more immediate push for some form of European integration can be dated to the nineteenth century. It is worth recalling that, for example, Germany and Italy only became unified states in 1871, drawing together what had hitherto been groups of smaller states, duchies, or principalities, some of which were ruled by foreign powers. A powerful factor in the unification process in both countries was the surge in nationalist sentiment, which resonated in politics, philosophy and literature. Fichte in Germany and Manzoni in Italy were but two prominent proponents of this nationalist ethos. It can be traced back to the beginnings of the nineteenth century, in reaction to French dominance of Europe and the privations that resulted from Napoleonic campaigns in Central Europe.

[1] For more detail, see the interactive map and timeline of the EU's development, which can be found on the Online Resource Centre which accompanies this book.

[2] D Urwin, *The Community of Europe: A History of European Integration* (Longman, 2nd edn, 1995); J Pinder and S Usherwood, *The European Union, A Very Short Introduction* (Oxford University Press, 3rd edn, 2013).

There was much that was positive about this nationalist sentiment, which was initially directed towards attainment of unified states from disparate principalities and the like, combined with the desire to be rid of foreign control. It was driven moreover by the strong feeling that those who shared a common language and culture should naturally co-exist in a single political entity, the corollary being that pre-existing boundaries between principalities were 'unnatural' and should not be allowed to impede the natural joinder of those who shared a common linguistic and cultural identity.

The darker side of nationalism became apparent towards the end of the nineteenth and the beginning of the twentieth century. It was driven in part by economic imperatives, but in part also by the desire to assert the prominence of a particular national identity. The battles were initially fought on borrowed terrain, with the main nation states in Europe engaged in the carving up of Africa. The First and Second World Wars brought the clash of nation states to the very forefront of the European stage, made yet worse by the increased capacity for death and destruction resulting from technological 'advances' in weaponry. While there is of course considerable debate about the causes of both conflicts, the aggressive and external effects of nationalism were significant in relation to both conflicts.

The culmination of the Second World War generated a wide-spread feeling that there had to be a way of organizing international affairs so as at least to reduce, if not eradicate, the possibility of such national conflict recurring on this scale. This explains the founding of the United Nations in 1945, where the guiding rationale was to provide a forum in which disputes could be resolved through dialogue, rather than conflict, and to institutionalize a regime of international peace-keeping and dispute settlement where force was required. The guiding

rationale for the establishment of the UN remains relevant, notwithstanding debates as to its subsequent successes and limitations.

The founding of the EEC was another response to the horrors of two World Wars, although it was to be over a decade before it became a reality. During the war, the Resistance movement had strongly supported the idea of a united Europe, to replace the destructive forces of nationalism .[3] However, the integration movement faltered after the war, especially after the electoral defeat in the UK of Churchill, who had been a strong proponent of European unity. There were nonetheless other moves towards European co-operation. The USA in 1947 introduced the Marshall Plan to provide financial aid for Europe, which was administered in 1948 by the Organization for European Economic Co-operation (OEEC) and in 1960 the Organization for Economic Co-operation and Development (OECD). Cooperation in defence was furthered by the creation of NATO in 1948 and the Western European Union (WEU) in 1954. The Statute on the Council of Europe was signed in 1949, providing for a Committee of Ministers and a Parliamentary Assembly. The international organization is best-known for the European Convention on Human Rights (ECHR), which was signed in 1950 and came into force in 1953. We can now consider the more concrete moves towards the founding of the EEC.

3. From ECSC to EEC

3.1. European Coal and Steel Community: ECSC

[3] W Lipgens (ed), *Documents of the History of European Integration* (European University Institute, 1985).

The UK was unwilling to participate in potentially far-reaching plans for European integration in 1948, and this led to more modest, albeit important, proposals advanced by the French foreign minister that France and Germany should administer their coal and steel resources pursuant to an international agreement in which supervisory authority was given to a body termed the High Authority. The proposal was framed so that other states could also join the international agreement. The detailed plan was drafted by Jean Monnet, a committed federalist. The focus on coal and steel was in part economic, but also in large part political. Coal and steel were still the principal materials for waging war. Placing production of such material under an international body was therefore consciously designed to assuage fears that Germany might covertly rearm. By assuaging such fears it was hoped to bring Germany back into the mainstream European fold, more especially because the political architecture in Europe had changed dramatically after 1945, with Russian dominance of Eastern Europe and the emergence of the cold war.

The ECSC Treaty was signed in 1951 by France, Germany, Italy, Belgium, Netherlands, and Luxembourg. It had a life-span of fifty years to expire in 2002 and established a common market in coal and steel. There were four principal institutions. The High Authority, composed of nine independent appointees of the six Member State governments, was the main executive institution with decision-making power; an Assembly made up of national parliaments' delegates had supervisory and advisory powers; a Council composed of a representative from each national government had limited decision-making powers and a broader consultative role; the fourth institution was the Court of Justice composed of nine judges. Although the remit of the ECSC was limited to coal and steel, its proponents always saw it as a supranational authority, in which the High Authority could adopt decisions other

than by unanimity, which could then to serve as the first step towards broader European integration.[4]

3.2. European Defence Community and European Political Community: EDC and EPC

The 1950s also witnessed setbacks in the moves towards European integration, which were nonetheless important in the overall story of the creation of the EEC. The central proposals that failed to come to fruition were the European Defence Community (EDC) and the European Political Community (EPC).

The proposal for the EDC had its origins in French opposition to German membership of NATO. The French alternative outlined in the Pleven Plan in 1950 was for the EDC, which would have a European army, a common budget, and joint institutions. The EDC Treaty was signed in 1952 by the six ECSC States, but Britain refused to participate, and progress towards ratification was slow. It was felt that the existence of a European army required some form of common European foreign policy, and this was the catalyst for the plans to establish the EPC. The 1953 EPC draft statute was crafted by the ECSC Assembly as reinforced by certain additional members, with the principal work being done by a Constitutional Committee. It produced far-reaching plans for a federal, parliamentary-style form of European integration, in which there would be a bicameral ('two-level') parliament, with one chamber elected by direct universal suffrage, and the other senate-type body being appointed by national parliaments. The parliament thus constituted would have real legislative power. There was also to be an Executive Council, which would in effect have been the government

[4] F Duchêne, *Jean Monnet: The First Statesman of Interdependence* (Norton, 1994) 239.

of the EPC, with responsibility to the Parliament. The draft statute also contained provision for a Court of Justice and an Economic and Social Council. Although the draft received almost unanimous support in the ECSC Assembly, the reaction of the six foreign ministers of the ECSC was more circumspect, and there was significant opposition to the degree of parliamentary power that existed under the draft EPC statute.

The fate of the EPC was however inextricably linked with that of the EDC. The latter failed when the French National Assembly refused to ratify the EDC in 1954, opposition coming from both the French right and left wing, albeit for very different reasons.[5] This resulted in a major setback for the integration process and the shelving of plans for defence and political union. It would be thirty-nine years before the Member States ratified another Treaty, signed at Maastricht in 1992, purporting to establish a 'European Union'

3.3. European Economic Community: EEC

Movement towards European integration was not, however, halted by the failure of the EDC/EPC. Indeed the very demise of these ambitious projects led proponents of European integration to focus more directly on the economic rather than the political, while drawing on ideas that had been discussed when the EPC was being drafted. Thus the Netherlands had sought to include in the EPC proposals the idea of a common market in which products would be able to move freely under the guarantee of a supranational authority. This was felt to be too risky for several countries in the early 1950s, since they had protectionist traditions that they were unwilling to relinquish. It was nonetheless this very idea of a common market in which goods and services would be traded freely across a level playing field consisting of

[5] J Pinder, *The Building of the European Union* (Oxford University Press, 3rd edn, 1998).

the territories of the Member States that was to resurface. A conference of foreign ministers of the six Member States of the ECSC was held in Messina in Italy in 1955. A committee chaired by Paul-Henri Spaak, Belgian Prime Minister and a strong advocate of integration, published its report in 1956, which contained the basic plan for what became the European Atomic Energy Community (Euratom) and the European Economic Community (EEC). The underlying long-term objective may well have been political, but the initial focus was nonetheless economic. There was no temporal limit to the EEC Treaty: the Treaty of Rome was signed in March 1957 and came into effect in January 1958. There were six Member States: France, Germany, Netherlands, Belgium, Italy, and Luxembourg. The same Member States were signatories of the Euratom Treaty, which came into effect at the same time as the EEC Treaty.

In economic terms the idea of a common market connotes the removal of barriers to trade, such as tariffs, which increase the cost of imports, or quotas, which limit the number of imports of a certain type of product. These barriers to trade were to be abolished and a common customs tariff was to be set up. The common market was to be established over a transitional period of several stages, during which tariff barriers would be removed and the common external customs tariff established. A common market connoted, however, more than the removal of tariffs and quotas. It entailed also the free movement of the economic factors of production in order to ensure that they were being used most efficiently throughout the Community as a whole. This explains the centrality to the Community of the ‘four freedoms’, which are often regarded as the core of its economic constitution: free movement of goods, workers, capital, and establishment and the provision of services (see further chapters 11 to 16). The idea was therefore that if, for example, a worker could not obtain a job in a particular country, because unemployment levels were high, he or she should be able

to move freely within the EEC to search for employment within another country where there might be an excess of demand over the supply for labour, with the consequence that the value of the labour resource within the Community as a whole was enhanced. The Treaty also contained key provisions to ensure that the idea of a level playing field was not undermined by the anticompetitive actions of private parties, or by national action that favoured domestic industry (see further chapters 17 and 18). The Rome Treaty was in addition designed to approximate the economic policies of the Member States, to promote harmonious development of economic activities throughout the Community, to increase stability and raise the standard of living, and to promote closer relations between the Member States. There were common policies in agriculture and transport. A European Social Fund was established to improve employment opportunities, and an Investment Bank to give loans and guarantees and to help less developed regions or sectors. A European Development Fund for overseas countries and territories of some of the Member States was also established.

In institutional terms the Rome Treaty was a mixture of continuity with the past in terms of the institutional ordering under the ECSC, combined with novel arrangements devised for the EEC. The Parliamentary Assembly and the Court of Justice were shared with the ECSC. There was, however, a separate Council of Ministers consisting of a national representative from each Member State, which represented its interest in the Council, and a separate executive authority, the Commission, which was composed of members drawn from the Member States, who had an obligation of independence and who were to represent the Community rather than the national interest. It was not until the Merger Treaty 1965 that these institutions were merged and shared by the three Communities. An Economic and Social Committee with advisory status was set up, to be shared with the Euratom Community.

The location of legislative and executive power was crucial to the arrangements put in place by the Rome Treaty (on the institutions, see further chapters 3 and 4). It will be recalled that the draft statute for the European Political Community had been parliamentary in its orientation, giving very considerable power to the proposed bicameral legislature. It will be recalled also that this aroused considerable opposition from the Member States of the ECSC. The same unwillingness to accord power to parliamentary institutions was evident in the Rome Treaty. The legal and political reality was that legislative power was divided between the Commission, which proposed legislative initiatives, and the Council of Ministers, which voted on them. The Parliamentary Assembly, which changed its name to the European Parliament in 1962, had a bare right to be consulted, and that was only where a particular Treaty article mandated such consultation. Voting procedure varied according to the nature of the issue: in some limited instances voting was by simple majority, in many others it was by 'qualified majority', while in yet others unanimity was required. Where qualified majority voting applied, voting in the Council was weighted to give greater weight to the larger Member States than the smaller, in order to reflect differences in population, although the weighting was not perfectly proportional in this respect.

Executive power was also divided in the original Rome Treaty, although the Commission was given considerable power in this respect. Thus it was the Commission that was accorded the role of 'watchdog' to ensure that Member States complied with the Treaty; it was the Commission that had responsibility to ensure that regulations, directives, and decisions enacted pursuant to the Treaty were effectively implemented; and it was the Commission that was the principal negotiator of international agreements on behalf of the Community. The Council nonetheless exercised certain executive responsibilities in relation to, for example,

the conclusion of international agreements, the planning of the overall policy agenda and the Community budget. The Assembly was also given some power over the budget, and in addition possessed a strong but never-used power of censure, despite the tabling of many motions of censure over the years, including one shortly before the dramatic resignation of the Commission in 1999.[6]

4. From EEC to the Single European Act

4.1. Tensions within the Community

The Rome Treaty continued to provide the legal framework for the EEC for almost thirty years, subject to the Merger Treaty 1965, which came into effect in 1967, and which merged the executive organs of the ECSC, Euratom, and the EEC. The lack of other Treaty amendment during this period is all the more remarkable given that the years after the Single European Act 1986 (SEA) have seen an almost continuous process of Treaty reform. There were nonetheless important developments in the period between the EEC Treaty and the SEA.

The Community expanded through accession of new Member States. The UK had chosen to remain outside the EEC when it was initially established. It made its first application to join in 1961, but the French President, Charles de Gaulle, vetoed UK membership in 1963, and also a second UK application in 1967. It was not until De Gaulle's resignation that Britain's

[6] K Bradley, 'The Institutional Law of the EU in 1999' (1999/2000) 19 YBEL 547, 584.

application for membership was accepted, together with those of Ireland and Denmark in 1973. Greece became a member of the EEC in 1981, followed by Spain and Portugal in 1986.

The almost thirty-year period between the EEC and the SEA revealed moreover tensions between an intergovernmental view of the Community, championed initially by President de Gaulle of France, in which state interests were regarded as paramount, and a more supranational perspective espoused initially by Walter Hallstein, the Commission President, in which the overall Community good was perceived as the primary objective, even if this required sacrifice by particular Member States. The tension surfaced in 1965, at the time when the transitional provisions of the Treaty dictated a move from unanimous to qualified-majority voting in the Council, which would have affected many, although not all, areas of decision-making. De Gaulle objected to a Commission proposal that the Community should be able to raise its own resources from agricultural levies and external tariffs, rather than national contributions.[7] When compromise in the Council proved to be impossible, France refused to attend further Council meetings and adopted what became known as the 'empty-chair' policy. This lasted for seven months, from June 1965 until January 1966, after which a settlement was reached, which became known as the Luxembourg Compromise or the Luxembourg Accords. They were essentially an agreement to disagree over voting methods in the Council. The French asserted that even in cases where the Treaty provided for majority decision-making, discussion must continue until unanimity was reached whenever important national interests were at stake. The other five Member States declared instead that in such circumstances the Council would 'endeavour, within a reasonable time, to reach

[7] The EEC achieved its own resources through the Treaty of Luxembourg 1970 (known as 'the first budgetary treaty'), which entered into force in 1971.

solutions which can be adopted by all'.[8] It seems nonetheless that the French view prevailed, such that if a state pleaded that its 'very important interests' were at stake, then this was akin to a veto, which the other Member States would respect.

The period between the EEC Treaty and the SEA also saw other developments that enhanced Member State power over decision-making and intergovernmentalism. In 1970 the Davignon Report recommended the holding of quarterly meetings of the foreign ministers of the Member States, which became an intergovernmental forum for co-operation in foreign policy. In 1973 this became known as European Political Co-operation, which enabled the EEC to be represented as one voice in other international organizations in which all Member States participated, but also enhanced intergovernmentalism.

In 1974 the European Council was established to regularize the practice of holding summits. This body consists of the heads of governments of the Member States, with the President of the Commission attending its bi-annual meetings. The European Council's 'summitry' provided the Community with much-needed direction, but represented to some a weakening in the supranational elements of the Community. The European Council was not within the framework created by the Treaties, and it was not until the Single European Act that it was recognized in a formal instrument. European Political Co-operation and the European Council enabled Member State interests at the highest level to impact on matters of political or economic concern, and their decisions, while not formally binding, would normally constitute the frame within which binding Community initiatives would be pursued. The Member States also assumed greater control over the detail of Community secondary legislation, through the creation of what became known as Comitology. This enabled

[8] Bull EC 3-1966, 9.

Member States to influence the content of secondary Community legislation in a way that had not been envisaged in the original EEC Treaty. Commentators lamented the dilution of the EEC's supranational dimension and regarded it as a principal reason why legislative initiatives to flesh out the requirements of Treaty articles were not being enacted, or that this only occurred after significant delay.[9]

There were however also developments during the period between the EEC and the SEA that enhanced supranationalism. Thus 1976 saw agreement on direct elections to the Assembly, and the first such elections took place in 1979. It provided the EEC with a direct electoral mandate that it had lacked hitherto, but the downside of this development was that voter turnout was low, and elections were often fought on national rather than Community issues.[10] Moreover the direct electoral mandate served to highlight the fact of the Assembly's limited power in the legislative process. The supranational dimension to the Community was more unequivocally enhanced by developments relating to resources and the budget. In 1969 agreement was reached on funding from the Community's own resources rather than from national contributions, and on the expansion of the Parliament's role in the budgetary process. This thereby gave the Community greater financial independence and strengthened Parliament's role as a decision-maker. These developments were furthered in 1975 when a second budgetary treaty was adopted. The European Court of Justice also made important contributions to the supranational dynamic of the Community during this period. It used the doctrine of direct effect in the 1960s and 1970s to make Community policies more effective.

[9] P Dankert, 'The EC—Past, Present and Future', in L Tsoukalis (ed), *The EC: Past, Present and Future* (Basil Blackwell, 1983) 7. For more on the European Council as an EU institution, see chapter 3, and for more on the comitology procedure, see chapter 5.

[10] M Holland, *European Integration from Community to Union* (??) 42.

It interpreted Treaty provisions broadly in order to foster the overall aims of the Community, such as the free movement of goods. It created the supremacy of Community law over national law to reinforce these judicial strategies (see further chapter 6; on the Court of Justice generally, see chapter 10).

While there were positive developments relating to the Community from a supranational perspective, it was nonetheless the case that the decade from the mid-1970s to the mid-1980s was perceived as a period of relative political stagnation in the EEC. This was epitomized by the Commission's difficulty in securing the passage of legislation through the Council, with the consequence that Community objectives were left unfulfilled or that progress was extremely slow. The malaise was recognized in high-level reports from the mid-1970s onwards, such as the Tindemans Report 1974-5 and that of the 'Three Wise Men' in 1978,[11] both of which recommended strengthening the supranational elements of the Community, and diminishing the impact of intergovernmentalism, but neither was acted on. The European Parliament proposed radical reform in 1984 in a 'Draft Treaty on European Union', but it too was largely ignored. The catalyst for change finally came from a meeting of the heads of state in the Fontainbleu European Council in 1984, which established two committees to consider Treaty revision and political integration. This in turn led the 1985 European Council in Milan to establish an intergovernmental conference (IGC) to discuss Treaty amendment. It was this IGC that generated the Single European Act (SEA). The impetus for reform was furthered by an extensive Commission 'White Paper' that set out a timetable for completion of the internal market, complete with a long list of barriers to be removed before a deadline of 1992.[12]

[11] Bull EC 11-1979, 1.5.2.

[12] COM(85) 310.

4.2. Single European Act: SEA

The SEA 1986 was a disappointment to those who advocated far-reaching reform of the kind posited by the European Parliament in its Draft Treaty on the European Union. It nonetheless had a far-reaching significance, and it still ranks as one of the most significant Treaty revisions in the history of the EU. This is because of the institutional and substantive changes that it introduced.

In institutional terms, the SEA made a number of changes. It gave a legal basis to European Political Co-operation and formal recognition to the European Council, although not within the Community treaties. A Court of First Instance (CFI) was created to assist the Court of Justice. Lastly, the so-called 'Comitology' procedure, under which the Council delegates powers to the Commission on certain conditions, was formally included within what was Article 202 EC.[13]

The most significant institutional change was, however, that the SEA began the transformation in the role of the European Parliament that continues to the present day. We have already seen that the Rome Treaty gave it scant powers, and that its role in the legislative process was minimal, being limited to a right to be consulted and then only where a particular Treaty article so mandated. We have seen also that the role of parliamentary institutions in the schema of European integration had been a contentious issue, as exemplified by the debates concerning the EPC and those concerning the Draft Treaty on European Union thirty years later. Viewed from this perspective the change made by the SEA

[13] The legal regime for dealing with these measures was altered by the Lisbon Treaty, Arts 290-291 TFEU. See further chapter 5.

might, at the time, have appeared relatively minimal. A new legislative procedure was created, the 'cooperation' procedure, which applied to a defined list of Treaty articles. There is some evidence that this was regarded as a relatively minor change, accepted by the Member States that were drafting the SEA to compensate the European Parliament for the fact that its far-reaching reforms proposed in the Draft Treaty on European Union had been largely sidelined. The creation of the cooperation procedure was however to transform the Community decision-making process. Prior to the SEA the approach to the passage of legislation was captured by the aphorism that the 'Commission proposes, and the Council disposes', revealing the Commission's role as initiator of legislation and the Council's role in voting on such measures. The change heralded by the SEA meant that the Commission would now have to take seriously the views of the European Parliament in the areas where the cooperation procedure applied. The enactment of legislation required input from three players, not two, more especially because the cooperation procedure meant that the European Parliament could in effect block legislative proposals provided that it had some support in the Council.

The impact of the cooperation procedure was enhanced because of the substantive changes made by the SEA, in particular the creation of what was initially Article 100a EEC and is now Article 114 TFEU, which is the main Treaty provision conferring power upon the EU to adopt legislation concerning the internal market. A word by way of explanation is required to understand the importance of this change. The completion of a common market requires not merely that trade barriers are prohibited, what is termed negative integration, but also that there should be European regulation of certain issues *in place of* national regulation, what is termed positive integration or harmonization. The latter is required because each country will have certain rules on, for example, banking that embody important public interests, such as

the prevention of fraud, the safeguarding of deposits and the like. These rules cannot be eradicated, nor should they be. It is nonetheless the case that the very multiplicity of such national rules can hamper the creation of a common market, because traders will then have to satisfy what may be a different set of such rules in each Member State, thereby adding significantly to the costs of business (see further chapter 11). A way of meeting this difficulty is for there to be one set of Community rules on such issues. This was recognized in the original Rome Treaty, but the relevant provision conferring power to adopt legislation concerning the common market, what was Article 100 EEC and is now Article 115 TFEU, required unanimity in the Council. This was difficult to secure, ever more so in a Community with a growing number of Member States. This was the rationale for the enactment of Article 100a EEC, now Article 114 TFEU, which provided for the enactment of measures to approximate the laws of the Member States for this purpose. The cooperation procedure was applicable to this Article and voting within the Council was by qualified majority, rather than unanimity. The European Parliament was thereby accorded a role in the legislative process and this role was applicable to the very Treaty article that was to be the foundation for the enactment of measures to complete the internal market. The SEA amended the Rome Treaty to provide that the Community should adopt measures with the aim of 'progressively establishing the internal market over a period expiring on 31 December 1992', and defined the internal market as 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured'.[14] What is now Article 114 TFEU became the principal vehicle for the enactment of measures to complete the internal market through the passage of legislation approximating Member State laws.

[14] Art 8a EEC.

The impact of the SEA was not, however, confined to the above. The SEA also added new substantive areas of Community competence, some of which had already been asserted by the institutions and supported by the Court, without any express Treaty basis. The additions covered co-operation in economic and monetary union (see chapter 19), social policy (see chapter 20), economic and social cohesion, research and technological development, and environmental policy (see chapter 22).

5. From the SEA to the Nice Treaty

5.1. Maastricht Treaty: The Treaty on European Union

The SEA reinvigorated the Community and many measures to complete the internal market were duly enacted in the period between 1986 and 1992. It would nonetheless be mistaken to think that the internal market could truly be 'completed' by 1992, or indeed any particular date thereafter. This is because factors such as technological change, industrial innovation and changing patterns of consumer behaviour can generate the need for new measures enacted by the EU in order to eradicate or reduce obstacles to inter-state trade. The momentum generated by the SEA continued after its adoption. A committee chaired by the President of the Commission, Jacques Delors, on Economic and Monetary Union (EMU) reported in 1989 and set out a three-stage plan for reaching EMU. The European Council held an intergovernmental conference (IGC) on the subject, and a second IGC on political union. This led to a draft Treaty in 1991 and the Treaty on European Union (TEU) was signed by the Member States in Maastricht in February 1992.[15] It entered into force in November 1993 having survived constitutional challenge before the German federal Constitutional Court.[16]

[15] R Corbett, *The Treaty of Maastricht* (Longman, 1993).

[16] Cases 2 BvR 2134/92 and 2159/92 *Brunner v The European Union Treaty* [1994] 1 CMLR 57.

5.1.1. The Three Pillar system

The TEU made a number of important changes to the Rome Treaty, in both institutional and substantive terms. It was also significant in terms of the overall legal architecture, because it introduced what was known as the 'three-pillar' structure for what was to be the European Union, with the Communities as the first of these pillars, and the EEC Treaty was officially renamed the European Community (EC) Treaty.[17] The Second Pillar dealt with Common Foreign and Security Policy, (CFSP) and built on earlier mechanisms for European Political Cooperation. The Third Pillar dealt with Justice and Home Affairs, (JHA) and built on earlier informal initiatives in this area (see chapters 25 and 26). The pillar structure was preserved in subsequent Treaty amendments, but was then removed by the Lisbon Treaty, although distinct rules still apply to the CFSP (see chapter 24). Title I of the TEU contained common provisions, which laid down basic principles for the 'Union', and set out its objectives.[18]

The European Union was therefore given new responsibilities in relation to CFSP and JHA. The key issue is therefore why these new competences were not simply added to those already existing, in the same manner as had been done in earlier Treaty amendments, when the Single European Act added to the range of Community competence through new titles or chapters being inserted in the existing Rome Treaty. The principal rationale for creating separate Pillars for the CFSP and JHA was as follows. The Member States wished for some

[17] D Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces' (1993) 30 CMLRev 17.

[18] There were originally seven titles in the TEU: Title I included the 'common provisions', which set out the basic objectives of the TEU. Titles II, III, and IV covered the First Pillar amendments to the EEC, ECSC, and Euratom Treaties respectively. Title V created the Second Pillar of the Common Foreign and Security Policy (CFSP), Title VI the Third Pillar of Justice and Home Affairs (JHA), and Title VII contained the final provisions.

established mechanism through which they could co-operate in relation to CFSP and JHA. The absence of such an established mechanism meant that such meetings would have to be set up afresh to discuss each new problem. This was time consuming and cumbersome. The Member States were not, however, willing to subject these areas to the normal supranational methods of decision-making that characterized the Community Pillar. They did not wish the Commission and the European Court of Justice (ECJ) to be able to exercise the powers they had under the Community Pillar, because the Second and Third Pillars concerned sensitive areas of policy considered to be at the core of national sovereignty. The central distinguishing feature of decision-making under the Second and Third Pillars is that it was more intergovernmental, with the Member States in the Council and European Council retaining the primary reins of power. The other Community institutions, the Commission, European Parliament, and ECJ, either had no role or one that was much reduced by way of comparison with the Community Pillar.

5.1.2. The Community treaties

The Maastricht Treaty made a number of institutional changes to the Rome Treaty, the most significant being the further increase in the Parliament's legislative involvement, by introducing the so-called co-decision procedure, which was amended and strengthened by the Treaty of Amsterdam. This allowed the EP to block legislation of which it disapproved, if it was subject to this procedure. The Parliament was also given the right to request the Commission to initiate legislation and the power to block the appointment of the new Commission. There were other significant institutional changes: provision was made for a European System of Central Banks (ESCB) and a European Central Bank (ECB) to oversee

economic and monetary union (see chapter 19); for a Parliamentary Ombudsman; and for a 'Committee of the Regions'.

The Maastricht Treaty also made significant substantive changes. It established the principle of subsidiarity. It was introduced to alleviate fears that the EC was becoming too 'federal' by distinguishing areas where action was best taken at Community level and national level.[19] A new concept of European citizenship was introduced, which was to become a fertile source for ECJ case law.[20] There were new provisions on economic and monetary union,[21] which laid the foundations for the introduction of the single currency.[22] The Maastricht Treaty also, like the SEA in the earlier decade, added new areas of competence to the EC, with new titles added to the Treaty in areas such as culture, public health (see chapter 21), consumer protection (see chapter 23), trans-European networks, and development co-operation, and significant modifications made in relation to the titles on, for example, the environment (see chapter 22).

5.1.3. Common foreign and security policy

The CFSP Pillar created by the Maastricht Treaty was, as we have seen, distinct from the Community institutional and legal structure, such that decision-making was more intergovernmental and less supranational than under the Community Pillar. The CFSP Pillar established the objectives of EU action in this area, which included preservation of peace and

[19] Art 5 EC. For more on the principle of subsidiarity, see chapter 5.

[20] Arts 17-21 EC. See chapter 13.

[21] Arts 98-124 EC. See chapter 19.

[22] J Pipkorn, 'Legal Arrangements in the Treaty of Maastricht for the Effectiveness of the Economic and Monetary Union' (1994) 31 CMLRev 263.

international security, respect for human rights and development of democracy. Each Member State had an obligation to inform and consult each other on any matter of common foreign and security policy that was of general interest, in order to ensure that the Member States' combined influence could be exercised as effectively as possible, through concerted and convergent action. Provision was made for the Council to define a 'common position' for the Member States on such issues. It was, however, the European Council, consisting of the heads of state and government of the Member States, which was to define the principles and general guidelines for the common foreign and security policy, with the Council having responsibility for decisions to implement it. The common foreign and security policy included all questions related to the security of the Union, including the eventual framing of a common defence policy. While decision-making was concentrated in the hands of institutions in which Member State interests predominated, the Council and the European Council, there was nonetheless provision for the European Parliament to be kept informed about foreign and security policy, and the Commission was to be fully associated with work in this area.

5.1.4. Justice and home affairs

The Justice and Home Affairs Pillar originally governed policies such as asylum, immigration, and 'third country' (non-EU) nationals, which were integrated into the EC Treaty by the Treaty of Amsterdam (see chapter 26). However, prior to the Lisbon Treaty the Third Pillar also included co-operation on a range of international crime issues and various forms of judicial, customs, and police co-operation, including the establishment of a European Police Office (Europol) for exchanging information (see chapter 25). National sensitivity about such issues meant that the Member States were not willing for them to be included within the ordinary Community Pillar and be subject to the supranational rules on decision-making. Decision-making was dominated by the Council, and the ECJ's powers

were limited. The Lisbon Treaty has now brought the entirety of what was the Third Pillar into the general fabric of the Treaty.[23]

5.2. The Treaty of Amsterdam

The process of Treaty amendment did not halt other important developments. Membership of the EU expanded shortly after the Maastricht Treaty, with Austria, Sweden, and Finland joining in 1995. An accession agreement was also negotiated with Norway, but a national referendum opposed membership of the EU, as it had done in 1973. An Agreement on the European Economic Area (EEA) was also made between the EC and the states that were party to the European Free Trade Association (EFTA), and came into force in 1994.[24]

The ink was nonetheless scarcely dry on the Maastricht Treaty before plans were being made for an intergovernmental conference between the Member States that would pave the way for the next round of Treaty reform, which was the Treaty of Amsterdam. It was signed in 1997 and came into effect on 1 May 1999. It was initially intended to prepare the Union for enlargement through accession of Eastern European countries, but this issue was postponed until the Nice Treaty. The result was that the Treaty of Amsterdam was a modest exercise in

[23] Arts 67-89 TFEU.

[24] It provided for free-movement provisions similar to those in the EC Treaty, analogous rules on competition policy, and 'close co-operation' in other policy areas, having been declared compatible with the EC Treaty by the ECJ, *Opinion 1/91* [1991] ECR 6079; *Opinion 1/92* [1992] ECR I-2821; J Forman, 'The EEA Agreement Five Years On: Dynamic Homogeneity in Practice and its Implementation by the Two EEA Courts' (1999) 36 CMLRev 751. Since 1995, the non-EU parties to the EEA have been Iceland, Norway, and Liechtenstein. One country (Switzerland) remains a member of EFTA, but decided not to join the EEA; it has however entered into a number of separate bilateral treaties with the EU.

Treaty reform, but it did delete obsolete provisions from the EC Treaty, and renumber all the Articles, titles, and sections of the TEU and the EC Treaty.

The 1990s saw a surge of debate, political and academic, concerning the legitimacy of the EU. This is the rationale for amendments introduced by the Amsterdam Treaty designed to enhance the EU's legitimacy. The principle of openness was added, such that decisions were to be taken 'as openly as possible' and as closely as possible to the citizen.[25] Promotion of a high level of employment and the establishment of the area of 'freedom, security and justice' were added to the EU's objectives.[26] There were amendments the effect of which was that the Union was said to be founded on respect for human rights, democracy, and the rule of law.[27] Respect for these principles was a condition for EU membership.[28] On a related note, the Amsterdam Treaty declared that the EU should respect the fundamental rights protected in the European Convention on Human Rights (ECHR) and in national constitutions,[29] and there was provision that if the Council found a 'serious and persistent breach' by a Member State of principles concerning the rule of law, human rights and democracy, it could suspend some of that State's rights under the Treaty.[30]

The institutional changes made by the Amsterdam Treaty were in large part an extension and consolidation of a reform process begun with the Single European Act. The co-decision procedure was amended to increase the European Parliament's power and the number of

[25] Art 1 EU. On the transparency of the EU decision-making process, see chapters 3 and 8.

[26] Art 2 EU.

[27] Art 6 EU.

[28] Art 49 EU.

[29] Art 6(2) EU. This was subject to judicial oversight through Art 46 EU. See further chapter 9.

[30] Art 7 EU.

Treaty articles to which it was applicable was expanded. The co-operation procedure introduced by the SEA was virtually eliminated, apart from provisions on EMU. The increase in the EP's power was also evident in the amendment whereby its assent was required for appointment of the Commission President.[31] There were moreover changes designed to enhance the Community's legitimacy in relation to its citizens. The same continuity with the past was evident in the trajectory of amendments concerning the scope of Community power. This was, as with the SEA and the Maastricht Treaty, further enhanced through the addition of new heads of competence, or the modification of existing heads.[32] There was also a new provision that conferred legislative competence on the Community to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation.[33]

The Treaty of Amsterdam also amended the Second and Third Pillars. The changes made to the Second Pillar were modest, including the fact that the Secretary-General of the Council was nominated as 'High Representative' for the CFSP to assist the Council Presidency, and the Council was given power to 'conclude' international agreements,[34] whenever this was necessary in implementing the CFSP.

The changes made to the Third Pillar were more significant. The decision-making structure had been criticized on the ground that many JHA policies, such as immigration, asylum and

[31] Art 214(2) EC. See chapter 3.

[32] There was a new title on Employment, the provisions on Social Policy were modified, the title on public health was replaced and enhanced, and that on consumer protection was amended. See chapters 20, 21, and 23.

[33] Art 13 EC. See chapter 20.

[34] Art 24 EU; JW de Zwaan, 'Legal Personality of the European Communities and the European Union' (1999) 30 Netherlands Yearbook of International Law 75; K Lenaerts and E de Smijter 'The European Union as an Actor under International Law' (1999/2000) 19 YBEL 95. On the CFSP, see further chapter 24.

border controls, were unsuited to the intergovernmental processes established. The consequence was that those parts of JHA dealing with visas, asylum, immigration, and other aspects of free movement of persons were incorporated into EC Title IV, although the relevant legal provisions meant that decision-making was still more intergovernmental than in other areas, at least for a certain period of time (see chapter 26). The remaining Third Pillar provisions were subjected to institutional controls closer to those under the Community Pillar, and the Third Pillar was renamed 'Police and Judicial Cooperation in Criminal Matters'. The aim of the remodeled Third Pillar was to provide citizens with a high level of safety in an area of freedom, security, and justice, by developing 'common action' in three areas: police co-operation in criminal matters, judicial co-operation in criminal matters, and the prevention and combating of racism and xenophobia.[35] These objectives were pursued through legal instruments specific to the Third Pillar:[36] common positions, framework decisions, decisions and conventions. The ECJ had some jurisdiction over certain measures adopted under this Pillar,[37] thereby further eroding the distinction between the Community Pillar and the Third Pillar, although it was not equivalent to its jurisdiction under the Community Pillar.

5.3. Nice Treaty

We have already noted the fact that the original Rome Treaty remained largely unchanged for the first thirty years of the Community's existence. By way of contrast, the period from the

[35] Art 29 EU. On the revised third pillar, see further chapter 25.

[36] Art 34 EU.

[37] Art 35 EU.

mid-1980s onwards was dominated by Treaty reform or discussion about such reform.[38] The very fact that the Treaty of Amsterdam had failed to address the institutional structure pending enlargement meant that a further IGC to pave the way for Treaty amendment was inevitable, given that discussions for enlargement were underway. Such an IGC was convened in 1999 to consider composition of the Commission, the weighting of votes in the Council, and the extension of qualified majority voting. The Nice Treaty was concluded in December 2000, and entered into force on 1 February 2003.[39]

The Nice Treaty made a number of changes to the EC Treaty, in particular relating to the Community's institutional structure. This had been devised for a Community of six Member States, which had now expanded to fifteen. There was consensus on the need for reform of institutional arrangements pending enlargement. This was achieved and the Treaty provisions concerning the weighting of votes in the Council, the distribution of seats in the European Parliament, and the composition of the Commission were amended. These topics might sound dry, but the debates concerning reform were often fierce, precisely because the resolution of these issues raised broader considerations concerning the relative power of large, medium, and small states in the Community, and raised also contentious issues as to the balance of power between the EU institutions (see further chapter 3). The detailed provisions on these matters have been superseded by those in the Lisbon Treaty, but we shall see that the discourse concerning these changes was similarly contentious as those in the Nice Treaty.

[38] B de Witte, 'The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process' in P Beaumont, C Lyons, and N Walker (eds), *Convergence and Divergence in European Public Law* (Hart, 2002) ch 3.

[39] [2001] OJ C80/1; K Bradley, 'Institutional Design in the Treaty of Nice' (2001) 38 CMLRev 1095; R Barents, 'Some Observations on the Treaty of Nice' (2001) 8 MJ 121.

5.4. Charter of Rights

Parallel to the discussion that led to the Nice Treaty, there was discourse that led to the EU Charter of Rights. The initial catalyst for this came from the European Council in 1999, which conceived of the Charter as important in itself and as a mechanism for enhancing the legitimacy of the EU. It established a 'body' which included national parliamentarians, European parliamentarians, and national government representatives to draft a Charter of fundamental rights for the EU.[40] This body, which renamed itself a 'Convention', began work early in 2000 and drew up a Charter by the end of 2000. The Charter received political approval of the Member States at the Nice European Council in December 2000.[41] It was drafted so as to be legally binding, and it was intended that this should be resolved when the Nice Treaty was being deliberated. The Charter's legal status was not however resolved in Nice, and the decision on its legal status was placed on the 'post-Nice agenda' and postponed until the 2004 IGC.

6. From Nice to Lisbon

6.1. The Laeken Declaration

The initial expectation following the Nice Treaty was that there would be yet another round of piecemeal Treaty reform four years later in 2004. The agenda for that IGC had already been partly filled in, the intent being that it would consider issues addressed but not resolved

[40] G de Búrca, 'The Drafting of the EU Charter of Fundamental Rights' (2001) 26 ELRev 126. See further chapter 9.

[41] [2000] OJ C364/1.

in the discussion leading to the Nice Treaty. These included the status of the Charter of Rights, the scope of Community competence, and the role to be played by national parliaments in the Community decision-making process. These issues were to be considered further at the Laeken European Council scheduled for December 2001. The nature of the reform process was however transformed during 2000, which was then reflected in the conclusions of the Laeken European Council.[42]

It came to be accepted that the topics left over from the Nice Treaty were not discrete, but resonated with other issues concerning the institutional balance of power within the EU, and with the distribution of authority between the EU and the Member States. This in turn led to a growing feeling that there should be a more profound re-thinking of the fundamentals of the EU. It was also accepted that if a broad range of issues was to be discussed, then the result should be legitimated by input from a broader 'constituency' than hitherto. This emerging consensus was reflected in the Laeken European Council,[43] which gave formal approval, through the Laeken Declaration, to the broadening of the issues left open post-Nice. These issues became the 'headings' within which a plethora of other questions were posed, concerning virtually every issue of importance for the EU. The Laeken Declaration also formally embraced the Convention model which had been used to draw up the Charter of Rights, and established a Convention on the Future of Europe, with a composition designed to enhance the legitimacy of its results.

[42] P Craig, 'Constitutional Process and Reform in the EU: Nice, Laeken, The Convention and the IGC' (2004) 10 EPL 653.

[43] Laeken European Council, 14-15 December 2001.

6.2. Constitutional Treaty

The Convention[44] was composed of representatives from national governments, national Parliaments, the EP, and the Commission. The accession countries were also represented. The Convention was chaired by former French President Giscard d'Estaing, and there were two vice-chairmen, Giuliano Amato and Jean-Luc Dehaene. The executive role in the Convention was undertaken by the Praesidium.[45] It began work in 2002, making extensive use of Working Groups for consideration of particular topics.[46] The end result in 2003 was a proposal for a Constitutional Treaty, but it is important to understand that this was not pre-ordained. The possibility of a constitutional text was mentioned only at the end of the Laeken Declaration, in the context of Treaty simplification, and the language was cautious. Many Member States felt that the Convention might just be a talking shop, which produced recommendations.[47] It was therefore something of a surprise when Giscard D'Estaing, in the Convention opening ceremony, announced that he sought consensus on a Constitutional Treaty for Europe. The Convention, once established, developed its own institutional vision. The idea took hold that the Convention should produce a coherent document in the form of a

[44] http://european-convention.eu.int

[45] It was composed of the Convention Chairman and Vice-Chairmen, and nine other members.

[46] Working groups were established on: subsidiarity, Charter of Rights, legal personality, national parliaments, competence, economic governance, external action, defence, Treaty simplification, freedom, security and justice, and social Europe. The decision to create the first six groups was taken in May 2002; the remaining five groups were created later in Autumn 2002.

[47] P Norman, 'From the Convention to the IGC (Institutions)' (Federal Trust, September 2003) 2.

Constitutional Treaty. The Draft Treaty Establishing a Constitution for Europe[48] was duly agreed by the Convention in June 2003 and submitted to the European Council in July.[49]

The Member States in the European Council were however divided on certain issues and agreement on the Constitutional Treaty was only secured at the European Council meeting in June 2004.[50] It was still necessary for the Constitutional Treaty[51] to be ratified in accord with the constitutional requirements of each Member State. Fifteen Member States ratified the Treaty, but progress with ratification came to an abrupt halt when France and the Netherlands rejected the Constitutional Treaty in their referenda.[52] A number of Member States therefore postponed their ratification process. The European Council in 2005 decided it was best for there to be a time for 'reflection'. The Constitutional Treaty never 'recovered' from the negative votes in France and the Netherlands, and did not become law. However, the Lisbon Treaty, which was ratified in 2009,, drew very heavily on the Constitutional Treaty and the great majority of the major changes in the Lisbon Treaty were taken over from the Constitutional Treaty without further debate.

[48] The Constitutional Treaty was divided into four parts: Part I dealt with the basic objectives and values of the EU, fundamental rights, competences, forms of law-making, institutional division of power, and the like; Part II contained the Charter of Rights, which had been made binding by Part I; Part III concerned the policies and functions of the EU; and Part IV contained the final provisions.

[49] CONV 850/03, Draft Treaty establishing a Constitution for Europe, Brussels 18 July 2003.

[50] Brussels European Council, 17-18 June 2004, [4]-[5].

[51] Treaty Establishing a Constitution for Europe [2004] OJ C316/1.

[52] R Dehousse, 'The Unmaking of a Constitution: Lessons from the European Referenda' (2006) 13 Constellations 151.

6.3. Lisbon Treaty

The failure of the Constitutional Treaty meant that the legal ordering of the EU continued to be based on the Rome Treaty as amended by later treaties, including the Nice Treaty. This Treaty architecture had to regulate an EU of 25 Member States, the result of the 2004 enlargement that brought ten further states into the EU: the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia, and Slovakia. Bulgaria and Romania joined the EU in 2007, and Croatia acceded in 2013 making 28 states.

Case study 2.1: Negotiation of the Lisbon Treaty

The preceding discussion revealed the delicate negotiations that often accompany Treaty reform. This was, not surprisingly, evident also in relation to the Lisbon Treaty, more especially so given the negative reaction to the Constitutional Treaty, which generated academic debate as to what should happen to the 'constitutional' project.[53] The decision that there should be a 'period of reflection' after the negative results in the French and Netherlands referenda was sensible, given the justified concern that more states might vote against the Constitutional Treaty. The calm phrase 'period of reflection' nonetheless concealed a far more troubled perspective in the EU institutions, which were at the time unsure whether any of the content of the Constitutional Treaty could be salvaged. The

[53] G de Burca, 'The European Constitution Project after the Referenda' (2006) 13 Constellations 205; A Duff, 'Plan B: How to Rescue the European Constitution', Notre Europe, Studies and Research No 52, 2006; J Ziller, 'Une constitution courte et obscure ou claire et détaillée? Perspectives pour la simplification des traites et la rationalisation de l'ordre juridique de l'union européenne', EUI Working Papers, Law 2006/31.

Member States were not, however, willing to allow the work that had been put into the Constitutional Treaty to be lost. To this end, the European Council in 2006 commissioned Germany, which held the Presidency of the European Council in the first half of 2007, to report on the prospects for Treaty reform. The choice of Germany was not simply fortuitous, since it was felt that if matters could be moved forward, it would have the organizational capacity and power to do so. In the first half of 2007 Germany engaged in a series of bilateral discussions with other Member States, in order to determine whether an agreement could be brokered that would lead to some revised Treaty reform. Germany's Presidency of the European Council culminated with the June 2007 European Council,[54] which considered a detailed mandate of the changes that should be made to the Constitutional Treaty, in order that a revised Treaty could successfully be concluded.

This led to the birth of the Reform Treaty. The European Council concluded that 'after two years of uncertainty over the Union's treaty reform process, the time has come to resolve the issue and for the Union to move on'.[55] It was agreed to convene an intergovernmental conference,[56] which was to carry out its work in accord with the detailed mandate provided in Annex I of the conclusions of the European Council, and finish its deliberations by the end of 2007.[57] The Reform Treaty was to contain two principal clauses, which amended respectively the TEU, and the EC Treaty, the latter of which would be renamed the Treaty on the Functioning of the European Union, TFEU. The Union should have a single legal personality and the word 'Community' throughout would be replaced by the word 'Union'.[58] There was a

[54] Brussels European Council, 21-22 June 2007.

[55] Ibid [8].

[56] Ibid [10].

[57] Ibid [11].

[58] Ibid Annex I, [2].

conscious decision to excise mention of the word 'constitution' from the Reform Treaty. The principal objective was to conclude this Treaty reform, and given that the constitutional terminology of the Constitutional Treaty was problematic for some Member States it was dropped. This was also the rationale for other terminological changes where the wording in the Constitutional Treaty was felt, whether correctly or not, [59] to connote the idea of the EU as a state entity. Thus the title 'Union Minister for Foreign Affairs' was replaced by High Representative of the Union for Foreign Affairs and Security Policy; the terms 'law' and 'framework law' were abandoned; there was no flag, anthem, or motto; and the clause in the Constitutional Treaty concerning the primacy of EU law was replaced by a declaration.

Portugal held the Presidency of the European Council in the second half of 2007 and was keen that Treaty reform should be concluded during its Presidency so that the new Treaty could bear its name. Developments in the second half of 2007 were rapid. There was scant time for any detailed discussion or input into the draft Treaty that emerged from the IGC. What became the Lisbon Treaty was forged hurriedly by the Member States and Community institutions, since they were keen to conclude a process that had started shortly after the beginning of the new millennium. The desire to conclude the Lisbon Treaty expeditiously was moreover explicable, since it was the same in most important respects as the Constitutional Treaty. The issues had been debated in detail in the Convention on the Future of Europe after a relatively open discourse, and were considered once again in the IGC in 2004. There was therefore little appetite for those engaged in the 2007 IGC to re-open Pandora's Box,[60] even if this could not be admitted too explicitly since they would be open to

[59] S Griller, 'Is this a Constitution? Remarks on a Contested Concept', in S Griller and J Ziller (eds), *The Lisbon Treaty, EU Constitutionalism without a Constitutional Treaty?* (Springer, 2008) 21-56.

[60] G Tsebelis, 'Thinking about the Recent Past and Future of the EU' (2008) 46 JCMS 265.

the criticism that they were largely re-packaging provisions that had been rejected by voters in two prominent Member States although it should also be noted that the negative votes in the French and Dutch referenda had relatively little to do with anything new in the Constitutional Treaty.[61]

The 2007 IGC produced a document that was signed by the Member States on 13 December 2007,[62] and the title was changed from the Reform Treaty to the Lisbon Treaty in recognition of the place of signature. The finishing post was in sight, but the Treaty required ratification by each Member State, and Ireland rejected it in a referendum. This obstacle was overcome by a second Irish referendum in October 2009, after concessions were made to Ireland. The final hurdle was the unwillingness of the Czech President to ratify the Lisbon Treaty, but he did so reluctantly after a constitutional challenge to the Treaty had been rejected by the Czech Constitutional Court, and after other Member States agreed to add at a later date a Protocol to the Treaties relating to the Czech Republic and the Charter of Rights (see chapter 9). The Lisbon Treaty entered into force on 1 December 2009.

6.3.1. Form

[61] See in general, R. Dehousse, 'The Unmaking of a Constitution: Lessons from the European Referenda' (2006) 13 Constellations 151.

[62] Conference of the Representatives of the Governments of the Member States, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, CIG 14/07, Brussels 3 December 2007, [2007] OJ C306/1.

The Lisbon Treaty amends the Treaty on European Union and the Treaty Establishing the European Community.[63] The Lisbon Treaty has 7 Articles, of which Articles 1 and 2 are the most important, plus numerous Protocols and Declarations. Article 1 amended the Treaty on European Union, TEU, and contained some principles that govern the EU, as well as revised provisions concerning the Common Foreign and Security Policy and enhanced cooperation. Article 2 amended the EC Treaty, which was renamed the Treaty on the Functioning of the European Union. The EU is henceforth to be founded on the TEU and the TFEU, and the two Treaties have the same legal value.[64] The Union replaces and succeeds the EC.[65] A consolidated version of the Lisbon Treaty contains the new numbering and references to the old provisions where appropriate.[66]

6.3.2. Substance

Part I of the Constitutional Treaty contained the principles of a constitutional nature that governed the EU. The Lisbon Treaty is less clear in this respect, although the revised TEU has some constitutional principles for the EU. This is especially true in relation to Title I-Common Provisions, Title II-Democratic Principles, and Title III-Provisions on the Institutions. There are nonetheless matters not included within the revised TEU, which had properly been in Part I of the Constitutional Treaty. Thus, for example, the main rules

[63] J-C Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge University Press, 2010); P Craig, *The Lisbon Treaty, Law, Politics and Treaty Reform* (Oxford University Press, 2010)

[64] Art 1 para 3 TEU.

[65] Art 1 para 3 TEU.

[66] Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2008] OJ C115/1, [2010] OJ C83/1.

concerning competence are in the TFEU,[67] as are the provisions concerning the hierarchy of norms,[68] and those relating to budgetary planning.[69]

The Lisbon Treaty did, however, improve the architecture of the TFEU. The latter Treaty is divided into Seven Parts. Part One, entitled Principles, contains two Titles, the first of which deals with Categories of Competence, the second of which covers Provisions having General Application. Part Two deals with Discrimination and Citizenship of the Union. Part Three, which covers Policies and Internal Actions of the Union, is the largest Part of the TFEU with twenty four Titles.[70] The provisions on Police and Judicial Cooperation in Criminal Matters, the Third Pillar of the old TEU, have been moved into the new TFEU.[71] Part Four of the TFEU covers Association of Overseas Countries and Territories. Part Five deals with EU External Action, bringing together subject matter with an external dimension. Part Six is concerned with Institutional and Budgetary Provisions, while Part Seven covers General and Final Provisions.

[67] Arts 2-6 TFEU. See further chapter 5.

[68] Arts 288-292 TFEU. See further chapter 5.

[69] Art 312 TFEU.

[70] I-Internal Market; II-Free Movement of Goods; III-Agriculture and Fisheries; IV-Free Movement of Persons, Services, and Capital; Title V-Area of Freedom, Security, and Justice; VI-Transport; VII-Common Rules on Competition, Taxation, and Approximation of Laws; VIII-Economic and Monetary Policy; IX-Employment; X-Social Policy; XI-The European Social Fund; XII-Education, Vocational Training, Youth, and Sport; XIII-Culture; XIV-Public Health; XV-Consumer Protection; XVI-Trans-European Networks; XVII-Industry; XVIII-Economic, Social and Territorial Cohesion; XIX-Research and Technological Development and Space; XX-Environment; XXI-Energy; XXII-Tourism; XXIII-Civil Protection; XXIV-Administrative Cooperation.

[71] Part Three, Title V TFEU. See chapter 25.

The Lisbon Treaty is not built on the Pillar system, and in this sense the Treaty architecture that had prevailed since the Maastricht Treaty has now gone. There are nonetheless distinctive rules relating to the Common Foreign and Security Policy, CFSP, which means that in reality there is still something akin to a separate 'Pillar' for such matters. The approach to the CFSP in the Lisbon Treaty largely replicates that in the Constitutional Treaty, subject to the change of nomenclature, from 'Union Minister for Foreign Affairs' to 'High Representative of the Union for Foreign Affairs and Security Policy'. Executive authority continues to reside principally with the European Council and the Council.[72] The ECJ continues to be largely excluded from the CFSP.[73]

7. Impact of the financial crisis

The Member States and EU institutional players that had finally secured the passage and ratification of the Lisbon Treaty hoped for a period of relative calm in which the new Treaty arrangements could bed down. This was not to be. The successful conclusion of the Lisbon Treaty overlapped with the beginnings of the financial crisis and related crisis with the Euro that have had a profound political, economic, and social impact on the EU.[74]

[72] Arts 22, 24 TEU. On the CFSP, see further chapter 24.

[73] Art 24 TEU, Art 275 TFEU. It does however have jurisdiction in relation to Art 40 TEU, which is designed to ensure that exercise of CFSP powers do not impinge on the general competences of the EU, and vice versa; the ECJ also has jurisdiction under Art 275 TFEU to review the legality of decisions imposing restrictive measures on natural or legal persons adopted by the Council under Chapter 2 of Title V TEU.

[74] M Adams, F Fabbrini, and P Larouche (eds), *The Constitutionalization of European Budgetary Constraints* (Hart, 2014).

The reasons for the crisis are complex and cannot be examined in detail here (see instead chapter 19), but some idea of the causes is nonetheless important.[75] The Maastricht Treaty introduced, as we have seen, the legal framework for economic and monetary union. The latter connotes the idea of a single currency overseen by a European Central Bank. The former captures the idea of control over national fiscal and budgetary policy, with the basic aim of ensuring that a Member State does not spend more than it earns. The rationale for these controls was that the stability of the Euro could be undermined if the economies of the Member States that subscribed to the currency were perceived to be weak, and the financial markets might reach this conclusion if some Member States persistently spent more than they earned. The problem was that the two parts of the Maastricht settlement were out of sync.[76] EU control over national budgetary policy was relatively weak, and thus it was unable to exert the requisite control over national economic policy.

The specific problem for the EU began in earnest with the fact that Greece's credit rating to repay its debt was down-graded. This then led to problems for the Euro, and to concerns about the budgetary health of some other countries that used the currency. The impact of these developments was downward pressure on the Euro, which was only alleviated when Euro countries provided a support package for Greece that satisfied the financial markets. The sovereign debt crisis was overlaid by, and interacted with, the banking crisis that affected some lending institutions that were heavily committed to economic sectors, such as housing,

[75] http://ec.europa.eu/economy_finance/focuson/crisis/2010-04_en.htm ; H James, H-W Micklitz; H Schweitzer, 'The Impact of the Financial Crisis on the European Economic Constitution', EUI Law Working Paper, 2010/05.

[76] J-V Louis, 'Guest Editorial: The No-Bailout Clause and Rescue Packages' (2010) 47 CMLRev 971.

which were hit badly by the downturn in the economic markets.[77] The net effect was that a number of countries, in particular Greece, Ireland, and Portugal, have required very large amounts of assistance provided from funds financed by other Member States. Italy and Spain have also been on the 'danger list'. The assistance has been subject to 'strict conditionality', which means that the funding to the recipient states is contingent on their introducing far-reaching economic and social reforms, thereby increasing unemployment at a time when the general economic outlook has been bleak.

The economic and financial crisis has had profound effects on the EU, including its constitutional architecture.[78] Nor is the problem likely to go way in the short term. It has generated a complex array of political responses, some of which have been designed to provide assistance to ailing states, others of which have increased oversight of national economic policy. The measures have assumed varying legal forms, ranging from the enactment of ordinary EU legislation, albeit in an accelerated manner as warranted by the nature of the crisis, to intergovernmental agreements made outside the formal confines of the constituent Treaties. The constitutional implications of these developments continue to unfold, with profound consequences for the legal, economic, and political dimensions of the EU, and indeed for the balance between the 'economic' and the 'social', a theme that has run through the development of the EEC from its very inception. The social dimension of EU policy has been markedly affected by austerity policies at both EU and national level. The EU

[77] M Maduro, 'A New Governance for the European Union and the Euro: Democracy and Justice', European Parliament, Directorate-General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, PE 462.484, 2012.

[78] P Craig, 'Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications', in Adams, Fabbrini and Larouche (n 74) Ch 2.

may weather this particular storm, but the nature of the polity that emerges thereafter remains to be seen.

8. Theories of Integration

The discussion in this chapter has shown the way in which the EEC has changed since its inception. There is, however, a related but distinct issue, which is the rationale for this integration. The original EEC Treaty has been amended on many occasions and the subject matter over which the EU has competence has expanded very considerably. It is therefore important to consider the rationale for this. There is a wealth of literature, principally from political science, and there is not surprisingly debate as to the causes of integration (see also chapter 11).

8.1. Neofunctionalism

Neofunctionalism was the early ideology of Community integration.[79] The central tenet of neofunctionalism was the concept of 'spillover'. Functional spillover was based on the interconnectedness of the economy. Integration in one sphere created pressure for integration in other areas. Thus, for example, removal of formal tariff barriers would generate a need to deal with non-tariff barriers, which could equally inhibit realization of a single market. The

[79] E Haas, *The Uniting of Europe: Political, Social and Economic Forces 1950-1957* (Stanford University Press, 1958); L Lindberg, *The Political Dynamics of European Economic Integration* (Stanford University Press, 1963); L Lindberg and S Scheingold, *Europe's Would-Be Polity: Patterns of Change in the European Community* (Prentice-Hall, 1970); L Lindberg and S Scheingold, *Regional Integration* (Harvard University Press, 1970).

desire for a level playing field between the states would then lead to other matters being decided at Community level, in order to prevent states from giving advantages to their own industries. Political spillover was equally important and involved the build-up of political pressure in favour of further integration. In integrated areas interest groups would be expected to concentrate their attention on the Community, and apply pressure on those with regulatory power. Such groups would also become mindful of remaining barriers to interstate trade, which prevented them from reaping the rewards of existing integration, thereby adding to the pressure for further integration. The Commission was to be a major player in this political spillover, since it would encourage the beliefs of the state players. Neofunctionalism was to be the vehicle through which Community integration, conceived of as technocratic, elite-led gradualism, was to be realised. The idea of spillover reinforced the view that gradualism was a meaningful strategy for integration. Legitimacy was conceived of in terms of outcomes, increased prosperity, which was to be secured through technocracy, even if this meant a marginal role for elected bodies.[80]

Neofunctionalism was however challenged empirically and theoretically. The empirical challenge was based on its failure to explain the reality of the Community's development. The 1965 Luxembourg crisis had a profound impact, since Member State interests re-emerged with a vengeance. The resulting de facto unanimity principle signalled that Member States were not willing to allow Community development inconsistent with their vital interests. Decision-making for many years thereafter was conducted in the shadow of the veto. The Commission's role changed from emerging government for the Community to a

[80] Lindberg and Scheingold (n 79) 268-269.

more cautious bureaucracy.[81] Moreover, evidence of interest group pressure for greater integration was found to be equivocal.[82]

The theoretical challenge to neofunctionalism was based on the fact that its failure to accord with political reality led to theoretical modification that rendered it increasingly indeterminate,[83] and on neofunctionalism's failure to relate to general themes within international relations, which sought to explain why states engaged in international co-operation. It would nonetheless be wrong to conclude that neofunctionalism has no explanatory value for EU integration, and it is arguable that functional spillover created impetus for further integration.[84]

8.2. Liberal Intergovernmentalism

An alternative theory of integration is known as liberal intergovernmentalism, championed by Moravcsik.[85] His thesis is rooted in a branch of international relations theory. The central

[81] K Neunreither, 'Transformation of a Political Role: The Case of the Commission of the European Communities' (1971-72) 10 JCMS 233.

[82] S George, *Politics and Policy in the European Union* (Oxford University Press, 3rd ed, 1996) 41-43.

[83] A Moravcsik, 'Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach' (1993) 31 JCMS 473, 476.

[84] George (n 82) 40-41.

[85] A Moravcsik, 'Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach' (1993) 31 JCMS 473; A Moravcsik, *National Preference Formation and Interstate Bargaining in the European Community, 1955-86* (Harvard University Press, 1992); A Moravcsik, 'Negotiating the Single European Act: National Interests and Conventional Statecraft in the European Community' (1991) 45 International Organization 19.

thesis is that states are the driving forces behind integration, that supranational actors are there largely at their behest and that such actors as such have little independent impact on the pace of integration.

The demand for integration is said to depend on national preferences, which are aggregated through their political institutions.[86] The increase in cross border flows of goods and services create what are termed 'international policy externalities' among nations, which can have negative side effects on other states, thereby creating an incentive for policy co-ordination. The supply of integration is said to be a function of interstate bargaining and strategic interaction. Domestic preferences define 'a "bargaining space" of potentially viable agreements, each of which generates gains for one or more participants'.[87] Governments choose one such agreement, normally through negotiation. Integration is pursued through a supranational institution because it is felt to be more efficient. Constructing individual *ad hoc* bargains between states can be costly.[88] This problem is obviated by a supranational structure such as the EU. The same basic driving force of efficiency is said to explain the decision-making procedures in the EU. Thus Member States carry out a cost-benefit calculation, with the decision to delegate or pool sovereignty signalling the willingness of national governments to accept an increased risk of being outvoted or overruled on any individual issue in exchange for more efficient collective decision-making.[89]

[86] Moravcsik, 'Preferences and Power' (n 85) 481.

[87] Ibid 497.

[88] J Buchanan and G Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (University of Michigan Press, 1962).

[89] Moravcsik, 'Preferences and Power' (n 85) 509-510.

8.3. Multi-level governance

Liberal intergovernmentalism was predicated on the assumption that supranational institutions enabled national governments to attain policy goals that could not be obtained by independent action.[90] This state-centric view was challenged by those who saw the EU in terms of multi-level governance.

Thus Marks, Hooghe, and Blank argued that integration was a process in which authority and policy-making were shared across multiple levels of government – subnational, national and supranational.[91] National governments were major players, but did not have a monopoly of control. Supranational institutions, including the Commission, the EP, and the ECJ, had influence in policy-making and could not merely be regarded as agents of national governments.[92] When competence over a certain subject matter has been transferred to the EU, proponents of multi-level governance contend that there are real limits to the degree of individual and collective state control over EU decisions.[93] Thus while Member States may play the decisive role in the Treaty making process, they do not exert a monopoly of influence, and the day to day control exercised by the states collectively is less than that

[90] A Milward, *The European Rescue of the Nation State* (University of California Press, 1992); A Milward and V Sorensen, 'Independence or Integration? A National Choice' in A Milward, R Ranieri, F Romero and V Sorensen (eds), *The Frontier of National Sovereignty: History and Theory, 1945-1992* (Routledge, 1993); P Taylor, 'The European Community and the State: Assumptions, Theories and Propositions' (1991) 17 Review of International Studies 109.

[91] G Marks, L Hooghe, and K Blank, 'European Integration from the 1980s: State-Centric v. Multiple-Level Governance' (1996) 34 JCMS 341, 342.

[92] Ibid 346.

[93] Ibid 350-351.

postulated by state-centric theorists. The ability of the 'principals', the Member States, to control the 'agents', the Commission and the ECJ, is limited by a range of factors, including, the 'multiplicity of principals, the mistrust that exists among them, impediments to coherent principal action, informational asymmetries between principals and agents and by the unintended consequences of institutional change'.[94]

8.4. Rational choice institutionalism

Rational choice institutionalism is a derivative of rational choice theory. The latter is premised on methodological individualism, whereby individuals have preferences, and choose the course of action that is the optimal method of securing them.[95] Rational choice institutionalists were critical of liberal intergovernmentalism because of the minimal role that the latter accorded to EU institutions,[96] although the gap between the two theories became narrower in the late 1990s.[97]

Proponents of rational choice institutionalism acknowledged that institutions were important. Institutions constituted the rules of the game thereby enhancing equilibrium, and they exemplified principal/agent analysis. Member State 'principals' delegated to supranational

[94] Ibid 353-354.

[95] J Jupille, J Caporaso and J Checkel, 'Integrating Institutions: Rationalism, Constructivism, and the Study of the European Union' (2003) 36 Comparative Political Studies 7.

[96] M Pollack, 'International Relations Theory and European Integration' EUI Working Papers, RSC 2000/55.

[97] This was primarily because Moravcsik modified his theory to acknowledge that supranational institutions might have greater powers over agenda setting and the making of EU law outside of major Treaty negotiations than he had posited in his earlier work, A Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Cornell University Press, 1998) 8.

'agents' to enhance the credibility of their commitments, and to deal with incomplete contracting, since Treaty provisions are often open to a spectrum of possible interpretations. Principal/agent literature focused on the controls that the principal might use to ensure that the agent did not deviate from the desired goals of the principal.[98]

8.5. Constructivism

Constructivists agree with rational choice institutionalists that institutions matter. They nonetheless dispute the foundations of much rational choice literature, more especially methodological individualism and the idea that individual or state preferences are 'given'.. Constructivists contend that the relevant environment in which preferences are formed is inescapably social.[99] This inevitably impacts on, and thus constitutes, a person's understandings of their own interests. Institutions will embody social norms and will affect a person's interests and identity.

Thus whereas rational choice institutionalism regards institutions as rules of the game that provide incentives within which players pursue their given preferences, constructivists regard institutions more broadly to include 'informal rules and intersubjective understandings as well as formal rules, and posit a more important and fundamental role for institutions, which

[98] M Pollack, *The Engines of European Integration: Delegation, Agency and Agenda Setting in the EU* (Oxford University Press, 2003); Pollack (n 96).

[99] T Risse, 'Exploring the Nature of the Beast: International Relations Theory and Comparative Policy Analysis Meet the European Union' (1996) 34 JCMS 53; J Checkel, 'The Constructivist Turn in International Relations Theory' (1998) 50 World Politics 324; T Christiansen, K Jorgensen, and A Wiener, 'The Social Construction of Europe' (1999) 6 JEPP 528.

constitute actors and shape not simply their incentives but their preferences and identities as well'.[100]

There have been attempts to soften the divide between rational choice institutionalism and constructivism.[101] Thus, for example, many rational choice theorists accept that preferences may well be altruistic as opposed to egoistic, and that preferences may be constrained by social structure. There have moreover been moves to test the relative cogency of the two approaches through carefully crafted case studies.[102]

9. Conclusion

There will be no attempt to summarize the preceding analysis by way of conclusion. Two more general points should be borne in mind when reflecting on this material when reading later chapters in this book.

First, there have always been debates, both political and academic, as to why the EU has the array of powers that it currently possesses. This has been a theme in the contending theories of integration, and it has surfaced repeatedly in claims and counter-claims as to the relative degree of influence of the ECJ in furthering the integration process. A simple fact should nonetheless be borne in mind when thinking about this issue. It was the Member States acting by unanimity through a series of Treaty amendments spanning thirty years that decided to

[100] Pollack (n 96) 14-15.

[101] J Checkel, 'Bridging the Rational-Choice/Constructivist Gap? Theorizing Social Interaction in European Institutions' University of Oslo, ARENA Working Papers 00/11.

[102] See, e.g., the essays in (2003) 36 Comparative Political Studies.

accord new heads of power to the EU. This should be borne firmly in mind when claims are made that the current disposition of power is the result of some 'smash and grab' operation by EU institutions.

Secondly, the balance between the 'economic' and the 'social' dimension of the EU has always been contentious. The successive Treaty amendments accorded the EU power over a broad array of subject matter, economic, social, and political in nature. While the EEC began with primarily economic aims, the establishment of a common market, the founding Member States were always alive to the interconnection between the economic, social and political facets of society. They did not imagine that the economic dimension could be hermetically sealed, and this was symbolically reflected in the shift of nomenclature from EEC to EC. It also serves to explain the grant of social power to the EU, this being justified in part in order to prevent the balance between the economic and the social within the EU being tilted too greatly in favour of the former. A danger of the financial crisis is however that the social dimension will be side-lined as a result of the prominence given to resolution of economic problems.

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