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The New EU System

The Evolution of the Union's Institutional Architecture

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About this Document: Readers' Guide - Fascination and Frustration

The study of the EU system is subject of a high level of fascination, but might also lead to deep frustration. There is some kind of academic joy to observe a new polity in the making. There is however also a high degree of uncertainty. We face serious challenges to observe, explain and evaluate this sui generis set-up. There still is no agreement in literature in the fields of law and political science on the nature and major features of the European Union (EU). It is obviously more than an 'ordinary' international organisation, but it is also not a conventional nation state. Different forms of 'governance' apply in the EU which are extremely hard to capture. Despite many political and academic controversies surrounding the EU and its institutional architecture one critical insight remains commonplace: This strange construction is increasingly relevant for European governments and Union citizens alike as well as for the partners in the international system.

This teaching companion's principle aim is to provide a general overview of the 'milestones' of European integration as well as to analyse and assess the functioning of the EU institutions. It tries to deal with developments of the new EU System after the Lisbon Treaty on the European Union (TEU) and Treaty on the Functioning of the European Union (TFEU) came into force in 2009, but also with EU institutions' reactions to the economic, financial and sovereign debt crisis since 2008 and the institutional effects after the EP election in 2014. To the fascinating and at the same time frustrating dimension belongs the dynamics of the EU construction: The EU system is a ‚moving target'. Thus we need to carefully observe the developments and the evolution of the EU policy.

A Note on the Editing of the Text

The text uses the spelling and expression as they are laid down in the Lisbon Treaty or in other official EU documents. The (Lisbon) Treaty on European Union' will be abbreviated to 'TEU'

and the 'Treaty on the Functioning of the European Union' as 'TFEU'. The text also follows the gender-neutral wording of the Treaty texts.

Articles of treaties before the Lisbon Treaty are identified with the name of that treaty, e.g. Art. 48 (Nice).

Quotes from German and French sources have been translated by the author, unless the respective text was available in English.

This book addresses several target groups:

- Early stage students;
- Advanced students who want to revisit and refresh their knowledge in view of recent developments;
- Experts/Practitioners who want to learn more about institutions and procedures outside their daily experiences.

Our Approach: The TEDO-Scheme

The TEDO–Scheme (see Table 1) provides a help to observe and analyse the major EU institutions in an overview from a comparative perspective.

Table 1: The TEDO-Scheme for each institution

Tasks**:**	The written / legal tasks as laid down in the treaties and real world functions as observed in the living architecture.
Election:	Conditions and provisions for the election or appointment of office holders as well as the composition of the institution.
Decision-making:	The legal rules and real patterns for internal decision-making procedures.
Organisation:	The structure, working methods and internal organization.

Of course, such a scheme of enumerating tasks, election/composition, decision making and internal organization of each institution is only a first step. In order to deepen the knowledge

on various aspects of the EU political system, further references to the academic literature are provided. Additionally, self-test questions enable the reader to check his/her knowledge at the end of each chapter.

Part I. The EU System: Many Faces - Multiple Perspectives

1. Framing and Re-Constituting European Identity

1.1 La Longue Durée

For many actors, citizens and observers alike, the EU-system is more than a constitutional and institutional set-up dealing with current challenges. It is the incarnation of fundamental developments of European history. The founding generation of the Lisbon Treaty put their creation in such a long term perspective (see Document I.1.1).

Document I.1.1: Preamble of the TEU

Preamble

Drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law, […] *have decided* to establish a European Union […].

This perspective characterises the Union as representing a 'community of values' developed over centuries.

Document I.1.2: The 'Community of Values'

Article 2 TEU

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the member states in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Following such an understanding, representatives of applicant countries claimed to 'return to Europe' in the nineties. Beyond the daily conflicts we might find traces of 'l'europe profonde' (Braudel 1986) – of some kind of a European family.

'Mieux vaut se disputer autour d'une table que sur un champ de bataille.' (Jean Monnet, cited in Van Rompuy (2012a) ('Better fight around a table than on a battle-field.')

'Our continent, risen from the ashes after 1945 and united in 1989, has a great capacity to reinvent itself. It is to the next generations to take this common adventure further. I hope

they will seize this responsibility with pride. And that they will be able to say, as we here today: Ich bin ein Europäer. Je suis fier d'être européen. I am proud to be European.' (ibid.)

A sense for a historical identity is also constructed in the post-World War II history. Several of these so called '*lieu[x] de mémoire'* are present in the European discourse. Herman van Rompuy, the former President of the European Council has enumerated some of them in his acceptance speech for the Nobel Peace Prize on 10 December 2012:

'When Konrad Adenauer came to Paris to conclude the Coal and Steel Treaty, in 1951, one evening he found a gift waiting at his hotel. It was a war medal, une Croix de Guerre that had belonged to a French soldier. His daughter, a young student, had left it with a little note for the Chancellor, as a gesture of reconciliation and hope. I can see many other stirring images before me.

- Leaders of six states assembled to open a new future, in Rome, città eterna.
- Willy Brandt kneeling down in Warsaw.
- The dockers of Gdansk, at the gates of their shipyard.
- Mitterand and Kohl hand in hand.
- Two million people linking Tallinn to Riga to Vilnius in a human chain, in 1989.' (ibid.)

On the same occasion, the former President of the European Commission said:

'I remember vividly in 1974 being in the mass of people, descending the streets in my native Lisbon, in Portugal, celebrating the democratic revolution and freedom. This same feeling of joy was experienced by the same generation in Spain and Greece. It was felt later in Central and Eastern Europe and in the Baltic States when they regained their independence. Several generations of Europeans have shown again and again that their choice for Europe was also a choice for freedom.'(Barroso 2012)

In this view there is more than what is usually discussed about concrete institutions and their performance: From this perspective, the EU's system is based on a deep rooted sense of a common European identity building an imagined community (Anderson 1983).

1.2 La Moyenne Durée – Post WWII Lieu(x) de mémoire

We might also identify further *lieux de mémoire* which might construct an EU identity. My favourite *lieu de mémoire* is a picture taken in Berlin in March 2007 celebrating with 27 members one birthday of the Union, the signature of the Treaty of Rome of the then six founding members. This picture is also a document for the long-term perspective as it assembles the highest representatives of France, the Czech and the Polish Republic around the German Chancellor – i.e. the highest representatives of European countries who fought terrible wars over centuries.

2. Indicators of Relevance: A Second View

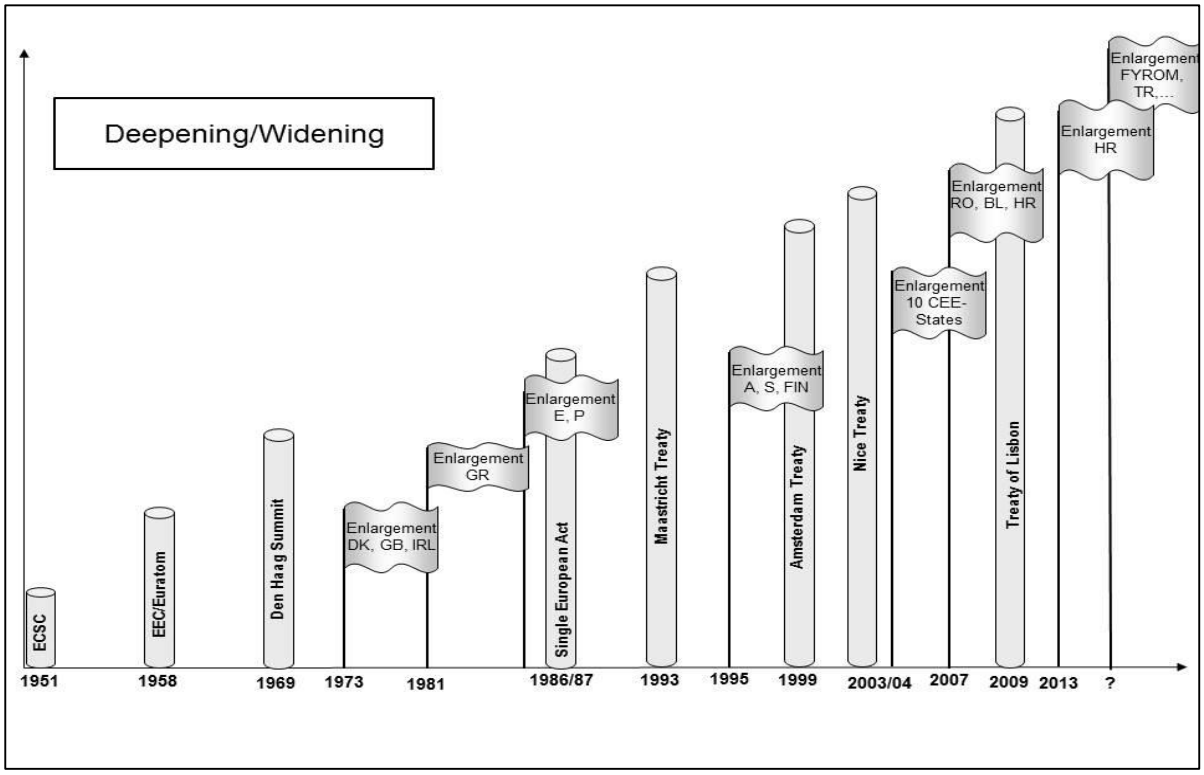
Document II.2.1:The Treaty on the European Union

Art.1 TEU

'This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.'

Major developments in the evolution of the EU system are quite often characterised by the process of 'deepening' and 'widening'. Figure I.2.1 provides a brief overview about this process. First, it documents eight major treaty revisions and secondly it shows seven rounds of accession. The number of member states has increased from six (1951) to 28 (2013). Furthermore, there are more countries potentially joining the EU in the near future. As of 2014, the EU leads accession negotiations with Iceland, Turkey, Montenegro and Serbia, as for the Balkan countries Albania, Bosnia and Herzegovina and the Kosovo, the European Council has offered them a membership perspective.

Figure I.2.1: Deepening and Widening of the EU System: Constitutional Milestones

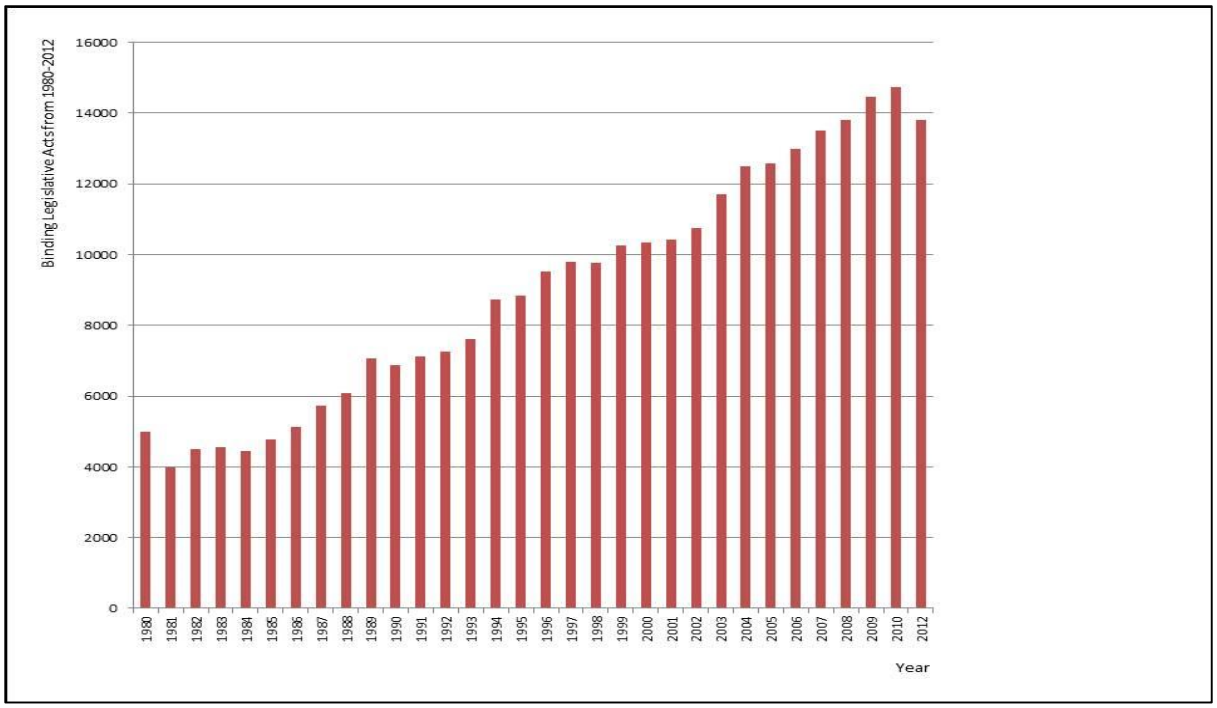


Source: see Readers' Guide.

During the history of the EU, its member states have regularly transferred competencies to the EU level in treaty revisions: agricultural, environmental, research, trade as well as economic

and monetary policy. But also foreign and security policy or home and justice affairs are – in varying decision-making procedures – dealt with by European institutions. As a result, the EU plays a decisive role in a significant number of policy areas, such as agriculture, energy, infrastructure, regional development, and many more. Figure I.2.2 illustrates the EU's increase of the stock of binding legislative acts.

Figure I.2.2: The Growing Acquis of binding legislative acts from 1980-2012



Source: see Readers' Guide. Based on: http://eur-lex.europa.eu/de/legis/latest/-index.htm (last accessed: 08.04.2013).

Looking at the list of competences, we find that the number of significant policy areas such as trade and monetary policy are exclusively dealt with by (supranational) European institutions while other policy areas are mainly dealt with at the national level (for example defence; see also Figure I.3.1). We also see an increasing number of policy areas shared between the member states and the EU.

European legislation regulates an increasing number of aspects in our daily lives, such as free movement of persons in the EU. Furthermore, national governments and parliaments, but also regions and municipalities are affected by European legislation and funding.

Also, the international role of the EU has become increasingly important: As a normative, trade and security power the EU influences neighbouring countries and other global actors in economic and political matters. There is a high degree of activities such as trade agreements,

military and civilian missions (e.g. ‘Atalanta’, an EU mission to fight Somalian pirates), declarations on international crises, common positions on climate conferences and a network of strategic partners.

From an economic perspective, the EU constitutes the largest market of the world with many opportunities which provide incentives to join the EU or to conclude comprehensive agreements with it.

3. Multiple Theoretical Perspectives

A number of approaches are used in academia to characterise and explain the complex EU system.

For the purpose pursued here, this teaching companion aims at exploring, explaining and evaluating the system by using several theoretical terms and key categories, which will be explained in the following subchapters:

- The pair '**supranational**' and '**intergovernmental**' is used to explain and characterise features and developments of the institutional framework. This dichotomy is a useful point of departure. Beyond the academic teaching this pair of categories is a major part of the political debates on the finality of the Union. As a third way, the '**fusion**'-thesis will be applied in order to offer an (alternative and) unconventional interpretation of recent developments in Europe.
- The **Principal-Agent approach** will be used to examine the relationships and division of tasks between various institutions, offices and the member states.
- For capturing the institutional configuration, there will be a comparison of '**legal**' wording in Treaty texts and '**real**' world functions, that is, if and in what way these Treaty texts are actually applied in practice. This terminology shall help to capture the written Treaty provisions as well as their actual use in the EU system. Comparing 'legal words' with the 'real world' is one major issue of our in-depth analysis.
- Legal provisions like real patterns will be analysed in a '**dynamic**' perspective, that is an analysis of the development of the EU's architecture over time. Consequently, the current legal and living architecture ('**static** view') of an institution will be complemented by its evolutionary development ('**dynamic** perspective'), so that the reader gets a better picture of the continuity and discontinuity in the EU's institutional architecture.
- For comparing procedures for taking binding decisions, I use the dichotomy between system-making and policy-making.

3.1 Institutions Matters

EU institutions are of key importance in order to understand the complex political system of the EU. In view of the broader definitions of institutions, I opt for a narrow focus on EU institutions as enumerated in Art.13 and 15 of the TEU. As a point of departure, we look at the institutional framework of the Union's architecture (see Figure I.3.1). For a closer analysis

we examine each institution with the TEDO scheme as enumerated in Art.13 TEU (see Document II.3.1).

Document II.3.1: The EU's Institutional Framework

Article 13 TEU

1. The Union shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the member states, and ensure the consistency, effectiveness and continuity of its policies and actions.

The Union's institutions shall be:

- the European Parliament,
- the European Council,
- the Council,
- the European Commission (hereinafter referred to as 'the Commission'),
- the Court of Justice of the European Union,
- the European Central Bank,
- the Court of Auditors.

2. Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation.

3. The provisions relating to the European Central Bank and the Court of Auditors and detailed provisions on the other institutions are set out in the Treaty on the Functioning of the European Union.

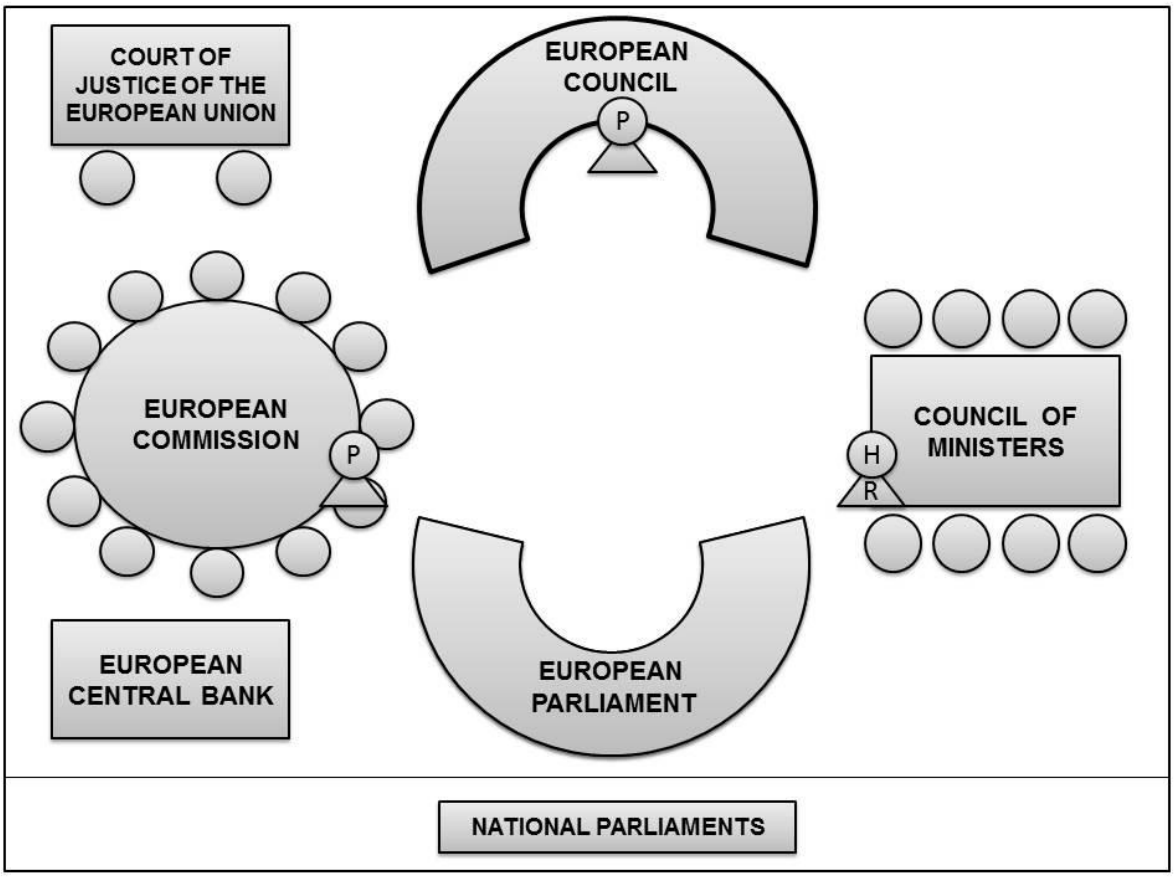
4. The European Parliament, the Council and the Commission shall be assisted by an Economic and Social Committee and a Committee of the Regions acting in an advisory capacity.

We will neither deal with the Court of Auditors, nor the Economic and Social Committee, nor the Committee of the Regions (as enumerated in Art.13(4)).

Because of their respective relevance, this teaching companion will also deal separately with the President of the European Council and the High Representative of the Union for Foreign

Affairs and Security Policy. Furthermore, this teaching companion also includes a chapter on national Parliaments.

Figure I.3.1: The European Union's Institutional Architecture

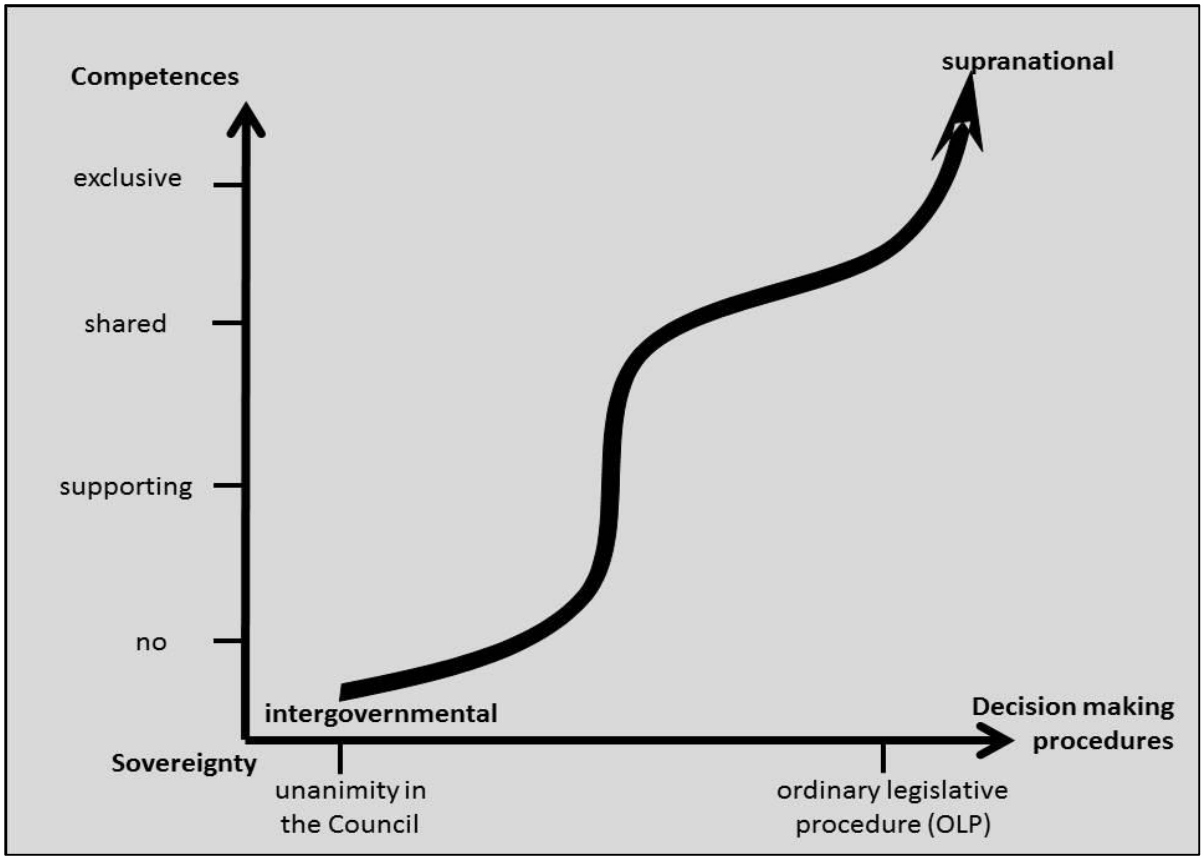


Source: see Readers' Guide. Wessels (2016)

3.2 The Dichotomy: Supranational and Intergovernmental

In view of the institutional architecture it is useful to describe the dichotomy of 'supranational' versus 'intergovernmental' on a vertical and a horizontal dimension (see Figure I.3.2).

Figure I.3.2: Vertical and Horizontal Dimension of the Supranational-Intergovernmental Dichotomy



Source: see Readers' Guide. Wessels (2016)

The term 'supranational' refers to a level of decision-making on policy competences that are allocated 'above' the sovereign state (vertical axis) and to a form of decision-making by institutions which are capable of acting beyond the veto power of national governments (horizontal axis). Supranationalism is therefore often described as a structural characterisation of the EU's institutional architecture, in which autonomous institutions such as the European Commission, the European Parliament, the Court of Justice of the EU or the European Central Bank play a key role in areas of exclusive or shared competences. A key characteristic of supranationalism is constituted by the fact that 'the law adopted by the Union […] has 'primacy' over the law of the law of member states' (Declaration 17 to the Lisbon Treaty).

Intergovernmentalism, in contrast, highlights the cooperation of governments without a transfer of competences (vertical axis of the figure) and without strong participation rights of EU institutions on (traditional) areas of national sovereignty (horizontal axis). In this category EU decision-making is dominated by the member states. Unanimity in the Council or the European Council protects the member states from losing influence and enables them to safeguard their national positions.

Applying such a dichotomy of ideal types to a real pattern is not always simple, but it remains nonetheless a useful tool to study the political system of the EU. Of course, there are also mixed or intermediate types of governance.

3.2.1 The Vertical Allocation of Competences: the Delimitation of Competences between the EU and the Member States

With the aim of distinguishing more clearly the corresponding powers of the member states and of the EU, the Treaty defines three major categories of EU competences (Piris 2010):

- Exclusive competences are defined by Art.2(1) TFEU):

Document I.3.2: The EU's Competences

Article 2(1) TFEU

1. When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the member states being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.

Examples for this kind of competence are the customs union, competition rules, monetary policy for the euro area, the common fisheries policy and the common commercial policy.

- Shared competences are defined by Art.2(2) TFEU):

Article 2(2) TFEU

2. When the Treaties confer on the Union a competence shared with the member states in a specific area, the Union and the member states may legislate and adopt legally binding acts in that area. The member states shall exercise their competence to the extent that the Union has not exercised its competence. The member states shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.

Shared competences can be found for example in the areas of the internal market, environment, energy, the area of freedom, security and justice and consumer protection.

- Supporting competences are defined by Art.2(5) TFEU:

Article 2(5) TFEU

5. In certain areas and under the conditions laid down in the Treaties, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the member states, without thereby superseding their competence in these areas. Legally binding acts of the Union adopted on the basis of the provisions of the Treaties relating to these areas shall not entail harmonisation of member states' laws or regulations.

The EU has supporting competences amongst others in the areas industry, culture, tourism, education and civil protection. In addition to shared and supporting competences, the Treaty enables the member state to coordinate economic, employment and social policies (see Art.2(3) TFEU and Art.5 TFEU).

Article 2(3) TFEU

3. The member states shall coordinate their economic and employment policies within arrangements as determined by the Treaties, which the Union shall have competence to provide.

Furthermore, Art.2(4) TFEU and Title V TEU confirm competences in the area of Common Foreign and Security Policy.

Article 2(4) TFEU

4. The Union shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy, including the progressive framing of a common defence policy.

The Lisbon Treaty also formulates the limits of the Union's competence as it is 'governed by the principle of conferral, subsidiarity and proportionality' (Art.5 TEU).

Document I.3.3: The Principle of Conferral

Article 5 TEU

1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.

2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the member states in the Treaties to attain the objectives

set out therein. Competences not conferred upon the Union in the Treaties remain with the member states.

Conferral means that the EU can only use those competences which member states have allocated to them. The German Constitutional Court ruled in its Lisbon Judgment that the EU does not possess the so-called 'Kompetenz-Kompetenz' (Bundesverfassungsgericht 2009) concluding that the EU institutions do not have the competence to decide on its own competence.

3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the member states, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

The principle of subsidiarity regulates the exercise of shared and supporting competences. It is based on the idea that decisions must be taken as closely as possible to the citizen: Thus the Union should not undertake actions (except on matters for which it has exclusive competences) unless EU action is more effective than action taken at national, regional or local level. In reality, a clear delimitation of competences is often difficult.

3.2.2 The Horizontal Dimension in the Balance of Power among Institutions

The horizontal dimension, on the other side, relates to the influence of member states in decision-making. The balance of power between institutions is a major issue of democracy and legitimacy.

The notion of institutional balance covers several aspects (Monar 2011, Jacqué and Simon 1988, Hoscheit and Wessels 2011, Bonvicini and Regelsberger 1988). From a legal point of view, it concerns a 'constitutional principle' (Jaqué 2004): The Court of Justice of the European Union is authorised to examine that 'each institution shall act within the limits of the powers conferred on it in the Treaties' (Art.13(2) TEU). The empowerment to pursue

institutional autonomy is balanced by the obligation that 'the institutions shall practice mutual sincere cooperation' (Art.13(2) TEU) (Jaqué 2010).

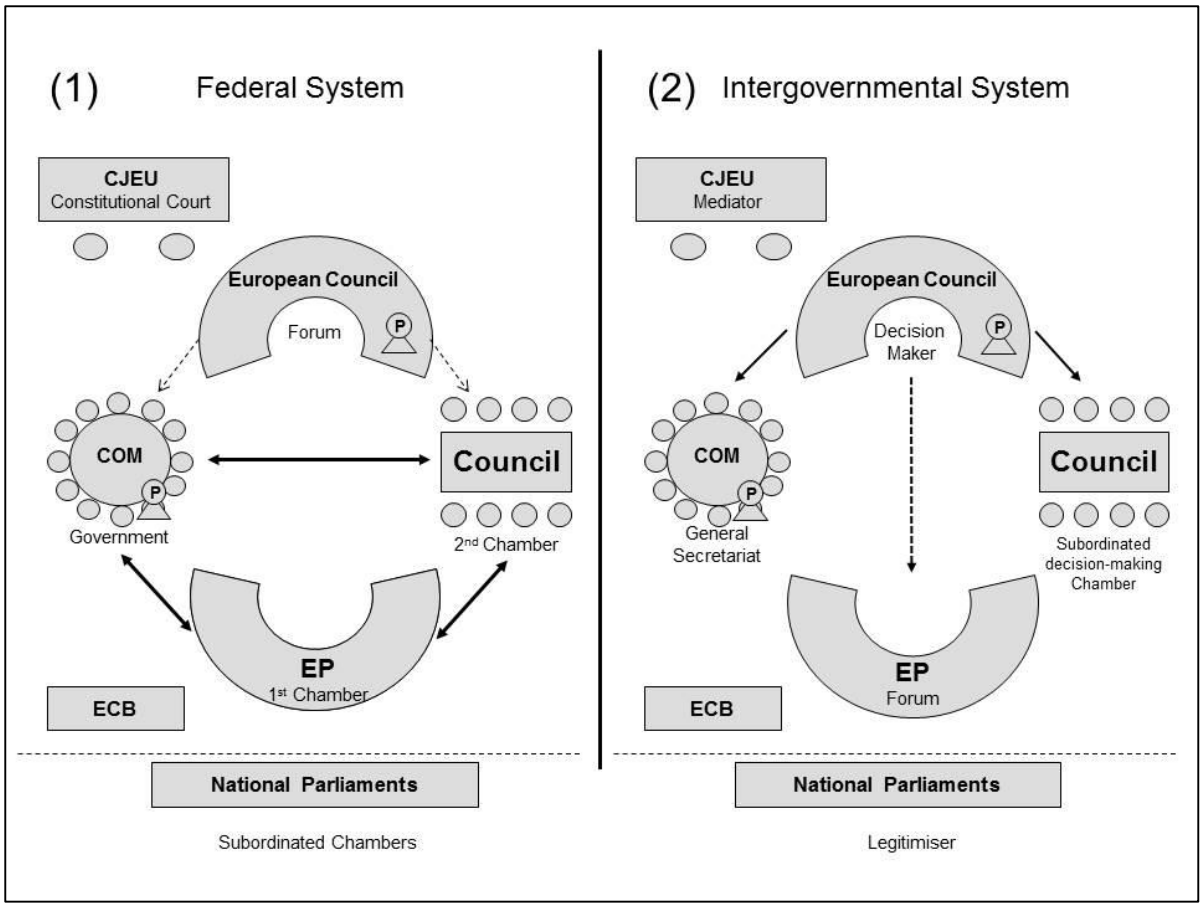
From an intergovernmental point of view, it is the European Council and the Council of Ministers that define the policy-making of the EU. The national governments remain the principal decision-makers. A key feature of an intergovernmental character is the right of each member state to veto a decision within the European Council or the Council. On the other end of the spectrum are procedures which empower European institutions besides the European Council and the Council to exercise the final say. A key provision is the 'ordinary legislative procedure' to which we will turn later on (see Chapter III.12.1).

In such a supranational perspective, the European Parliament (EP), the Commission and the Court of Justice of the European Union are the most important institutions since they can act relatively autonomous from the influence of member states. In addition, qualified majority voting (QMV) in the Council is seen as an instrument to limit the veto powers of the member states.

Traditional views of the Community orthodoxy have located an institutional balance between the Commission and the Council in the early phase of the EU and in the triangle between Commission, EP and Council since the Maastricht Treaty (see Figure II.3.3) (Kühnhardt 2010). Orthodox voices then assess the European Council as a disturbance of these Treaty constellations. Others stress the 'coexistence' of the Community method and the European Council (De Schoutheete 2012b).

In the disputes about the power relation between these institutions each revision of the EU's primary law and also the Lisbon Treaties have provoked an intensive debate on the question which of the EU's institutions can be regarded as the 'winner' or 'loser' of the revised institutional architecture (Monar 2011, Piris 2010, Hofmann and Wessels 2008, Christiansen 2012, Biondi et al. 2012). Thus, the European Council has always been a significant point of dispute, arguing for or against the potential strengthening of the intergovernmental direction of the EU system. Regarding the leading role of the European Council in facing the euro crisis and considering the role of its newly established permanent President, this debate has again taken momentum. The reaction to the monetary turbulences seems to reinforce the European Council as the intergovernmental incarnation of a 'Europe des patries' (De Gaulle 1970). For summing up we confront both perspectives in Figure I.3.3.

Figure I.3.3: Two Perspectives on the Institutional Architecture: Federal/Supranational (1) and Intergovernmental (2)



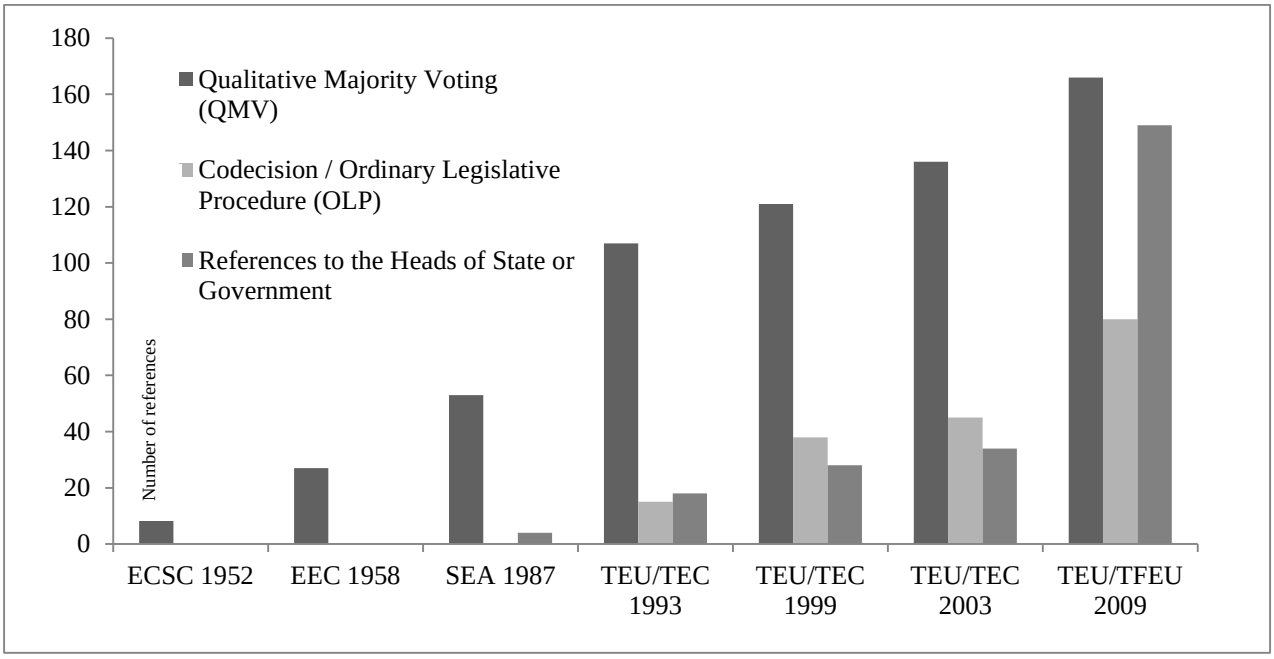
Source: see Readers' Guide. Wessels (2016)

Also, the controversy about the 'Union method' (Merkel 2010), put forward by the German Chancellor Merkel, with the European Council as an essential part of the Union's institutional architecture fuelled this controversy. According to Merkel, this method is based on "coordinated action in a spirit of solidarity – each of us in the area for which we are responsible but all working towards the same goal" (Merkel 2010).

By looking at the evolution of treaty provisions (see Figure I.3.4), we see that one persistent trend is the extension of the supranational Community method as indicated by the increase of treaty articles in which the 'ordinary legislative procedure' (the former co-decision) and thus the qualified majority voting in the Council can be applied. In this view, the EP is increasingly gaining powers. The extension of these procedures also confirms and extends the power of the Commission to pursue its monopoly of initiative (see below) and of the Court to 'review the legality of legislative acts' (Art.263 TFEU). These modes of governance reduce the power of national governments. But in the Treaty provisions, the Heads of State or Government have also increased the weight of their own institution: National leaders incorporated the European

Council in an increasing number of Treaty articles (see also Figure I.3.4); they also empowered their institution to take binding decisions (Piris 2010). This assessment leads us to the fusion approach.

Figure I.3.4: Trends in the Union's Procedural Provisions

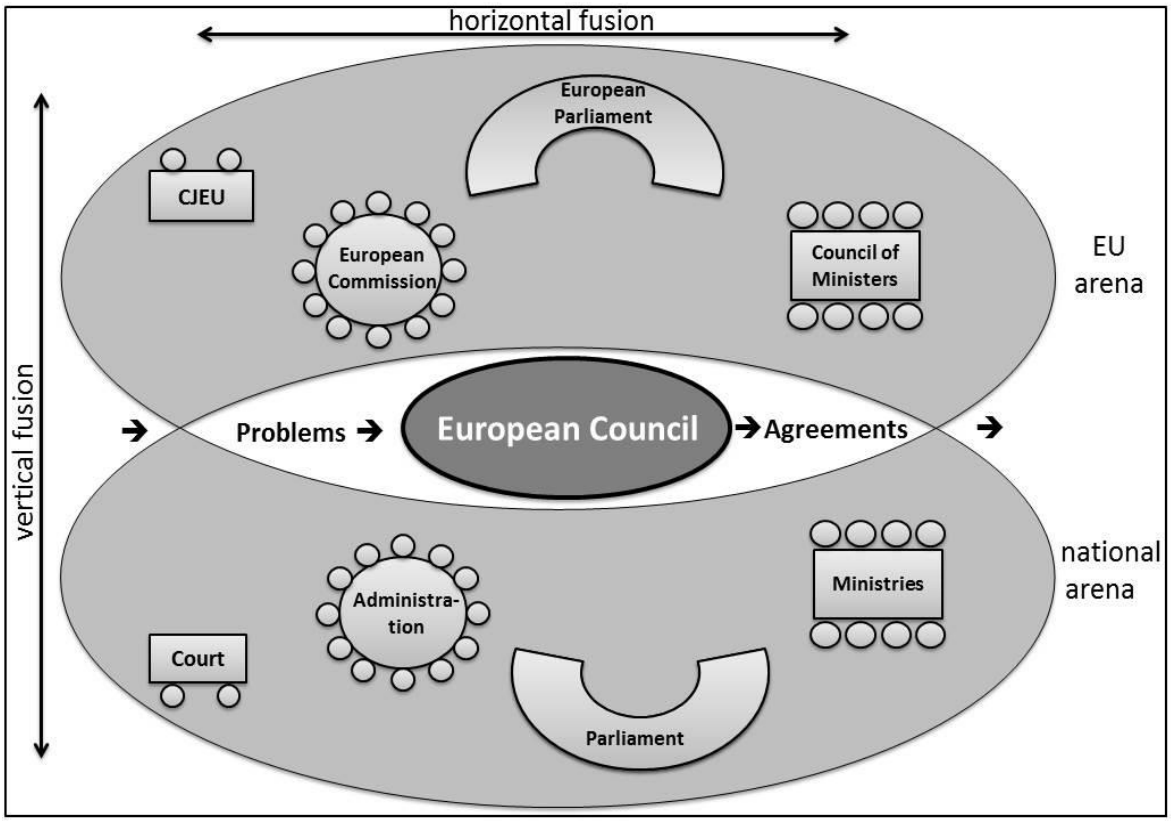


Source: see Readers' Guide. Wessels (2016)

3.2.3 Vertical and Horizontal Fusion

In view of the two-dimensional scheme I argue that we can observe a process of vertical and horizontal fusion (see for example Wessels, 2010, Wessels, 2005, Mittag, 2011, Miles, 2011, Wessels, 2016). Following this model, the European Council can be regarded as the centrally located and pivotal player in both a vertical multilevel constellation and in a horizontal multi-institutional architecture of the EU system (see Figure I.3.5).

Figure I.3.5: The Fusion Model



Source: Jean Monnet Chair Wolfgang Wessels 2013. Wessels (2016)

Within the multilevel game, each Head of State or Government wears a 'double hat', as European Council members act both within the national and the European arena. By linking their key positions at both levels, national leaders gain additional power both within the domestic power game and the EU architecture. Their dual role demands a high degree of skill in order to face 'the tensions between the coercion of the table' and the 'voice of the voters back home' (Van Middelaar 2013). Members of the European Council thus have to balance the pressures of their European peer group to reach agreement in order to deal with urgent issue on their joint agenda, but also need to meet expectations of their respective domestic arenas.

Following these assumptions, the European Council constitutes the institution in which European executive leaders are confronted with a fundamental dilemma between a 'problem-solving instinct' and a 'sovereignty reflex': Reacting to major global, European and transnational challenges, they realise that the national level is not the optimal problem-solving area to deal with vital challenges. As a consequence, the EU system is perceived as an increasingly useful arena in which to shape more efficient and effective policies.

In parallel, due to the inbuilt reflex to protect national sovereignty of their home states, the 'national hat' would constrain political leaders of the Member States from transferring too many powers and responsibilities to the EU level. A consequence of this dilemma is on the one hand a propensity of the highest national representatives to extend the EU's scope of activities, while on the other hand aiming to reinforce the powers of their own institution within the EU architecture in order to protect and defend national influence.

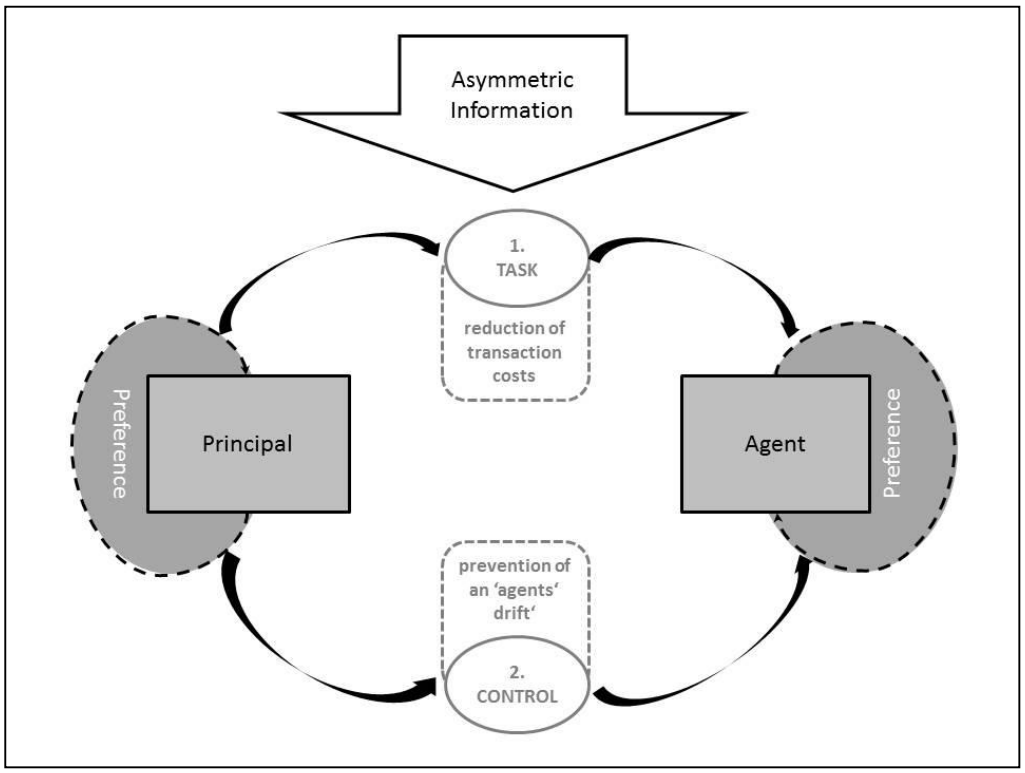
Based on such an interpretation, the European Council is characterised as the more pro-active institution within the transformation process of the multilevel EU polity. In this perspective, the main impacts of the European Council can be described and analysed as a process of vertical and horizontal fusion. In a vertical direction, the Heads of State or Government merge domestic and European agendas and pool national and EU instruments. These activities lead to an increasing number of areas of 'shared sovereignty' (Habermas 2012). This particular process leads to the formation of a state-like agenda of the European Council that covers a range of public policies, as broad as that of nation states themselves. In a horizontal direction, the European Council also impacts on the institutional balance of the EU architecture. National leaders strengthen supranational institutions while, at the same time, maintaining and extending the significant role for their own institution. As an unintended consequence, this process leads to a joint exercise and management of shared competences as well as of transferred and pooled instruments and responsibilities. Such trends result in an even more complex fusion.

3.3 The Principal Agent Approach

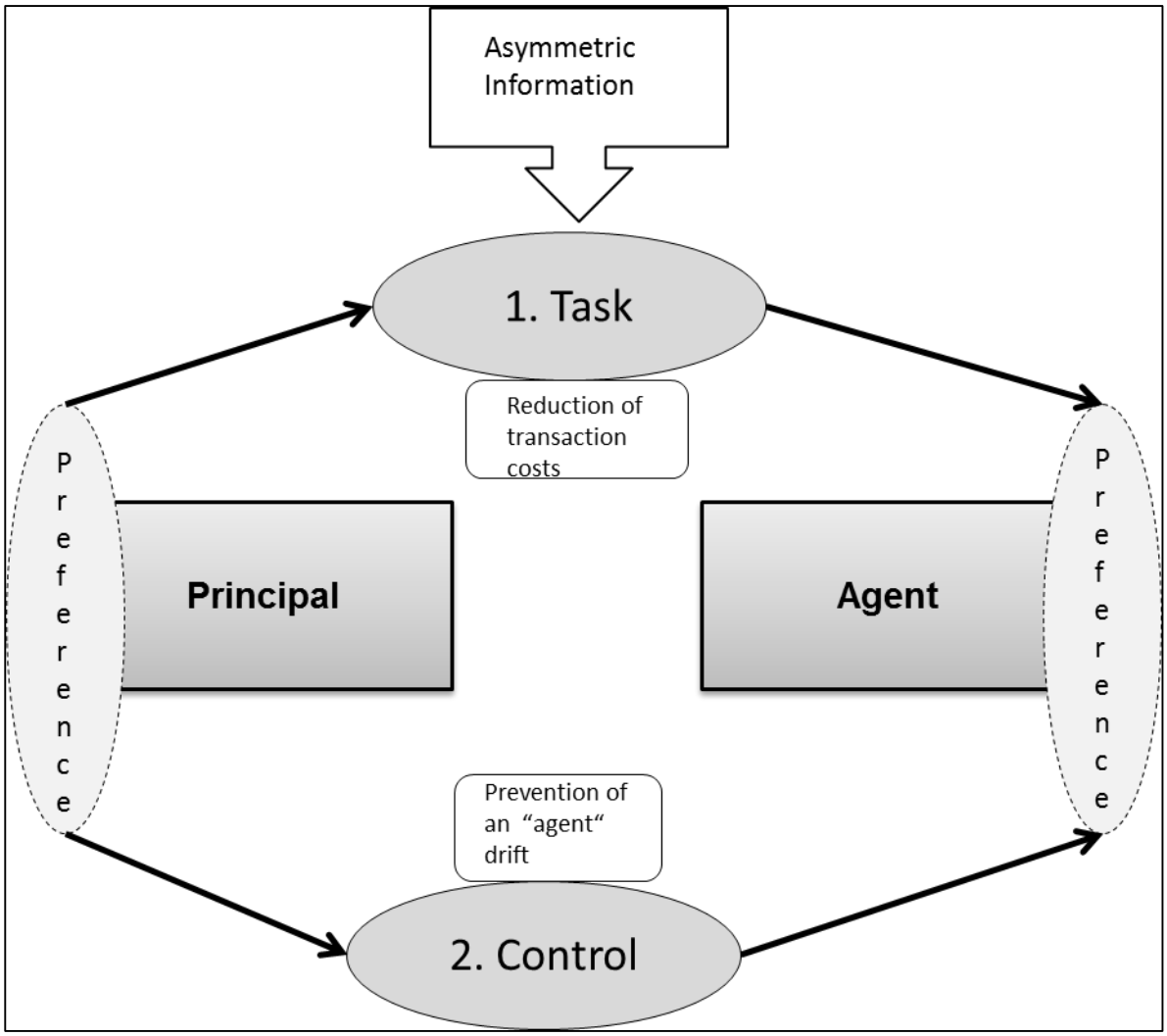
In assessing relations among the EU institutions and between these institutions and the nation states, the principal agent approach can be applied. This approach deals with the division of labour between a 'principal' who assigns task to his 'agent(s)' in order to reduce transaction costs and increase efficiency (see Figure I.3.6) (Kassim and Menon 2003, Pollack 2003, Moravcsik 1993b). A crucial element of this approach is the assumption that not only the

principal but also the agent acts upon their own preferences. Therefore, the principal creates control mechanisms which are supposed to prevent a so-called ‘agents’ drift’.

Figure I.3.6: The Principal Agent Model



Source: see Readers’ Guide.



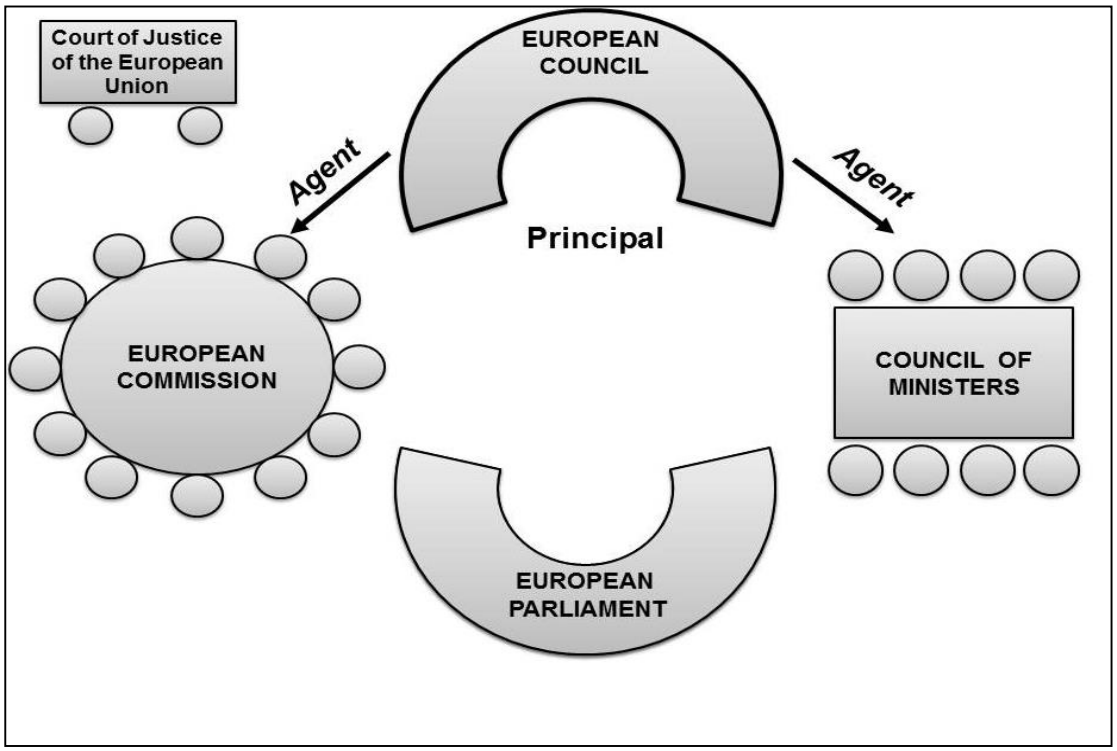
When looking at the relation between the member states of the EU and the (supranational) institutions, this mechanism of division of labour can be observed as one approach to study the institutional set-up: The member states as 'principals' have a functional interest in delegating certain competences to institutions as 'agents' since they take on tasks that could only be fulfilled at a considerable cost by the member states themselves – tasks such as the collection of relevant information and the monitoring of compliance with treaty obligations.

But, as mentioned above, the model predicts that the newly formed agent will not always follow the interests of its principal but rather pursue its own. This could lead to a situation of conflict since principal and agent might pursue different aims. In order to prevent such a situation of 'agency slippage' where the principals (the member states) lose control over their agents (the European institutions such as the Commission or the Court of Justice), the

delegation contract (the European treaties) imposes certain constraints on the acts of the agents.

In relation to other actors in the EU's institutional architecture (see Figure I.3.7), the Heads of State or Government in the European Council can be characterised as 'principals', especially regarding the European Commission and the Council.

Figure I.3.7: The Principal Agent Model of the EU's Institutions



Source: Wessels (2016)

Especially from an intergovernmental perspective, the European Council´s natural function is to initiate and prepare, to guide and direct, as well as to control the work of the EU institutions which serve as agents of the political leaders and thus possess merely a derived legitimacy. The principal agent relationship among the EU's institutions is especially important for assessing the role of the European Council: The members of the European Council are also responsible for the creation of and amendments to the treaties (see Chapter III.13.1) which assign major tasks to the institutions and also impose several ex ante and ex post control mechanisms, for example regarding the (re)election of chairpersons or possible sanctions such as a motion of censure by which the EP can force the Commission to resign. Therefore, key elements of the model can be tested when studying the role of the European Council acting as a principal.

3.4 Legal and Living Architecture: (Legal) Words and (Real) World

In describing and analysing the Union's institutional architecture the teaching companion follows a two-step approach. A useful point of departure is the legal provisions of the Lisbon TEU and TFEU. Consequently, we start with reading and interpreting articles of EU primary law. However, studying legal texts alone does not provide a comprehensive picture of the 'real world' behaviour of political actors. Treaty provisions offer opportunities for actors which in many cases may be used or not – such as the motion of censure by the EP (see Chapter II.8) or the de facto application of QMV in the Council (see Chapter II.7). Even if not often used, the articles might have an indirect impact on worries and expectations of actors – for example for Ministers in the Council living in the 'shadow of the vote'. Treaty articles are often not clear because they are worded in ambiguous terms during treaty negotiations. This means that they often are interpreted and developed further.

Generally, we observe that there are many informal 'ways of doing things'. Thus, the European Council has been a key institution since its creation in the 1970s. But it was only the Lisbon TEU that listed the European Council as one of the official EU institutions (Art.15) and even the articles of this recent treaty do not cover major activities of that institution in the living architecture. Also, the study of rules of QMV is necessary but not sufficient in order to understand the real consensus-seeking practice in the Council.

Quite often, procedures and arrangements developed in the living practice are codified into EU law at a later date. We find several examples that underline this pattern in the evolution of the EU system.

3.5 Static and Dynamic Perspectives

In taking up this kind of process, this teaching companion stresses that in order to fully capture and understand the different practices within the EU's institutional architecture one also needs to adopt a dynamic perspective which links current practices and behaviour to past patterns and history-making decisions at critical junctures. This approach is particularly useful for the EU system as a whole because the present architecture of the EU is based on former treaties and practices. Although a 'static' view of a legal text or an institution offers the possibility for a deep analysis, it cannot be used to fully explain the appearance and development of the EU system or to discuss the future of the EU polity.

3.6 System-Making vs. Policy-Making

For comparing procedures for taking binding decisions, we use the dichotomies between system-making and policy-making. With regards to system-making, we will study the creation and evolution of the EU politics via treaty-making (and revisions) and via enlargement (deepening and widening). Policy-making refers to procedures leading to binding decisions in central policy areas like environment or monetary policy.

Questions

1. Define the terms ‘intergovernmental’ versus ‘supranational’.
2. Sketch trends in the EU’s institutional architecture.
3. Define the difference between the ‘legal words’ and ‘real world’.
4. Define the difference between ‘static’ and ‘dynamic’.
5. Define the fusion model.
6. What are your lieux de mémoire concerning the EU’s history?
7. How is the category of ‘exclusive competence’ defined and what policy areas belong to it?
8. How is the category of ‘shared competence’ defined and what policy areas belong to it?
9. How is the category of ‘supporting competence’ defined and what policy areas belong to it?

Further Reading

Cini, Michelle and Pérez-Solórzano Borragán, Nieves (2013): European Union politics (Oxford: Oxford University Press).

Hix, Simon and Bjørn Høyland (2011): The Political System of European Union, 3rd edn., (New York: Palgrave Macmillan).

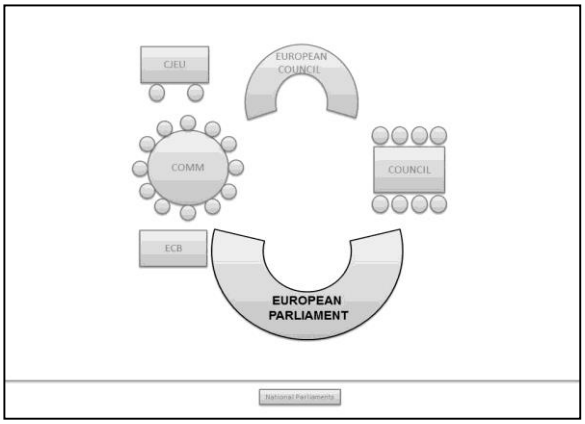
Weidenfeld, Werner, and Wolfgang Wessels. 1980 (continual). Jahrbuch der Europäischen Integration 1980; latest edition 2014.

Weidenfeld, Werner and Wessels, Wolfgang (2013): Europa von A bis Z: Taschenbuch der Europäischen Integration (Nomos and also Bundeszentrale für Politische Bildung).

Part II. The Union’s Institutional Architecture

This part studies each institution and significant offices by using the TEDO scheme.

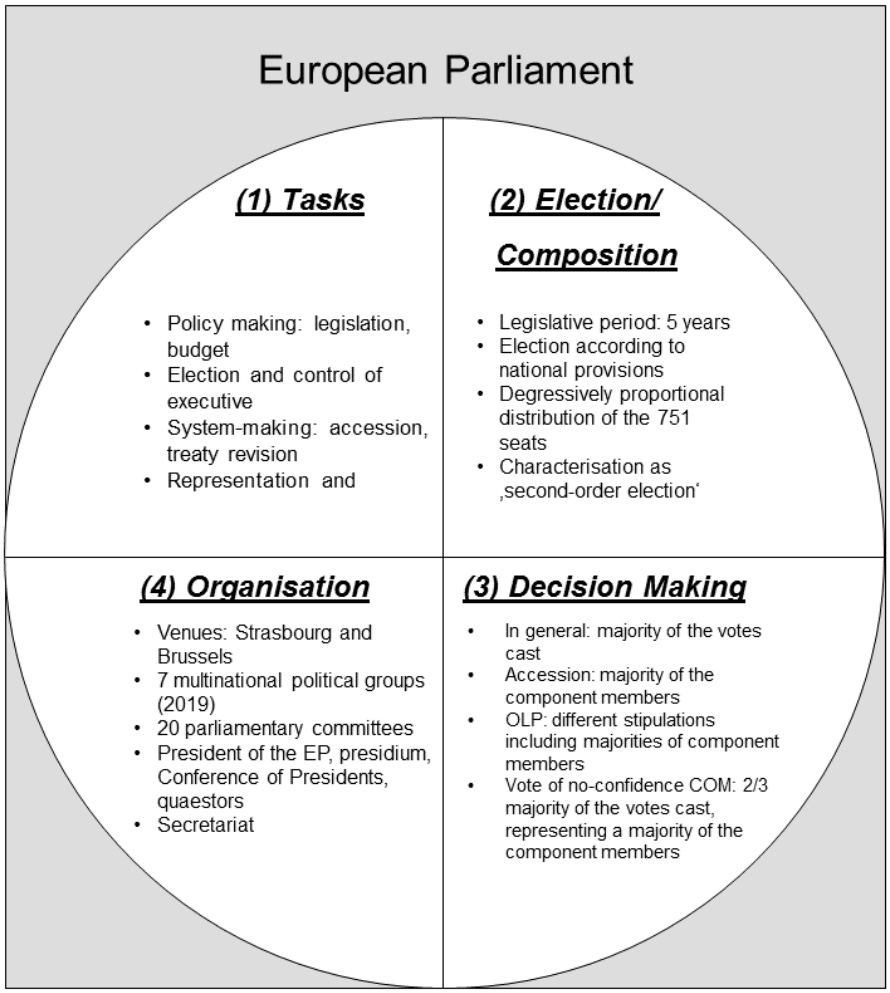
4. The European Parliament: A real Parliament in the Making?



The European Parliament is the only directly elected institution of the European Union. In view of its legitimation, Art. 10 (2) TEU stipulates that 'Citizens are directly represented at Union level in the European Parliament'. Since the 'functioning of the Union shall be founded on representative democracy' (Art. 10 (1) TEU), federal voices claim that this institution plays a central role within the EU institutional architecture as it helps to strengthen the EU's democratic legitimacy.

Intergovernmentalist positions downgrade the relevance of this institution to a forum of European deliberation and stress the legitimising role of national parliaments. With all major treaty reforms in the last decades, the powers of the EP have been significantly increased (see Figure II.4.2). In major procedures we see the balance of power in the institutional architecture moving towards a bicameral system between the EP and the Council of the EU. Thus tensions rise between the European Council and the European Parliament. (Wessels, 2016)
However, we have to discuss whether and to what extent the EP (already) is a real parliament – in the conventional sense.

Figure II.4.1: The European Parliament - TEDO



Source: Translation of Wessels 2019, p. 4

4.1 Tasks: A Broad set of Functions

Document II.4.1: The European Parliament's Functions

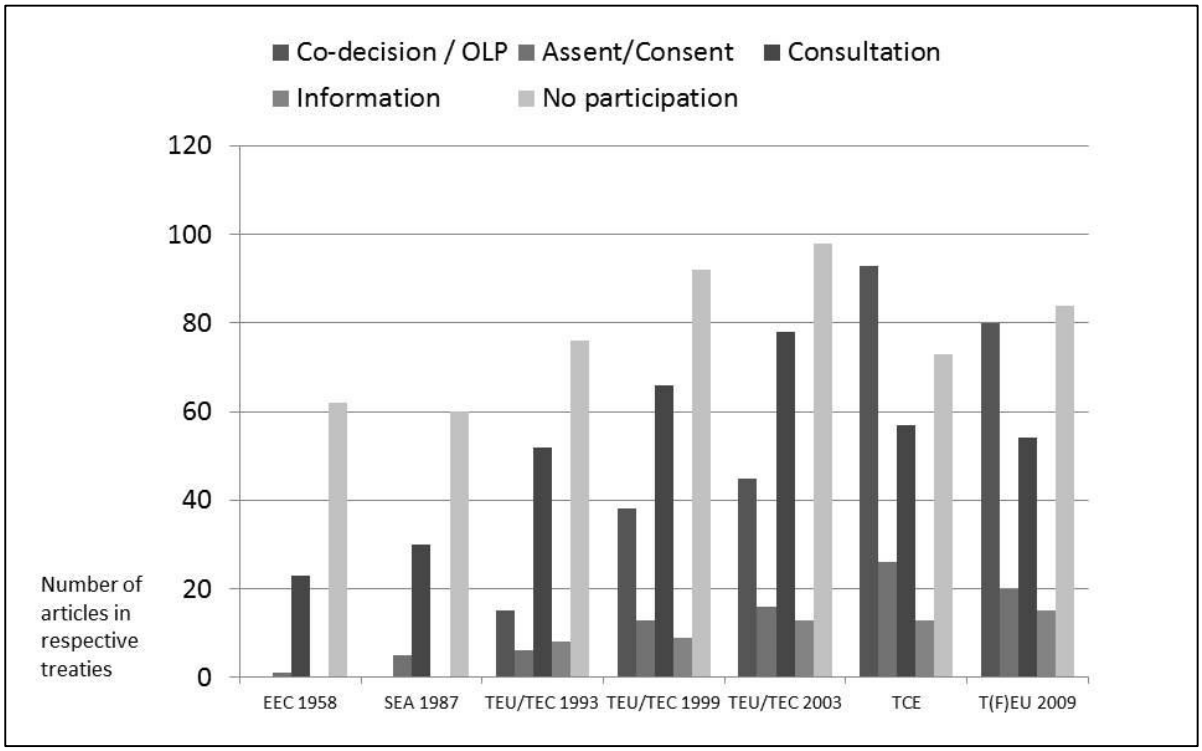
Article 14 (1) TEU
The European Parliament shall, jointly with the Council, exercise legislative and budgetary functions. It shall exercise functions of political control and consultation as laid down in the Treaties. It shall elect the President of the Commission.

The treaty provisions (see Art. 14 (1) TEU) enumerate a set of tasks normally attributed to parliaments. The article stresses the bicameral nature of legislative and budgetary decision-making with the term 'jointly with the Council'.

The EP has the strongest say dealing with competences allocated to the Union level (see Figure I.3.1), i.e. in policy areas that are related to the completion of the Single Market, environmental protection or measures to protect citizens against discrimination. In the Lisbon TEU, it has also gained reinforced competences in the area of freedom, security and justice.

Concerning its legislative functions, there are different degrees of involvement of the EP in the decision-making process (see Figure II.4.2). In the adoption of legislative acts, a distinction is made between the 'ordinary legislative procedure' (former 'co-decision') which puts the Parliament on an equal footing with the Council, and the 'special legislative procedures' which are applied in those cases where the Parliament only has a consultative role. Of specific importance is also the consent procedure which is applicable for major items of system making like accession treaties (Art. 49 TEU) and the multiannual financial framework (Art. 312(2) TFEU).

Figure II.4.2: Extension of Legal Functions: The European Parliament / Growth of treaty based functions



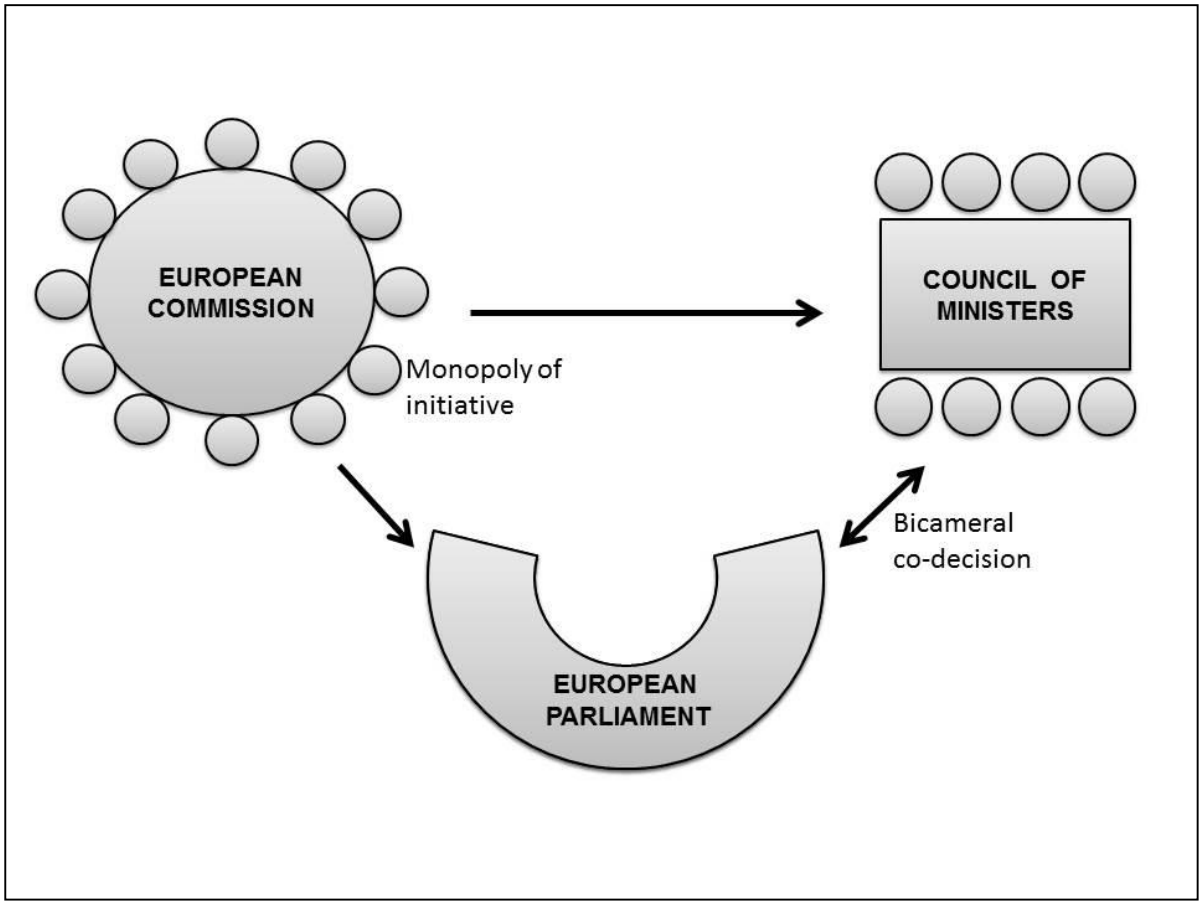
Source: Jean Monnet Chair Wolfgang Wessels 2013.

As can be seen in the figure above, the OLP has become the most important decision-making procedure in recent years, although a number of policy areas remain in which the EP has no participation rights at all. The details about the procedures will be explained in chapter III.14. The OLP gives the same weight to the European Parliament and the Council on a wide range of areas. With the entry into force of the Lisbon Treaty, the vast majority of European laws are adopted jointly by the EP and the Council. In the legislative period 2009-2014, 70.7 % of all EP involving legislative[1] acts were concluded by the OLP (see Figure III.13.1).

With regard to a pre-legislative function, the EP 'may, acting by a majority of its component Members, request the Commission to submit any appropriate proposal on matters on which it considers that a Union act is required for the purpose of implementing the Treaties. If the Commission does not submit a proposal, it shall inform the European Parliament of the reasons.' (Art. 225 TFEU). Thus, the EP can be described as an active pole within the legislative triangle of Council, Commission and EP.

[1] EUR-LEX http://eur-lex.europa.eu.

Figure II.4.3: The Legislative Triangle



Source: see Readers' Guide.

As for the budgetary functions the treaty provisions have allocated different powers to the EP (Art. 310-324 TFEU). In adopting the system of 'own resources', the income side of the Union's budget, the Council and de facto the European Council (see Chapter 5) only have to consult the EP (Art. 311 TFEU). For laying down the 'multiannual financial framework', e.g. the categories of expenditures for seven years, the EP needs to give its 'consent, which shall be given by a majority of its component members' (Art. 312 (2) TFEU). Only in the establishment of the 'annual budget', the powers of the EP are equal to those of the Council. In this system of financial provisions the EP is not empowered to fix the amount of income to the public budget – especially not to raise taxes –, which is a traditional parliamentary power.

A major task of the EP is to elect the President of the Commission and give its consent to the Commission as a body (Art. 17 (7) TFEU, Chapter 8). The European Parliament has persistenly and cleverly made a profit from these legal provisions. It strongly claimed its power when electing the President of the European Commission in 2014 by formulating clear requests concerning the European Council's nomination of the respective candidate. Vis-à-vis

the Commission as executive branch, the EP exercises political control which includes the power of making the Commission resign after a vote of censure (Art. 17 (8) TFEU). For controlling the Commission, the EP may ask written and oral questions, which it does extensively. The EP can also convene investigation committees concerning the implementation of legal acts (Art. 226 TFEU). It does only rarely make use of this.

Besides these tasks as enumerated in Art. 14 (1) the EP has competences in procedures of system making. Thus, the EP may submit proposals to amend EU primary law in the procedure of ordinary treaty revisions, but it is not empowered to ratify treaty revisions (Art. 48 TEU) With regard to widening, it has a veto power for accessions; in case a country wants to join the EU the European Parliament needs to give its consent (Art. 49 TEU).

The EP also has to consent in case a Member State decides to withdraw from the EU (Art. 50(2) TEU).

Besides the legislative functions the EP deals with a broad and differentiated set of topics, e.g. human rights or relations with other countries, as the following agenda of a plenary session shows. It documents that the EP deals with nearly all items of public policies, i.e. it deliberates a state-like agenda.

Box II.4.1: European Parliament: Agenda of a Plenary Session

Thursday 18th April 2019	
08:30-11:50	Debates • A comprehensive European Union framework on endocrine disruptors *Commission statement* • European Maritime Single Window environment • Disclosures relating to sustainable investments and sustainability risks • Debates on cases of breaches of human rights, democracy and the rule of law *China, Cameroon and Brunei*
12:00-14:00	VOTES followed by explanations of votes • Motions for resolutions concerning debates on cases of breaches of human rights, democracy and the rule of law (Rule 135) • Eurojust-Denmark Agreement on judicial cooperation in criminal matters • Coordination of social security systems • CO2 emission performance standards for new heavy-duty vehicles • Promotion of clean and energy-efficient road transport vehicles

	• Use of digital tools and processes in company law • Cross-border conversions, mergers and divisions • European Defence Fund • Exposures in the form of covered bonds • Covered bonds and covered bond public supervision • InvestEU • European Maritime Single Window environment • Disclosures relating to sustainable investments and sustainability risks • Persistent organic pollutants • Clearing obligation, reporting requirements and risk-mitigation techniques for OTC derivatives, and trade repositories • Authorisation of CCPs and recognition of third-country CCPs • Promotion of the use of SME growth markets • Motions for resolutions - Negotiations with Council and Commission on European Parliament's right of inquiry: legislative proposal • A comprehensive European Union framework on endocrine disruptors Motions for resolutions

Source: http://www.europarl.europa.eu/doceo/document/OJQ-8-2019-04-18_EN.html (last accessed: 22. 06.2019).

4.2 Election and Composition of the European Parliament

A major element in studying the EP is the nature of EP elections and the treaty based distribution of seats among the Member States.

4.2.1. Elections to the European Parliament: A second-order Election

The election period of the EP is five years. There are no rules to dissolve it earlier.

Document II.4.2: Election of MEP

Article 14 (3) TEU
The members of the European Parliament shall be elected for a term of five years by direct universal suffrage in a free and secret ballot.

One major issue is the attention the EU citizens give to 'their' parliament. Since the first direct elections in 1979, the turnout in European elections has fallen, as the Table II.4.1 shows.

Table II.4.1: Turnout in European and German Elections from 1979-2019

Year of election:	EP election in: EC/EU	EP election in: Germany	Compared to: federal elections in Germany	
1979:	63,0%	65,7%	1983:	89,1%
1984:	61,0%	56,8%	1987:	84,3%
1989:	58,5%	62,4%	1990:	77,8%
1994:	56,8%	60,0%	1994:	79,0%
1999:	49,4%	45,2%	1998:	82,2%
2004:	45,7%	43,0%	2002:	79,1%
2009:	43,0%	43,3%	2009:	70,8%
2014	42,5%	48,1%	2013:	71,5%
2019	50,6%	61,4%	2017:	76,2%

Source: https://election-results.eu/turnout/ (last accessed: 22.07.2019)

In view of these developments, the elections to the EP are often characterised as 'second-order elections' (see Box II.4.2) (Hix, 2003, Maurer and Wessels, 2003).

Box II.4.2: Second-order Elections

'All elections (except the one that fills the most important political office of the entire system and therefore is the first-order election) are 'national second-order elections', irrespective of whether they take place in the entire, or only in a part of, the country'

Schmitt (2005) characterises second-order elections as 'perceived to be less important, because there is less at stake'. In this regard, it is not the European agenda that voters are concerned about in going to the ballot, but the national context. National political issues influence more voters' choices in EP elections than 'genuine' European topics. From the citizens' point of view, rather than voting for candidates for the European Parliament, national politicians from the governing parties are put to vote in a kind of 'intermediate (test-)election'. Other examples of secondary elections are by-elections in the UK, mid-term elections in the US or elections for Länder parliaments in Germany. Results in European elections then differ

from national first-order elections: generally, opposition parties as well as small and new parties are favoured in the EU ballots.

One reason for a lower interest was seen in the fact that the voting results do not lead to the establishment of an executive body, i.e. the European Commission. In most national contexts in Europe, elections to a parliament lead to the election of a government. In the European case, the nomination of the Commission was not directly affected by the outcome of the EP-elections until 2009. However, in the eighth elections to the European Parliament in 2014, the Lisbon provisions were applied for the first time. Article 17(7) of the TEU (see Figure II.8.3), which stipulates that the European Council has to take "into account the elections to the European Parliament" when proposing a candidate for the post of the Commission's president, led to European parties represented in the EP putting forward lead candidates, the so-called "Spitzenkandidaten". As a result, the 2014 and 2019 electoral campaign was more personalised than the previous ones. However, even this innovation was not able to reverse the decline of the turnout completely. Nevertheless, the 2019 elections were marked by a slightly increased turnout.

4.2.2. Composition: Degressive Proportionalities

As to the distribution of seats the relevant Treaty article points at the major dilemma between a minority protection of smaller Member States and the democratic principle of 'one person – one vote'.

Document II.4.3: The European Parliament's Composition

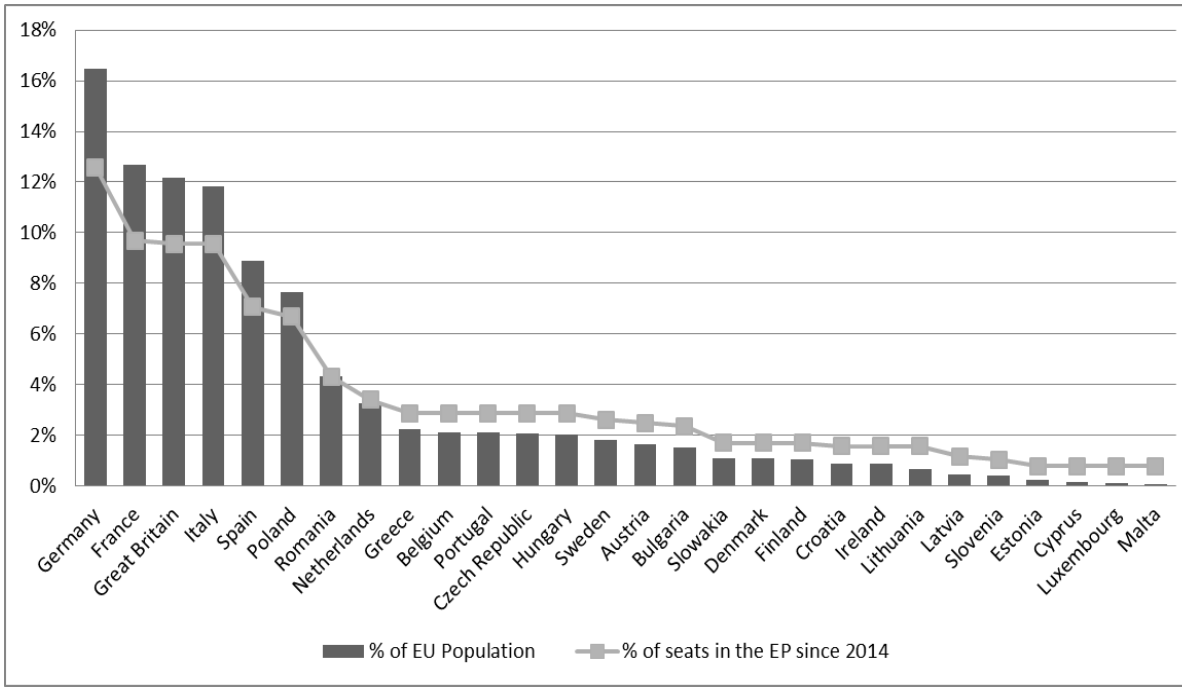
Article 14(2) TEU
The European Parliament shall be composed of representatives of the Union's citizens. They shall not exceed seven hundred and fifty in number, plus the President. Representation of citizens shall be degressively proportional, with a minimum threshold of six members per Member State. No Member State shall be allocated more than ninety-six seats. The European Council shall adopt by unanimity, on the initiative of the European Parliament and with its consent, a decision establishing the composition of the European Parliament, respecting the principles referred to in the first subparagraph.

The European Parliament has been composed of 751 members since 2014. The Lisbon TEU, like former treaties, fixed the minimum and the maximum number of MEPs per Member State, being six and 96, respectively (Art. 14(2) TEU). The final national quotas were jointly determined by the European Parliament and the European Council in 2013.

The representation of citizens is ‘degressively proportional’ and favours smaller Member States. Smaller Member States have relatively more parliamentarians compared to the overall share of their population. As a result, Germany has 96 seats meaning that one seat in the EP represents around 800.000 German citizens, while one member from Malta represents around 80.000 Maltese citizens. Figure II.4.4 illustrates this point.

This system of distribution of seats also implies the fact that the European citizens cannot vote for EU wide party lists.

Figure II.4.4.: Share of Seats per Member States compared to share of National Population



Source: see Readers' Guide.

The proportionally higher number of seats for smaller Member States can be regarded as a form of minority protection.

This provision was heavily criticised by the German Federal Court in its Judgement of the Lisbon Treaty in 2009. According to the Court, this provision violates the democratic principle of 'one man one vote' (BVerfG 2009: par. 106). In view of such an assessment, a majority decision in the European Parliament might not represent a majority of European citizens.

There are several options on the table that could potentially solve this dilemma; the three most debated ones are:

- First: Reducing the number of seats for smaller Member States. It is unlikely that smaller Member States would agree to such a proposal. If they had only one or two seats in the EP, the EP elections in these countries would not represent the political landscape of that Member State.
- Second: Increasing the number of seats for more populous Member States. Proportional representation with six seats for smaller member states like Luxembourg would mean more than 900 seats for the biggest member state Germany. The problem here is that the EP already has 751 (from 2014 on) members and a further increase would certainly hamper an effective decision-making in the parliament.

- Third: Creating a 'transnational list'. Each citizen shall be given 'two ballots […] for his/her national list and for a transnational list to further strengthen his preference.' '[T]this system will also require a review of the allocation of seats in Parliament so that the demographic reality of the EU is given more consideration.'[2]. This proposal was, however, not accepted by the EP itself.

4.3 Internal Decision-Making Rules and their Effects

There is no single procedure to adopt decisions in and by the EP. Varying procedures require different decision-making quotas which are defined in the Treaties.

- In general, the EP decides with a majority of the votes cast (Art. 231 TFEU), i.e. of the majority of those present in a given moment.
- In cases of political significance, the Treaties demand a majority of its 'component members' which means 376 votes out of 751 seats. This is applied, for instance, in case of rejection of a common position of the Council within the OLP (Art. 294 TFEU, see also Chapter III.13.2) and the election of the President of the Commission (Art. 17(7) TEU, see also Chapter II.8.2).
- The threshold is even higher in the case of a notion of censure on the activities of the Commission (Art. 234 TFEU).

These legal provisions have strong impacts on the real patterns of interaction and cooperation among the Members of European Parliament (MEP). Since no single political group (see Chapter II.4.4) has a majority in the parliament, the formation of coalitions is required in order to pass legislation. The treaty based necessity of building the majority of the component members has often led to a de facto 'grand' coalition between the conservative European Peoples Party (EPP) and the Socialists and Democrats in the European Parliament (S&D) as mostly no other political coalition is able to pass this threshold.

Still, the voting behaviour of the Members of the European Parliament is informed by a variable voting geometry (Vote Watch Europe 2013).

- Also consensual voting, i.e all political groups agreeing on the respective decision to take, is not uncommon in the European Parliament. Nevertheless, that does not imply

[2] Source: Andrew Duff, MEP: http://andrewduff.eu/en/article/2012/555278/meps-elected-on-transnational-basis-would-strengthen-european-democracy-1 (last accessed: 08.04.2013).

an absolute consensus among the parliamentarians due to the imperfect voting cohesion of the political groups.

- There has also been a considerable number of left-right competitions in the European Parliament – 'where political parties organise and compete as vigorously as in domestic parliaments in Europe' (Hix and Roland, 2003), i.e. S&D and EPP voting differently. In the eighth parliament, these coalitions are scarcely possible as none of the two political camps can reach an absolute majority of the seats (see Table II.4.2).
- Voting along national lines is fairly rare. Agricultural affairs have been marked most by national instead of ideological confrontation.

The (partly necessary) cooperation between the two largest party groups of the EP have had considerable effects – e.g. on the election of the President of the European Parliament, for which these groups conclude agreements to elect one of their members for each half of the election period.

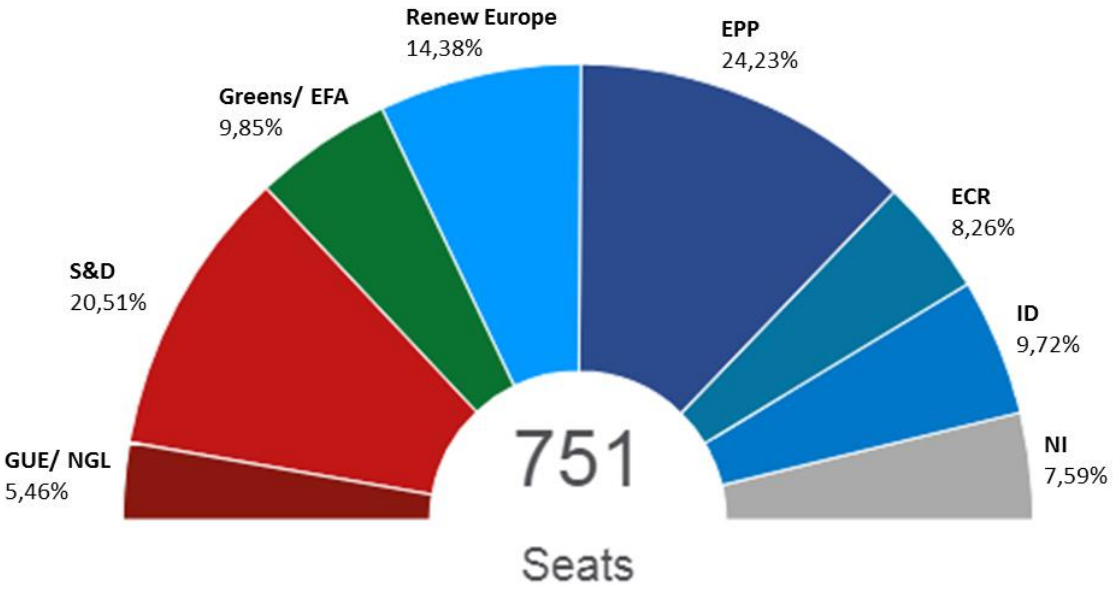
4.4 Organisation of the European Parliament

4.4.1 Formations of transnational Political Groups

For studying the internal life of the EP we need to look at several phenomena: The political group composition, the committee structure and the role of the EP President and the Secretariat General.

The in-coming ninth EP is composed of members from more than 200 different parties from 28 countries. Inside the EP a transnational political group must consist of a minimum of 25 MEPs from at least one fourth of the EU Member States. In the ninth European Parliament, there are seven different formations of transnational political groups and a number of non-attached members. Each group elects a chair and different numbers of co-chairs (see Figure II.4.4).

Figure II.4.5: Composition of the European Parliament After the Elections in 2019



Source: www.europarl.europa.eu (last accessed: 22.07.2019).[3]

The two largest parliamentary party groups – the EPP and the Socialists – have dominated the Parliament historically. They have had a decisive say when the EP elected its President for a 2.5 year term. However, their majority shrunk from 54.7% to 44,7% with the 2019 EP elections (see Chapter II.4.3). Since 2014, the Parliament consists of 751 members of parliament.

[3] Abbreviations of political groups:

- EPP (European People's Party)
- S&D (Progressive Alliance of Socialists and Democrats)
- Renew Europe (Renew Europe group)
- Greens-EFA (European Greens-European Free Alliance)
- ECR (European Conservatives and Reformists)
- ID (Identity and Democracy)
- GUE-NGL (United Green Left-European Nordic Left)
- NI Non-Inscrits (Non-attached members).

Table II 4.2: Coalitions 2019-2024

	Grand Coalition EPP – S&D – Renew Europe	Grand Coalition EPP – S&D	Center-left Coalition	Center-right Coalition
S&D	154	154	154	
EPP	182	182		182
Renew Europe	108		108	108
Greens/ EFA			74	
GUE/ NGL			41	
ECR				62
	444 (59,12%)	336 (44,74%)	377 (50,2%)	352 (46,87%)

Source: see Readers' Guide based on: www.europarl.europa.eu.

In the ninth European Parliament, only a grand coalition comprising the socialist S&D, the conservative EPP group and the liberal Renew Europe and a Center-left Coalition of S&D, Renew Europe, Greens/EFA, GUE/ NGL can secure an own majority.

4.4.2 Parliamentary Committees

As most parliaments, the EP conducts a huge part of its preparatory work for the plenary meetings in a number of specialised committees. Currently, the EP has 20 standing committees that each consists of between 25 and 71 MEPs. The areas of activities of these committees again document the broad state-like agenda of the EU (see Figure II.4.6).

Figure II.4.6: Committees in the EP

Source: see Readers' Guide. Based on http://www.europarl.europa.eu/committees/en/parliamentary-committees.html (last accessed: 22.07.2019)

As a general rule, the political composition of the committees reflects that of the plenary assembly.

EP committees are key actors in the adoption of EU legislation. They have the task to draw up and amend legislative proposals as submitted by the Commission and in the second reading by the Council. They prepare reports that are then adopted in the plenary meetings. Committees may also launch initiative reports. Beside these standing committees, the parliament can also set up sub-committees (Security and Defence, and Human Rights) and special temporary committees to deal with specific issues, for instance committees of inquiry.

The debates in the plenary are held in public when sessions are convened once or twice a month. They usually take place in Strasbourg and occasionally in Brussels. It is necessary to translate all parliamentary and committee debates in all 24 official EU languages. Otherwise,

an effective scrutiny on EU laws would not be possible on grounds of cultural and linguistic diversity within the EU.

4.4.3 The internal Working Method

The internal working is organized in several forms and levels. The Conference of Presidents, which comprises the President of the EU and the political group chairs, is the central decision making body inside the EP. Inter alia, it decides on the plenary agenda as well as the composition and competences of the committees.

The President has a variety of tasks: He is responsible for the application of the Rules of Procedure of Parliament, and, to this end, oversees all the activities of Parliament and its bodies; he represents the Parliament in all legal matters, and the President addresses the European Council prior to each of its meetings, stating the EP´s viewpoint on the subjects on the agenda.

The Secretariat General consists of ten directorates. It supports the work of the MEP: Its task is to coordinate legislative work and organise plenary meetings. It also provides technical and expert assistance to parliamentary bodies and Members of Parliament to support them in the exercise of their mandates.

4.5 General Remarks: A Parliament in the Making?

The EP has moved from an assembly which focussed on deliberations to a chamber with strong powers in essential areas of the Union’s decision-making. In view of conventional powers the EP is still not on an equal status with normal national Parliaments, e.g. on fixing taxes and ratifying the constitutional act of treaty revisions. A major issue of the political and academic debate remains its claims of legitimacy, especially in view of the (second- order) elections and (degressively proportional) composition.

Questions

1) Identify major functions of the EP and compare tasks and rights of the EP with those of national parliaments. Which differences are most obvious? Where do you see similarities?
2) What does a 'degressively proportional representation' mean? Discuss pros and cons.
3) What does 'second order election' mean? Discuss in terms of legitimacy!
4) Which decision-making rules are given to the EP? What is their impact?
5) Why do Presidents of the EP in most cases belong either to the EPP or to the S&D?
6) If the EP wants to dismiss the Commission, how many votes does it need from 2014 onwards?
7) What are the strengths and weaknesses of the EP?
8) How do you assess the EP?

Essential Reading

CEPS, EGMONT and EPC Study (2010), *'The Lisbon Treaty: A second look at the institutional innovations'*, Brussels, pp. 29-44.

Shackleton, Michael (2012), 'The European Parliament", in: Peterson, John and Shackleton, Michael (2012), *'The Institutions of the European Union'*, 3rd edition, Oxford: Oxford University Press, pp. 124-147.

Maurer, Andreas (2014), 'Europäisches Parlament', in: Weidenfeld, Werner and Wolfgang Wessels (eds.), *'Europa von A bis Z'*, Baden-Baden: Nomos Verlagsgesellschaft, pp. 212-225.

Maurer, Andreas and Jürgen Mittag (2014), 'Europäische Parteien', in: Weidenfeld, Werner and Wolfgang Wessels (eds.), *'Europa von A bis Z'*, Baden-Baden: Nomos Verlagsgesellschaft, pp. 341-346.

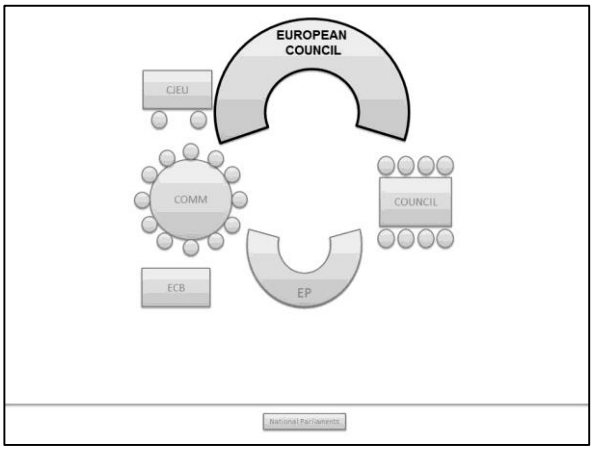
Piris, Jean-Claude (2010), *'The Lisbon Treaty. A Legal and Political Analysis"*, Cambridge: Cambridge University Press, pp. 114-122.

Raunio, Tapio (2012), 'Political Interests: the European Parliament's Party Groups', in: Peterson, John and Michael Shackleton (eds.), *'The Institutions of the European Union'*, 3rd edition, Oxford: Oxford University Press, pp. 338-358.

Schmitt, Hermann (2005), 'The European Parliament of June 2004: Still Second-order?", MZES, Universtiy of Mannheim

5. The European Council – The (Unconventional) Key Institution

Studying the institutionalised summitry of the Heads of State or Government[4] of the EU satisfies a fundamental curiosity to observe what European political leaders do and attempt to achieve in their European Council. However, it also raises difficulties to fully understand the functioning of this key institution.



It starts from the observation that the Heads of State or Government have regularly exercised in and via their institution major functions for system- and policy-making. Not only with the dramatic crisis sessions from 2010 onwards but already since its creation in 1974 no other institution has shaped the fundamental developments of the European construction as widely and deeply as the European Council.

Irrespective of what relevant articles of EU primary law have stated – even in the new provisions of the Lisbon treaties – 'the Union's highest executive leaders' (Van Rompuy 2012c) have regularly dealt with a state-like agenda of public policies, have taken history-making decisions to transform the EU polity and have reacted after night-long sessions to external shocks and internal crises.

Analysing and assessing the European Council is thus a necessary requirement to understand the emergence and evolution of the EU system itself. A closer look at the European Council's profile and performance offers important insights into changes of the institutional balance within the Union's architecture. Activities, agreements and acts of several generations of 'chief executives' (Johansson and Tallberg, 2010) highlight fundamental European developments that took place in the second half of the 20th century and the first years of the 3rd millennium.

The European Council was a newcomer to the original institutional architecture of European integration. Its nature and role within the EU system has been ambiguous and multifaceted. From the emergence of summits in the 1960s and early 1970s and with the establishment in

[4] The text follows the spelling of the 'Heads of State or Government' as they are put down in the TEU in the Lisbon Version.

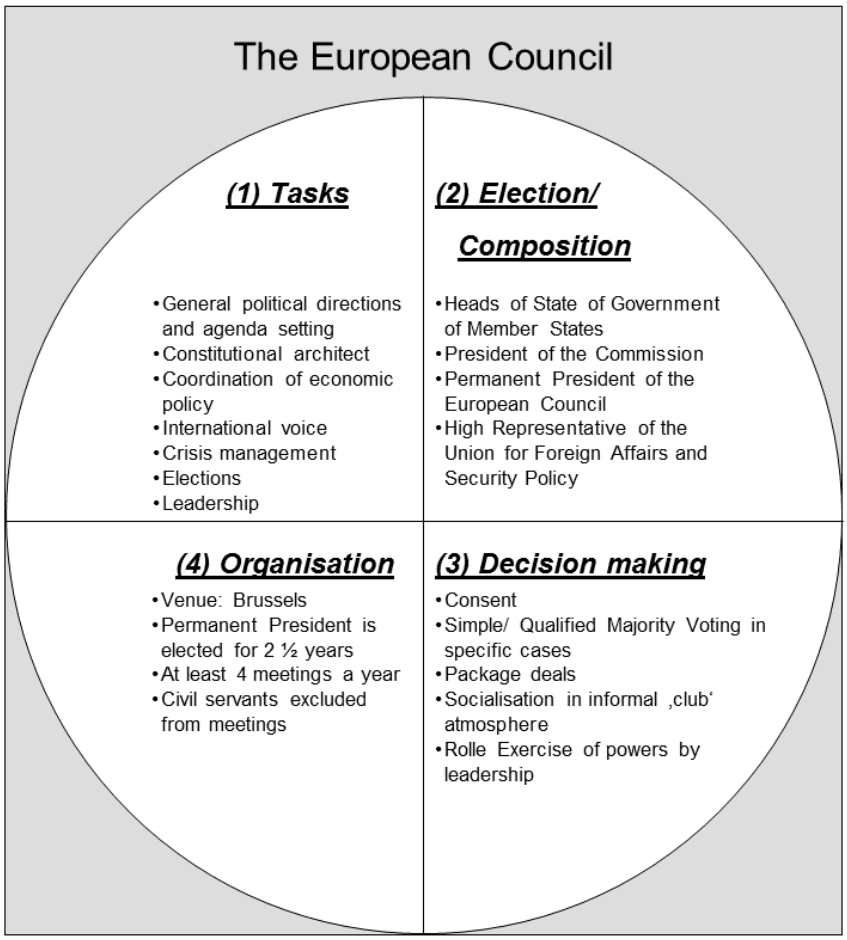
1974 up to the Lisbon Treaties in 2009, intensive debates about the European Council's functions and form have taken place in fairly regular intervals including the constitutional convention and the making of the Lisbon treaty in the 2000s.

The Lisbon TEU and TFEU then have introduced considerable changes and fundamental novelties compared to the pre-existing legal architecture, especially the creation of the office of a permanent president.

Analyses and assessments of the European Council document considerable controversies. Seen from an intergovernmental view, it is the legitimate incarnation of 'l'Europe des patries' (De Gaulle, 1970) or of a 'Staatenverbund' (association of states) (Bundesverfassungsgericht, 1994). Federalists use to criticise this set-up as an undemocratic 'diktat[s] from Brussels' (Schulz, 2012). From a neo-functionalist perspective, it might push a spill-over process[5] towards more integration (Wessels, 2016).

[5] See for the term NIEMANN, A. & SCHMITTER, P. 2009. Neofunctionalism. *In:* WIENER, A. & DIEZ, T. (eds.) *European Integration Theory.* 2nd ed. Oxford: Oxford University Press..

Figure II.5.1: The European Council - TEDO



Source: Translation of Wessels 2019a, p.5.

5.1 Tasks: Legal and Real

Document II.5.1: Functions of the European Council

Article 15(1) TEU
The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof. It shall not exercise legislative functions.

Compared with analogue articles for other EU institutions (see Art.14(1) TEU for the EP and 16(1) TEU for the Council), the functions conferred to this body remain vague and general. The wording indicates a role somehow superior to or at least independent of the remaining EU institutions**.**

Following former role descriptions, the European Council's general task is 'to provide the Union with the necessary impetus for its development' and 'define general political directions and political priorities thereof' (Art.15(1) TEU).

One newly written provision aims to limit the acts the European Council is allowed to perform: It 'does not exercise legislative functions' (Art.15(1) TEU). This formulation represents a precautionary and pre-emptive reaction to prevent an intervention from the political top into the 'ordinary legislative procedure' i.e. in the 'institutional triangle'.

Beyond these general orientations, the new treaty provisions assign a set of more specific tasks to the European Council. As to system-making, the Lisbon TEU empowers the European Council to act in procedures for deepening and, to a marginal degree, for widening. Thus, for treaty-making the newly designed 'ordinary' and 'simplified' revision procedures (Art.48 TEU; see also Chapter III.12.1 and Document III.12.1) allocate essential functions to the European Council. In the real world, sessions of the European Council served the 'masters of the Treaties' (Bundesverfassungsgericht, 2009) to prepare, negotiate, agree on and monitor the implementation of pre-constitutional and constitutional acts that led to a deepening and widening of the EU system. In particular, national leaders as 'constitutional architects' concluded the final agreements of intergovernmental conferences for five treaty reforms and for five waves of accessions to the Union.

Besides these functions of system-making and policy-making, the Lisbon Treaties have underlined additional positions of leadership of the European Council. The provisions of the primary law have confirmed its power as an electoral body in proposing the candidate for the President of the Commission (Art.17(7), see also Chapter II.8 and Document II.8.2) and for

nominating the President and the members of the Executive Board of the European Central Bank (ECB; see Document II.11.2). Treaty articles also have extended this function to the election and appointment of the permanent President of the European Council itself (see Document II.6.2) and of the High Representative of the European Union for Foreign Affairs and Security Policy (see Document II.9.5).

Following the general pattern of these treaty provisions, the European Council is the only or at least one of the decisive institutions to vote persons into the top positions of the EU's institutional architecture: The only exception is the President of the European Parliament.

Political leaders of several generations have de facto used their institution to become 'masters of procedures' to direct policies of vital interests for them. The European Council has again and again acted as ultimate decision-maker and as highest political instance of appeal for controversial issues which could not be settled on a lower level, even if this institution is not mentioned in the respective treaty articles. One significant case is their role in settling fundamental issues of the Union's budget: Beyond treaty provisions the European Council has exercised the 'power of the purse' in regular intervals by achieving highly controversial agreements on the size of EU income and of categories of expenditures for what is now known as the 'multiannual financial framework' (see Chapter II.4.3).

As result of its intensive work, the European Council has – like the EP – developed a state-like agenda, covering a broad scope of public policies in different degrees of intensity. In several ways, though with varying impact, the Heads of State or Government have set the EU's agenda and priorities, shaped doctrines and formulated guidelines for most public policies and also monitored and moderated implementation processes in many domains.

Dominating items on the European Council's agenda were issues under the broad label of 'economic governance'. Heads of State or Government have used the European Council to deliberate and agree on measures dealing with major economic challenges. From the creation of the European Monetary System (EMS) in 1979 to the deep and dramatic crisis of the euro area from 2008 onwards, they made decisions with a strong impact on core areas of national economic sovereignty.

Even more explicit than in the previous (Nice) treaty, the Lisbon TEU defines the European Council's pivotal role in the 'general provisions on the Union's external action' (Art.22(1) TEU) and in the 'specific provisions on the Common Foreign and Security Policy' (see especially Art.22, 24 and 26 TEU). The Lisbon TEU places the European Council at the top of the institutional architecture regarding what the TEU now calls 'external action' (Art.21

TEU, see also Chapter II.9). In taking up this responsibility, the European Council has dealt with differentiated items on the international agenda. Declarations of the European Council range from dealing with developments in the regional neighbourhood to global issues. In its attempts to establish the EU as a 'global player', the European Council can be regarded as the EU's collective voice and face, perhaps even as a 'collective Head of State' (De Schoutheete, 2012a).

The European Council also exercised major pre-constitutional and pre-legislative functions in another core area of national sovereignty: It created and developed an 'area of freedom, security and justice' in dealing with salient items of justice and home affairs (see Art.68 TFEU).

Even if originally not intended, the chief national executives have also included traditional policies of the European Community in the European Council's agenda, like the internal market and the Common Agricultural Policy (CAP), as well as newer issues like environmental, climate and migration policies.

A major function that is not explicitly mentioned in the Treaties is the European Council's role to offer political leadership for (re-)acting in situations of internal crisis and external shocks. A strong demand for guidance has often pushed the Heads of State or Government to direct the Union in times of uncertainties. From the Yom Kippur War in 1973 to the fall of the Berlin Wall (1989) and the financial crisis of Greece (from 2010 onwards), national executive leaders used their roles as 'summitteers' on the European level to pursue crisis management functions, although they were not always successful to achieve coherent and effective actions. A typical invitation letter of the European Council's President documents major issues on the broad agenda for its deliberations (see Document II.5.2).

Document II.5.2: Excerpt of an Invitation Letter by President Herman van Rompuy

EUROPEAN COUNCIL
THE PRESIDENT

EN

Brussels, 16 October 2012
EUCO 190/12
PRESSE 431
PR PCE 163

Invitation letter by President Van Rompuy to the European Council

It is my pleasure to invite you to the meeting of the European Council on 18 and 19 October 2012 in Brussels.

Further to our June 2012 European Council meeting, I sent you last week the interim report on the Economic and Monetary Union which I prepared in close cooperation with the Presidents of the Commission, the Eurogroup and the European Central Bank. The report constitutes a second step on the way to setting out our vision to complete a genuine EMU and contains several ideas which need to be explored further. After our traditional meeting with the President of the European Parliament, I intend to use our first working session to discuss the report. The President of the ECB will join us for this discussion as well as for the dinner.

Over dinner, we should look more specifically at our draft conclusions on the EMU. The aim is to give an impulse to ongoing work on important legislative proposals, in particular as regards the Single Supervisory Mechanism for the banking sector. But we should also give guidance on the work ahead as regards further integration of our budgetary and economic policy frameworks as well as the strengthening of democratic legitmacy and accountability which must accompany this process. My objective is to reach agreement on that section of the conclusions already Thursday evening.

On Friday morning, in the context of our discussion on the EU's relations with its strategic partners, I will debrief you on the recent summit we held with China. We will also adopt conclusions on Syria, Iran and Mali prepared in the light of discussions at the Foreign Affairs and General Affairs Councils.

We will then approve the rest of our draft conclusions. These should help provide momentum where required in the implementation of the Compact for Growth and Jobs we decided last June. As I explained in my recent letter to you, there are indeed some areas where there is a risk of progress lagging behind. This was in fact discussed at the General Affairs Council on Tuesday. All members of the European Council should ensure that the content of the Compact is rapidly implemented, both at the level of the EU and at the national level.

Source: Modified Scan. For original see: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/132909.pdf (last accessed 18.11.2012).

The headlines of the agenda from June 2019 mirror the scope of its activities.

Box II.5.1: European Council Conclusion Headlines June 2019

I. The Next Institutional Cycle
II. Multiannual Financial Framework
III.Climate Change
IV.Disinformation and Hybrid Threats
V. External Relations
VI. Other Items

Source https://www.consilium.europa.eu/media/39922/20-21-euco-final-conclusions-en.pdf (last accessed: 22.07.2019).

Box II.5.2: Agenda of the European Council Meeting 20-21 June 2019

1. Exchange of views with the President of the European Parliament
2. Adoption of the agenda
3. The next institutional cycle
4. Multiannual Financial Framework
5. Climate change
6. Disinformation and hybrid threats
7. External relations
8. Other items
9. Adoption of the conclusions (EUCO 9/19)
10. Review of the European Council Decision concerning the number of members of the European Commission
11. Approval of the minutes of the European Council meeting on 21-22 March 2019 and decision to make them public (EUCO 4/19)

Source: https://data.consilium.europa.eu/doc/document/ST-10-2019-INIT/en/pdf (last accessed: 22.07.2019).

5.2 Election and Composition: The Club of the Highest Political Leaders

An essential feature of the European Council is its composition. Its members are legitimised by national elections. They are the highest representatives of the member states as 'masters of the Treaties'. Since the creation of its post, the President of the European Commission has also belonged to this group.

Document II.5.3: Composition of the European Council

Article 15(2) TEU

The European Council shall consist of the Heads of State or Government of the member states, together with its President and the President of the Commission. The High Representative of the Union for Foreign Affairs and Security Policy shall take part in its work.

The provisions of the Lisbon TEU added an elected permanent President to the list of members, replacing the rotating presidency which was exercised by the Head of State or Government of the member state which chaired the Council of the EU for half a year. These new provisions also guarantee the participation of the High Representative of the Union for Foreign Affairs and Security Policy who 'shall take part in its work' (Art.15(2) TEU). When dealing with the financial crisis, the President of the European Central Bank also took part in the deliberations.

At the beginning of each session, the president of the EP presents the positions of the European Parliament. However, after a short discussion, he leaves the conference room. Advisors, for example national civil servants, are not allowed to be present. The members seek to keep a highly exclusive club atmosphere. Yet, there are many civil servants close to the conference room, in order to brief their member of the European Council if needed.

In contrast to former versions, the new Lisbon provisions no longer mention the Ministers of Foreign Affairs who used to be members of a subordinated rank.

Since the outbreak of the financial and debt crisis, the so-called Euro-summit has emerged. In this composition, only the Heads of State or Government whose currency is the euro gather to take decisions related to the Economic and Monetary Union (EMU). The Heads of State or Government of the euro area also have elected their own President for a two-and-a-half year term.

5.3 Decision-Making: Formal and Informal

Given their pivotal role, the decision-making procedures of the European Council deserve closer attention. The legal provisions confirm one major rule regarding its internal decision-making: The dominating mode is to grant each member a veto position (see Document II.5.4.).

Document II.5.4: Decision-Making within the European Council

Article 15(4) TEU
Except where the Treaties provide otherwise, decisions of the European Council shall be taken by consensus.

Despite the above mentioned treaty article, the provisions also enable the members to take decisions by qualified majority (Art.235 TFEU) when exercising electoral functions and deciding on minor adaptations for the working of other institutions.

The impact of this legal provision on the real behaviour is minimal. The shadow of a potential vote does not serve as a 'whip' for the President to strengthen his role as a consensus broker as this is a recurrent pattern in the Council (Hayes-Renshaw and Wallace, 2006a).

In view of these legal rules for decision-making within the European Council, one could expect that this institution would not be capable of concluding any real agreements. As each political leader is equipped with a veto right and considering deeply heterogeneous interests among the member states, it is surprising that the European Council has regularly adopted agreements on major issues of national interests.

To explain this performance, we need to look at real patterns of reaching agreements. We observe a set of differentiated tactical devices and bargaining instruments to form consensus among national leaders.

One major factor for explaining the way of achieving a common position is to look at the preparation and the conclusion of 'big bargains'(Laffan, 2005, Jopp and Matl, 2005, Moravcsik, 1998) on comprehensive 'package deals' (Werts, 2008). This argument stresses that only those policy-makers at the top of the national hierarchy are able to reach agreements which include demands and concessions over a broader scope of policy domains. By combining side payments and intersectoral linkages ('horse-trading'), chief national executives have the authority and power to link detailed decisions for several issues on the political agenda. In this they are able to frame gains and losses in a way which at the end is acceptable to each member.

The process of framing and concluding agreements is not a simple or rapid one. In spite of many experiences and lessons drawn, it still takes the Heads of State or Government considerable time and energy to get to a consensus.

In the final hours of the real negotiation, quite often in the middle of the night, the President of the European Council uses several procedural devices to facilitate consensus (Art.15(6) TEU). One of the most important of these devices is the so-called 'confessional procedure' (Hayes-Renshaw and Wallace, 2006a). Before or during plenary sessions of the European Council, the President will individually contact those members who are crucial to reach consensus. Based on such an informal procedure, the President identifies the essential elements of package deals and drafts a compromise text. A well-documented case is the Copenhagen session in 2002 in which the Danish Prime Minister concluded the accession negotiations with the ten applicant countries in individual bilateral meetings (Guldbrandsen, 2003).

Besides the skills of the President, we observe also another significant feature to reach an agreement. Like in other negotiations in similar constellations, drama and exhaustion forces members to agree. The culmination of such a process is quite often known as a 'night of the long knives' (De Schoutheete, 2002) or as the ‘end-game’ (Dyson and Featherstone, 1999). Long night sessions of the European Council took place at nearly each act of system-making and when taking decisions on the Union’s own resources and on the multiannual financial framework. Also in emergency cases under external shocks, members had to find solutions in long-night sessions. In this context and confronted with strong pressures from financial markets, national chief executives negotiated rescue packages for the euro during weekends and until the early hours of the next day. As telling examples, the chief national executives concluded major programs on 27 October 2011 at 4 a.m. and on 9 December 2011 at 5 a.m.

To understand these bargaining processes we need to be aware that the Heads of State or Government need to deal with controversial key details. Merely fulfilling its role to ‘define the general political directions and priorities thereof’, as the Art.15(1) TEU stipulates (see Document II.5.1), does not adequately characterise the bargaining style. Although it might not appeal to them, they personally have to get down to the unpleasant so-called ‘technical details’. Only by negotiating concrete formulations the political leaders can reach a consensus in important matters of conflict.

Faced with these difficulties as ultimate decision-makers, the top politicians also use a couple of conventional devices to get to acceptable compromises. Quite often we can discover vague and ambiguous wordings. Often agreements can only be reached by increasing the complexity of the solutions or even by a consensus on meaningless but face-saving formulations.

Another tool is to postpone decisions: If in a final session controversies could not be settled, members also agreed to take further decisions at a later date – these are referred to as ‘left-overs’ or ‘rendezvous-formulas’.

A special device to reach consensus in the European Council is to agree on different forms of ‘opt outs’: In these cases the majority of members offers an exception from common rules to deviating colleagues in firm minority positions (Dyson and Sepos, 2010, Tekin, 2012).

Besides analysing negotiation tactics, we also need to look at sources of power including constellations and coalitions of countries as well as at potential factors for leadership.

Several sources confirm that members can be roughly divided in a small group of leaders and a larger group of followers. Against some conventional assessments, I argue that the European Council serves smaller states to counteract tendencies towards a directorate of just the mighty

few by offering the less powerful ones the opportunity to raise their voice. At the same time there is a strong demand for leadership which the Franco-German tandem has taken up on its own initiative but which is accepted and even asked quite often for by many less influential members.

5.4 Organisation of the European Council

As to the internal organisation of the European Council's work, the Lisbon TEU and TFEU introduce a significant novelty: Instead of a Presidency rotating between its members on a half-yearly basis, the Heads of State or Government elect a President for a term of two and a half years, renewable once (Art.15(5) TEU). The extensive list of his functions and the provisions to exercise them (Art.15(6) TEU) signal that the members wanted to increase their own institution's efficiency without giving this office too much autonomy (see Chapter II.5).

The European Council is supposed to meet at least twice every six months which amounts to at least four meetings a year. In exceptional circumstances special sessions of the European Council can be convened (Art.15(3) TEU).

Document II.5.5: Meetings of the European Council

Article 15(3) TEU

The European Council shall meet twice every six months, convened by its President. When the agenda so requires, the members of the European Council may decide each to be assisted by a minister and, in the case of the President of the Commission, by a member of the Commission. When the situation so requires, the President shall convene a special meeting of the European Council.

Recent examples have been extraordinary meetings due to the situation in Georgia in 2008 or the financial and sovereign debt crisis. Reacting to economic challenges the European Council met nearly every month in the years 2010-2012.

As part of organisational arrangements 'the European Council shall be assisted by the General Secretariat of the Council' (Art.235(4) TFEU) which acts 'under the authority of its Secretary-General' who 'shall take all the measures necessary for the organisation of proceedings' (Art.13(1,2) TEU; Rules of Procedure).

In contrast to rules of the Council to 'meet in public' (for legislative acts) (Art.16(6) TEU), 'meetings of the European Council shall not be public' (Art.4(3) Rules of Procedure), and, even more, 'the deliberations of the European Council shall be covered by the obligation of professional secrecy' (Art.11 Rules of Procedure).

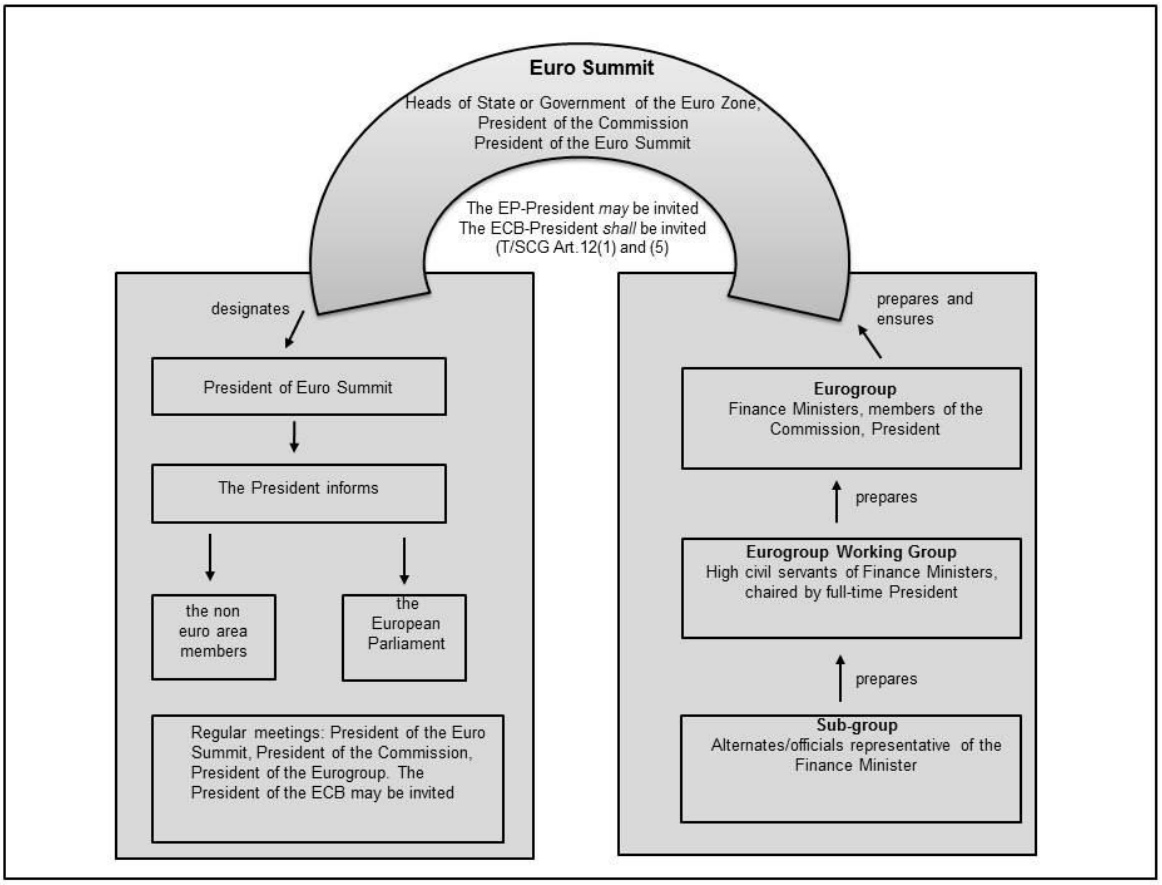
The language regime raises less difficulties. The Rules of Procedure dictate that 'the European Council shall deliberate and take decisions only on the basis of documents and drafts drawn-up in the languages specified in the rules in force governing languages', i.e. the official languages (Art.9(1) Rules of Procedure).

5.5. Euro Summit

Of particular importance for the EU's institutional architecture is the establishment of the Euro Summit. The French position, voiced by former President Sarkozy, claimed that it was up to the Heads of State or Government of the euro area to take on additional responsibilities for dealing with the crisis, as they were, in his understanding, the only policy-makers with the necessary democratic legitimacy to do so (Sarkozy, 2008, Sarkozy, 2011). Other members of this group, particularly German Chancellor Merkel, were more hesitant and several members of the European Council outside of the euro area voiced strong concerns regarding their exclusion from deliberations and decision-making, which could arguably undermine the unity of the European Council. Despite such concerns the chief executives of the euro area set up the Euro Summit which is separate from the European Council. The rationale for this exclusive set-up was succinctly summarised by the President of both the European Council and the Euro Summit: 'It is natural that those who share a common currency – which by the way in the Union is the norm and not the exception – need to take some common decisions' (Van Rompuy, 2012c: 18).

The Euro Summit itself adopted 'Ten measures to improve the governance of the Eurozone [euro area]' (Euro Summit, October 2011). The objective is 'to strengthen economic policy coordination and surveillance within the Eurozone [euro area], to improve the effectiveness of decision-making and to ensure more consistent communication' (Euro Summit, October 2011; see Figure II.5.2). In addition, the euro area members adopted specific rules of procedure, entitled 'The guiding principles for the conduct of proceedings of Euro Summit meetings' (March 2013).

Figure II.5.2: The Euro Summit in the Euro area's Institutional Architecture



Source: **Compiled by the author. Adapted from Conclusions Euro Summit (October 2011: Annex I, TSCG Art.12 and Conclusion 2013 and its Annex 'Guiding Principles'.**

Euro Summit meetings consist of the Heads of State or Government of the euro area and a president of this summit who is appointed at the same time as the president of the European Council. The President of the ECB is also invited to take part in the meetings. The President of the Euro group (the meeting of the finance ministers of the members states that have the euro as their currency) may be invited to attend, and the President of the EP may be granted a hearing (Art.4 Guiding Principles of the Euro Summit). A general rule allows for the participation of non-euro members of the European Council who have ratified the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG) for discussions concerning competitiveness, the modification of the euro area's architecture and the implementation of the TSCG (Art.4(5) Guiding Principles of the Euro Summit).

Efforts to use synergies between the two different summit formats are evident, as 'The Euro Summit shall meet at least twice a year, convened by its President. Its ordinary meetings shall, whenever possible, take place after the European Council' (Art.1(1) Guiding Principles of the Euro Summit). In real life, the frequency of meetings depends on the issues at hand and on the overall political context. The Euro Summit met four times each in 2011 and 2012, and only once in 2013. In 2014 there was no Euro Summit meeting. With a view to achieving continuity and inter-institutional coherence, the rules of procedure stipulate that the 'President of the Euro Summit will ensure the preparation and continuity of the work of the Euro Summit, in close cooperation with the President of the Commission and on the basis of the preparatory work of the Euro Group' (Art.2(1) Guiding Principles of the Euro Summit).

Also with the intention of ensuring some consistency between the Euro Summit and the plenary of the European Council, the Heads of State or Government of the euro area appointed the President of the European Council also as President of the Euro Summit (Euro Summit March 2012). This 'double hat' was supposed to alleviate the concerns of those countries that are not part of the Euro Summit that they would become second-rank members, by being obliged to accept what the smaller circle decides, while being unable to influence proceedings directly (See Van Rompuy, 2012c: 28). In this sense 'the President of the Euro Summit will keep the non-euro area member states closely informed of the preparation and outcome of the Summits. The President will also inform the European Parliament of the outcome of the Euro Summits' (Art.3 Guiding Principles of the Euro Summit).

Aside from these highly formalised procedures, there are informal gatherings and highly publicised meetings of groups of two to four members. In particular, the Franco-German tandem regularly meets to discuss and shape central elements of future agreements.

The crisis management of the European Council also had other consequences for the institutional set-up, some intended and some unintended. The reinforcement of the position of the President of the European Council *vis-à-vis* the Commission President is one example. On several occasions members have asked their president to make proposals for the reform of the euro area. In 2010, Van Rompuy established and chaired a task force on Economic Governance and in 2012 he presented a paper entitled 'Towards a genuine Economic and Monetary Union' at the behest of the members of the European Council. While the Commission was involved in both initiatives, the President of the European Council took full

responsibility for a task that had previously been assigned to the Presidents of the Commission.

5.6 General Remarks: Putting the European Council into a Theoretical Perspective

Looking at the diverse activities of the European Council, it becomes obvious that it has significantly shaped the 'legal and living' constitution of the EU. Over the past decades, the Heads of State or Government had constantly taken decisions of major importance in nearly every policy field within the European Council. Because of this active profile, one could raise the question of how this institution has triggered sustainable changes in the institutional architecture[6].

From an intergovernmental point of view, one would expect that the European Council would function as the constitutional architect in order to change the institutional architecture to its own benefit – for example enhancing its own ability to define general political guidelines: Such a role would also lead to breaking up the Commission's monopoly to initiate legislation and degrading its status to a general secretariat and furthermore to downgrading the Council of Ministers to a mere ratifying chamber and to cutting the EP´s rights to participate in legislation.

In reality, however, one observes a different outcome. Several times the political leaders have introduced new procedures that strengthen the position of the supranational institutions – for example the European Commission, the European Parliament, and the Court of Justice of the European Union. Moreover, the Heads of State or Government have changed the system of decision-making in the Council from unanimity to QMV various times and therewith reducing the powers of single member states. Obviously, intergovernmentalism has its difficulties to explain this outcome (see Figure I.3.4).

In a long term perspective, the 'fusion'-thesis is able to provide an unconventional explanation. As indicated at the beginning, the fusion approach expects a simultaneous and reciprocal relationship between supranational and intergovernmental elements, since European states primarily perceive the Union in terms of performance benefits and as a means of providing new institutional means to deliver policy goals that are difficult to achieve at the

[6] see for example MONAR, J. 2010c. The Institutional Framework of the AFSJ: Specific Challenges and Dynamics of Change. *In:* MONAR, J. (ed.) *The Insitutional Dimensions of the European Union's Area of Freedom, Security and Justice.* Brussels: P.I.E. Peter Lang

domestic level. Thus, the decisions made by the Heads of State or Government within the European Council document both supranational and intergovernmental features. As a result, one can conclude that the European Council has inserted a complex fusion of intergovernmental and supranational components into the system of the EU.

Questions

1) What are the major functions of the European Council? Compare the 'written' provisions of the treaties with 'real' world patterns.
2) Define and explain the role of the European Council as the 'constitutional architect'.
3) Why is the President of the Commission member of the European Council?
4) How does the European Council get to agreements in spite of the veto of each member?
5) Discuss: The European Council is the intergovernmental body par exzellence!
6) Discuss: The European Council is the key case for the fusion thesis.
7) Discuss: The European Council acts like an undemocratic 'dictator' of policy.
8) Discuss: The European Council is the EU's government.
9) Discuss: The European Council enhances the EU's democratic legitimacy.
10) How do you assess the European Council?

Further Reading

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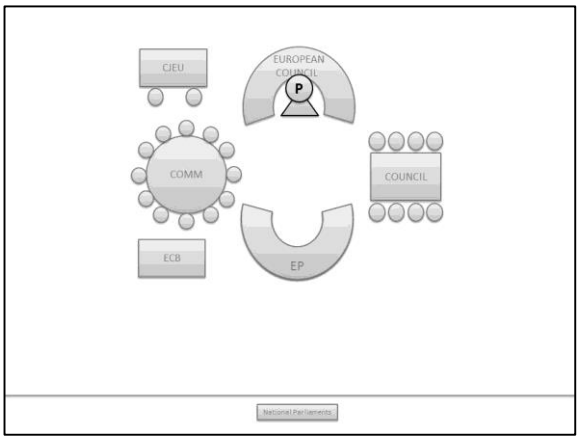
6. The President of the European Council: Master or Manager?

For understanding the European Council's profile and performance we need to study the role of its President. Two principal reasons justify a longer chapter on the Presidency. First, there is a widely shared opinion that the Presidency 'has become a key element in the functioning of the life of the Union' (CEPS, Egmont and EPC, 2007).



Secondly, with the Lisbon TEU, the Heads of State or Government have agreed on one far-reaching, innovative change for managing their own work. The new provisions replaced the rotating Presidency among the members of the European Council by a permanent (or full time) President (Art.15(5) and (6) (TEU)).

Taking up the often-used 'principal-agent approach' (see Chapter I.3.3), we can raise the question if the office holder was – and with the Lisbon TEU provisions will be – more likely to be the 'principal' or the 'agent' of the institution. With a set of related terms (Wessels and Traguth, 2011), I will discuss whether the President is rather a 'master' with strong power and influence or rather a 'manager' with limited but effective procedural powers, or if he might even be just the 'maid' of the European Council with a low degree of influence and autonomy. This last type would lead to the role of an upgraded Secretary General.

The first office holder defined his own role as follows: 'The two extreme role models should be discarded: The permanent President is not meant to be a *Président* nor is he meant to be only a *chairman'* (Van Rompuy, 2010b). In between these two extremes, we also find the notion in the Brussels arena of 'neither spectator nor dictator but facilitator' (Baker, 2011).

The list of arguments for a permanent Presidency stressed the intended improvements for the working of the European Council: having more time at his disposal and thus a higher degree of continuity, the office holder was expected to fulfil relevant functions in the European Council with a higher degree of procedural efficiency and effective impact.

One major argument was the expectation that with no national interests to defend, the person holding the chair could act more convincingly as an honest broker. Furthermore, the purposeful selection of a president by its members allows the election of an officeholder that

the Heads of State or Government esteem fit and trustworthy instead of being dependent on an accidental taking up of an office holder who automatically becomes president because of his national position. Others – especially the media – expected some kind of charismatic leader who would act within the EU and to the outside world as 'Mr. or Ms. Europe' (Lamassoure, 2004).

Beyond functional arguments, we observe, however, also a fundamental political controversy about expected consequences on the institutional balance in the EU's architecture.

One line of argument in this debate assumed that the office holder would act in a way that can be characterised as an agent for the directorate of great powers trying to dominate the EU architecture as 'cooperative hegemony' (Pedersen, 2002). Also leading members of the EP classified the office of a permanent President as 'superfluous' (Brok, 2003).

Figure II.6.1: The President of the European Council - TEDO

Source: Translation of Wessels 2019b, p. 4

6.1. Tasks

The provisions of the Lisbon Treaties (Art.15(6b) TEU) and even more the new Rules of Procedures (Art.3) fix the tasks of the President. Art.15(6) TEU asks the President of the European Council to fulfil a variety of tasks.

Document II.6.1: Tasks of the President of the European Council

Article 15(6) TEU

The President of the European Council:

(a) shall chair it and drive forward its work;

(b) shall ensure the preparation and continuity of the work of the European Council in cooperation with the President of the Commission, and on the basis of the work of the General Affairs Council;

(c) shall endeavour to facilitate cohesion and consensus within the European Council;

(d) shall present a report to the European Parliament after each of the meetings of the European Council.

The President of the European Council shall, at his level and in that capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy.

For analysing the tasks of the President we will follow an ideal policy cycle of preparing, concluding, implementing and controlling decisions.

As a starting point the President might 'frame' the upcoming debate. Given the ambitions of the European Council, the President might take up the active lead to develop initiatives for acts of system making and of policy making already at an early stage of deliberations. From his position and even more with established personal reputation he might turn into a 'norm entrepreneur'.

The first concrete step is to convene the session: Beyond the mainly organisational responsibility to fix the date of a session, a major task of the President is to prepare the agenda for the sessions of the European Council and to draft the texts for the conclusions and decisions taken by the European Council.

The legal words however limit the autonomy of the permanent President. He may not launch an initiative without the support and agreement of the President of the Commission and with some kind of mandate by the General Affairs Council. The intention is obvious: Given

experiences with the way ambitious presidents in former times used their prerogatives, a large coalition of governments wanted to establish or keep a dense system of concrete checks to reduce unexpected, unintended and uncontrollable moves by the President. These rules may set limits to the President's autonomy, but the President is nevertheless established as the only 'gate keeper' for agenda setting of their body.

As to the next phase in the policy cycle, the treaty provisions enumerate the President's tasks during the meetings: 'The President of the European Council shall chair it (the meeting) and drive forward its work' (Art.15(6a) TEU). This procedural prerogative enables the president to call interruptions of meetings for working towards a consensus position (for example for organising confessionals, see Chapter II.4.3).

Experienced skills of a chairperson are necessary but not sufficient for the major and traditional task of a president. He is to 'facilitate cohesion and consensus within the European Council' (Art.15(6c) TEU). The office holder is supposed to steer and lead members of the European Council to an agreement – without voicing a position of his own on the substance of the matter at stake.

This role is normally characterised with labels such as being an 'honest broker' (Elgström, 2003). With procedural tools at hand, the Presidency is supposed to foster productive discussions and conclusive negotiations.

For arguing and bargaining he might employ several means and tactics; one of the most important is the so-called 'confessional procedure' 8hayes-renshaw and Wallace 2006b) (see above Chapter II.4.3). As part of this consensus building process the chair – often with the help of the secretariat – has to draft compromise texts which might be acceptable to all members. One issue might be of specific importance: if the analysis on decision-making stresses the essential role of the Franco-German tandem, then the President has to develop the skills to get both to a compromise in spite of their usual large differences on concrete issues and to give the other members the feeling that the agreement among the two is not an 'order' by a directorate for the rest of European Council. Thus, the President can offer major services that are high in demand within peer groups such as the European Council which acts without an institutionalised hierarchy and without voting.

After the sessions, the President acts as a 'spokesperson': it is the President's task to brief the international press (together with the President of the Commission). His statements and answers to questions remain general and do not mention any internal disputes. After a session,

the President is also obliged to 'present a report to the European Parliament' (Art.15 (6d) TEU).

We now turn to another major issue for the effectiveness of the European Council. It is the obligation of the President to 'ensure [...] the continuity of the work of the European Council in cooperation with the President of the Commission, and on the basis of the work of the General Affairs Council' (Art.15 (6b) TEU). For such a function the President might serve as a guardian, as a watch dog, to look that members take and stick to 'credible commitments'.

One major assignment of the Permanent President is the external representation of the EU on his level. Given increased ambitions of the EU to play a greater role in world affairs and the shortcomings of the rotating presidencies this part of the President's job description has even gained more importance, but the office holder will be bound by the positions taken by the European Council. More important are, however, the delimitations in the scope of activities: in international arenas he will only be able to speak on issues of the Common Foreign and Security Policy (CFSP). In other areas of the EU's external action which are dealt with at for example the G8 or G20 summits, the President of the Commission keeps his former prerogatives (see Chapter III.14.4). In view of the external representation not only the rivalry between EU office holders is obvious; also government leaders of the larger EU powers are reluctant to give 'their' President an exclusive or even only a prominent role as an international player when they deem an international involvement as appropriate for themselves.

Beyond the legal formulations, the office holder is confronted with the expectation that he will be able to react and act adequately for the Union in times of extraordinary challenges. External shocks and internal crises will stimulate a high demand for leadership in the Union which will then put pressure on the President to take up a role for and within the European Council which goes beyond the wording and the original spirit of the treaty text.

6.2 Election: Strong Anticipatory Control by Members

Document II.6.2: Election of the President of the European Council

Article 15 TEU

5. The European Council shall elect its President, by a qualified majority, for a term of two and a half years, renewable once. In the event of an impediment or serious misconduct, the European Council can end the President's term of office in accordance with the same procedure.

At first sight, the rules for the election are surprising. In contrast to the President of the Commission and the High Representative of the Union for Foreign Affairs and Security Policy, this office holder is only elected for two and a half years. The mandate of the President of the European Council is also only 'renewable once'. Thus, the overall term is limited to five years – again in clear difference to other top positions.

In the shadow of qualified majority voting, not all members of the European Council need to agree on the candidate for the chair. However, given the group norms and the interest of the elected person to be accepted by all of his colleagues, an open controversy seems less likely.[7] The respective Art.15(5) TEU clearly sets limits to the autonomy of the office holder. National leaders might sanction a person with a too ambitious profile already after the rather short time span of two and a half years.

Overall, the intended consequences of these rules for election are thus shaped by the inclination to prevent an agent's drift by the potential misuse of longer experiences and deeper institutional memory than most members of the European Council. The treaty article documents the members' attempts to set up provisions which weaken inbuilt trends towards an overly powerful and charismatic leadership role.

To reduce the risk that the office holder pursues strong national interests, the position is de-nationalised. The chairperson cannot hold a national office and be President of the European Council at the same time. This formulation does not exclude that the same person might wear a so-called 'big double hat' taking up at the same time the Presidency of the European Commission or other functions like the Presidency of the Euro Summit.

The election of the first President, the then Belgian Prime Minister van Rompuy, in 2009 and his re-election in March 2012 offered insights into the preferences of the Heads of State or Government in their search for a chairperson (Barber, 2010). In the public debate, the competition for this job took place between the former British Prime Minister Blair with his extended international profile and the long-serving Luxembourgian Prime Minister Juncker with his high European reputation and engagement. The European Council then did not choose any of these more experienced and prominent candidates. Members of the European Council finally agreed on the then Belgian Prime Minister van Rompuy who was a widely unknown candidate and disposed only of limited experiences in European and international affairs. His

[7] Notably, the election of Jean-Claude Juncker as President of the Commission in June 2014 has proven that under certain circumstances the Heads of State or Government decided against the explicit will of some member states.

peers apparently wished to limit the risk of electing a person who would try to establish himself as a master of their group. The re-election of van Rompuy for a second period of two and half years took place without any public debate. Apparently, he had acquired a high degree of trust and respect in his handling of their institution also by keeping a low profile for him.

In August 2014, the European Council selected the then prime minister of Poland, Donald Tusk, to succeed van Rompuy. The election of Tusk as the new permanent President (from 1st of December 2014 onwards) fulfilled the criterion of an equal geographical distribution among member states for the EU key position.

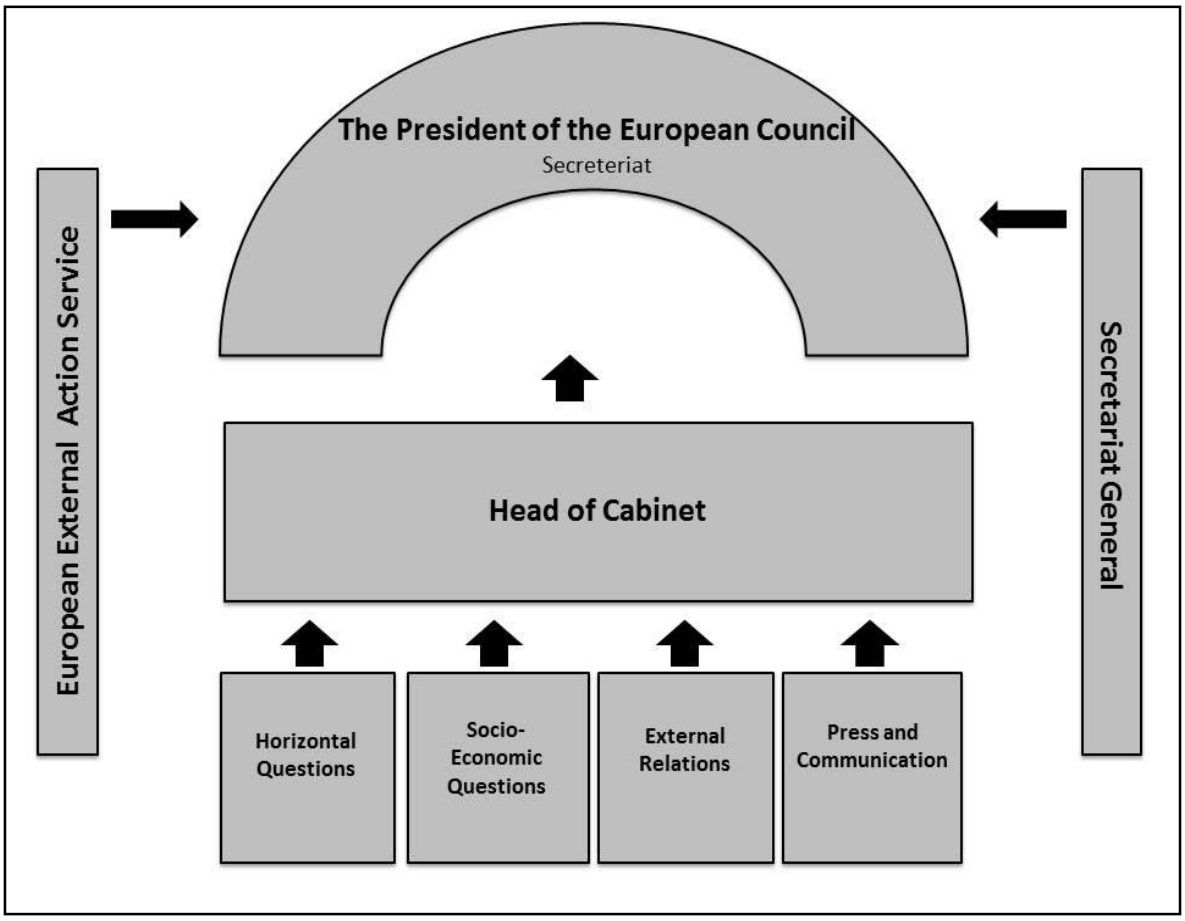
After several negotiations between 30 June-2 July 2019, the European Council elected Charles Michel as its new president. It will be interesting to see how he will interpret the role as President in comparison to his predecessors.

6.3 Organisation

The President has an administrative set-up of his own (see Figure II.5.2). As is customary in EU institutions, the President disposes of a 'cabinet', a set-up of personal advisors. The Head of the Cabinet is in a key position to organise the work of the President. The distribution of tasks inside the cabinet indicates the scope of the President´s activities. His cabinet has a size comparable to the one of the Commission President. As the European Council is served by the Secretariat General of the Council, the President can also use the latter's expertise.

The President, like the President of the Commission, is assisted by the newly founded European External Action Service in the exercise of his respective functions 'in the area of external relations' (Art.2(2) Rules of Procedure).

Figure II.6.2: Administrative Set-up of the President



Source: Wessels (2016). Based on: http://www.european-council.europa.eu/the-president/cabinet.aspx?lang=en (last accessed: 03.04.2013).

6.4 General Remarks: Low Profile for a High Performance

In the treaty provisions, the High Contracting Parties formulated ambitious objectives for this new office. The text enumerates several key tasks circumscribed with keywords such as 'preparation and continuity', 'cohesion and consensus' and 'external representation'. At the same time they offer only restricted procedural powers to the office holders.

The detailed provisions offer him sufficient opportunities to prepare and chair the meeting, but they also tend to prevent him from mastering the relevant procedures just and fully in his own way. The inherent logics and the spirit derived from the texts point at a low profile for the office holder, while aiming at a high performance. Such a capabilities-expectation gap does not need to be a shortcoming per se. A modest consent-driven chairperson and facilitator might be adequate and appropriate for a body with major controversies on vital issues on its agenda.

When debating the President's role, it is also of importance to take some external factors into account, such as the emergence of crises. Given the serious turbulences in the Euro area, he contributed to an intensive and dramatic crisis management by the European Council. For outside observers it is difficult to identify and qualify the real impact the President had on the decision making inside the European Council when reacting to 'the most serious test that the European Union has faced since long' (Van Rompuy, 2012c). Following anecdotal information, he apparently played an active and engaged role as a dynamic moderator in highly politicised and controversial deliberations and contributed to achieve agreements of considerable political relevance.

The preliminary assessment highlights his profile and performance as a highly attentive facilitating manager. Serving in many ways his institution, I do not observe any steps on his side to become the 'master' of his club or even to aim at the status of a charismatic 'Mr. Europe' for the European public, challenging the authority of national leaders.

Comparing the legal word and the real world, personal characteristics of the first office holder and his way to use the treaty provisions role adequately fits the profile formulated in the treaty text. Though the activities and performance of the European Council might change after the end of the euro crisis, the profile which van Rompuy has developed will have long term effects, setting precedents for the election and for the role of his successors.

Questions

1) Compare the President's written tasks with his real world functions.
2) Define the term 'honest broker' and explain the process that the President can use to pursue such a role.
3) Describe and explain the election procedure of the President.
4) Discuss: The President of the European Council should be a charismatic leader of Europe.
5) Discuss: The President of the European Council should be elected directly by a popular vote.
6) Discuss: The creation of the President's office can be seen as strengthening intergovernmentalism within the EU's system.

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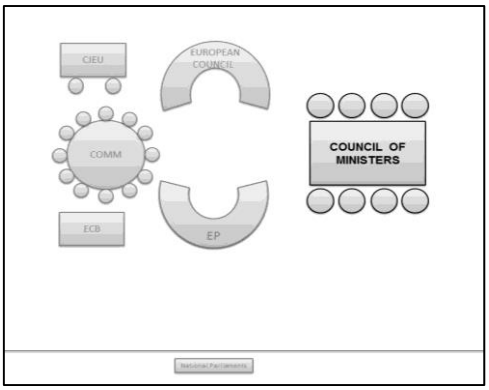
7. The Council of the European Union



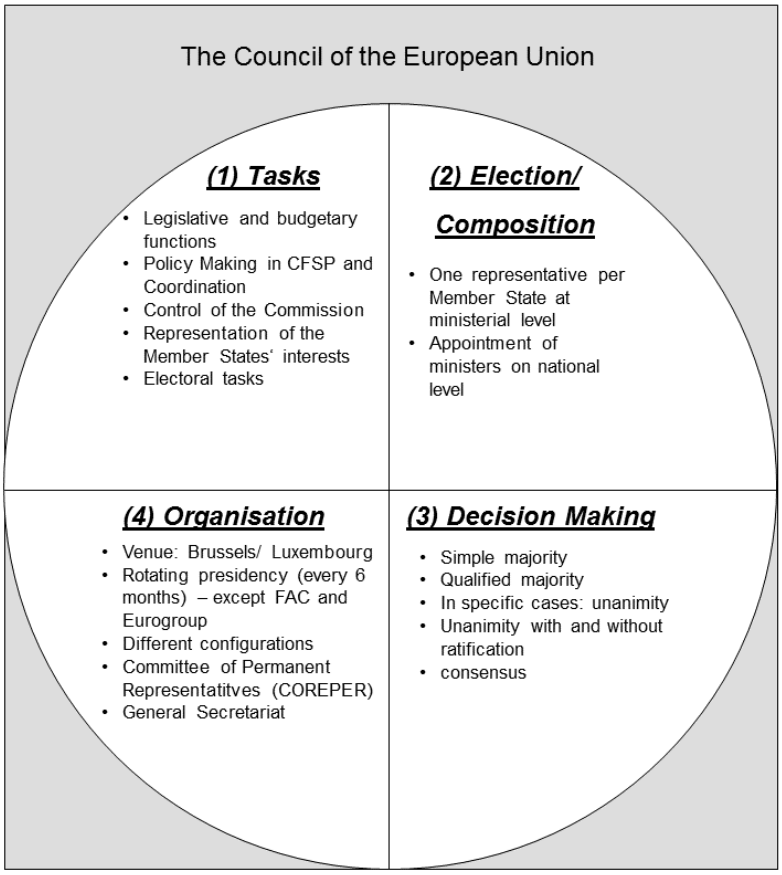
The Council of the European Union – also called the 'Council of Ministers' or just the 'Council' – plays a significant role in the EU political system. The Council has central decision-making powers in internal and external affairs, especially within the Common Foreign and Security Policy (CFSP) and the Common Security and Defence Policy (CSDP). Federalists see its as a typical second chamber in a bicameral system. Intergovernmentalists stress its role in representing national interests in all areas of public policies, also in preparing the European Council to which it should be subordinated.

The democratic legitimacy of Council decisions is based on Art. 10(2) TEU which states that 'Member States are represented […] in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens'. However, its legitimacy as a sole decisison making body became increasingly questioned. With each transfer of powers to the European level, member states saw a need to legitimate European decisions by incorporating the directly elected European Parliament into legislative and budgetary processes.

The former dominant position of the Council was thus increasingly limited in recent years: Within the 'ordinary legislative procedure' (OLP) (see above Chapter III.4, Chapter III.14.1 and Figure III.14.2) the Council constitutes – now *jointly* with the European Parliament – the Union's legislator. It is thus embedded into a bi-cameral system (see Figure II.4.3), apart from some minor exceptions, e.g in the CFSP. Similar to the European Parliament, the Council can ask the Commission to initiate policy proposals (Art. 241 TFEU).

The decision making procedures within the Council have always been disputed; their reform was one of the major controversies in the negotiations concluding the Lisbon Treaties. The dispute documents a trade-off between the search for more efficient decision making procedures and the preservation of national influence. Member States tried to safeguard their national prerogatives by developing a complex system in which it is still difficult to overrule a country.

Figure II.7.1: The Council of the European Union - TEDO



Source: translation of Wessels 2019c, p.4

7.1 Tasks

Document II.7.1: Tasks of the Council

Article 16(1) TEU
The Council shall, jointly with the European Parliament, exercise legislative and budgetary functions. It shall carry out policy-making and coordinating functions as laid down in the Treaties.

The Council fulfils a broad range of tasks. One major priority is its legislative function. It decides on all proposals sent from the Commission. Together with the European Parliament, the Council represents the legislative and budgetary authority of the European Union (Art. 16(1) TEU) (see also above Chapter II.4) although there are still a number of policy areas in which the European Parliament is not involved. Especially in the CFSP, only the Council takes binding decisions (Art. 24(1) and Art. 26(2) TEU).

Document II.7.2: The Decision-Making in the Council in the CFSP

Article 24(1) TEU
The common foreign and security policy is subject to specific rules and procedures. It shall be defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise.

Generally speaking, the role of the Council is strong in those areas in which an intergovernmental mode of decision-making prevails. This also applies for some procedures for coordinating economic, employment and social policies.

Furthermore, the Council fulfils a decisive role in recommending and nominating candidates for European institutions and committees. The treaty articles outline that the Council

- shall adopt – by common accord with the Commission President – a list of the other persons whom it proposes for appointment as members of the Commission (Art. 17(7) TEU; see Chapter II.8)
- shall adopt a list of members for the Economic and Social Committee (Art. 302(1) TFEU)
- shall recommend the President, the Vice-President and the other members of the Executive Board of the European Central Bank (Art. 283(2) TFEU).

The Council furthermore has established a control function with regard to the European Commission: When exercising its implementing powers, the Commission is ‘assisted’ by

representatives of the Member States through committees, in accordance with the 'comitology' procedure (Christiansen and Dobbels, 2012) (see Art 290 and 291 TFEU).

7.2 Election and Composition

Document II.7.3: Membership in the Council

Article 16(2) TEU

The Council shall consist of a representative of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote.

The Council consists of one representative per Member State at the ministerial level (Art. 16(2) TEU). Ministers are appointed or elected by varying national provisions.

Legally speaking, there is only *one* Council. However, it convenes in different configurations according to policy fields. In order to reduce the number of these configurations (22 in 1990), the European Council has restricted the configuration to the number of ten.

Box II.7.1: Different Council Configurations

1. General Affairs (GAC)
2. Foreign Affairs (FAC**Fehler! Textmarke nicht definiert.**) (sometimes including Defence Ministers)
3. Economic and Financial Affairs (ECOFIN)
4. Justice and Home Affairs (JHA)
5. Employment, Social Policy, Health and Consumer Affairs (EPSCO)
6. Competitiveness (internal market, industry, research and space) (COCOM)
7. Transport, Telecommunication and Energy (TTE)
8. Agriculture and Fisheries (AGRIFISH)
9. Environment (ENVI)
10. Education, youth, culture and sport (EYC)

Source: https://www.consilium.europa.eu/en/council-eu/configurations/ (last accessed: 22.07.2019).

The membership of a national minister depends on his or her specific portfolio. If, for instance, a policy proposal is related to environmental policy, the respective Council brings together the 28 national ministers who deal with environmental issues. The General Affairs Council (GAC), the Foreign Affairs Council (FAC), the Council of the Economic and Financial ministers (ECOFIN) and the Council of Justice and Home Affairs (JHA) are the most prominent Council configurations.

The General Affairs Council (GAC) is supposed to pursue a coordinating role and has a supporting function of the European Council.

Document II.7.4: Tasks of the GAC

Article 16(6) TEU

The General Affairs Council shall ensure consistency in the work of the different Council configurations. It shall prepare and ensure the follow-up to meetings of the European Council, in liaison with the President of the European Council and the Commission.

The agenda of one meeting of the General Affairs Council (GAC) documents a broad scope of activity. The June 2019 agenda of the GAC demonstrates that it is dealing with strategic long-term issues, but is also responsble for coordinating the implementation of European Council decisions.

Box II.7.2: Agenda of a Meeting of the General Affairs Council

25 June 2019

1. Adoption of the agenda
2. Legislative Package for Cohesion Policy 2021-2027
    a. Overall state of play of negotiations
    Progress report
    b. Future challenges in the programming of the funds
    Policy debate
3. Any other business

Source: https://data.consilium.europa.eu/doc/document/ST-10374-2019-INIT/en/pdf (last accessed: 22.07.2019).

Another specific Council configuration is the Foreign Affairs Council (FAC). Since the entry into force of the Lisbon Treaties, this Council is no longer chaired by a rotating presidency but by the High Representative of the Union for Foreign Affairs and Security Policy (HR). A permanent chair shall facilitate the continuity and cohesion in the foreign policy of the Union (see Chapter II.9).

Another (informal) configuration is the so-called Eurogroup[8]. The Lisbon Treaties mention it for the first time explicitly in Protocol No. 14, although it has already been established alongside the creation of the single currency. In the Eurogroup, the ministers of finance and economics of the countries whose currency is the Euro regularly meet to discuss and deliberate on various topics related to the Economic and Monetary Union. They prepare the ECOFIN

[8] see Treaty Protocol No. 14.

sessions and the Euro summit (see above Chapter II.5). The Commissioner for economic and monetary affairs, as well as the President of the European Central Bank are also members of this configuration. The Eurogroup elects its own President for a 2.5 year term. It is, however, not an official Council Configuration.

7.3 Decision Making: Rules and Practices of Qualified Majority Voting (QMV)

The Lisbon Treaties foresee a variety of decision making procedures for the Council. The rules for decision making have been highly contested in the negotiations leading to the Lisbon, but also the Nice Treaties. We can broadly distinguish five types:

- Simple majority voting of its 'component member'; mainly for procedural issues (see Art. 238(1) TFEU)
- Qualified majority (see below)
- Specific forms of qualified majority 'where the Council does not act on a proposal from the Commission (see Art. 238(2) TFEU)
- Unanimity; e.g. in CFSP
- Unanimity with national ratification; e.g. on determining own resources (see Art. 311 TFEU).

Document II.7.5 Treaty Rules for Decision Making

Article 16(3 and 4) TEU

3. The Council shall act by a qualified majority except where the Treaties provide otherwise.

4. As from 1 November 2014, a qualified majority shall be defined as at least 55 % of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65 % of the population of the Union.

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

Article 238 TFEU

1. Where it is required to act by a simple majority, the Council shall act by a majority of its component members.

2. By way of derogation from Article 16(4) of the Treaty on European Union, as from 1 November 2014 and subject to the provisions laid down in the Protocol on transitional provisions, where the Council does not act on a proposal from the Commission or from the High Representative of the Union for Foreign Affairs and Security Policy, the qualified majority shall be defined as at least 72 % of the members of the Council, representing Member States comprising at least 65 % of the population of the Union.

3. As from 1 November 2014 and subject to the provisions laid down in the Protocol on transitional provisions, in cases where, under the Treaties, not all the members of the Council participate in voting, a qualified majority shall be defined as follows:

(a) A qualified majority shall be defined as at least 55 % of the members of the Council representing the participating Member States, comprising at least 65 % of the population of these States.

A blocking minority must include at least the minimum number of Council members representing more than 35 % of the population of the participating Member States, plus one member, failing which the qualified majority shall be deemed attained;

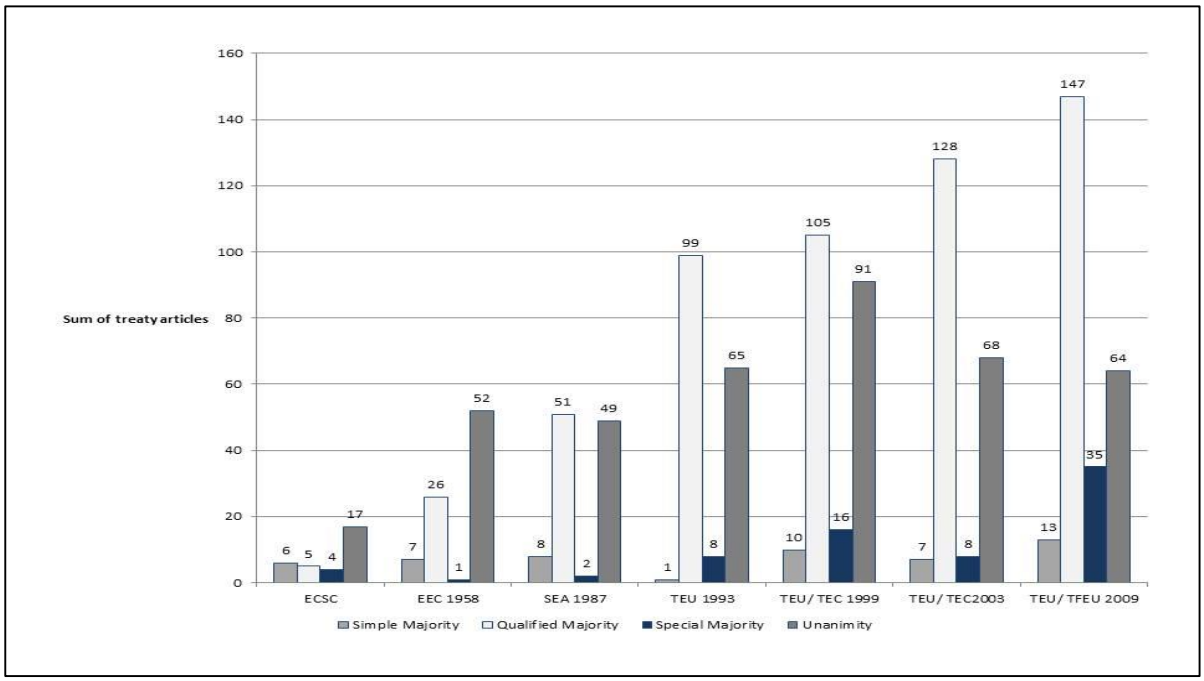
(b) By way of derogation from point (a), where the Council does not act on a proposal from the Commission or from the High Representative of the Union for Foreign Affairs and Security Policy, the qualified majority shall be defined as at least 72 % of the members of the Council representing the participating Member States, comprising at least 65 % of the population of these States.

4. Abstentions by Members present in person or represented shall not prevent the adoption by the Council of acts which require unanimity.

The controversy on the decision-making rules document a trade-off between efficient problem solving (the possibility to be outvoted from time to time) and a sovereignty reflex (the possibility to easily block decisions by keeping a veto. The specific requirements for qualified majority voting are a compromise between these two views (see below).

The Lisbon TEU and TFEU extended the opportunities of the Council to decide by qualified majority (see Figure II.7.2) again. As a general rule the Council ‘shall act by a qualified majority except where the Treaties provide otherwise’ (Art. 16(3) TEU).

Figure II.7.2: Evolution of the Voting Procedures in the Council of the European Union



Source: see Reader's Guide.

Even if the instalment of QMV has increased over the decades the Member States still demonstrate a high level of risk aversion in areas central to national politics: foreign and defence policy (Art. 42(1) TEU), social policy (Art. 151 TFEU), as well as fundamental decisions on 'own resources' (Art. 311 TFEU) and the 'multiannual financial framework' (Art. 312 TFEU) will remain subject to unanimity voting. Relating to sensitive policy fields, such as judicial cooperation in criminal matters, the Lisbon TEU and TFEU provisions also include 'emergency brakes' for each Member State to avoid being outvoted (see Art. 82(3) TFEU) (Piris, 2012).

7.3.1 The Rules for Qualified Majority Voting

The Rules for the qualified majority voting deserve a closer analysis. From 2014 onwards the new provisions are applied (see Document II.7.5 and Art. 16(3,4) TEU), but the treaties also foresee a transitional period until 2017 in which – upon the request of a Member States – the old voting system (established by the Nice Treaty) may still be applied (Art. 16(5) TEU). Thus we need to compare both set of rules (see Figure II.7.3).

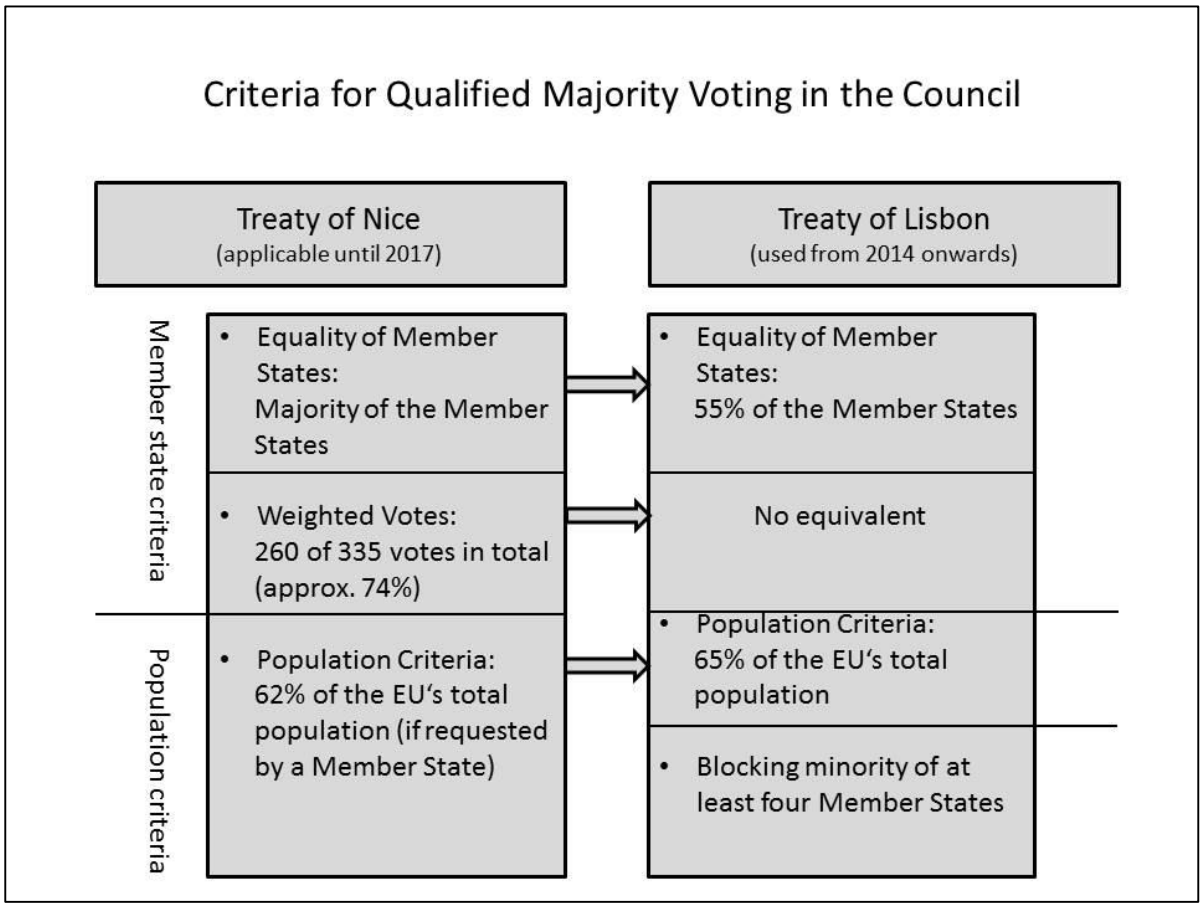
In principle, the QMV-system under the *Treaty of Nice* was complex since potentially three conditions had to be fulfilled in order to adopt a legislative proposal:

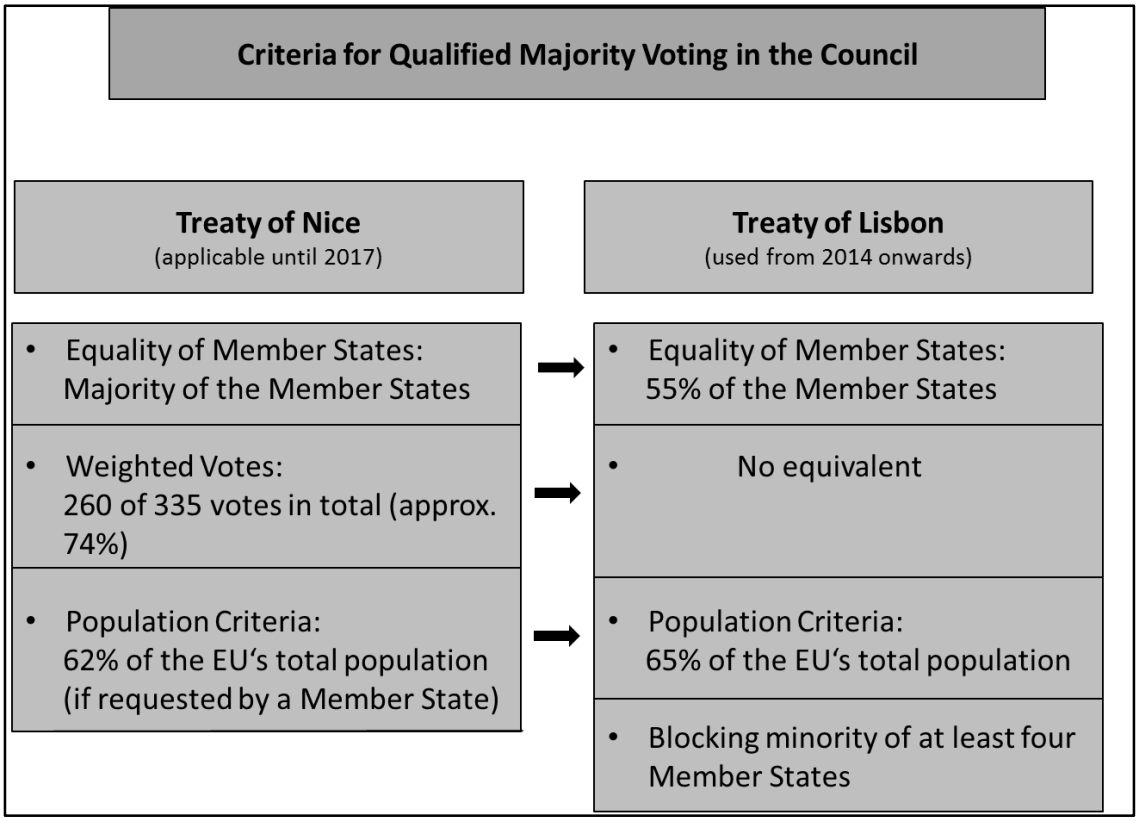
1. a majority of the Member States had to be in favour of a proposal (currently 15 out of 28 Member States),
2. at least 260 out from 352 so-called weighted votes in favour of a proposal (see below),
3. upon the request of one Member State, the Member States in favour of a proposal had to represent at least 62% of the EU population.

The new *Lisbon QMV-system* foresees basically two criteria (Art. 16(4) TEU):

1. 55% of the Member States have to agree to a proposal (currently at least 15 out of 28 Member States), i.e. equality of members states: one country, one vote
2. and this majority of countries must represent at least 65% of the whole EU-population.

Figure II.7.3: Nice / Lisbon QVM Rules





Source: by author.

Of particular interest in the old Nice system were the so-called weighted votes (see above). The treaties attribute each country a certain number of votes: bigger Member States have a higher number of weighted votes than smaller Member States: the four biggest Member States have 29 votes (Germany, UK, Italy, France) while the least populated country – Malta – has only three votes.

The distribution is also degressively proportional: Germany, with 80 million citizens has the same amount of votes as France with its 60 million citizens (for the full list of weigthed votes see next table).

Table II.7.1: Weighted Votes in the Council of Ministers (valid until 2014/2017)

Member States	Weighted Votes	Member States	Weighted Votes
Belgium	**12**	Bulgaria	**10**
Czech Republic	**12**	Denmark	**7**
Germany	**29**	Estonia	**4**
Ireland	**7**	Greece	**12**
Spain	**27**	France	**29**
Italy	**29**	Cyprus	**4**
Latvia	**4**	Lithuania	**7**
Luxembourg	**4**	Hungary	**12**
Malta	**3**	Netherlands	**13**
Austria	**10**	Poland	**27**
Portugal	**12**	Romania	**14**
Slovenia	**4**	Slovakia	**7**
Finland	**7**	Sweden	**10**
United Kingdom	**29**	Croatia	**7**

Source: Jean Monnet Chair 2013, based on the Lisbon Treaties, Protocol No. 36, Title III, Art. 3.

The abolishment of the weighted vote system from 2014/2017 onwards is supposed to make the new procedure more efficient and transparent. The system is, however, still rather complicated and it remains to be seen whether is really easier to reach a qualified majority voting with the new system.

7.3.2. The rules for blocking minorities

The entire dispute about rules of decision-making is often less about the stakes for a qualified majority, but about the conditions to establish blocking minorities. Since a QM requires at least 55% of the members of the Council, a blocking minority can be established by a little more than 45% of the Member States. With the population criteria coming into play, it can, however, already be established by four larger Member States only (Art. 16(4) TEU) - given that they represent more than 35% of the entire population. The three most populated Member

States are thus not sufficient to block a decision (see last paragraph of Art. 16(4) TEU, Document II.7.5).

To reduce the risk of being overruled, member states also agreed on the so-called 'Ioannina formula'. This provision established a suspensive veto as it empowers a group of countries below the threshold of a blocking minority to ask for delays[9].

7.3.3 Application of the QMV: Real life patterns

An essential question is how these highly contested rules affect the behaviour in the Council. Thus we have to analyse if and how the legal constitution made an impact on the living constitution.

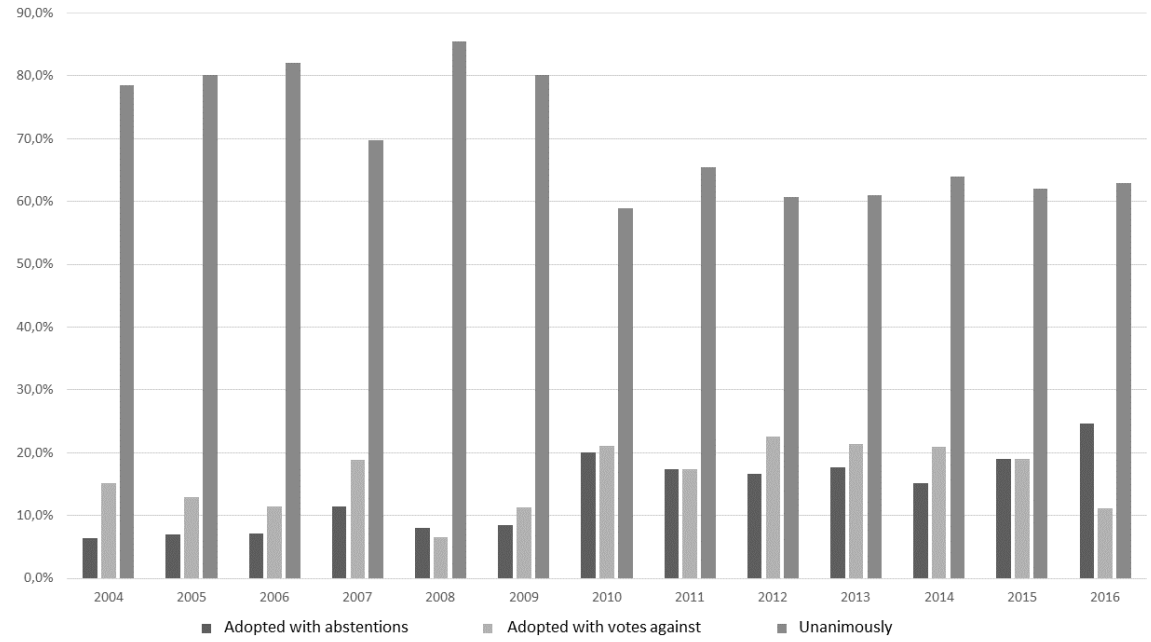
As Table II.7.2 shows, between 69,7% and 85.4 % of the adopted legislative acts in 2004-2016 were agreed unanimously, although the Council could have voted by QMV. There is also no clear trend whether this number is going to increase or decrease; the pattern is relatively stable over time.

I like to read this statistical result of voting behaviour of Member States in two connected interpretations. On one side, voting is not such an 'exception' that Council members would feel that overruling another member is 'inappropriate'. In the history of the Council, the so-called Luxembourg compromise (forced upon by de Gaulle's empty chair blackmail) had created a political culture inside the Council in which voting was uncommon. Overruling another country was regarded as inappropriate and Member States tried to reach a consensus whenever possible. After the Single European Act in 1987 this attitude started to change. As the numbers of votes indicate, Ministers and civil servants have to act in the 'shadow' of a (potential) vote.

At the same time, these statistics illustrate that votes are still not always taken when legally possible. The political culture of the Council is dominated by the members' attitude to reach decisions by consensus. The search for consensus is, however, facilitated by the threat of voting if minority positions of one or few members are maintained too long. The QMV rule thus works as a whip for countries defending a position outside the area of a reachable agreement.

[9] see Declaration 7 to the Lisbon TEU.

Table II.7.2: Unanimity under QMV, 2004-2016



Source: translation of Wessels 2019c, p. 15

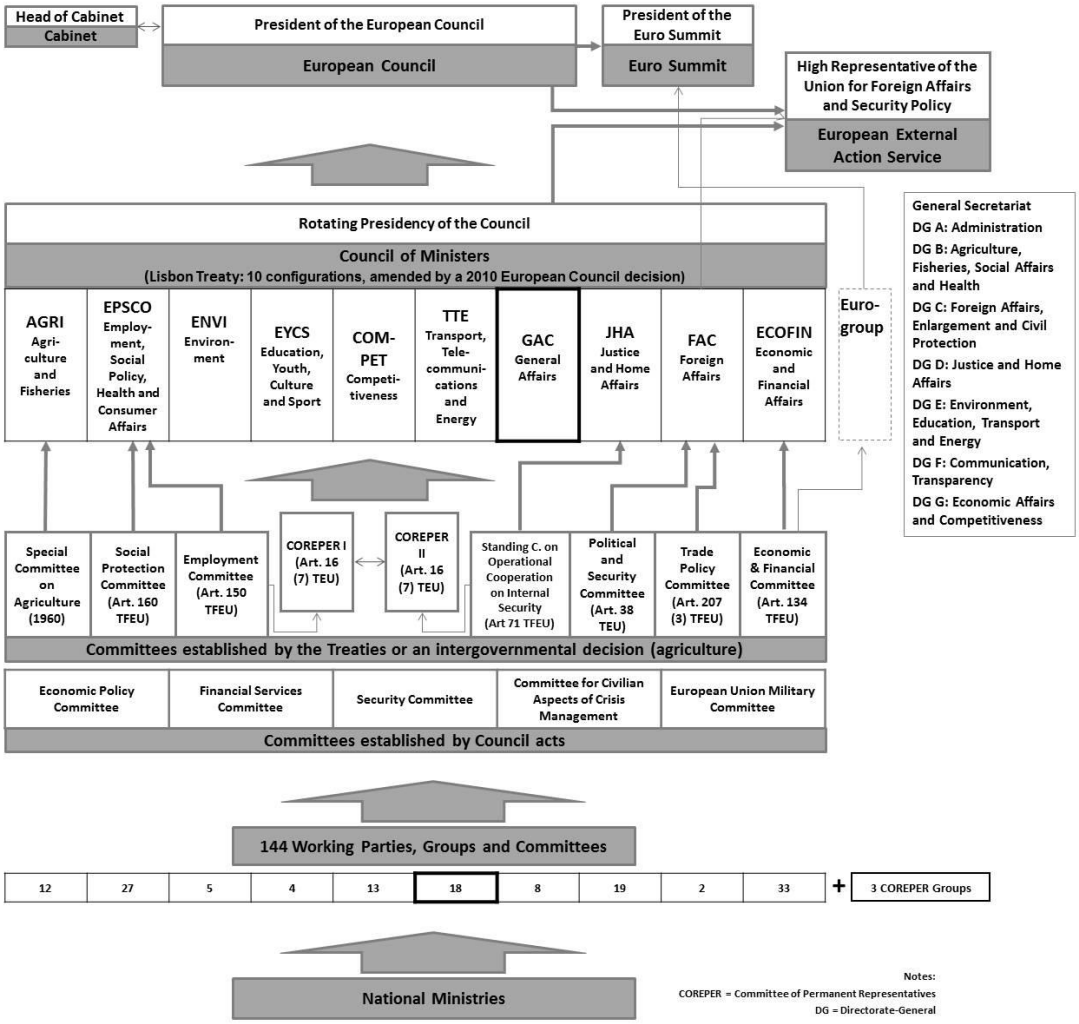
The search for consensus is also facilitated by the (rotating) presidency of the Council as an 'honest broker': The chair person is expected to intensively search for consensus and, if necessary, use its prerogative to move to a voting.

7.4 Organisation

7.4.1 The Administrative Level

As Figure II.7.4 documents, the Council's organisation is based on an extensive and highly differentiated administrative network. A major part of the Council's work is actually done before the formal sessions. Standing committees and working groups – composed of national experts from the Member States – already discuss the texts in detail and agree on significant parts of the final legal texts.

Figure II.7.4: The Structure of the Council



Source: Wessels 2015

The main administrative gate is Committee of the Permanent Representatives (COREPER). It 'shall be responsible for preparing the work of the Council' (Art. 16(7) TEU). In general, COREPER convenes twice a week. It consists of representatives from the Member States with the high rank of Member States' 'ambassadors' to the European Union. It is chaired by the Member State which holds the Council Presidency.

COREPER occupies a pivotal position in the Community decision-making system. This body is a link between Brussels and the national capitals and it serves means of political control, guidance and supervision of the work of the expert groups. It carries out preliminary scrutiny of the proposals and drafts for acts tabled by the Commission.

COREPER works in two configurations:

- COREPER I, consisting of the deputy permanent representatives, predominantly deals with so called technical matters;
- COREPER II, consisting of the ambassadors, deals with political, commercial, economic or institutional matters.

The agenda as prepared by COREPER for Council meetings reflects the progress in reaching agreements. So-called A items are approved without discussion following agreement within COREPER; B items need to be discussed inside the Council by the ministers themselves. In some Council configurations, it is estimated that the ministers only decide between 10 and 15 per cent of all of the items on their agendas, with the rest being pre-decided as A points on the administrative level (Hayes-Renshaw, 2012).

COREPER deals with all areas of the Council's work. Some issues of major importance are, however, prepared by high level committees of other national civil servants such as the Special Committee on Agriculture (SCA), the Political and Security Committee (PSC) for the CFSP or the Employment Committee for the field of employment. Also the Economic and Financial Committee and its subgroup, the Eurogroup working group, plays a major role in preparing the work of ECOFIN.

Below these high level committees, national administrations have established a system of (technical) working groups which deal with details of the respective proposals on the table. Overall, this complex involvement of national civil servants documents a strong process towards an administrative fusion (Wessels, 1998).

Finally, the Council is assisted by a Secretariat which consists of about 3,500 civil servants. The Secretariat is divided into eight DGs, the largest being responsible for personnel and administration.

7.4.2 The Rotating Presidencies

A further essential element of the Council's organisation is its presidency that rotates every six months among the Member States (see Table II.7.3). The Member State holding the presidency leads all (formal) bodies within the Council (with the exception of the Foreign Affairs Council which is chaired by the High Representative of the Union for Foreign Affairs and Security Policy (see Chapter II.9). The presidency plays an important role: 'The presidency is the driving force in carrying out the Council's work. […] The Presidency also

ensures that the rules of procedure are properly applied and that discussions are conducted in a business-like manner'[10]. Each presidency needs to take into account the other Member States' interests, their different administrative cultures and negotiating styles; otherwise, it would quickly be isolated and inefficient.

The recent enlargements of the EU to 28 members have made this task even more time-consuming. A high level of financial and personal resources are required that constitutes problems, especially for smaller Member States. Therefore, in 2007, a team presidency was introduced in which three countries holding the presidency in succession.

Table II.7.3: Presidency in the Council

Year	***Month***	***Country***
2011	July - Dec	Poland
2012	Jan – June	Denmark
2012	July – Dec	Cyprus
2013	Jan – June	Ireland
2013	July – Dec	Lithuania
2014	Jan – June	Greece
2014	July – Dec	Italy
2015	Jan – June	Latvia
2015	July – Dec	Luxembourg
2016	Jan – June	Netherlands
2016	July – Dec	Slovakia
2017	Jan – June	Malta
2017	July – Dec	Estonia
2018	Jan – June	Bulgaria
2018	July – Dec	Austria
2019	Jan – June	Romania
2019	July - Dec	Finland
2020	Jan – June	Croatia

Source: https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=CELEX:32016D1316&from=EN (Last accessed: 22.07.2019).

They agree on a common programme to assure a smooth follow up of the agenda. As far as it can be evaluated today, the team presidency did not have a major impact on policy making in the European Union.

[10] see Rules of the Procedure of the Council of the European Union.

7.5 General Remarks: A Hybrid Institution

The Council plays a key role in the institutional architecture, in particular within the bi-cameral system. It is a hybrid institution as it has to defend national interests and at the same time enable decisions within the EU system.

Over the history of the EU construction it has lost de jure and de facto powers *vis-à-vis* the EP and the European Council. The disputes about the QMV and the real voting behaviour document significant trends of policy making in the EU. It shows the difficulties to reach agreements, taking into account national and European interests. The activities of the Council on all its levels signal the broad and deep engagement of national governments and their ministries in the EU policy cycle. Decisions of the EU are not prepared, made and implemented without an intensive involvement of national decision makers. In and with the Council, member states share and merge national competences and policy instruments in the daily work. Likewise as the European Council, the performance patterns of the Council documents the process of a vertical and horizontal fusion.

Questions

1) Enumerate three major tasks of the Council!
2) Will the threshold for a qualified majority voting under the Lisbon Treaty provisions be reached if…
    1) the 12 largest Member States vote in favour for a legislative proposal?
    2) the 15 smallest Member States vote against a legislative proposal?
    3) the 5 largest and 8 smallest Member States vote in favour for a legislative proposal?
4) Which Council configuration has a special status? Explain why.
5) Which role does COREPER play?
6) Which role does the Presidency play?
7) Discuss: Do the decision-making rules for the QMV enhance the democratic legitimacy of the European Union?
8) Discuss: The legal Treaty rules do not impact on the real pattern of consensus building in the Council!
9) Discuss: The extension of a qualified majority voting is a strong move towards a supranational architecture!

Further Reading

Christiansen, Thomas/Dobbels, Mathias (2012): 'Comitology and delegated acts after Lisbon: How the European Parliament lost the implementation game', *European Integration Online Papers (EIOP)*, 16.

Hayes-Renshaw, Fiona (2012), 'The Council of Ministers', in: Peterson, John and Michael Shackleton (eds.), *'The Institutions of the European Union'*, 3rd edition, Oxford: Oxford University Press, pp. 68-95.

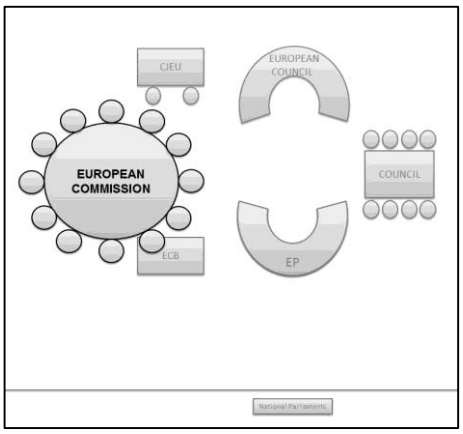
Lewis, Jeffrey (2011), 'National Interests: the Committee of Permanent Representatives', in: Peterson, John and Michael Shackleton (eds.), *'The Institutions of the European Union'*, 3rd edition, Oxford: Oxford University Press, pp. 315-337.

von Ondarza, Nicolai (2014), 'Rat der Europäischen Union', in: 'Jahrbuch der Europäischen Integration 2014', Baden-Baden: Nomos, pp. 99-108.

Umbach, Gaby (2014), 'Rat', in: Weidenfeld, Werner and Wolfgang Wessels (eds.), *'Europa von A bis Z'*, Baden-Baden: Nomos Verlagsgesellschaft, pp. 392-401.

8. The European Commission

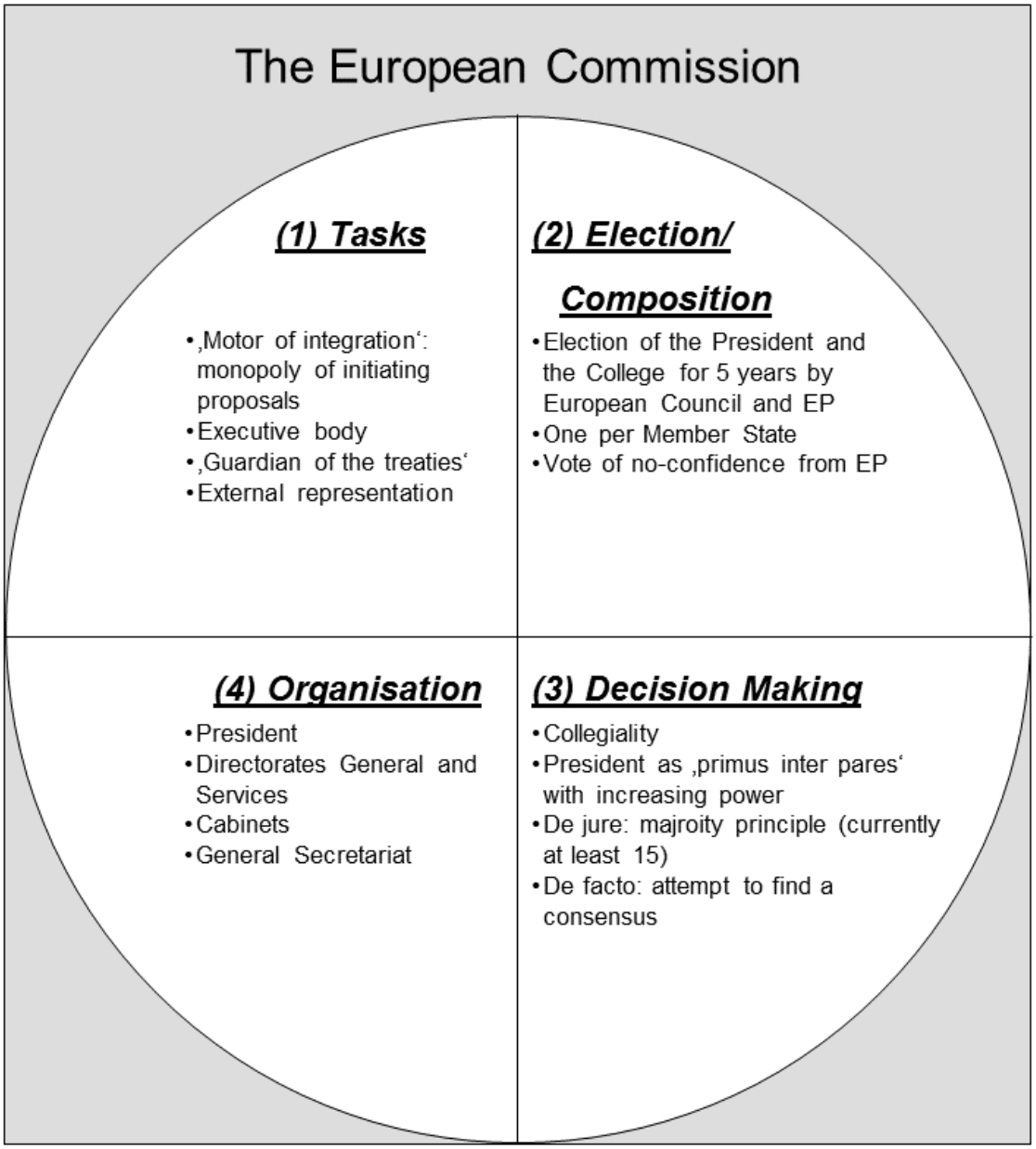
The European Commission is a unique institution and arguably the most disputed one inside the EU institutional architecture. It is a key player within each phase of the EU policy cycle. The Commission pursues major functions of preparation, decision making, implementation and control of legislative and budgetary acts.



Hailed by some as the most European body to ‘promote the general interest of the Union’ (Art. 17(1) TEU), this very institution is also criticised as a centralizing monster bureaucracy: A technocracy without democratic control and without 'patrie' (De Gaulle, 1965).

In a neo-functionalist view, it is the engine for cultivating a spill-over towards more integration. From an intergovernmental point of view, the Commission is at best a secretariat for the European Council. In a federalist narrative the Commission is a European government in the making – accountable only to the European Parliament.

Figure II.8.1: The European Commission – TEDO



Source: translation of Wessels 2019d, p.4

8.1 Tasks

From the relevant treaty articles we can identify five major roles (see Document II.8.1).

Document II.8.1: Tasks of the Commission[11]

Article 17(1) TEU
The Commission shall promote the **general interest** of the Union and take appropriate initiatives to that end.

[11] Emphasis added by author.

It shall ensure the **application of the Treaties**, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union.

It shall **execute the budget** and **manage programmes**.

It shall exercise **coordinating, executive and management functions**, as laid down in the Treaties.

With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union's **external representation**.

8.1.1 Preparing Decisions

As the so-called 'engine of integration', the European Commission promotes the general interest of the Union. It identifies problems and formulates drafts for the EP and the Council to exercise their legislative power. Within this preparation phase, it is the European Commission that holds the monopoly to initiate legal acts (Art. 17(2) TEU). Furthermore, it can define major guidelines for future policy making in so-called Green and White Papers.

The proposals are, however, not prepared by the Commission alone. Special committees, civil servants from Member States, representatives of non-governmental organisations, intermediary groups and independent experts are also involved in the process (see for instance Art. 11 TEU). Such an involvement is useful for data collection and the definition of policy options, but it might also lead to a bias in favour of 'organized' interests.

Some observers state that the autonomy of the Commission was de facto reduced within the last decades. One reason for this is the growing influence of the European Council (see Chapter II.5) as well as the European Parliament. The introduction and extension of the 'ordinary legislative procedure' (former co-decision procedure; see Chapter III.14.1) resulted in a reduction of the Commission's impact on policy proposals. Its role in the preparation phase might thus be more limited in practice than treaty articles indicate. Still, it plays a major role within the legislative and budgetary procedures (see Figure III.14.2). And despite these

shifted institutional powers, the Commission remains the only formal gate keeper for EU legislation.

8.1.2 Executive Functions

Within the formal policy cycle, the European Commission acts as the 'executive institution'. It is responsible for the implementation of the EU-budget and binding legal acts in policy fields such as the common market, trade, research, environmental or agricultural policy. Its central role in the annual budgetary procedure (Art. 314 TFEU) should be emphasized. In pursuing this function, the Commission must pay attention to the interests of Member States and the European Parliament.

8.1.3 Coordinating Function

The European Commission has gained coordinating powers in policy areas outside the exclusive and shared competences. Specifically efforts to coordinate economic, employment and social policies (see Art. 4 TFEU) as well as the fiscal policies of Member States (see Art. 5 TFEU) have become important. The application of the stability and growth pact as well as the newly introduced European Semester are examples (Kunstein and Wessels, 2011) of such a newly acquired function (see Chapter III.14.3). The task of scrutinizing the fiscal discipline of participating Member States was handed over to the Commission in the 'Treaty on Stability, Coordination and Governance' (TSCG) – which was concluded outside of the EU legal framework (Kunstein and Wessels, 2011).

8.1.4 External Representation

A fourth significant task of the Commission constitutes its external representation function (Art. 17(1) TEU). The article states, however, that this function does not include the 'common foreign and security policy (see Chapter II.6, Chapter II.9). In negotiations concerning trade agreements, however, the European Commission occupies a major role.

8.1.5 Guardian of the Treaties

A fifth and highly significant role of the Commission is to act as the 'guardian of the treaties'. It is responsible for the effective application of Union law under the control of the Court of Justice of the European Union. Thus, the Commission is allowed to call the European Court of Justice if a Member State fails to fulfil an obligation under the treaty or secondary legislation (Art. 17(1) TEU, see also Art. 258 TFEU). Such a role is highly significant as it

reduces the propensity of Member States to play a role as free rider, i.e. not to implement binding decisions and rules. The Commission is the ‘watch dog’ to guarantee that member states make ‘credible commitments’ (Moravcsik, 1993a). Furthermore, the Commission can take action against other EU institutions on grounds of lack of competence, infringement of a procedural requirement and infringement of the treaties or misuse of power (see Chapter II.10).

8.2 Election and Composition

8.2.1 Size and Composition

The size of the Commission was intensely debated in the IGC leading to the Lisbon Treaties. With – at that time – 25 Member States, could the European Commission still work effectively if every country sends one representative to this body? The treaty provisions eventually stated that the number of Commissioners should be reduced to two-thirds of the Member States – unless the European Council decides to alter this number (Art. 17(5) TEU). This is exactly what happened in 2009. To prevent another ‘No’ vote in the second referendum on the Lisbon Treaties in Ireland, the European Council abandoned the plan to reduce the number of Commissioners. The Irish government demanded that every country could still nominate an own Commissioner. The topic played a significant role during the electoral campaign on the first Lisbon referendum. In fact, many small Member States regard an own national representative in the Commission as important to defend national interests. Bigger Member States, on the other side, can more easily defend their interest in other institutions, such as the European Council or the Council.

This controversy highlights the conflict between two principles: an efficient team work 'for the general European interest’ vs. ‘legitimacy by national representation´.

The treaty provisions emphasise that the ‘members of the Commission shall be chosen on the ground of their general competence and European commitment from persons whose independence is beyond doubt’ (Art. 17(3) TEU). The same article stipulates that they ‘shall neither seek nor take instructions from any Government or other institution, body, office or entity’, and that they ‘shall refrain from any action incompatible with their duties or the performance of their tasks’. This high level of independence fits into a picture of a technical expert bureaucracy whose main impetus is of an a-political or non-partisan nature.

In a classical sense, a huge part of the legitimacy of the European Commission is thus derived from an output legitimation. Candidates are chosen based on their expertise and European

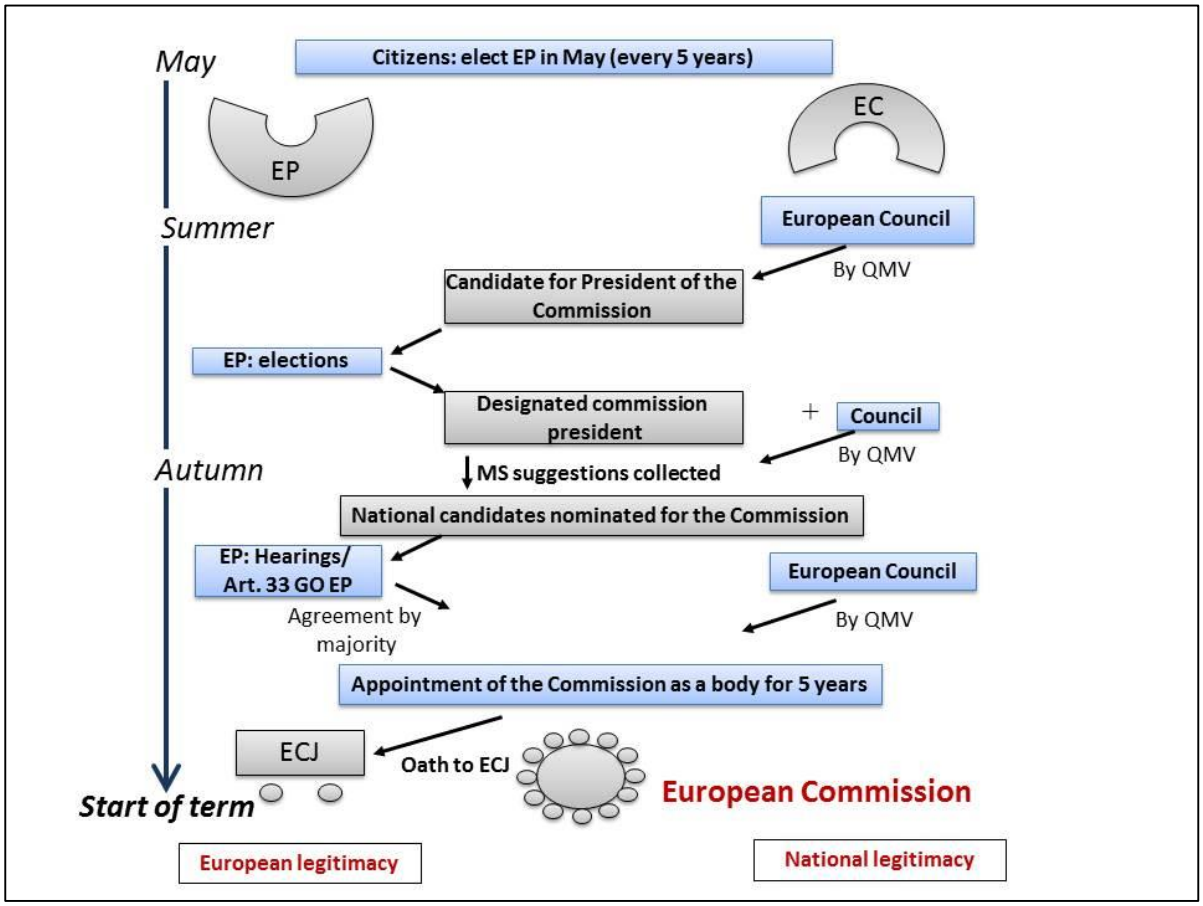
commitment. However, the nomination of leading candidates in the 2014 European elections – running explicitly on a party platform – might have shifted the legitimacy of the European Commission towards input legitimacy. However, it will be more difficult to be independent if a candidate is elected on a party platform and has to be responsive to electoral demands.

Again, the entire controversy represents two opposing views on the Commission's role: being a European institution pursuing Community's interests – free from political influence - or being also a defender of national interests, based on equal geographical representation of the Member States.

8.2.2 Election of the President of the Commission and the Collegiate Body

Of high political importance is the election of the President of the Commission and in the follow up procedure of nominating the Commission as a collegiate body.

Figure II.8.2: Election of the Commission and its President



Source: Jean Monnet Chair Wolfgang Wessels 2013. Based on: Art. 17(7) TEU.

The process starts with the election of the EP every five years. The legislative periods of the European Parliament and election period of the European Commission have been adjusted to the same time period. This has not always been the case.

The election of the Commission President takes now place in the months following the EP elections. The Heads of State or Government nominate – if necessary by qualified majority – a candidate whom they believe to be capable of carrying out the tasks (Art. 17(7) TEU).

Document II.8.2: Election of the Commission's President

Article 17(7) TEU

Taking into account the elections to the European Parliament and after having held the appropriate consultations, the European Council, acting by a qualified majority, shall propose to the European Parliament a candidate for President of the Commission. This candidate shall be elected by the European Parliament by a majority of its component members (…).

When deciding on the nominee for the President of the Commission, the members of the European Council are supposed to take the results of the European Parliament election into account (Art. 17(7) TEU). Legally speaking, the Heads of State or Government do not have to nominate a candidate who was running as a party candidate beforehand. This, however, happened for the first time in the 2014 elections against the explicit will of some Heads of State or Government. The largest European political party groups nominated candidates – so-called 'Spitzenkandidaten' or leading candidates - for this office in advance. The idea was to 'personalize' the European elections, and also strengthen the EP by giving it de-facto the right not only to elect the Commission President, but also to nominate him or her. The absence of running candidates always constituted a major difference to national elections where the candidates for the head of the executive play a major role in electoral campaigns. In 2014, the EPP (supporting Jean-Claude Juncker) won more seats in the EP than the S&D (supporting Martin Schulz). After intense discussion, the European Council eventually nominated Jean-Claude Juncker as Commission President in June 2014. For the first time, however, unanimity could not be reached and Hungary and the UK voted against his nomination (see Table II.8.1).

In 2019, the EPP (supporting Manfred Weber) have won the most seats in parliament, once more. Nevertheless, several member states opposed the Spitzenkandidaten procedure and

rejected Manfred Weber as the new president of the European Commission as he was said to lack executive competences. After two month of negotiations, in July 2019, the European Parliament and the European Council elected Ursula von der Leyen as the new president of the European Commission.

Table II.8.1 Time Table of the Election of the Commission 2019

Date	**Action**
May 2019	Election of the EP
July 2019	European Council nominates Ursula von der Leyen as candidate as President of Commission
July 2019	EP elects Commission President by votes 383 out of 733 votes cast

The next step in the procedure is that the Commission President-elect is also 'elected' by the European Parliament by the majority of its component members (from 2014 onwards 376 of 751). The pre-Lisbon provisions only required the 'approval' of the European Parliament. If a candidate does not receive a majority, the European Council has to propose another candidate.

Each national government then decides – with the approval of the President-elect – on the person it wants to nominate as member of the Commission. In the follow-up, the President-elect is free to allocate the respective portfolios to the individual Commissioners, but the national governments normally want to have a say for the departmental responsibility their candidate receives.

In the next step, the European Parliament has to give its consent to the Commission as a body i.e. not on each commissioner. As a major precondition, the EP has installed so-called 'hearings' on each nominee; i.e. each candidate has to present him- or herself in the committee of the EP which is relevant for his/her portfolio. Even if the a EP Committee votes against an individual Commissioner, the vote is not legally binding. However, a no-vote puts considerably pressure on the future Commission since the EP can threaten not to give its consent to the entire Commission.

After the consent of the entire Commission by the EP, the European Council appoints the whole Commission as a body, acting by a qualified majority.

This bi-cameral procedure between the EP and the European Council/Council can be characterised as a fusion of two sources of legitimacy – the EP as the representation of the citizens and the European Council/ Coucil as the representation of the Member States. It is nonetheless a long and complex chain of delegation from the voters to the election of the Commission.

In view of the power relations between the EP and European Council/Council on one side and the often described relation of the Commission as an 'agent' vis-a-vis the European Council as the principal, it is remarkable that only the EP (and not the European Council) has the power to dismiss the Commission. A motion of censure of the EP needs two thirds of the votes and the majority of its component members (see above Chapter II.4). Until 2014 no motion of censure was ever successful. However, the Santer-Commission collectively resigned in 1999, in view of a threatened motion of censure.

The procedure for nominating the High Representative of the Union for Foreign Affairs and Security Policy has different specificities (see Chapter II.9.2).

8.3 Decision Making. Power Distribution in a 'Magic Triangle'

In light of the roles played by the European Commission within the policy cycle of the European Union, it is important to have a closer look on its internal decision-making patterns.

Document II.8.3: Treaty Rules for Decision Making

Article 250 TFEU
The Commission shall act by a majority of its Members. Its Rules of Procedure shall determine the quorum.

Legally, the College decides by simple majority (Art. 250 TFEU); in practice, however, the President attemps to reach decisions by consensus. In order to analyse the real processes within the Commission, I use a 'magic triangle' (see Figure II.8.3). It should help visualising the relations of three different forms of internal decision-making structures and patterns which are relevant for all larger organisations:

(1) hierarchical political leadership from the top,

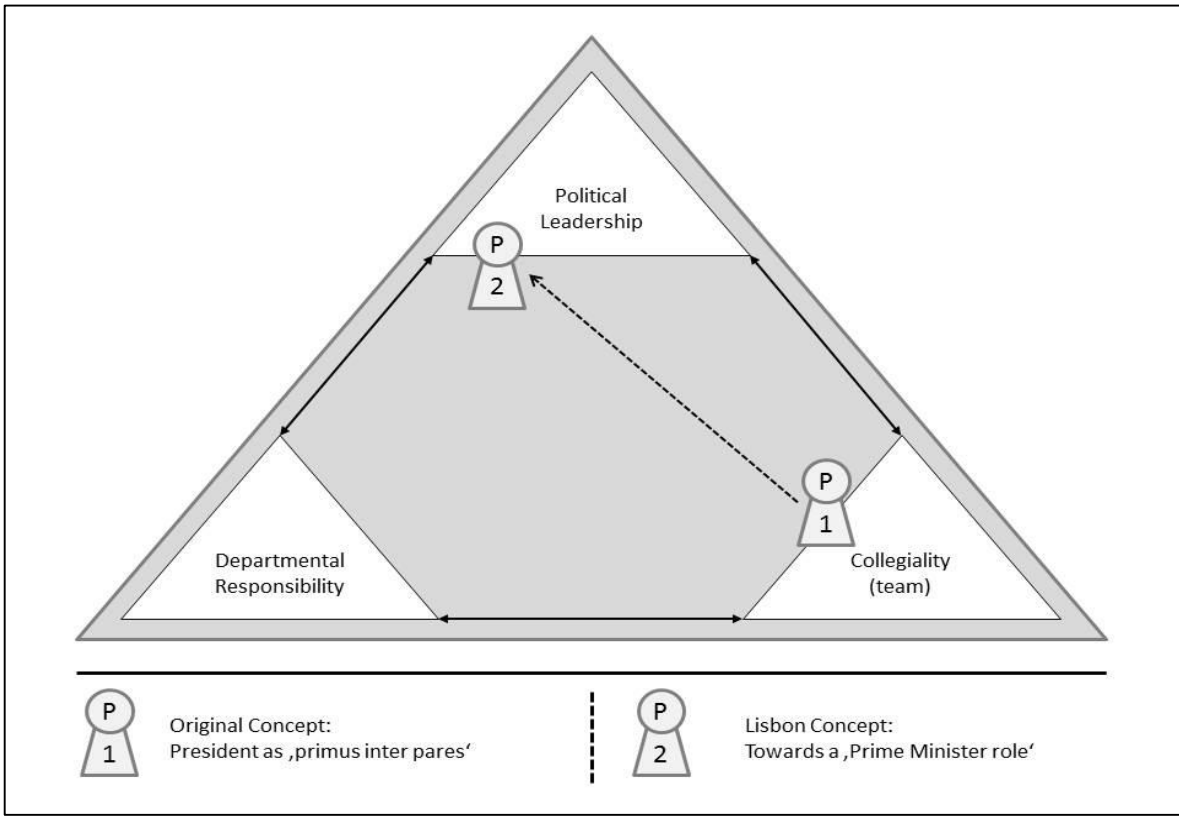
(2) collegiality within a team of (equal) peers and

(3) individual responsibility for a department/portfolio.

The relationship of these three principles might be characterised as ‘magical’ since not all of them can be completely fulfilled at the same time.

The original concept in the Rome treaties was based on the notion of ‘collegiality’ with the President of the Commission as ‘first among equals’ ('primus inter pares'). This principle is still valid in the case of a vote of censure by the EP. In this case ‘the members of the Commission shall resign as a body’ (Art. 17(8); see also above Chapter II.4).

Figure II.8.3: The President’s Position in the ‘Magical Triangle’



Source: Jean Monnet Chair Wolfgang Wessels 2013.

However, already the first president Walter Hallstein developed a strong profile. In the last two decades we observe an increasing shift towards strengthening the political leadership by the president and at the same time more departmental responsibility by individual members which reduces the overall importance of the team.

Telling for this evolution are the new provisions of the Lisbon TEU (see Document II.8.4).

Document II.8.4: Tasks of the President of the Commission

Article 17(6) TEU

6. The President of the Commission shall:

(a) lay down guidelines within which the Commission is to work;

(b) decide on the internal organisation of the Commission, ensuring that it acts consistently, efficiently and as a collegiate body;

(c) appoint Vice-Presidents, other than the High Representative of the Union for Foreign Affairs and Security Policy, from among the members of the Commission.

A member of the Commission shall resign if the President so requests. The High Representative of the Union for Foreign Affairs and Security Policy shall resign, in accordance with the procedure set out in Article 18(1), if the President so requests.

Art. 17(6) TEU empowers the President to set political guidelines for his colleagues, to decide on the internal organization, i.e. to allocate areas of responsibilities to each of them. and – perhaps more important – to dismiss a member of the Commission. The former President Barroso used this possibility once.

There are several and different reasons for these developments. One is the upgraded position of the President in the procedure of his/her election and his/her role in the European Council (see Chapter II.5) in international conferences like the G7/G8. Another functional factor is the need to lead in a large group of now 28 members. A factor for enlarging the departmental responsibility of each Commissioner is the widening of the scope on the Commission agenda and the increasing complexity of policy fields which renders a decision-making process as a team more difficult. It appears obvious that the President and the team cannot be experts in every policy field so that they heavily rely on the departmental responsibility of each Commissioner (see Art. 21 Rules of Procedure).

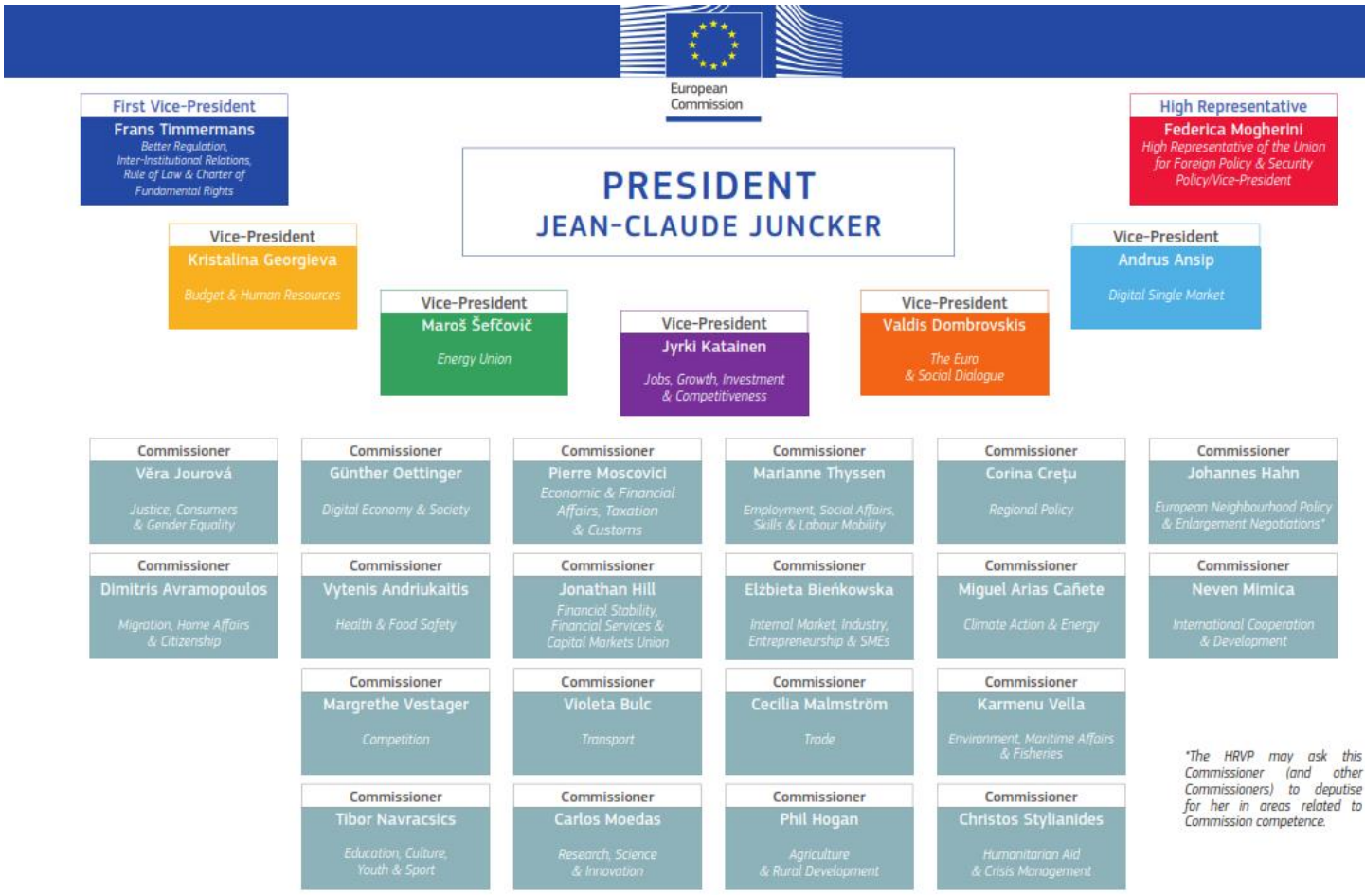
8.4 Organisation: Directorate Generals and Cabinets

The 2014 Commission has partly re-organised the departmental responsibilities to overcome these shortcomings. With 28 Commissioners, the principle of collegiality has been increasingly undermined in recent years. It became difficult to coordinate the different portfolios in order to enhance the efficiency of the Commission work.

The 2014 Commission still had seven Vice-Presidents (including the High Representative who is automatically Vice-President), but there were two major innovations: First, a ‘First

Vice-President' – who can replace the Commission President in his absence – was established. And second, the Vice-Presidents has lead project teams, steering and coordinating the work of a number of Commissioners.

Figure II 8.4: Organisation of the 2014 European Commission



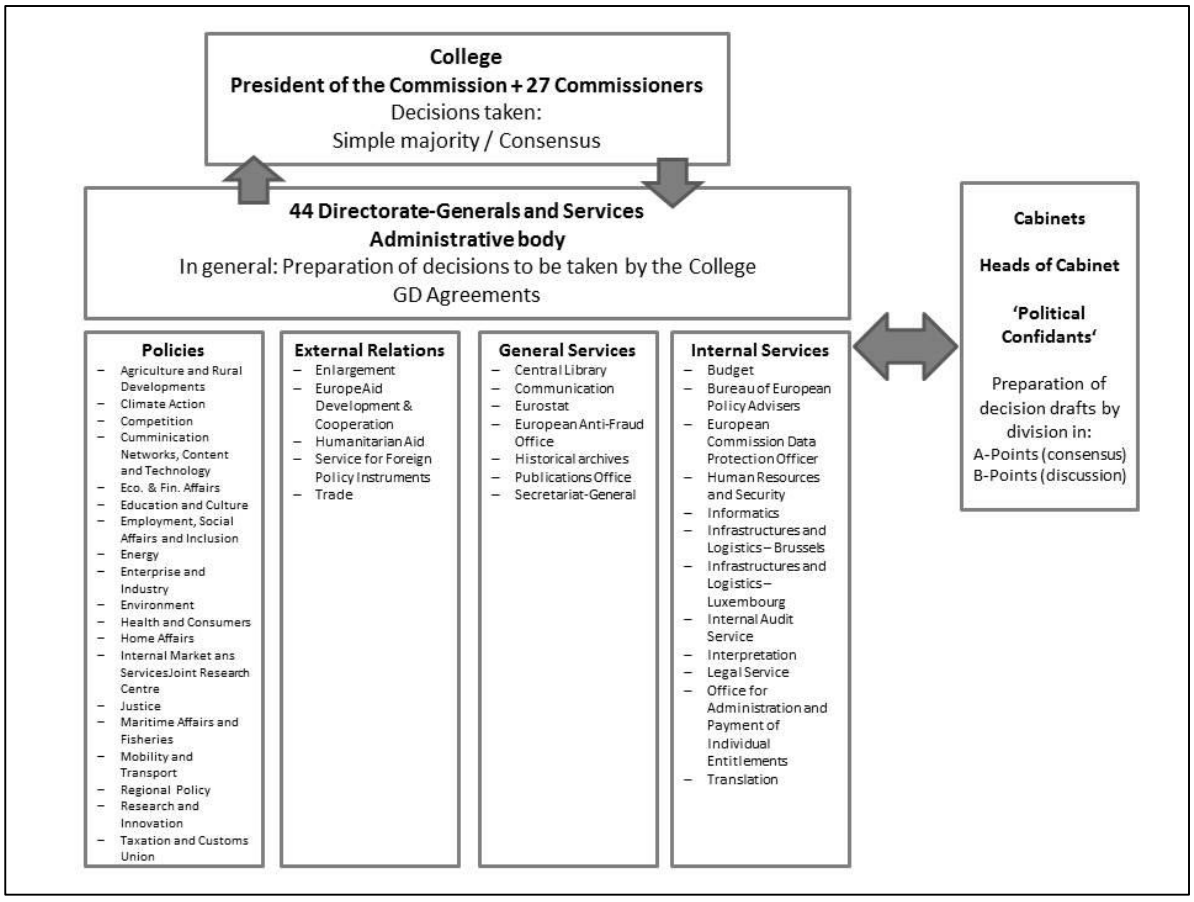
Source: European Commission, retrievable from: http://ec.europa.eu/about/juncker-commission/docs/structure_en.pdf (last accessed: 29.10.2014).

The First Vice-President is in charge of 'Better Regulation, Inter-Institutional Relations, the Rule of Law and the Charter of Fundamental Rights'. The other six are responsible for 'Budget and Human Resources', the 'Energy Union', 'Jobs, Growth, Investment and Competitivness, 'the Euro and Social Dialogue, the 'Digital Single Market' and 'Foreign and Security Policy'. Although all Commissioners still have one vote, the remaining

Commissioners now depend on the support of a Vice-President to bring in a new initiative in to the Commission Work Programme or on the College Agenda.

On an administrative level, the Commission's work is still prepared and managed in differentiated set-up. One backbone are the departments, known as directorates-general (DGs) or services, each responsible for a particular policy area and headed by a Director-General (see Figure II.8.5).

Figure II.8.5: Organisational Map of the European Commission



Source: Jean Monnet Chair 2013. Based on: http://ec.europa.eu/about/ds_en.htm (last accessed: 20.05.2014).

The DGs – like ministries at national level – draft laws, but their proposals only come into force once the College of Commissioners adopts them, after careful scrutiny, also by the legal service. The Commission services deal with more general administrative issues or have a specific mandate, for example fighting fraud (OLAF) or creating statistics. Of specific importance are the legal service and the Secretariat General which both have horizontal tasks.

As to the internal organisation of the Commission we observe some peculiarities – at least in comparison to German political administrations. Each commissioner gets his/her own 'Cabinet' of his/her own personal choice. They not only advice the Commissioner but prepare and facilitate the internal coordination by structuring the decisions at hand in so called 'A-points', which do not need any further discussion, and 'B-points', which will have to be discussed at the meetings of the Commission. Thus, the influence of cabinets in the preparation of the decision-making inside the Commission is considerable.

8.5 General Remarks

To analyse the role(s) of the Commission in the Union's architecture we can detect several and different views, assessments and narratives.

One of the most intriguing puzzles dealing with the power of the Commission is the relationship towards the European Council (Monar, 2010b, Höing and Wessels, 2013). In a counterintuitive approach (see also Chapter II.5), I argue that the Commission (and especially its President) can use the European Council in a strategic way for pursuing its own preferences, leading at the end to more powers for the Commission and thus to a more supranational direction of the EU system. In such a line of arguments, this supranational institution exploits the 'intergovernmental body par excellence' (Quermonne, 2002) to legitimate its own far-reaching initiatives and programs. The Commission instrumentalises the guidelines and decisions of the European Council to set priorities for the Council and pressure the national Ministers to accept its ambitious proposals (Eggermont, 2012, Craig, 2011).

According to this logic, the Commission President acts as norm entrepreneur in the European Council. The office holder persuades his colleagues in the European Council to accept strategies to solve urgent problems for which the Commission claims that there are no alternatives but to extend and upgrade EU policies and with that its own role. In consequence, the European Council's agreements, subsequent to the Commission President´s persuasion, set and confirm a supranational path which following generations of Heads of State or Government have to pursue and even extend in the following phases of the Union's construction. In such a perspective, the principal-agent relationship between the Commission and the European Council is turned upside down. The Commission as hidden master uses the European Council as an arena to further strengthen its own position.

The Commission cultivates and activates spill-over processes towards more Europe[12]. As they can no longer be controlled by Member States, this supranational institution becomes increasingly independent from Member States. The Treaty revisions verify this neo-functionalist perspective.

From an alternative intergovernmental view, the role of supranational institutions such as the Commission is less important than those of the Council or the European Council (see Figure I.3.3). The assumption goes that Member States delegate certain but limited competences to supranational institutions to overcome inherent problems of collective action and improve their bargaining efficiency. In this view the legitimacy of the Commission is derived from the European Council. Member States still control supranational institutions through various institutional channels. This reading claims that the European Council has generally weakened the Commission's original treaty-based role: The formal right of presenting initiatives might remain with the Commission, but the political impetus is primarily given by national leaders. In this view, the European Council has downgraded the original position of the Commission. In consequence, this supranational institution is seen to have turned into a secretariat, serving as an 'agent' for the European Council which atcs as the 'principal' (see Chapter I.3).

In the logics of this type, the adequate position of the Commission President inside the European Council is to serve national leaders. However, the newly created office of a permanent President of the European Council can be interpreted as an attempt not only to improve the efficiency of the European Council but also to downgrade the Commission's role in facilitating consensus to a mere secretariat of the European Council.

In a federalist perspective, the Commission is supposed to be the European government in the making. Its legitimacy is derived from its election by the EP as the only directly elected institution of the EU's architecture.

However, all of these are ideal types that do not fully match with the reality we observe. An overview of empirical observations identifies several, partly divergent trends.

Important to note is that the degree of influence and power of the European Commission varies between policy fields and depends on the personality and skills of its President. A number of

[12] See for the Term NIEMANN, A. & SCHMITTER, P. 2009. Neofunctionalism. *In:* WIENER, A. & DIEZ, T. (eds.) *European Integration Theory.* 2nd ed. Oxford: Oxford University Press., TRANHOLM-MIKKELSEN, J. 1991. Neo-functionalism: Obstinate or Obsolete? A Reappraisal in the Light of the New Dynamism of the EC. *Millennium,* 20**,** 1-22..

provisions in the Lisbon Treaties support the view that the Commission has lost powers in the EU architecture – not at least in relation to the European Council (Monar, 2010b).

On the other hand, evidence supports a neo-functionalist argument: As an essential part of the European Council's crisis management the Commission 'received unprecedented supervisory power' (Van Rompuy, 2012b). To guarantee the compliance with their own commitments national executive leaders have increased the Commission's power to monitor and control the national implementation of the fiscal discipline.

Given the extension of the OLP (see Figure I.3.4 Trends in the Union's Procedural Provision) the constitutional architect has also increased the number of policy areas in which the Commission is empowered to pursue its five key original functions. Thus, in the area of freedom, security and justice the Commission's role has been upgraded from a participating expert of a subordinated rank in the seventies to a leading actor in the Lisbon TFEU. The way the EP has elected the President of the Commission in 2014 points at the direction of forming a parliamentary government as known in usual European political systems.

Overall, the empirical evidence points at a mixed record: In view of some developments the Commission and its President have lost powers; but has kept its role as an indispensable player with varying degrees of influence depending on the policy area, political contexts and on the President's personal skill. Overall, there is an increasing trend towards horizontal fusion among major institutions in the EU architecture.

Questions

1) Describe the five major roles of the European Commission.
2) Describe the steps of election procedure of the European Commission, with a special focus on the election of the President of the Commission.
3) Describe the evolution of the 'magic triangle' inside the European Commission.
4) What is a 'cabinet' and which role is it supposed to play?
5) Discuss: The election of the Commission is based on a dual legitimacy.
6) Discuss: the President of the Commission has acquired a position like a prime minister in national systems.
7) Discuss: the Lisbon Treaties have weakened the role of the Commission within the institutional architecture of the EU.
8) Discuss: The Commission is a government in the making.
9) Discuss: The Commission is the de facto principal of the European Council.

Further Reading

Hofmann, Andreas (2014), 'Europäische Kommission", in: Weidenfeld, Werner and Wolfgang Wessels (eds.), *'Europa von A bis Z'*, Baden-Baden: Nomos Verlagsgesellschaft, pp. 182-196.

Hofmann, Andreas (2014), „Europäischer Kommission", Weidenfeld, Werner and Wessels, Wolfgang (eds.), 'Jahrbuch der Europäischen Integration', Baden-Baden: Nomos Verlagsgesellschaft, pp. 109-116.

Hooghe, Liesbet; Kassim, Hussein (2012), 'The Commission's Services", in: Peterson, John and Michael Shackleton (eds.), '*The Institutions of the European Union'*, 3rd edition, Oxford: Oxford University Press, pp. 173-198.

Höing, Oliver and Wessels, Wofgang (2013), 'The European Commission's Position in the post-Lisbon Institutional Balance: Secretariat or Partner to the European Council?', in Chang, Michele and Monar, Jörg (eds), *The European Commission in the post-Lisbon era of crises: Between political leadership and policy management* (Brussels: Peter Lang).

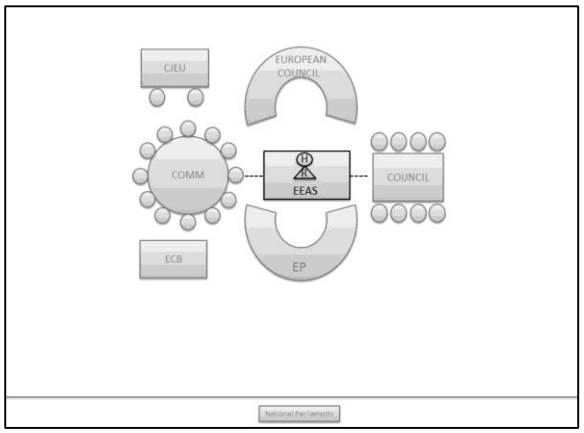
Nasshoven, Yvonne M. (2011), *The Appointment of the President of the European Commission: Patterns in Choosing the Head of Europe's Executive* (Baden-Baden: Nomos Verlagsgesellschaft).

Peterson, John (2012), 'The College of Commissioners", in: Peterson, John and Michael Shackleton (eds.), *'The Institutions of the European Union'*, 3rd edition, Oxford: Oxford University Press, pp. 96-123.

Piris, Jean-Claude (2010), *'The Lisbon Treaty. A Legal and Political Analysis"*, Cambridge: Cambridge University Press, pp. 225-229.

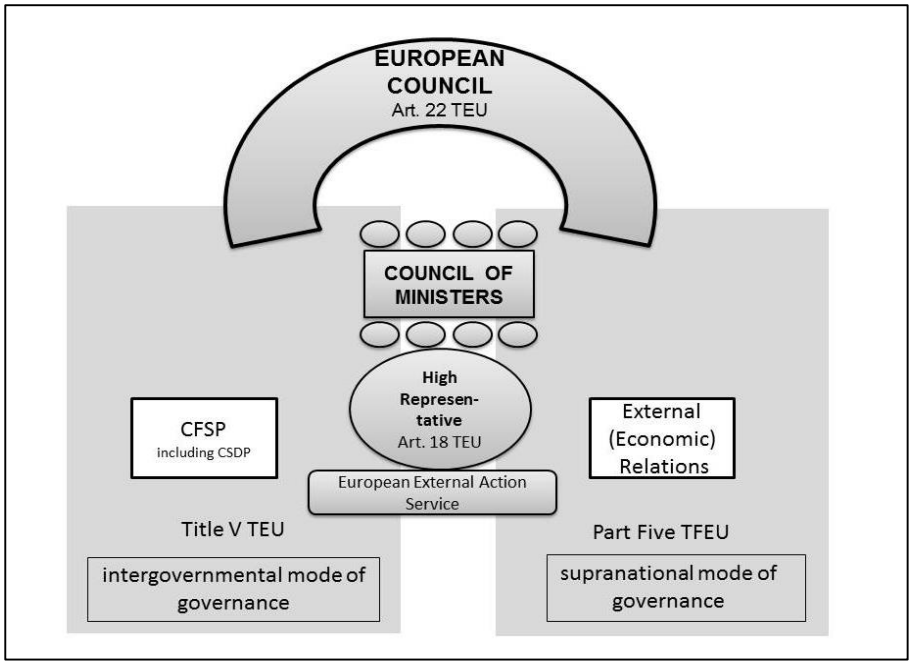
Spence, David (2006), *'The European Commisson -3rd edition'*, (London).

9. The High Representative of the Union for Foreign Affairs and Security Policy and the European External Service: A Hybrid and Challenging Office



One much debated innovation of the Lisbon treaties was the introduction of the office of the ´High Representative of the Union for Foreign Affairs and Security Policy' and, linked with it, the installation of the European External Action Service (EEAS). The overall motivation was to give the Union 'one face' and 'one voice' in the international system and one of the major aims of the Lisbon treaties was explicitly stated as 'enhancing (…) the coherence of [the EU's] external action' (Council of the European Union 2007a: 15) The new HR office and the EEAS are supposed to bridge the gap between two sets of legal provisions by which EU institutions pursue 'external action'. I call this constellation a 'two pillar' structure of the EU's architecture for acting in the international system (see figure II.9.1) .

Figure II.9.1: The two Pillars of EU External Action



Source: Author.

The responsibilities for what the TEU now calls ‘external action’ (see Title V TEU) were previously divided among three principal EU offices:

1. The High Representative for Common Foreign and Security Policy (CFSP), created by the Amsterdam Treaty in 1999. This position - which was occupied by the former Secretary General of NATO, Javier Solana - had a legally subordinated rank: he was supposed to assist the Council under the authority of the rotating chairperson of the Council through ’contributing to the formulation, preparation and implementation of policy decisions’ as well as through ‘conducting political dialogue with third parties’ (Art. 26 former TEU).

2. The chairperson of the Foreign Affairs Council (FAC), who ‘represented the Union in matters coming within the [CFSP]’, was ‘responsible for the implementation of decisions’, and ‘expressed the position of the Union in international organisations and international conferences’ (Art. 18 former TEU). This post had been exercised by the respective foreign minister of the six monthly-rotating Presidency of the Council.

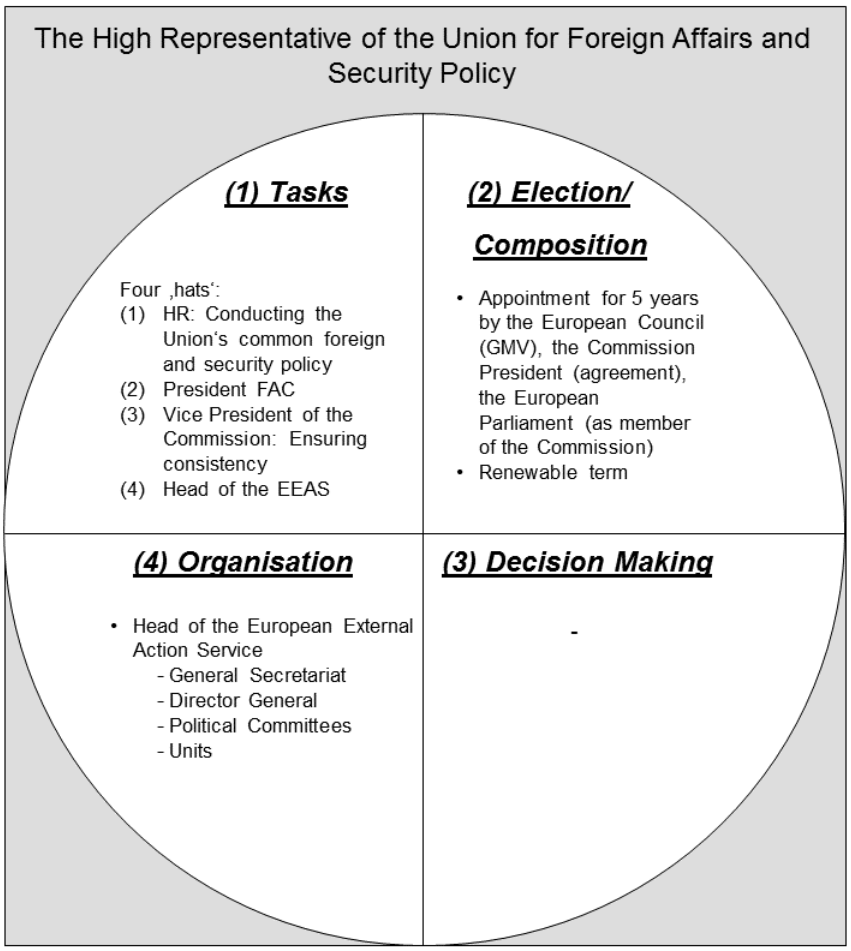
3. The Commissioner for External Relations as a member of the Commission’s collegiate body, who was responsible for the Commissions external representation in the world and the EU’s Neighbourhood Policy.

In addition, a major new fourth task is to create and head the new EEAS.

Merging three former offices and creating a new one, the Lisbon TEU created a hybrid office. In pursuing this task. the High Representative has to serve different masters as one agent to several principals:the European Council, the President of the Commission and the EP. This relationship manifests itself in different circumstances. As regards to the EP, the High Representative for instance committed to “to have the following interactions with the EP: 6x EP-plenary (including 2x per annum special question hour), 2x Committee of Foreign Affairs, 1 - 2x Enlarged Bureau of Committee of Foreign Affairs, 1x Election Coordination Group, 1x in Development Committee, 1 - 2 x Conference of Presidents” (Helwig 2015). From 2009 onwards, this peculiar construction fuelled an intensive debate about the actual performance of the office holder and the supporting EEAS structures. For some this position is an intergovernmental ‘Trojan Horse’ to reduce the autonomy of the Commission in its range of external action. For others this is a step to a real European Foreign Minister with an EU Foreign Office. Most acknowledge that the treaty provisions have created an office which is difficult to run: There are simply too many ‘hats’ on one ‘head’. The first holder of the nw office, Caterine Ashton, admitted in her EEAS review report in 2013 that „It was in a word,

tough“ and „I have likened it to trying to fly a plane while still bolting the wings on. The institutional challenges, and sometimes battles, were many“ (EEAS 2013: 3).

Figure II.9.2: The High Representative of the Union for Foreign Affairs and Security Policy - TEDO



Source: translation of Wessels 2019e, p. 3

9.1 Tasks: Four Hats

In my reading the TEU allocates four major tasks to the High Representative.

Document II.9.1: Tasks of the High Representative according to the TEU (1)

Article 18(2) TEU:

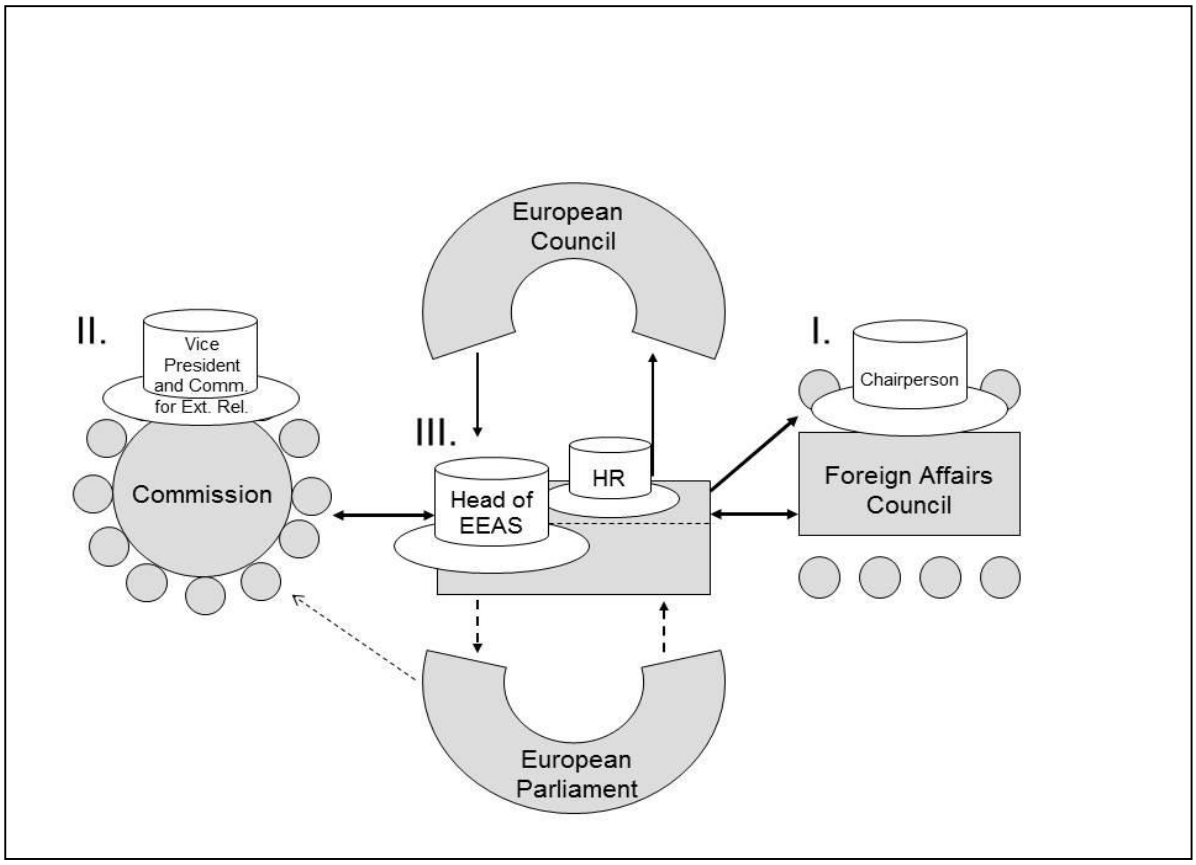
2. The High Representative shall conduct the Union's common foreign and security policy. He shall contribute by his proposals to the development of that policy, which he shall carry out as mandated by the Council. The same shall apply to the common security and defence policy.

3. The High Representative shall preside over the Foreign Affairs Council.

4. The High Representative shall be one of the Vice-Presidents of the Commission. He shall ensure the consistency of the Union's external action. He shall be responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union's external action. In exercising these responsibilities within the Commission, and only for these responsibilities, the High Representative shall be bound by Commission procedures to the extent that this is consistent with paragraphs 2 and 3.

The conventional characterisation speaks of a 'double hat – that of the High Representative and that of the vice president of the Commission (see Document II.9.2). I like to add also the 'hat' of the Chair of the Foreign Affairs Council (FAC) and - on a different level - the 'hat' as head of the EEAS (see Figure II.9.2). I here exclude other less salient positions and channels of influence like participating in the European Council and being the chairperson of the European Defence Agency and the European Union Institute for Security Studies (EUISS).

Figure II.9.3: High Representative Within the EU Architecture – Four Hats



Source: author.

It is useful to start with the role of the High Representative in the Common Foreign and Security Policy (see Art. 27 TEU below). In difference to the rights attributed to the High Representative in the Amsterdam Treaty, the Lisbon provisions empower the High Representative to submit proposals and to implement relevant decisions. This set of tasks also includes the representation of the Union in CFSP matters in contacts with third parties and on the international level (see Document II.9.2).

Document II.9.2: Tasks of the High Representative according to the TEU- 2

Article 27 TEU:

1. The High Representative of the Union for Foreign Affairs and Security Policy, who shall chair the Foreign Affairs Council, shall contribute through his proposals to the development of the common foreign and security policy and shall ensure implementation of the decisions adopted by the European Council and the Council.

2. The High Representative shall represent the Union for matters relating to the common foreign and security policy. He shall conduct political dialogue with third parties on the Union's behalf and shall express the Union's position in international organisations and at international conferences.

[…]

In exercising these functions, the High Representative has produced a differentiated set of outputs (see Table II.9.1).

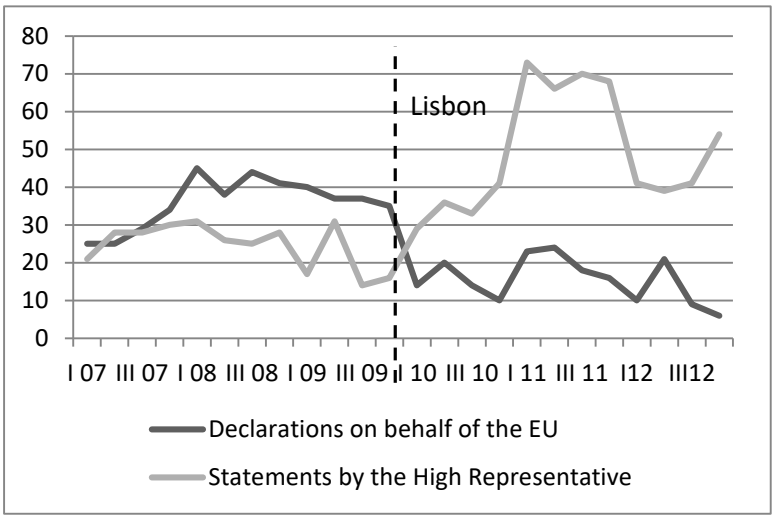
Table II.9.1: Overview on CFSP-Activities of the EEAS in 2012

Legislation (Decisions on Common Action, Positions etc. including Amendments)	49
Statements on behalf of the EU (excluding those of the European Council)	52
Statements by the High Representative Catherine Ashton	408
Statements by the Spokesperson	194
Local Statements	84

Source: http://eeas.europa.eu/statements/index_en.htm (last accessed: 08.04.2013).

Since the creation of the new office in 2009, an increase in statements of the HR is visible (See figure II.9.4).

Figure II.9.4: Declarations and statements of the HR



Source: Niklas, Helwig; Ivan, Kostanyan 2013: 22

A second task, quite often underestimated in the literature, is the significant steering role as the permanent chairperson of the Foreign Affairs Council. From the early days of the European Political Cooperation and in the CFSP, this rotating office – exercised by the Foreign Ministers of the half year Council Presidency - was a key actor inside and outside the EU.

In 2012 the FAC met on average every month, all together 13 times. The agenda of the session on 15 November 2012 documents the scope of its responsibilities.

Box II.9.1: Agenda of a Session of the FAC Fehler! Textmarke nicht definiert.

Agenda of the Session of the FAC**Fehler! Textmarke nicht definiert.**, 12 May 2014

MONDAY, 12 MAY

- +/- 8.30 **Doorstep by High Representative Catherine Ashton**
- +/- 9.30 **Beginning of Foreign Affairs Council meeting**

Adoption of the agenda (9640/14)

- +/- 10.00 Exchange of views on Ukraine with Didier Burkhalter, OSCE chairperson in office

Ukraine - EU only

- +/- 12.30 Adoption of non-legislative A Items (9641/14 + ADD1)

Middle East peace process

- +/- 14.00 Lunch: European Neighbourhood Policy
- +/- 16.00 **Press conference** (Foreign Affairs Council)
- +/- 17.00 **EU-Albania Association and Stabilisation Council**
- +/- 19.15 **Press conference** EU-Albania Association and Stabilisation Council)

TUESDAY, 13 MAY

- +/- 9.00 **EU-Algeria Association Council**
- +/- 9.50 **Press conference** (EU-Algeria Association Council)

Source: http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/142548.pdf (last accessed: 12.08.2014).

In a third set of tasks the office holder is one of the Vice-Presidents of the Commission responsible for the specific Commission responsibilities in the field of external relations. In this function she is subject to the powers of the Commission President. As Vice-President he chairs the group of Commissioners responsible for external action (e.g. development policy). After it became apparent that these meetings did not place effectively on a regular basis, the EEAS review from 2013 called for a strengthening of the procedure (Helwig, 2015). The potential Commission powers of the Vice-President were diminished from the beginning of his term after President Barroso reduced his scope of action by transferring competences for the European Neighourhood Policy to Commissioner Stefan Füle's portfolio.

As a fourth set of tasks the High Representative is the head of the EEAS.

Document II.9.3: The European External Action Service

Article 27(3) TEU

In fulfilling his mandate, the High Representative shall be assisted by a European External Action Service. This service shall work in cooperation with the diplomatic services of the Member States and shall comprise officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States. The organization and functioning of the European External Action Service shall be established by a decision of the Council.

The organisation and functioning of the EEAS was established through a Council decision on 26 July 2010. Art. 3 of this decision sets out the EEAS' tasks. This document signals the highly complex nature of this autonomous service (see below).

Document II.9.4: Tasks of the EEAS

Article 3 (Dec. 2010/427/EU)

Cooperation

1. The EEAS shall support, and work in cooperation with, the diplomatic services of the Member States, as well as with the General Secretariat of the Council and the services of the Commission, in order to ensure consistency between the different areas of the Union's external action and between those areas and its other policies.
2. The EEAS and the services of the Commission shall consult each other on all matters relating to the external action of the Union in the exercise of their respective functions, except on matters covered by the CSDP. The EEAS shall take part in the preparatory work and procedures relating to acts to be prepared by the Commission in this area.
3. The EEAS may enter into service-level arrangements with relevant services of the General Secretariat of the Council, the Commission, or other offices or interinstitutional bodies […]
4. The EEAS shall extend appropriate support and cooperation to the other institutions and bodies of the Union, in particular to the European Parliament. The EEAS may also benefit from the support and cooperation of those institutions and bodies, including agencies, as appropriate. The EEAS internal auditor will cooperate with the internal auditor of the Commission to ensure a consistent audit policy, with particular reference to the Commission's responsibility for operational expenditure.

Source: http://www.eeas.europa.eu/background/docs/eeas_decision_en.pdf (last accessed: 02.04.2013)

The establishment of the EEAS was a difficult and complicated task to pursue integrating three pre-existing administrations and the on-going rivalry with national diplomacies, especially those of larger Member States, created considerable difficulties.

Looking at this set of tasks, it becomes obvious that the High Representative has a broad and differentiated set of functions in which the office holder must cooperate with many other actors in many institutions. The following agenda documents this broad scope of activities.

Box II.9.2: Agenda of High Representative/ Vice President Catherine Ashton

Week of 31 March 2014

Monday 31 March

o Meets Xi Jinping, President of China, Brussels

o Meets Thorbjørn Jagland, Secretary General of the Council of Europe

o Hosts Prime Minister Dačić and Prime Minister Thaçi in the framework of the EU facilitated dialogue for normalisation of relations between Belgrade and Pristina, EEAS, Brussels

Tuesday 1 April

o Co-chairs EU-Africa Ministerial meeting on peace and security

o Chairs ministerial meeting on maritime security/piracy

Wednesday 02 April

o Attends the meeting of the College, Brussels

o Co-chairs EU-US Energy Council

o Participates in the EU – Africa summit 2014, Brussels

Thursday 03 April

o Meets Ban Ki-moon, Secretary-General of the United Nations

Friday 04 – Saturday 05

o Chairs "Gymnich" biannual informal meeting of the Foreign Ministers of the European Union Member States, Athens

Source: http://www.eeas.europa.eu/agenda/2014/310314_ashton_agenda.pdf

9.2 Election

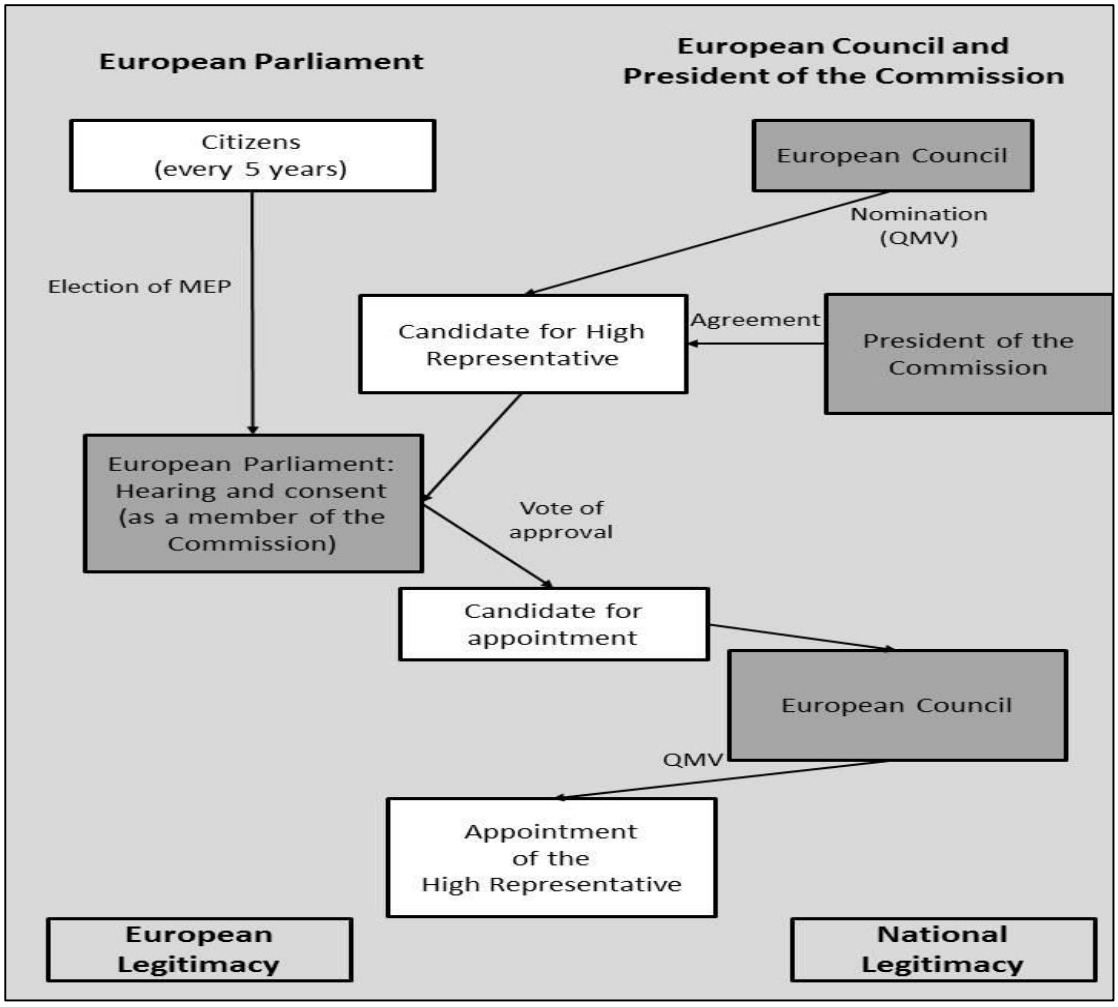
The appointment of the High Representative involves several institutions and procedural steps (see Figure II.9.2 and Chapter II.8.2).

Document II.9.5: Election of the High Representative

Article 18(1) TEU

1. The European Council, acting by a qualified majority, with the agreement of the President of the Commission, shall appoint the High Representative of the Union for Foreign Affairs and Security Policy. The European Council may end his term of office by the same procedure.

Figure II.9.5: Appointment of the High Representative



Source: Jean Monnet Chair Wolfgang Wessels 2013.

The office holder is elected in the function as High Representative of the Union for Foreign Affairs and Security Policy by the European Council with the agreement of the President of the Commission. However, as Vice-President of the Commission, he also needs the approval from the European Parliament as member of the body (see Figure II.9.3). If the entire Commission has to resign as a body due to a motion of censure by the EP, the High Representative of the Union for Foreign Affairs and Security Policy would lose its function as the Vice-President of the Commission, but could still carry out the duties as High Representative of the Union for Foreign Affairs and Security Policy. Also, the President of the Commission only has the power to ask the HR to step down from her or his office as Vice-President, but not from that of the High Representative. This set of provisions is a telling example for the complexity of the institutional set-up of the High Representative as embedded in the two pillar structure of external action.

As the first High Representative the European Council nominated Catherine Ashton at its informal meeting on 19 November 2009. Shortly afterwards, the Commission President agreed to this nomination and she was formally appointed on 1 December 2009. Her nomination was part of a larger package involving also the election of the Presidents of the European Council and of the Commission. With its power to elect the President of the Commission and the Commission as a whole, the EP had a major say in the constellation of persons. To achieve a balance in terms of geography, party affiliation and gender, she was chosen because she was a female member of the New Labour (and thus of the Socialists & Democrats group) from a larger Northern country, fulfilling all the necessary criteria to counterpoise the other leading positions.

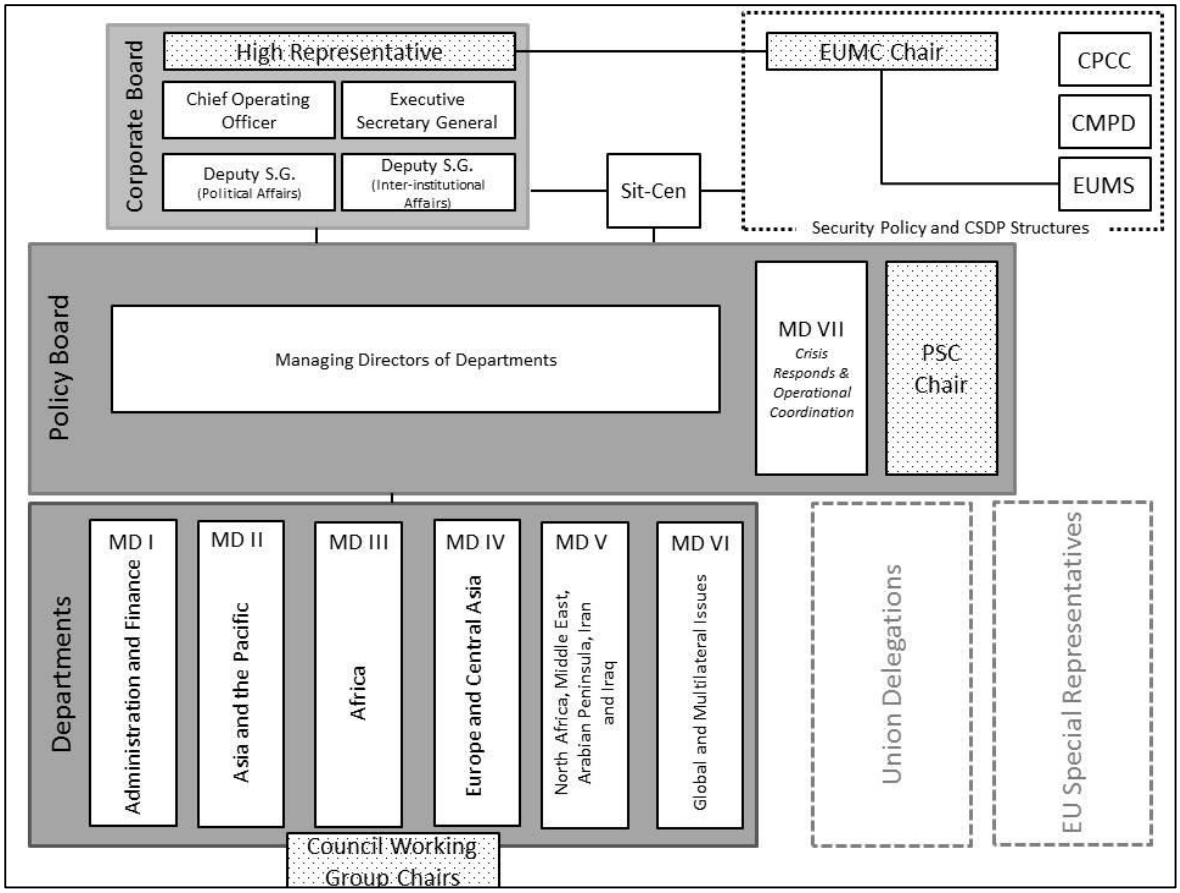
9.3 Internal Organisation: The Structure of the European External Action Service

In order to fulfil the diverse tasks, the High Representative relies on the assistance of the EEAS. Before the Lisbon Treaties entered into force, responsibilities of external relations were split among various DGs (DG External Relations, DG Trade, DG Development, DG Enlargement) in the Commission and respective DGs in the Council secretariat. With the aim to enhance the Union's effectiveness and efficiency, the Heads of State or Government decided to create a single service.

As Art. 27(3) TEU shows, the Lisbon Treaty does not spell out details on the EEAS' structure, organisation and functioning; in this regard, the Council has taken a decision unanimously on the 26 July 2010. The EEAS was formally launched on 1 December 2010 and is located in Brussels. In a preliminary process, the EEAS has been constructed with civil servants from three institutional backgrounds, i.e. from the European Commission, the Council Secreteriat and the diplomatic services of Member States (see Document II.9.3), which were transferred to the new service.

The EEAS is managed by an Executive Secretary-General who operates under the authority of the High Representative. The Executive Secretary-General shall take all measures necessary to ensure the smooth functioning of the EEAS, including its administrative and budgetary management. The holder of this office shall ensure effective coordination between all departments in Brussels as well as with the Union Delegations.

Figure II.9.6: Organisation of the EEAS



Source: Jean Monnet Chair Wolfgang Wessels 2013. Based on: http://eeas.europa.eu/background/docs/organisation_en.pdf (last accessed: 13.03.2013).[13]

Recruitment of the service should be based on merit whilst ensuring adequate geographical and gender balance. The staff of the EEAS should comprise a meaningful presence of nationals from all the Member States (Art. 6(1) July 2010/427/EU).

[13] Abbreviations: CPCC: Civilian Planning and Conduct Capability; CMPD: Crisis Management and Planning Directorate; EUMS: European Union Military Staff.

Table II.9.2: Recruitment of EEAS officials

Countries	Member States Diplor	%	AD of	%2	Total	%3	AST Staff as of Jun	Contract agents as of June
Austria	11	1.2%	17	1.8%	28	3.0%	11	7
Belgium	16	1.7%	49	5.2%	65	7.0%	166	85
Bulgaria	10	1.1%	3	0.3%	13	1.4%	5	5
Cyprus	1	0.1%	3	0.3%	4	0.4%	2	0
Czech Republic	12	1.3%	11	1.2%	23	2.5%	13	2
Denmark	10	1.1%	17	1.8%	27	2.9%	16	1
Estonia	7	0.7%	5	0.5%	12	1.3%	10	0
Finland	7	0.7%	13	1.4%	20	2.1%	17	4
France	39	4.2%	83	8.9%	122	13.0%	51	68
Germany	22	2.4%	69	7.4%	91	9.7%	42	19
Greece	9	1.0%	26	2.8%	35	3.7%	28	3
Hungary	11	1.2%	10	1.1%	21	2.2%	10	2
Ireland	7	0.7%	15	1.6%	22	2.4%	14	3
Italy	15	1.6%	84	9.0%	99	10.6%	53	39
Latvia	7	0.7%	4	0.4%	11	1.2%	3	1
Lithuaina	4	0.4%	5	0.5%	9	1.0%	5	2
Luxembourg	0	0.0%	2	0.2%	2	0.2%	0	0
Malta	6	0.6%	2	0.2%	8	0.9%	4	0
Netherlands	10	1.1%	21	2.2%	31	3.3%	25	2
Poland	10	1.1%	27	2.9%	37	4.0%	24	4
Portugal	9	1.0%	20	2.1%	29	3.1%	29	12
Romania	14	1.5%	4	0.4%	18	1.9%	16	12
Slovakia	4	0.4%	3	0.3%	7	0.7%	4	3
Slovenia	9	1.0%	2	0.2%	11	1.2%	10	0
Spain	22	2.4%	61	6.5%	83	8.9%	44	36
Sweden	11	1.2%	25	2.7%	36	3.9%	28	1
United Kingdon	25	2.7%	46	4.9%	71	7.6%	29	9
Total	308	32,9%	627	67,1%	935	100%	659	320

Source: EEAS Review 2013: Annex 1

9.4 General Remarks: A Fusion Perspective

Looking at the set of tasks, the procedures of election and the complex set up of the EEAS the HR office can be analysed, assessed and characterised from several perspectives. The community orthodoxy argues that the High Representative acts as an agent of the European Council and thus works as a Trojan horse of the intergovernmental Council in the supranational Commission. But as the defender of the national sovereignty in diplomatic matters, the High Representative might be considered a Trojan horse of the Commission in

the key area of national sovereignty. As declaration 14 to the Lisbon TEU documents, Member States expressed their worries about keeping national sovereignty.

Document II.9.6: Declaration Concerning the Common Foreign and Security Policy

> […] t[T]he Conference underlines that the provisions covering the Common Foreign and Security Policy including in relation to the High Representative of the Union for Foreign Affairs and Security Policy and the External Action Service will not affect the existing legal basis, responsibilities, and powers of each Member State in relation to the formulation and conduct of its foreign policy, its national diplomatic service, relations with third countries and participation in international organisations, including a Member State's membership of the Security Council of the United Nations. […]

Source: Declaration 14 annexed to Lisbon Treaty.

On the other hand, after some apparently weak performances of the HR some Foreign Ministers demand a reinforcement of his/her powers[14]. Given the tension between supranational and intergovernmental directions, I claim that the High Representative is a significant case for a hybrid process of vertical fusion of competences between national and EU competences and a related horizontal fusion of powers from the European Council, the Council and the EP.

14 FUTURE OF EUROPE GROUP 2012. Final Report of the Future of Europe Group of the Foreign Ministers of Austria, Belgium, Denmark, France, Italy, Germany, Luxembourg, The Netherlands, Poland, Portugal and Spain, 17 September..

Questions

1) Why did the Masters of the Treaties create the High Representative and the EEAS?
2) Describe the key tasks of the High Representative.
3) Identify the institutions necessary to nominate the High Representative and describe the procedure of the election.
4) Discuss: The High Representative is a European Foreign Minister.
5) How do you assess the office of the High Representative?
6) Discuss: The office of the High Representative is a 'mission impossible'.
7) Discuss: The High Representative is the Trojan Horse of the Member States in the Commission.
8) Discuss: The High Representative is a perfect case for a vertical and horizontal fusion.

Further Reading

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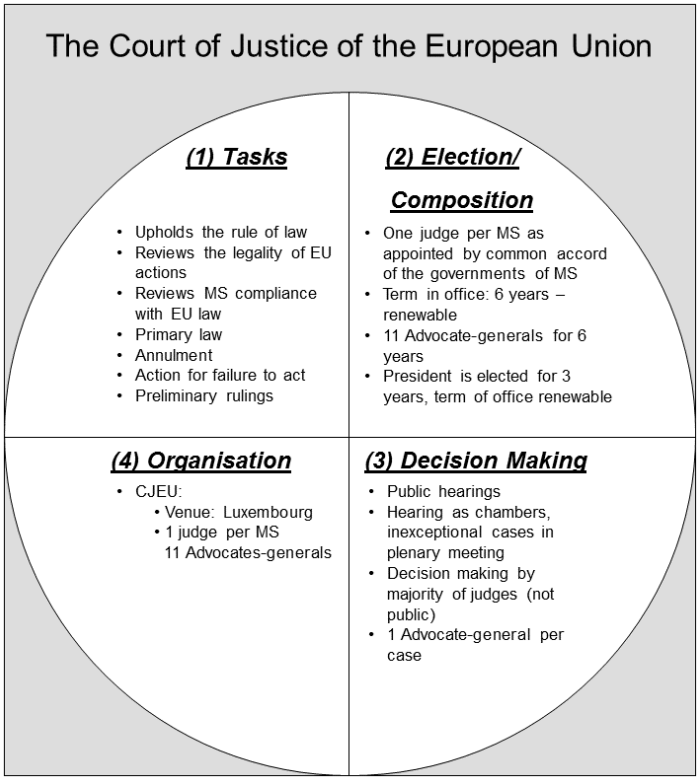
10. The Court of Justice of the European Union

Of major importance for understanding the functioning of the EU polity is the ‘Court of Justice of the European Union’ (CJEU). Political scientists are inclined to underestimate the role and impact of the EU’s courts. This institution however is of key importance.

The Court of Justice of the European Union’s role is to “ensure that in the interpretation and application of the Treaties the law is observed” (Art. 19 TEU). It is therefore a cornerstone in the EU’s commitment to the rule of law (Art. 2 TEU). Pursuing such a role the CJEU serves to reinforce the Union’s legitimacy. The role of Court is an essential indicator for understanding the nature of the Union’s governance.

Figure II.10.1: TEDO – The Court of Justice of the European Union



Source: translation from Wessels 2019h, p. 5

10.1 Tasks

The tasks of the Court of Justice of the European Union are generally described in Art. 19(3) TEU (see Document II.10.1) and more specifically in the respective articles of the TFEU (Art. 251-281 TFEU).

Document II.10.1: Tasks of the Court of Justice of the EU

Article 19(3) TEU

The Court of Justice of the European Union shall, in accordance with the Treaties:

(a) rule on actions brought by a Member State, an institution or a natural or legal person;

(b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions;

(c) rule in other cases provided for in the Treaties.

The legal procedures before the CJEU are manifold (see Table II.10.1). It takes several forms of action:

Table II.10.1: Court of Justice of the EU: Legal Procedures

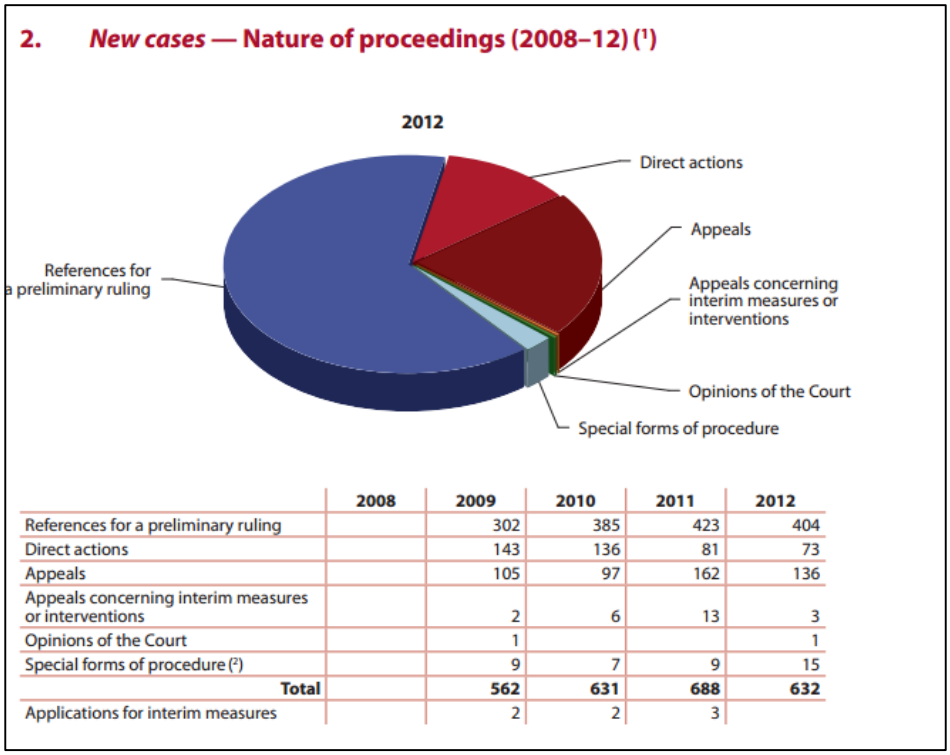
	Objective of Legal Action	Entitled to seek Legal Action
Infringement (Failure to fulfil an obligation) (Art. 258, 259, 260 TFEU) /	Member State compliance with EU primary or secondary law	European Commission and Member States (before the Court of Justice)
Annulment (Art. 263, 264 TFEU)	Judicial review of the legality of EU legal acts.	EP, Council, Commission, Member States, ECB, Court of Auditors, natural and legal persons (Court of Justice or General Court)
Failure to act (Art. 265 TFEU)	Forcing an EU institution to act where it is legally obliged to do so (and neglects or refuses to do so).	Member States, Community institutions, natural and legal persons (Court of Justice or General Court)
Preliminary ruling (Art. 267 TFEU)	Interpretation of EU law that is relevant for a case in a Member State court.	Natural and legal persons via courts of Members States (Court of Justice)

Source: see authors guide.

Generally, EU institutions and Member States have access to direct actions before the Court of Justice, the highest tier in the EU's judicial hierarchy. Persons, companies or other civil society organisations have also the opportunity to bring cases directly to the Court. In general, they need to demonstrate a "direct and individual concern" to challenge an EU legal act. Normally, they first bring their case before the General Court, which acts as a 'court of first instance'. The European Union Civil Service Tribunal has been the first of so called 'specialized courts', which the EP and the Council can set up according to Art. 257 TFEU 'to hear and determine at first instance certain classes of action or proceeding brought in specific areas'. Having been established in 2004, it handled legal conflicts between the EU institutions and their staff. This specialized court has ceased to operate on 1 September 2016 and its jurisdiction has been transferred to the General Court.

The use of the occurring legal procedures shows a high degree of variation (see Figure II.10.2.).

Figure II.10.2: Percentage of CJEU Proceedings



	2008	2009	2010	2011	2012
References for a preliminary ruling		302	385	423	404
Direct actions		143	136	81	73
Appeals		105	97	162	136
Appeals concerning interim measures or interventions		2	6	13	3
Opinions of the Court		1			1
Special forms of procedure (2)		9	7	9	15
Total		**562**	**631**	**688**	**632**
Applications for interim measures		2	2	3	

Source: http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-04/192685_2012_6020_cdj_ra_2012_en_proof_01.pdf (Last access: 30.07.2014)

10.1.1 The Infringement Procedure: Review of Member State Compliance With EU law

Document II.10.2: Failure to fulfil an Obligation

Article 258 TFEU

If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.

This type of procedure is generally referred to as an 'infringement procedure'. The Commission or Member State governments can ask the Court of Justice to review the (lack of) compliance of a Member State with EU law. In practice, Member States never use the procedure against one another. It is only the Commission, as the 'guardian of the treaties' (see Chapter II.8), that makes frequent use of this procedure to monitor and enforce Member State compliance with the primary and secondary law.

The infringement procedure is separated into an administrative and a judicial phase. Before a case reaches the Court of Justice, the Member State concerned is given the opportunity to reply to the complaints addressed to it. Art. 258 TFEU specifies that the Commission 'shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations'. Consequently, this procedure is supposed to avoid legal action by providing the corresponding Member States with the possibility of initiating appropriated steps to fulfil the respective obligation. This method plays a crucial role because it helps to solve potential disputes at an early stage. Most cases put forward by the Commission are settled in this phase[15].

If the dispute cannot be resolved in the administrative phase, the Commission can bring an action for infringement of EU law before the Court of Justice. The rulings of the Court of Justice can require the Member State to fulfil its legal obligations. If the Member State does not comply with the ruling, the Court of Justice can - by way of an abridged second infringement procedure - impose a penalty on the respective Member State (see Document II.10.3).

[15] For statistics of 2012 see http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-04/192685_2012_6020_cdj_ra_2012_en_proof_01.pdf (last accessed: (30.07.2014).

Document II.10.3: Failure to fulfil an Obligation and Penalty Payments

Article 260 TFEU

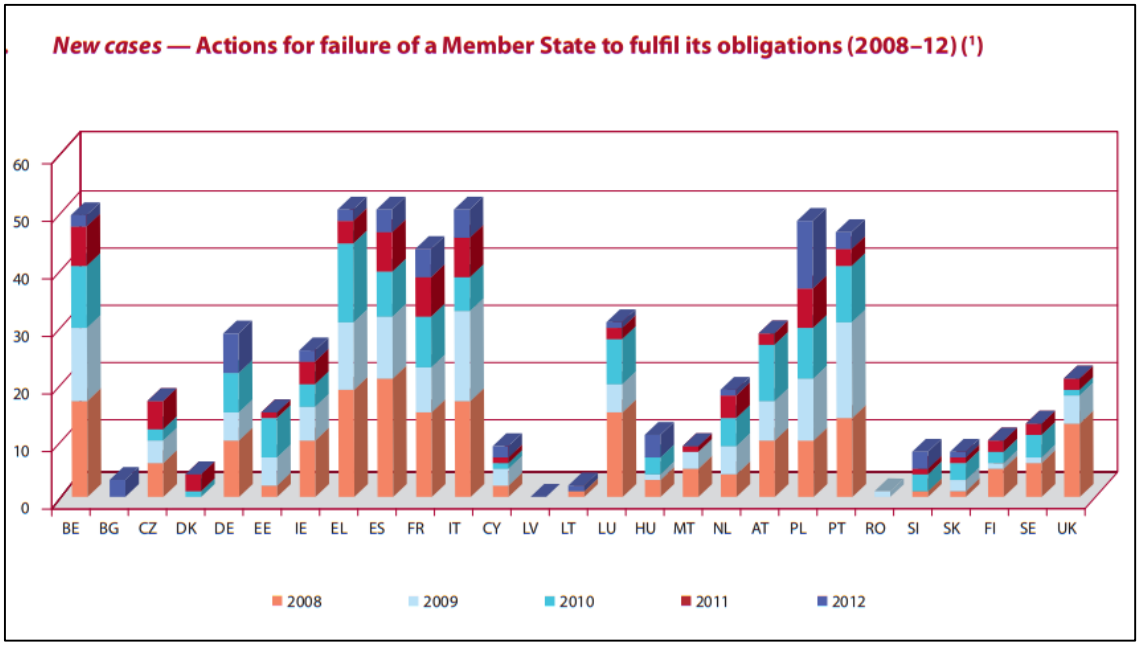
If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court.

If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.

The statistics show the intensive use of this procedure and furthermore that Member States show quite different records.

Figure II 10.3: New Cases



Source: http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-04/192685_2012_6020_cdj_ra_2012_en_proof_01.pdf (Last access: 30.07.2014)

10.1.2 The Annulment Procedure: Review of the Legality

Document II.10.4: Legality of Legislative Acts

Article 263 TFEU

The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.

This type of procedure is generally referred to as 'annulment actions'. In these cases the Court of Justice and the General Court have the jurisdiction to issue rulings 'on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers' (Art. 263 TFEU). The court may 'declare the act concerned to be void' (Art. 264 TFEU). The General Court generally has jurisdiction at first instance in all cases concerning natural or legal persons, and cases brought by Member States against the Commission. Most other annulment cases are brought directly before the Court of Justice by other EU institutions.

10.1.3 Failure to act

Document II.10.5: Failure to Act

Article 265 TFEU

Should the European Parliament, the European Council, the Council, the Commission or the European Central Bank, in infringement of the Treaties, fail to act, the Member States and the other institutions of the Union may bring an action before the Court of Justice of the European Union to have the infringement established.

The action shall be admissible only if the institution, body, office or agency concerned has first been called upon to act. If, within two months of being so called upon, the institution, body, office or agency concerned has not defined its position, the action may be brought within a further period of two months.

This procedure is the corollary to the annulment action. In these cases of Art 265 TFEU, the Court of Justice and the General Court have jurisdiction over complaints against the failure of

EU institutions to act where the Treaty would have mandated them to take action. This article is not used very often, for example only 8 times in 2012.

10.1.4 Preliminary Rulings

Document II.10.6: Preliminary Ruling

Article 267 TFEU
The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union; Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

A highly significant procedure concerns 'preliminary rulings' on cases brought to it by courts of Member States to clarify the interpretation of European Union law and the compatibility of national laws with EU law.

To ensure the effective and uniform application of European Union legislation and to prevent divergent interpretations of EU law, the national courts may, and, in the case of national courts of last instance, must, refer cases to the Court of Justice if a case before them involves the application of EU law. In theory, the Court of Justice rules on the interpretation of the concerned EU law and hands the case back to the national court for the ultimate ruling. In practice, the Court of Justice's rulings on preliminary references often leave very few options to the national court. In many cases, when references concern questions of compatibility, the Court of Justice will judge whether national law infringes on EU law.

The latest figures provided by the EJC point out that references for preliminary ruling are of major importance; they constituted 423 out of 688 (61%) of all new cases in 2011[16]. Almost all important principles of EU law have been laid down in preliminary rulings.

10.1.5 Reviewing compatibility with the Treaties

[16] ECJ (2012)

Document II.10.7: Compatibility with the Treaties

Article 218(11) TFEU
A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.

The Court may issue an opinion if an international agreement envisaged by the Union with third parties is compatible with the treaty. In a negative ruling this agreement may not enter into force. A contested case was the agreement on the European Economic Area in 1994.

10.2 Election and Composition

Document II.10.8: Composition and Nomination of the Court of Justice

Article 19(2) TEU
The Court of Justice shall consist of one judge from each Member State. It shall be assisted by Advocates-General. The General Court shall include at least one judge per Member State. The Judges and the Advocates-General of the Court of Justice and the Judges of the General Court shall be chosen from persons whose independence is beyond doubt. They shall be appointed by common accord of the governments of the Member States for six years. Retiring Judges and Advocates-General may be reappointed.

Governments of the Member States appoint 'by common accord' the Judges and Advocates General of the Court of Justice for a term of six years' (Art. 19(2) TEU). These appointments are renewable. 'The membership shall be partially renewed every three years' (Art. 254 TFEU).

The Court of Justice 'shall consist of one judge from each Member State' (Art. 19(2) TEU) (28 in 2013) and 'it shall be assisted by eight Advocates Generals' (Art. 252 TFEU). Furthermore, Art. 19(2) TEU emphasises that their independence shall be 'beyond doubt'. To prevent inopportune nominations, the Lisbon TFEU has now installed a special selection panel consisting of seven former judges and legal experts 'to give an opinion on candidates' suitability to perform (their) duties' (Art. 255 TFEU) In 2013, the panel for instance panel held 8 meetings and examined 24 candidatures (CJEU 2014).The appointed judges of the

Court of Justice elect amongst themselves a president for a renewable term of three years. The president directs the work of the Court and presides at hearings and deliberations of the Grand Chamber.

The General Court (see for this level of the judicial set up Figure II.10.4) is made up of 'at least' one judge from each Member State – i.e. there could be more than one judge per member state. This is currently not the case, but was reserved as an option in case the General Court's caseload exceeds the resources of 28 judges. Judges of the General Court are also appointed for a renewable term of office of six years. Unlike the Court of Justice, the General Court does not have permanent Advocates General. However, that task may, in exceptional circumstances, be carried out by a judge.

Before being dissolved, the Civil Service tribunal was composed of seven judges appointed by the Council for a period of six years which may be renewed.

10.3 Decision Making

Document II.10.9: Procedures of the CJEU concerning deliberations

Article 32(1) Rules of Procedure of the Court of Justice

(…)

1. The deliberations of the Court shall be and shall remain secret.

2. (...)

3. Every Judge taking part in the deliberations shall state his opinion and the reasons for it.

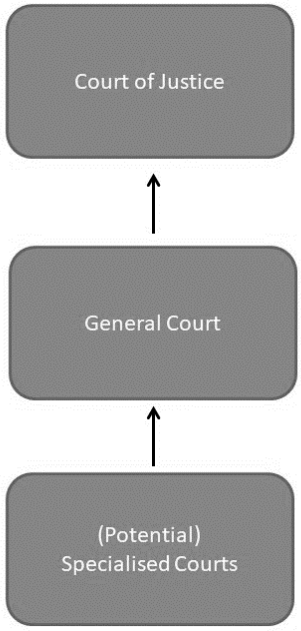
4. The conclusions reached by the majority of the Judges after final discussion shall determine the decision of the Court.

When a case is brought before the CJEU, the president assigns a responsible Judge-Rapporteur. The main task of the Rapporteur is to prepare an initial report which enlists and summarises all relevant aspects of the case. Then, the court as a body decides to what type of chamber the case should be assigned and whether a hearing should be held. Most cases are handled by judicial chambers consisting of three or five judges. In exceptional cases, and mostly if a Member States or institution asks for it, cases will be assigned to a Grand Chamber consisting of at least 13 judges. In theory, there is the possibility of the Court sitting in "Full Court", i.e. all judges, in particular for disciplinary hearings of high officials. This procedure

is rather rare and has in recent years only been employed once in 2011.[17] The hearings to the cases are public. Each official language of the EU can be used. If required, the Advocate General prepares an opinion to the case and sends it to the judges. Finally, the judges reach a decision, by majority, if necessary, on the basis of the draft which has been prepared by the Judge-Rapporteur. Judicial deliberations are secret. All the three courts act as collegiate institutions. No "votes" are published, neither are there any dissents or concurring opinions, but only the views and arguments of the majority. In Germany and the United States, for example, dissenting opinions can also be published.

10.4 Organisation

Figure II.10.4: Structure of the CJEU



Source: see Readers Guide.

The Treaty of Lisbon has introduced a new sometimes confusing nomenclature for the European Union's judicial institutions.

The newly named Court of Justice of the European Union (CJEU) consists of

1) the Court of Justice (commonly referred to as the European Court of Justice), established in 1952
2) the General Court (formerly the Court of First Instance), established in 1989

[17] http://curia.europa.eu/jcms/upload/docs/application/pdf/2009-03/ra08_de_cj_stat.pdf

3) the EU's potential specialised courts (established in 2004): there only used to be a "Civil Service Tribunal" responsible for staff issues that has been dissolved in the context of the reform of the European Union's judicial structure in 2016.

The different tiers of the CJEU system are structured hierarchically and decisions of a 'lower' court may be appealed on a higher level (see Figure II.10.4).

10.5 General Remarks

The Court of Justice of the European Union's jurisdiction has steadily expanded over the course of the integration process. Some observers qualify its role as a 'constitutional court'[18], similar to a 'national supreme court'[19]. In this way it promotes a spill-over with supranational effects. While this expansion often had its origin in Treaty revisions, the Court of Justice is critized to assume competences for itself that are not immediately obvious from the Treaty text. Many of the central legal principles of EU law, such as its direct effect and its primacy over national law, have first been declared by the Court of Justice before they became generally accepted and even partially incorporated in the Treaty text. Some legal experts criticise this competence creep because they claim that the rulings of the Court go far beyond the words of the Treaties (they claim that it acts 'ultra vires'[20]). Critics bemoan a'judicial activism'[21] which leads to an 'ursupation of power'[22] and finally to a 'gouvernement des juges'[23]. The Treaty contains a number of express exceptions from the Court's encompassing competences. As such, CJEU has no 'jurisdiction with respect to the provisions relating to the common foreign and security policy' (Art. 275 TFEU, see also Art. 24(1) TEU and see Chapter II.7.1 Tasks of the Council of Ministers). Also, some activities of the EU concerning cooperation in police and criminal matters (the EU's former third pillar) are equally excluded from its jurisdiction (Art. 276 TFEU).

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[18] CRAIG, P. & DE BURCA, G. 2011. *EU Law : Text, Cases, and Materials*, Oxford, Oxford University Press..

[19] KENNEDY, T. 2006. The European Court of Justice. *In:* PETERSON, J. & SHACKLETON, M. (eds.) *The Institutions of the European Union.* 2 ed. New York: Oxford University Press..

[20] CRAIG, P. & DE BURCA, G. 2011. *EU Law : Text, Cases, and Materials*, Oxford, Oxford University Press..

[21] NEILL, S. P. 1995. The European Court of Justice - A Case Study in Judicial Activism *European Policy Forum.*.

[22] RASMUSSEN, H. 1986. *On Law and Policy in the European Court of Justice,* Dordrecht, Martinus Nijhoff..

[23] OPPERMANN, T. 2005. Europarecht. Ein Studienbuch. Munich: C.H. Beck..

Questions

1. Identify and describe the three main procedures.
2. Identify and describe the structure of Court of Justice of the EU.
3. Discuss: the judges of the court should be elected by the European Parliament after a public hearing.
4. Discuss. The Court of the European Union is a government by judges.
5. Discuss. The Court is a key institution of the EU system.
6. Discuss: the area of competence of the court should be extended to the CFSP.
7. How do you evaluate this institution?

Further Reading

Craig, Paul and De Burca, Grianne (2011) *EU Law: Text, Cases, and Materials* (Oxford: Oxford University Press).

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Magiera, Siegfried (2014), 'Gerichtshof der Europäischen Union', in: Weidenfeld, Werner; and Wolfgang Wessels (eds.), *'Europa von A bis Z'*, Baden-Baden: Nomos Verlagsgesellschaft, pp. 279-285.

11. The European Central Bank: A Trustee for stabilizing the EURO Zone?

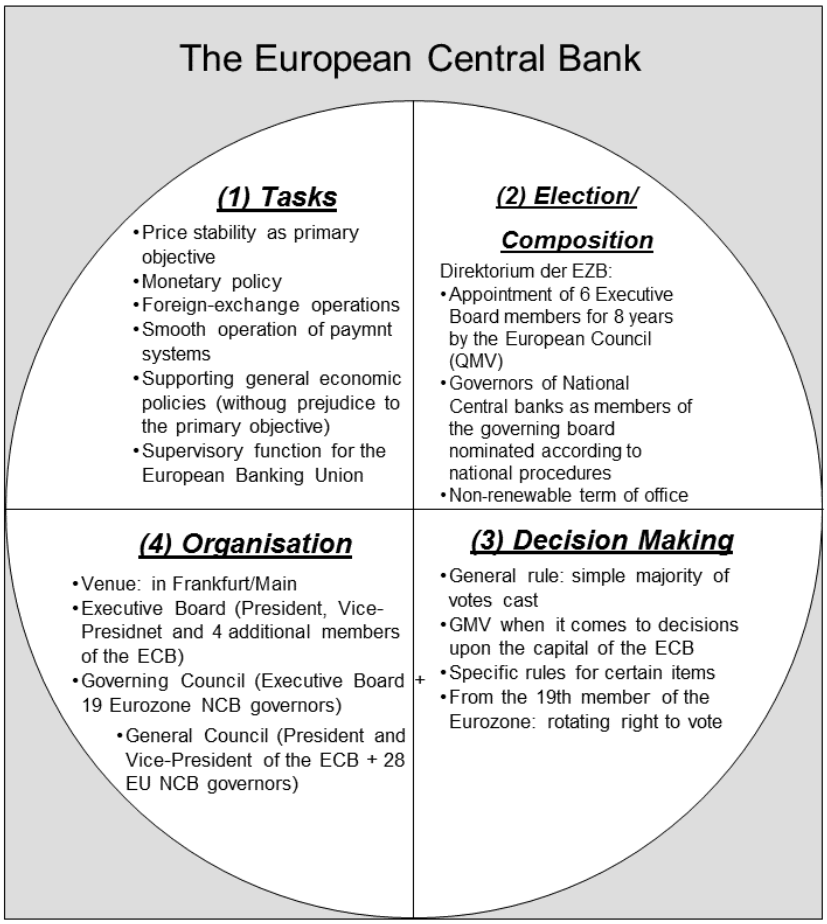
The TEU has formally added the European Central Bank (ECB), already created in the Maastricht Treaty, to the set of formal EU institutions enumerated in Art. 13 TEU. However, more than by legal integration into the institutional framework, the ECB has gained public and academic attention through its role in stabilizing the Eurozone since the outbreak of the financial and sovereign debt crisis from 2008 onwards. Its low public visibility prior to the crisis can be largely attributed to the central bank's set-up as a multilevel, non-majoritarian technocracy.

Following the model of the former (German) Bundesbank, the ECB was deliberately created as a body independent from the political influence of governments and parties. In line with the provisions of the Maastricht Treaty, which formed the cornerstone of the monetary union, it focused on the task of guaranteeing a stable currency. In shaping and making the Maastricht Treaty in the early 1990s and during the ongoing period of crisis management since late 2008, the degree of the central bank's independence was highly disputed. French Governments had wished for a more active and interventionist role of the central bank – also supporting the economic and employment policies of the Member States, whereas the German position demanded an exclusively monetary function.

These conflicting views on the role of the ECB are often linked to the concept of *gouvernement économique*, or *economic governance*[24] (see Chapter III.13.3) . In the center is a respective performance of the European Council (see Chapter II.5) and its relation to the ECB.

[24] WESSELS, W. 2009. Der Europäische Rat als Wirtschaftsregierung, Zur französisch-deutschen Kontroverse. *In:* KNOLL, B. & PITLIK, H. (eds.) *Entwicklung und Perspektiven der Europäischen Union. Festschrift für Dr. Rolf Caesar.* Baden-Baden: Nomos Verlagsgesellschaft., HOWARTH, D. 2008a. France: The Political Management of Paradoxical Interests. *In:* DYSON, K. (ed.) *The Euro at Ten. Europeanization, Power, and Convergence* New York: Oxford University Press., LINSENMANN, I., MEYER, C. O. & WESSELS, W. 2007b. Evolution Towards a European Economic Government? Research Design and Theoretical Expectations. *In:* LINSENMANN, I., MEYER, C. O. & WESSELS, W. (eds.) *EU Economic Government. A Balance Sheet of New Modes of Policy Coordination.* Basingstoke, New York: Palgrave Macmillan..

Figure II.11.1: The European Central Bank – TEDO



Source: tranlation of Wessels 2019g, p. 4

11.1 Tasks

Following an intense dispute over the diverging French and German concepts on the role of the ECB, the German position which emphasized the objective of price stability mainly dominated the treaty formulation.

Document II.11.1: Tasks of the ECB/ESCB

Article 127(1) and (2) TFEU

(1) The primary objective of the European System of Central Banks (hereinafter referred to as "the ESCB") shall be to maintain price stability. Without prejudice to the objective of price stability, the ESCB shall support the general economic policies in the Union with a view to contributing to the achievement of the objectives of the Union as laid down in Article 3 of the Treaty on European Union. The ESCB shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 119.

(2) The basic tasks to be carried out through the ESCB shall be:

- to define and implement the monetary policy of the Union,
- to conduct foreign-exchange operations consistent with the provisions of Article 219,
- to hold and manage the official foreign reserves of the Member States,
- to promote the smooth operation of payment systems.

In line with its mandate, the ECB defines price stability as an inflation rate of close to, but below, 2% over the medium term.[25] Although the treaties, in addition to the narrow mandate, put a number of restrictions on its actions, the ECB as an independent institution disposes of high autonomy in pursuing this goal. Moreover, in reaction to the financial and sovereign debt crisis, the ECB has markedly expanded its activities. In order to stabilize the situation, it has designed several programmes. Whether or not these measures are compatible with the ECB's treaty mandate is a point of heated debate among observers.[26] In view of the plans for a 'Banking Union', legal provisions will enlarge the list of tasks, turning the ECB into the highest

[25] See http://www.ecb.int/mopo/strategy/pricestab/html/index.en.html (last accessed: 02.01.2013). It should be noted that it is up to the ECB to quantitatively define what 'price stability' means.

[26] SINN, H.-W. & WOLLMERSHÄUSER, T. 2012. Target Loans, Current Account Balances, Capital Flows and the ECB's Rescue Facility. *International Tax and Public Finance*, 19**,** 468-508..

level banking supervisor within the Single Supervisory Mechanism and a role in the Single Resolution Mechanism.

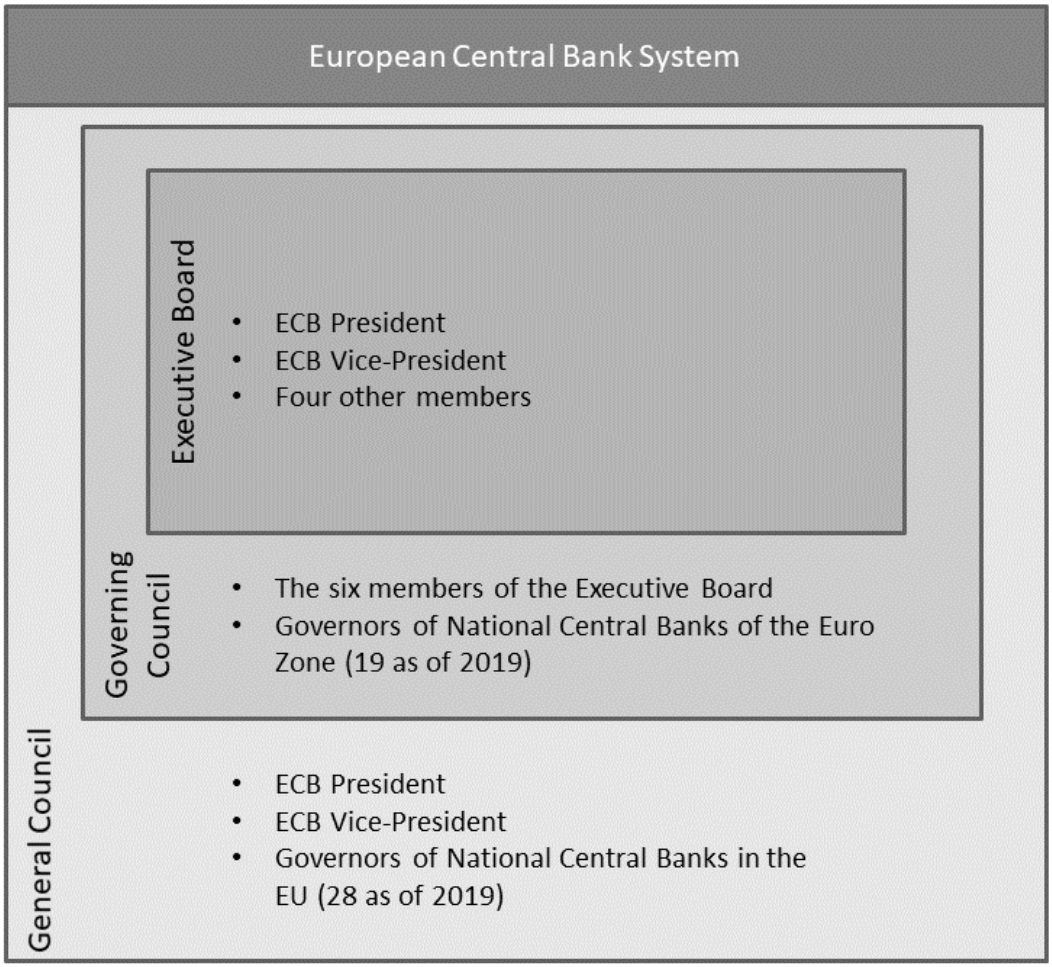
11.2 Election and Composition

According to Art. 282(1) TFEU, the ECB and the national central banks (NCBs) of all EU Member States form the European System of Central Banks (ESCB). Given that not all EU Member States have introduced the single currency, the term 'Eurosystem' is used to denote the ECB and the NCBs of all Eurozone members.

The institutional architecture consists of three levels:

1. the Executive Board of six members, including the President and the Vice President,
2. the Governing Council composed of the six Executive Board members and the rotating Central Bank governors of the 19 Eurozone members,
3. the General Council composed of the President and Vice President of the ECB and the Central Bank governors of all EU Member States.

Figure II.11.2: Composition of the ECB



Source: Jean Monnet Chair Wolfgang Wessels 2013. Based on: Art. 129,141, 283 TFEU.

Document II.11.2: Election and Composition of the ECB

Article 283(2) TFEU

2. The Executive Board shall comprise the President, the Vice-President and four other members.

The President, the Vice-President and the other members of the Executive Board shall be appointed by the European Council, acting by a qualified majority, from among persons of recognised standing and professional experience in monetary or banking matters, on a recommendation from the Council, after it has consulted the European Parliament and the Governing Council of the European Central Bank.

Their term of office shall be eight years and shall not be renewable […].

Of high relevance is the election of the Executive Board, which as of 2019 consists of the President of the ECB (currently Mario Draghi from Italy and Christine Lagarde until 1 November 2019), the Vice-President of the ECB (currently Vítor Constâncio from Portugal), and four other members (currently Benoît Cœuré from France, Sabine Lautenschläger from Germany, Yves Mersch from Luxenbourg and Peter Praet from Belgium).

After consulting the European Parliament and the Governing Council of the ECB, the European Council appoints Executive Board members, if necessary by qualified majority (see also Chapter II.5 The European Council). The candidate's expertise in monetary or banking matters is a precondition to be appointed (Art. 283(2) TFEU). This criterion indicates the technocratic, apolitical nature of the offices. In some cases, the Euro Heads of State of Government quarrelled over the nomination of the President and some Board members reflecting the high importance attributed to the ECB by the Heads of State or Government. These disputes also point towards attempts to influence decision-making in the Executive Board.

Members of the Executive Board are sometimes associated with a certain kind of monetary philosophy, leading to suspicions that the Executive Board might lean stronger towards a 'Northern' stability-oriented or 'Southern' growth-oriented position of an 'economic government'.

Both the long duration – eight years – and the non-renewability of the term of the members of the Executive Board are features which are special at least in comparison to those of the Commission and the judges of the CJEU. These provisions serve to increase the independence of the ECB. The expectation linked to this rule is that the board members will not be tempted to adapt their policies according to the preferences of relevant Member States in order to lobby for a renewed term. Moreover, the principle that the ECB may not seek or take instructions from any Community institution, body or national government has been enshrined in the treaties (see Art. 130 TFEU). These treaty articles give the ECB the status of one of the most independent central banks in the world.

The Governing Council of the ECB comprises all members of the Executive Board of the ECB and the Governors of the NCBs of countries whose currency is the Euro (Art. 283(1) TFEU). Although governors of each national central bank are elected in line with constitutional or statutory provisions of the Member States, their independence from the respective government has to be ensured at the national level (Art. 130 and 131 TFEU).

In addition to central bank representatives, the President of the ECOFIN Council and a member of the Commission may participate in meetings of the Governing Council without having a right to vote (Art. 284 TFEU).

The General Council of the ECB comprises the President and the Vice-President of the ECB and the Governors of the NCBs of all 28 EU Member States. The additional members of the ECB's Executive Board, the President of the EU Council and one member of the European Commission may attend the meetings of the General Council without having a right to vote (see Protocol No. 4, Art. 44). The General Council basically is a formal body. Meeting less frequently than the Governing Council (usually four times a year), this set-up ensures coordination between the countries that use the EURO and those that do not.

In line with legal requirements (Art. 15 of the ECB/ESCB Statute), the ECB reacts to concerns over its accountability by frequently giving press conferences and by public speeches of its senior executives. It regularly explains its policies in hearings at the European Parliament and publishes reports on its activities. However, this form of accountability is only weak as no institution (neither the European Council nor the EP) can dismiss the ECB Board as a whole or individual members.

11.3 Decision-making

There are different rules for decision-making for the three main bodies of the ECB. The ECB/ESCB Statute lays down that the Executive Board acts by a simple majority of the votes cast. Each vote has the same weight. In the event of a tie, the President has the decisive vote. The Board's decisions are far-reaching since it prepares the Governing Council, implements the monetary policy for the euro area and manages the day-to-day business of the ECB.

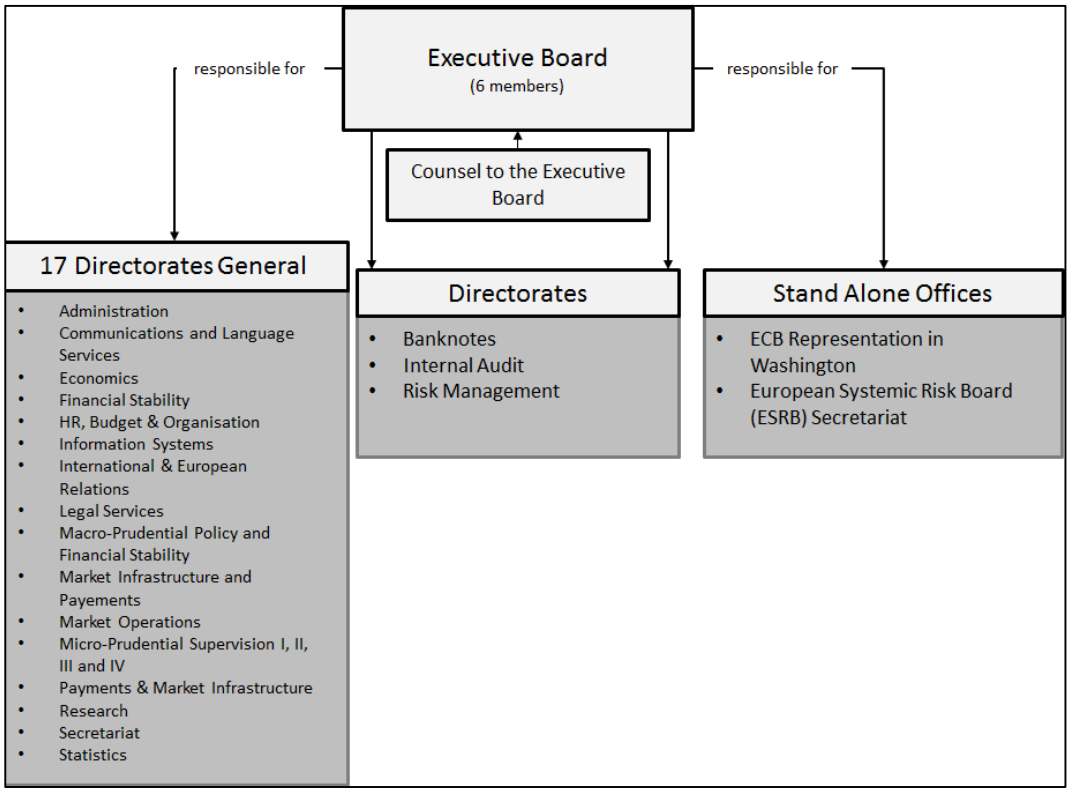
The Governing Council is the most important decision-making body of the ECB which decides, for instance, on setting the interest rates in the euro area. As a rule, decision-making requires a simple majority (unless otherwise provided by the ECB/ESCB Statute) and each member casts one vote. This 'one person – one vote principle' stresses the equality of all Euro states but is increasingly disputed as representatives of the larger Member States might be overruled by those of smaller ones. We observe also cleavages between countries which are economically more successful and those in a weak economical position. Whereas in the first years consensus was the typical pattern of decision making, from the financial and sovereign debt crisis onwards both the Board and the Governing Council have apparently taken some significant decisions under the by majority instead of unanimity. However, for some decisions

(mainly concerning financial questions), each vote must be weighed according to the ECB's capital subscription key and higher thresholds than a simple majority apply.
Decisions in the General Council are taken by simple majority unless otherwise stipulated in the ECB/ESCB Statute.

11.4 Organisation and Members of the Executive Board

Day-to-day work of the executive board is carried out by 17 Directorates General (as of 2014) and a number of smaller functional offices. Responsibility for them is distributed among the members of the Executive Board (see Figure II.11.3).

Figure II.11.3: Organisation Chart of the ECB



Source: Readers' Guide. Based on: http://www.ecb.europa.eu/ecb/orga/orgachart/html/index.en.html (last accessed: 05.01.2015).

Overall, over 1.600 civil servants work in Frankfurt as of 2014. With the expansion of tasks the organization in the Frankfurt headquarters grows. For its functions in the European Bannking Union additional departments are set up.

11.5 General Remarks: Legitimacy as Trustee?

In view of its activities and policies, the ECB's high degree of independence regularly raises the issue of its legitimacy. Due to the bank's crisis management, this has become an even

more salient issue in political discussions. The academic literature on central banks often refers to a conflict between output legitimacy by effectiveness and input legitimacy by influence and accountability[27]**.** On the one hand, the effectiveness of monetary policies 'to maintain price stability' is supposedly guaranteed by a high level of central bank independence only. Put differently, a central bank dependent on national governments might be pushed by them (for electoral purposes) to lower interest rates to stimulate the economy, raising inflation and possibly jeopardizing the bank's primary goal of preserving price stability.

But on the other hand, the ECB takes decisions that affect millions of Europeans in their every-day life without being accountable to any elected democratic body. This conflict is neither specific to the European Central Bank nor to central banks in general, but applies to all institutions whose members are not directly elected. Judges in constitutional courts, for example, are not elected democratically and nevertheless are guaranteed a high level of independence. However, a particular feature of the European level in this context is that the ECB's mandate is enshrined in treaties which can be changed solely through a unanimous decision of and ratification by all EU Member States. By contrast, the German Bundesbank law could have been changed by a simple legislative majority in the Bundestag.

In view of the 'principal - agent dichotomy', the treaty rules considerably reduce the feature of the ECB as an agent. Given that the options for ex-ante or ex-post control by the European Council or the EP are limited, the ECB can rather be described as a 'trustee' - an institution that administers assets for the benefit of a third party - who is supposed to act in the fundamental common interest of maintaining price stability and, perhaps even more importantly, to secure the stability of the Eurozone as such. In difference to a position of an agent, there are no ongoing, permanent or specific control mechanisms. This high degree of independence then favours a specific status as a trustee who takes care of a (public) good without being directly accountable to those countries and citizensfor whom the office holder makes decisions.

One major feature of high political salience is that in recent years, the ECB has become more closely involved in deliberations of the European Council with regard to economic governance. Already before the crisis, the Heads of State or Government invited the ECB to participate in various forms of consultation and cooperation, for example when establishing

[27] SCHARPF, F. W. 1999. *Governing in Europe: effective and democratic?,* Oxford / New York, Oxford University Press., see also MCNAMARA, K. R. 2002. Managing the Euro: The European Central Bank. *In:* PETERSON, J. S., MICHAEL (ed.) *The Institutions of the European Union.* Oxford: Oxford Universtiy Press..

'a macro-economic dialogue' (Cologne, June 1999). The fact that in the turbulences of the Eurozone the President of the ECB became a major actor participating at crisis meetings of the European Council and of the Euro Summit underlines the broadening of the bank's tasks and implied power. In critical moments ECB Presidents confronted the Union´s highest executive leaders with apparently shocking analyses of the situation of some Member States and the Eurozone as a whole. As a result, European leaders apparently agreed to the creation of the euro rescue funds. Vice versa, members of the European Council apparently put pressure on the ECB President to pursue (monetary) policies supporting the actions of the Heads of State or Government of the Eurozone countries. His ad hoc participation in the top-level meetings was formalised in the provisions for the 'governance of the Euro Area' adopted in October 2011 and also form part of the intergovernmental Treaty on Stability, Coordination and Governance in the EMU: 'the President of the European Central Bank shall be invited to take part in the [Euro Summit] meetings' (Art. 12 TSCG).

The increasing involvement of the ECB President leads to a more intense dialogue, to a sharing of responsibilities and to exercising coordinated activities by different institutions. From a theoretical perspective focussing on integration dynamics, this can be interpreted as horizontal fusion of legally independent competences towards a collective 'gouvernement économique'.

Questions

1. Which tasks is the ESCB supposed to fulfill?
2. What are the main decision-making bodies of the ESCB and what are their respective functions?
3. How are the members of the ECB executive board elected?
4. What are the main rules protecting the independence of the ECB?
5. Discuss: The ECB is not an agent but a trustee.
6. Discuss: In combatting the financial and sovereign debt crises, the ECB has overstepped its treaty mandate.
7. Discuss: The European Central Bank is a supranational technocratic actor.

8. Discuss: The rising role of the ECB leads to a horizontal fusion.
9. How do you evaluate this institution?

Further Reading

Hodson, Dermot (2011), 'Managing the Euro: the European Central Bank', in: Peterson, John and Michael Shakleton (eds.), *'The Institutions of the European Union'*, 3rd ed., Oxford: Oxford University Press, pp. 199-218.

Kunstein, Tobias/Wessels, Wolfgang (2012): 'What we hope, what we fear, what we expect: posible scenarios for the future of the Eurozone', *European View*, 11(1): pp. 5-14.

Kunstein, Tobias/Wessels, Wolfgang (2011): 'Die Europäische Union in der Währungskrise: Eckdaten und Schlüsselentscheidungen', *integration*, 34(4): pp. 308-322.

Kunstein, Tobias (2014), 'Europäische Zentralbank', in: Weidenfeld, Werner and Wolfgang Wessels (eds.), '*Europa von A bis Z*', Baden-Baden: Nomos, pp.256-259.

Scharpf, Fritz W. (1999): *Governing in Europe: effective and democratic?*, 1st ed Oxford / New York: Oxford University Press).

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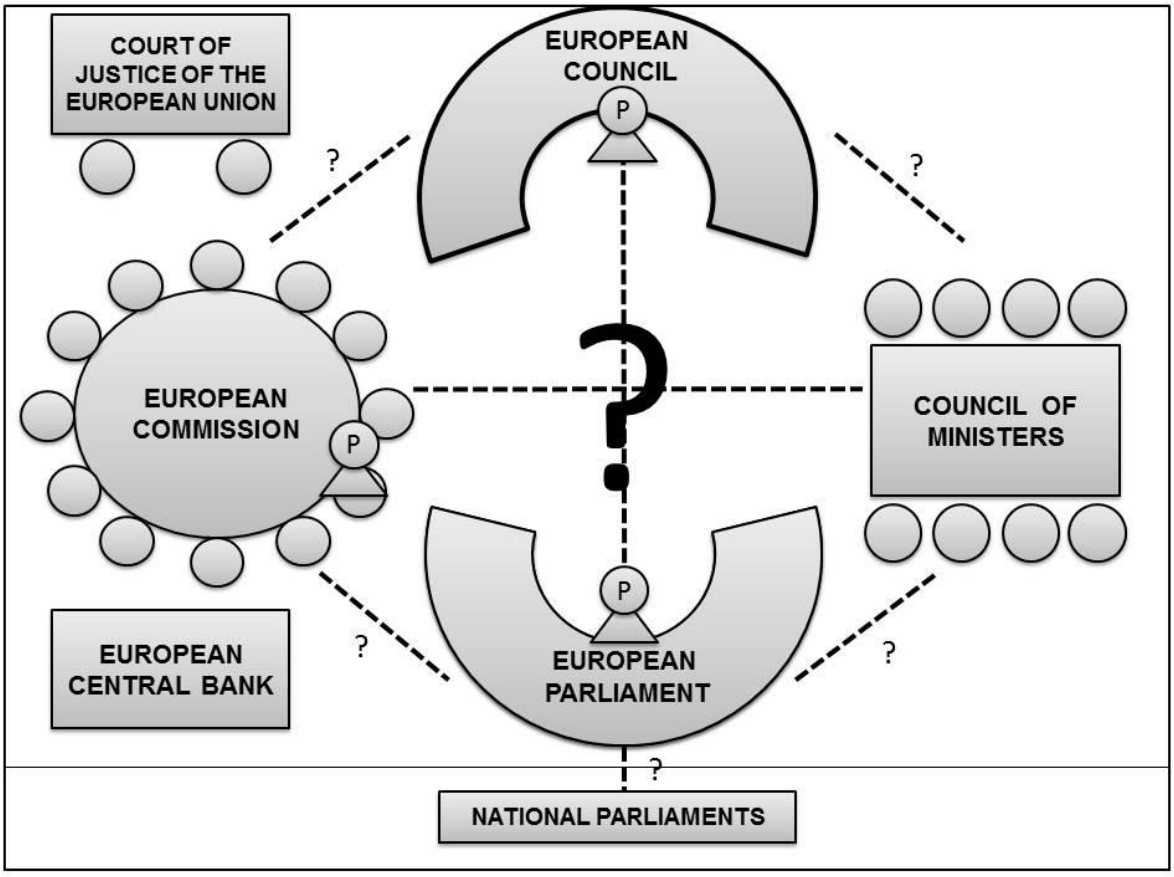
Part III. EU system and policy-making

So far the teaching companion mainly looked at single institutions. We will now turn our attention to the interactions among them in key procedures of system - and policy making. For system making, we study the process of treaty making (see Chapter II.12.1) and of accession agreements (see also Figure III.12.2). For policy making, we study the 'ordinary legislative procedure' (see Chapter II.13.1), special legislative procedures (see Chapter III.13.2) as well as forms of economic governance.

The key question is: How are binding decisions prepared, taken, implemented and scrutinized. Significant issues are the efficiency and legitimacy of these processes. In an overall view, we can identify certain persistent patterns – i.e. an increasing role of the European Parliament in the institutional balance (see also Figure I.3.2).

Figure III.12.1: Basic Model of the EU's Institutions: Towards an Institutional Balance?



Source: Jean Monnet Chair Wolfgang Wessels 2013.

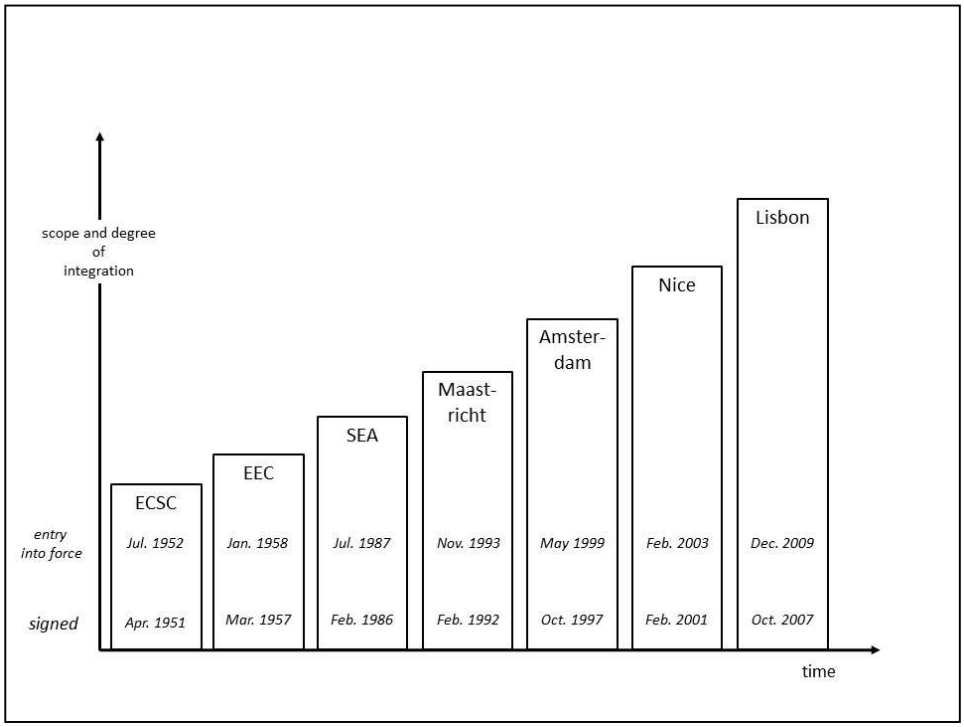
12. System Making: Deepening and Widening

In the post WWII history, (West) European States have constructed a new polity at many critical junctures (see Chapter I.1).

In shaping and making the Union´s constitutional and geographic architecture, the European Council is of special interest. From the early summits onwards**,** the Heads of State or Government prepared and then concluded de facto history-making decisions which determined fundamental directions of the European construction. The European Council's activities show that the Heads of State or Government have intensively used their meetings to deal with central and perennial issues of the nature and finality of the European polity. Over its whole life time, it adopted pre-constitutional or even constitutionalizing acts and thus shaped a significant dimension of the Union's and Europe's identity.

These activities, agreements and acts of the Heads of State or Government led to five treaty amendments and revisions (see Figure III.12.2) as well as to seven steps of enlarging membership from six to twenty-eight European states (see Figure I.2.1).

Figure III.12.2: Treaty Milestones of the European Integration Process



Source: Wessels (2016).

Having in mind this performance, I argue that the European Council has acted – beyond its legal empowerments – to pursue a role as 'constitutional architect' transforming the EU polity in several ways (see Chapter II.5).

One major issue for the Union and for the Heads of State or Government was the strategic question if and in which way they should relate both forms of system making. Already at the summit in The Hague in 1969 they had agreed on a package deal in which they purposefully linked 'deepening' and 'widening'. The Copenhagen Criteria again raised the issue of 'the Union's capacity to absorb new members'[28]. When launching the constitutional decade from 1999 to 2009 both dimensions of system making were also closely linked[29].

Putting the European Council into the focus we should not underestimate that its deliberations and decisions are embedded in a set of complex interactions between several networks on more than one level (Pappi and Thurner, 2009). The Heads of State or Government do not deliberate and act in a vacuum. They act in a complex multi-level and multi-institutional architecture (see also Figure I.2.5), confronted with a 'plethora of national, transitional and supranational actors' (Christiansen and Reh, 2009). Domestic politics impact on the autonomy of governments (Finke, 2009) to act on the EU level.

We should also be aware of a set of exogenous factors. Constellations, conditions and constraints of system making depended quite significantly on the respective historical contexts. The formation of national preferences were often reactions to external shocks and challenges – like the fall of the Berlin wall in 1989 – as well as to internal crises like negative referenda on treaty revisions.

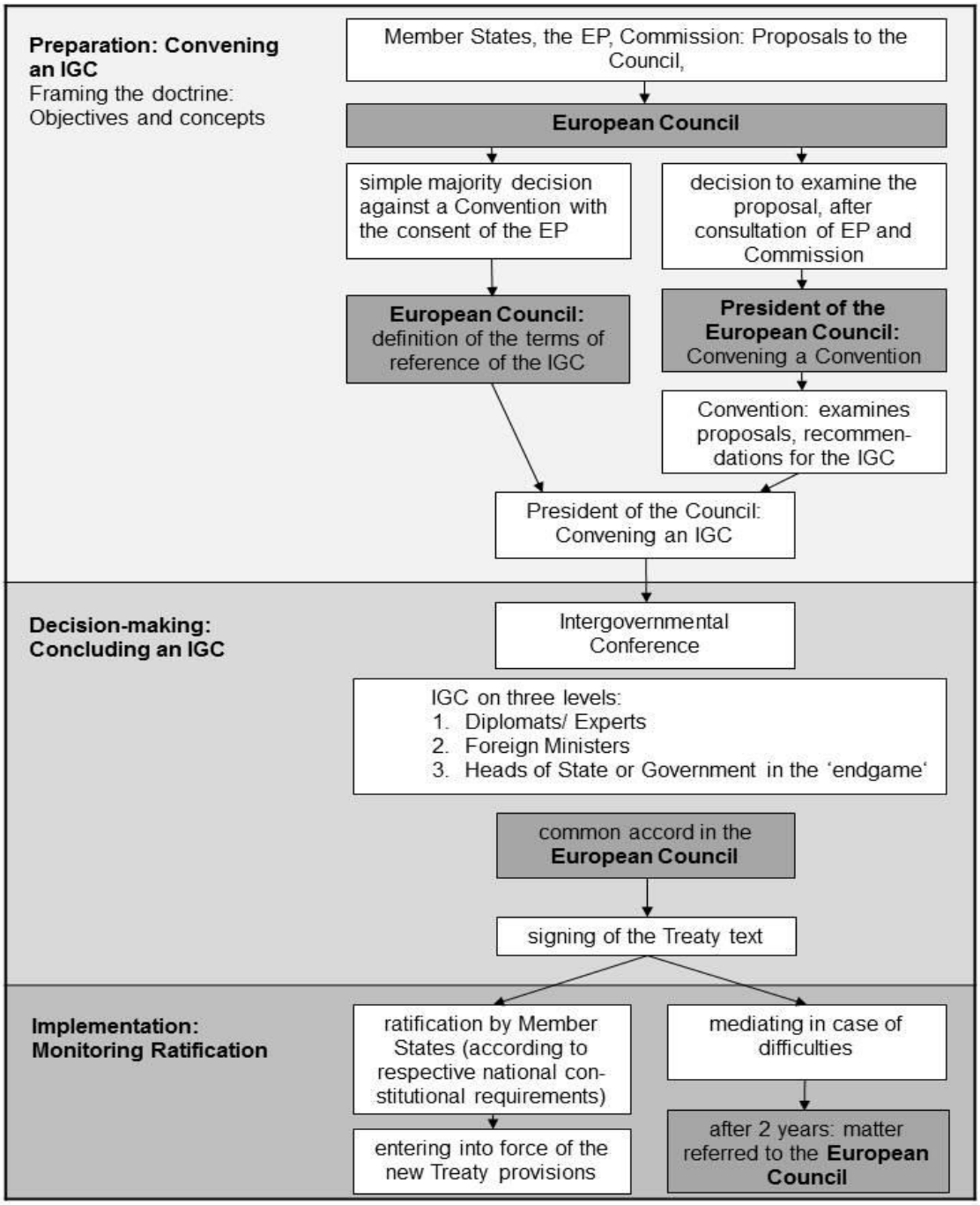
[28] Copenhagen, June 1993.

[29] Declaration 23, Nice (February 2001).

12.1 Treaty Making: Legal Rules and Real World Patterns

Deliberating and deciding on (quasi-)constitutional issues of treaty making the Member States have dealt with the vertical allocation of competences between the Member States and the EU level as well as with the horizontal decision-making procedures and its implied impact on the EU's institutional balance.

Figure III.12.3: The Ordinary Revision Procedure



Source: see Readers Guide Art.48. TEU.

In launching an ambitious initiative 'towards a Constitution for European citizens', the European Council itself aimed to achieve 'a better division and definition of competence 'and 'more democracy, transparency and efficiency in the European Union'[30].

12.1.1. Preparation: Convening an IGC

The legal form of revising the Treaty is the 'intergovernmental conference' (IGC). Based on its task to 'provide the Union with the necessary impetus of its development' (Art. 15(1) TEU) the European Council has in several forms and in many occasions framed 'doctrines' for deepening: Propagating objectives, norms and values the Union's political leaders of several generations shaped the ideational and discursive context of the constitutionalisation process.
In this initial deliberative phase of treaty making the European Council used special additional devices to prepare its work. Following the highly appreciated Spaak Report which laid the ground for the IGC leading to the Rome Treaties in the second half of the 1950s, the European Council has regularly mandated persons or groups to identify major issues and to propose options for treaty changes and amendments. Nearly every treaty revision was preceded by such a preparatory work. The list of bodies installed by the European Council includes several expert groups which drafted major elements of later agreements. Some of them served especially for preparing a concrete IGC. We find an 'ad hoc Committee on Institutional Affairs'[31]and one on 'People's Europe'[32], as well as the 'Delors Committee'[33], which was mandated to prepare the EMU provisions of the Maastricht Treaty and a 'reflection group for the preparation of the Amsterdam Treaty'. For drafting the Lisbon Treaty, the German Presidency installed a small group of experts under its own responsibility.
The European Council also created the 'Convention method', a specific and significant procedural innovation. At the start of the constitutional decade in 1999, it designed a new way to prepare treaty revisions and amendments. The Heads of States or Government convened a 'convention' far drafting a charter of fundamental rights in 1999 and another in 2001 for drafting a Treaty on the Future of Europe (Laeken 2001). The Lisbon TEU has formalised the Convention method as one of the procedures within the preparatory phase of the 'ordinary revision procedure' (Art.48(3) TEU) (see Figure III.12.3).

[30] Laeken (December 2001) : 21.

[31] the so-called Dooge Group, December 1984.

[32] the so-called Adonnino Report, December 1984.

[33] Hannover, June 1988.

Concrete initiatives for treaty revisions have been addressed to the Presidency of the European Council. Its members, including the President of the Commission, have put forward suggestions which quite often took up earlier deliberations and decisions of their institution. Several Franco-German initiatives were introduced via the President of the European Council. The concluding step in the preparation phase is an agreement of the Heads of State or Government to convene a 'Conference of Representatives of the Governments of the Member States' (Art. 48(4) TEU). The Union's political leaders have regularly defined the terms of reference, formulated the mandate and fixed the institutional responsibilities including the participation of representatives from other EU institutions as the mandate for the IGC 2007 documents[34].

Box III.12.1: Launching an IGC: The Mandate for the IGC 2007

10. The European Council agrees to convene an Intergovernmental Conference […]
11. The IGC will carry out its work in accordance with the mandate set out in Annex I to these conclusions […]
12. The IGC will be conducted under the overall responsibility of the Heads of State or Government, assisted by the members of the General Affairs and External Relations Council.
The Representative of the Commission will participate in the Conference. The European Parliament will be closely associated with and involved in the work of the Conference with 3 representatives. The General Secretariat of the Council will provide the secretariat support for the Conference. […]

Source: European Council (June 2007).

A decision to convene an IGC is of high political relevance as the Heads of State or Government only wanted to launch an initiative if it was promising enough to lead to a final agreement. Though the terms of reference for the IGCs did not pre-empt the final outcome, they set major priorities – also by excluding items. Deliberations on the mandate for an IGC thus quite often led to intensive disputes and controversies. In the case of convening the IGC leading to the Single European Act (Milano, June 1985) members even used the simple majority rule of the relevant treaty article against the strong opposition of the UK, Denmark and Greece (De Schoutheete, 2006).

[34] see European Council (June 2007).

12.1.2. Decision Making: Steering, Negotiating and Concluding the IGC

IGCs are generally organised on three levels (see Figure III.12.3). On an administrative level experts from Member States and the legal service of the Council Secretariat have turned into a highly experienced epistemic community for treaty revisions over the last two decades (Christiansen et al., 2002). The Foreign Ministers in the Council, a second level, reviewed the progress reports, and finally the European Council itself evaluated interim results in (Presidency) Conclusions.

Most significant for the EU's treaty-making process is, however, that national leaders acted as the ultimate decision makers. They have concluded the negotiations of the IGC typically in a long prepared summit in a city of the Presidency which often gave the name for the treaty (e.g. the 'Maastricht Treaty'). At the climax of each of these history-making agreements they took the key decisions on the most controversial issues of the envisaged treaty amendments. They finalised these negotiations in the 'night of long knives' or 'the endgame' in a highly dramatic atmosphere (see Chapter II.5.3**)**. Oral information tells us about the difficult process to reach an agreement, often only possible after long disputes in the early hours of the final day. Members of the European Council and close observers quite often spoke of a low quality of the European Council as a 'treaty negotiator' (De Schoutheete, 2012a). In order to achieve a compromise the President of the European Council has to play a major role as an honest broker to shape the necessary package deal (see Chapter II.6).

After the final summit and after the text agreed upon has been put in proper legal forms in all language versions the Heads of State or Government like to celebrate the achievements in a symbolic ceremony to sign the new treaty.

12.1.3. Implementing: Monitoring and Mediating the Ratification Process

After signing treaty revisions, each Head of State or Government needs to have the treaty amendments accepted by the respective domestic veto players, especially chambers of national parliaments, public referenda (e.g. in Ireland) or constitutional courts (e.g. in Germany).

Experiences since the Maastricht Treaty indicate, however, that the European Council has to get again engaged in case of difficulties in individual Member States. It has to monitor national follow-ups and mediate in cases of ratification problems, for example after negative referenda in Ireland concerning the Nice and Lisbon Treaty.

12.1.4. The Treaty-Making Rules of the Lisbon TEU: Reinforcing the Role as Constitutional Architect

Member States as "Masters of the Treaties" have reformulated the respective article of the former treaty versions (see Art. 48 TEU (Nice)). In the respective provisions of the Lisbon TEU, the High Contracting Parties have transferred major patterns from the living architecture into legal provisions. The new treaty article confirmed and extended the role of the European Council as the constitutional architect mastering the relevant procedures (see Figure III.12.3). The treaty provisions empower the European Council to act as driving wheel, as gate keeper and veto player in all three phases. However, we should not forget that the respective legal formulations have also increased secondary powers for the EP and confirmed the veto power of national parliaments (see Chapter II.12).

One significant innovation of the Lisbon TEU is the distinction between two procedures. The rules for the 'ordinary revision procedure' (Art. 48(2)-(5) TEU) relate to amendments of the treaties which 'may, inter alia, serve either to increase or to reduce the competences conferred on the Union in the Treaties' (Art. 48(2) TEU). In contrast, decisions following the 'simplified revision procedures' (Art. 48(6) and (7) TEU) 'shall not increase the competences'. This means that governments cannot revise the division of competences between the EU and the national level. This procedure is however supposed to make institutional and procedural adaptions within the existing framework easier. The proposal to use a specific qualified majority for this procedure was not taken up; each national parliament has kept its veto power.

Phases of the Ordinary Treaty Revision

In the preparation phase of the ordinary revision procedure, the European Council is the exclusive gate keeper to which the Council submits proposals from any Member State, the European Parliament or the Commission.

Document III 12.1: Council proposals

Article 48 (2) TEU
2. The Government of any Member State, the European Parliament or the Commission may submit to the Council proposals for the amendment of the Treaties. These proposals may, inter alia, serve either to increase or to reduce the competences conferred on the Union in the Treaties. These proposals shall be submitted to the European Council by the Council and the national Parliaments shall be notified.

By a simple majority, Heads of State or Government initiate the process to examine the proposed amendments. At that stage they decide – again by simple majority – if their President shall convene a 'Convention composed of representatives of the national Parliaments, of the Heads of State or Government, the European Parliament and the European Commission' (Art. 48(3) TEU). A decision not to convene a Convention, if this is 'not justified by the extent of the proposed amendments' (Art. 48(3) TEU) needs, however, the consent of the European Parliament.

If a Convention is put in place, it 'shall adopt by consensus a recommendation' to the IGC. Following the example of the first conventions in 1999 and 2001, the convention consisted of

- National MPs and MEPs
- Representatives of Head of States and of the Commission.

Without a Convention 'the European Council shall define the terms of reference' for the IGC (Art.48(3) TEU). Afterwards, an IGC 'shall be convened by the President of the Council' (Art.48(4) TEU).

Document III 12.2: IGC

Article 48 (3,4) TEU

3. If the European Council, after consulting the European Parliament and the Commission, adopts by a simple majority a decision in favour of examining the proposed amendments, the President of the European Council shall convene a Convention composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission. The European Central Bank shall also be consulted in the case of institutional changes in the monetary area. The Convention shall examine the proposals for amendments and shall adopt by consensus a recommendation to a conference of representatives of the governments of the Member States as provided for in paragraph 2. The European Council may decide by a simple majority, after obtaining the consent of the European Parliament, not to convene a Convention should this not be justified by the extent of the proposed amendments. In the latter case, the European Council shall define the terms of reference for a conference of representatives of the governments of the Member States.

4. A conference of representatives of the governments of the Member States shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to the Treaties.

The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.

Whereas the new treaty provisions are more explicit about the preparation phase, they just repeat that the unanimity rule applies for the IGC regarding the decision-making phase: The conference shall be convened 'for the purpose of determining by common accord the amendments to be made to the Treaties' (Art. 48(4) TEU). Each Member State's government thus has a veto. With that empowerment, the European Council is also able to adapt or change drafts submitted by the Convention.

During the ratification phase the respective article empowers the European Council to review the situation, 'if, after two years after the signature of a Treaty amending the Treaties, four fifths of the Member States have ratified it and one or some encounter difficulties in proceeding with ratification' (Art. 48(5) TEU).

Document III 12.3: Treaty Amendments

Article 48 (5) TEU

5. If, two years after the signature of a treaty amending the Treaties, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council.

The Simplified Revision Procedure and Bridging Clause

Within the 'simplified revision procedure', proposals for amendments cover only Part Three of the Treaty on the Functioning of the European Union (TFEU). It is therefore more limited in scope than the ordinary revision procedure. The amendments shall not lead to an increase of the competences of the Union.

Document III.12.4: Simplified Treaty Revision

Art. 48 (6) TEU

The Government of any Member State, the European Parliament or the Commission may submit to the European Council proposals for revising all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union relating to the internal policies and action of the Union.

The European Council may adopt a decision amending all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union. The European Council shall act by unanimity after consulting the European Parliament and the Commission, and

the European Central Bank in the case of institutional changes in the monetary area. That decision shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements.
The decision referred to in the second subparagraph shall not increase the competences conferred on the Union in the Treaties.

Compared to the ordinary revision procedure is, the major difference is that a convention or an intergovernmental conference does not have to be convened. The European Council acts by unanimity (Art. 48 (6) TEU), but must consult the European Parliament and the European Commission; the European Central Bank must consulted in cases of institutional changes in the monetary area. The amendments have to be ratified by the Member States in accordance with their constitutional requirements.

The passerelles (or 'bridging clauses') are another instrument that shall help to simplify treaty revisions. It allows either the European Council or the Council to decide by unanimity to switch a particular legal basis from unanimity to QMV (Piris, 2010). It also allows switching from the 'special legislative procedure' to the 'ordinary legislative procedure'.

12.1.5 General Remarks

All of these treaty revisions remain subject to unanimity in the European Council. Thus they maintain the veto powers of each national government and also of national parliaments. As a general conclusion, with the rules as established by the Lisbon TEU, treaty revisions remain a complex and time-consuming undertaking.

Another example of a system-making process led to the establishment the Charter of Fundamental Rights. In a pre-constitutional framing the European Council published guiding statements and declarations on 'human rights'[35]. The Heads of State or Government then agreed on the initiative to launch a 'body' (later Convention) responsible for drafting a Charter of Fundamental Rights[36]. As the next step, the European Council adopted a 'Charter of Fundamental Rights of the European Union' at the Nice summit in December 2000, which was, however, not legally binding. The Lisbon TEU finally 'recognizes the rights, freedoms

[35] see e.g. Luxembourg, June 1991; Essen, December 1994; Vienna, December 1998.

[36] Cologne, June 1999.

and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000 […] which shall have the same legal value as the Treaties' (see Art. 6 TEU). The making of this Charter illustrates the trend in the EU' constitutionalization process: from soft, legally non-binding forms to hard treaty reforms.

Questions

1. Identify the five constitutional milestones in treaty making (with years of entry into force).
2. Who acted as the constitutional architect? Explain why.
3. What are the differences in the procedures between the ‘ordinary treaty revision’ and the ‘simplified treaty revision’?
4. Describe the three major phases in the ordinary revision procedure!
5. What are the roles in the ordinary treaty revision for the
    a. European Parliament
    b. European Council?
6. Why is the ordinary treaty revision so complicated and complex?
7. Discuss: As long as the treaty revision demands unanimity, the EU system will not become more efficient and effective.
8. Discuss: As long as the EU architecture is based on consensus, it is legitimised.
9. Discuss: The European Council is the key actor in the EU’s system making.

Further Reading

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12.2 The Enlargement Procedure: Legal Rules and Real World Patterns

The enlargement or accession procedure is another major part of the system-making that transformed the EU polity. Since 1958, 22 countries joined the European Union/ European Community.

The question of who should belong under which conditions to the 'family' was a vital matter for the Member States. Accessions of applicant states and related issues of the EU enlargements have always been of high interest for all governments. The Treaty sets rules for membership (see Document III.12.5).

Document III.12.5: Accession to the EU: Fundamental Precondition for Accessions

Art. 49(1) TEU

Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. […]

There is no clear definition of what a 'European State' is. Morocco, for instance, applied for membership in the late 1980s. Its application was turned down since Morocco is not part of the European continent. The peripheral borders of Europe, however, are more difficult to define. For the issue of adhering to the European community of values, the Union has developed a set of norms in Art. 2 TEU.

Document III.12.6: The values of the European Union

Art. 2 TEU

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.

These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Universal value such as the respect for human dignity, freedom, democracy and the rule of law are listed in this article, as well as pluralism, non-discrimination, tolerance and equality between women and men. The respect for these values form an integral part of the accession process. There is no objective measurement to which degree countries respect these values. This is why the performance of these values is often politically disputed. The treaty also fixes the rule for the application process.

Document III.12.7: Legal provisions of the Accession Procedure

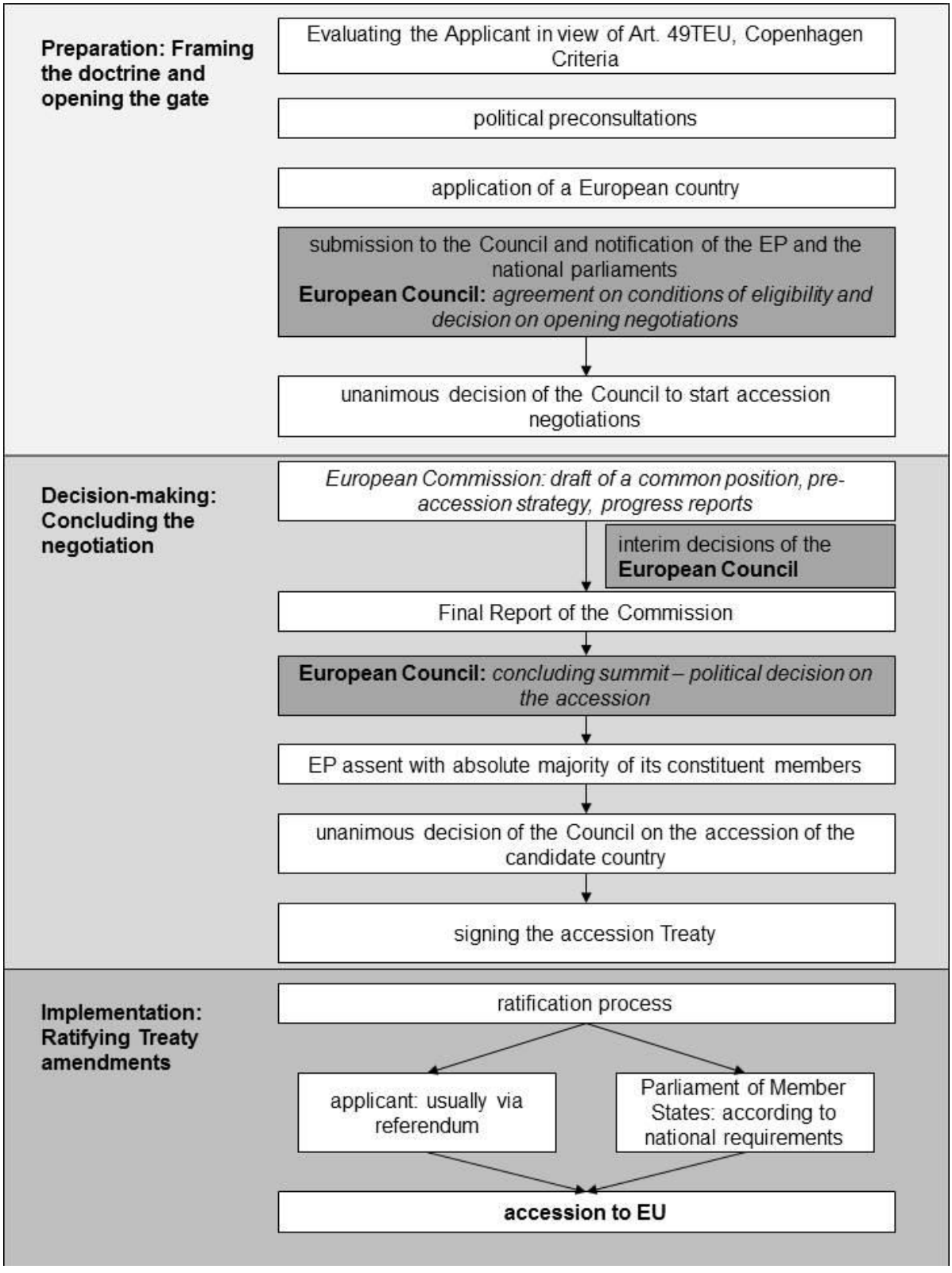
Art. 49(1) TEU

[…] The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members.

Although the relevant treaty provision (Art.49 TEU) empowers the European Council only for agreeing upon the 'conditions of eligibility' (Art.49 TEU), the European Council has exercised its functions as constitutional architect also concerning the geographic identity of the Union (see Figure III.12.2). Overall, the European Council took up a role as 'master of enlargement' (Lippert, 2011). Its members agreed on initiating and opening the process by accepting the application, directed and steered the cumbersome and often lengthy negotiations and concluded the respective negotiations by making decisions on important controversial issues, leading to an agreement between the Member States and the applicant state (Art.49 TEU).

The process of joining the EU broadly consists of three phases (see Figure III.12.4). First, a country has to become an official candidate for membership which does not necessarily mean that formal negotiations are opened. Second, accession negotiations start which includes the European Commission (leading the talks), the European Council and the European Parliament. And third, the ratification of the treaty by the applicant well as the EU Member States according to their constitutional provisions.

Figure III.12.4: Three Phases of the Accession Procedure



Source: see Readers Guide.

Preparation phase

One major contribution of the European Council in the preparation phase was the framing of an enlargement doctrine for the European Union (Lippert, 2011). For each of the six steps of enlargement, members of the European Council presented and reinforced narratives about the necessity for widening, thus contributing to its acceptance in a broader public

Especially after 1989, the issue of accession of new groups of central and European countries was high on the EU agenda. As the most significant document for the enlargement doctrine, in 1993 the European Council agreed on the so-called 'Copenhagen criteria'[37], formulating a set of three conditions for applicant countries and one precondition for the EU itself. This list set essential political and economic thresholds for opening, pursuing and concluding membership negotiations.

Document III.12.8: Copenhagen Criteria

• Political criteria: the 'stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities' must be ensured;

• Economic criteria: new Member States must possess a 'functioning market economy' with 'the capacity to cope with competitive pressure and market forces within the Union';

• Legal criteria: new Member States must accept the Community acquis: that means the 'ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union';

• The fourth criterion of relevance for the EU itself: 'Union's capacity to absorb new members'.

Each accession starts with intensive pre-consultations by individual governments and the European Commission. In this preparation phase, the European Council examines especially the political criteria.

[37] Copenhagen, 1993.

Accession negotiations

In the second phase, formal membership negotiations are opened if the compliance to the accession criteria as outlined above is fulfilled. In this phase, the decision making for concluding the accession treaties, 35 so-called chapters are negotiated with the applicant state. Here, the European Commission plays the central role. It drafts the pre-accession strategy as well as progress reports for each perspective member state. The European Council regularly decides on the interim reports of the European Commission; the European Parliament and the Council are regularly informed on the outcomes.

In concluding the accession negotiations, national leaders act as ultimate decision makers in the end game. The European Council has quite often set a closing date to put pressure on applicant states. Under the self-imposed timetable the European Council has then spent considerable time and energy to reach an acceptable package deal. In some cases Heads of State or Government had deep disputes about the internal distribution of the expected costs of enlargement.

In this decision-making process the European Council had to search for a comprehensive list to include all of the member's favourite candidates. Such a *quid pro quo* has led them to opt for groups of applicants, up to the big bang enlargement in 2004, including – upon demand of Greece - also a divided Cyprus.

In this process, the European Parliament has to give its assent with the (absolute) majority of its constituent members, i.e. 376 out of 751. So far the inclusion of the EP has not created significant problems. The Council then unanimously decides on the accession treaty.

Ratification of the accession treaty

The third stage of the process encompasses the implementation and ratification of the accession treaty. The applicant state usually decides via a national referendum. Within the applicant countries, there are often long and controversial political discussions about costs and benefits of EU accession. For example, Norwegian referenda vetoed the signing of the accession treaty twice.

On the national level, the parliaments of the Member States also have to ratify the treaty according to their national requirements. These constitutional provisions can vary from country to country. In the case of a Turkish membership several member states intend to put the issue to a popular vote in national referendums.

General Remarks

The procedures for accession to the EU are complex and cumbersome. Also the set of system-making rules and enlargement rules demand consensus in order to guarantee a broad acceptance and thus to ensure the legitimacy of system making. Public scepticism towards further enlargement is more pronounced nowadays, and political parties in all major European countries try to take this into account. The President of the European Commission Jean Claude Juncker announced 2014 that there will be no further accession to the EU in the 2014-2019 period. Other voices demand that the European Union must further reform its institutional architecture, before it can accept other countries to join the European Union.

Questions

1) Describe the three major phases in the accession procedure.
2) Define the four Copenhagen Criteria!
3) What are the roles in the accession procedure of
    - The Commission
    - the European Parliament
    - the European Council
    - national parliaments.
4) Discuss: The European Council is the ‘master of enlargement’.
5) Discuss: Accession procedures should be based on decisions by QMV.

Further Reading

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13. Procedures for Policy-Making

The Lisbon Treaty enumerates five instruments – regulations, directives, decisions, recommendations and opinions for taking decisions in the EU's policy fields (see Document III.13.1).

Document III.13.1: Instruments to Exercise the Union´s Competences

Article 288 TFEU

To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.

A **regulation** shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A **directive** shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A **decision** shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.

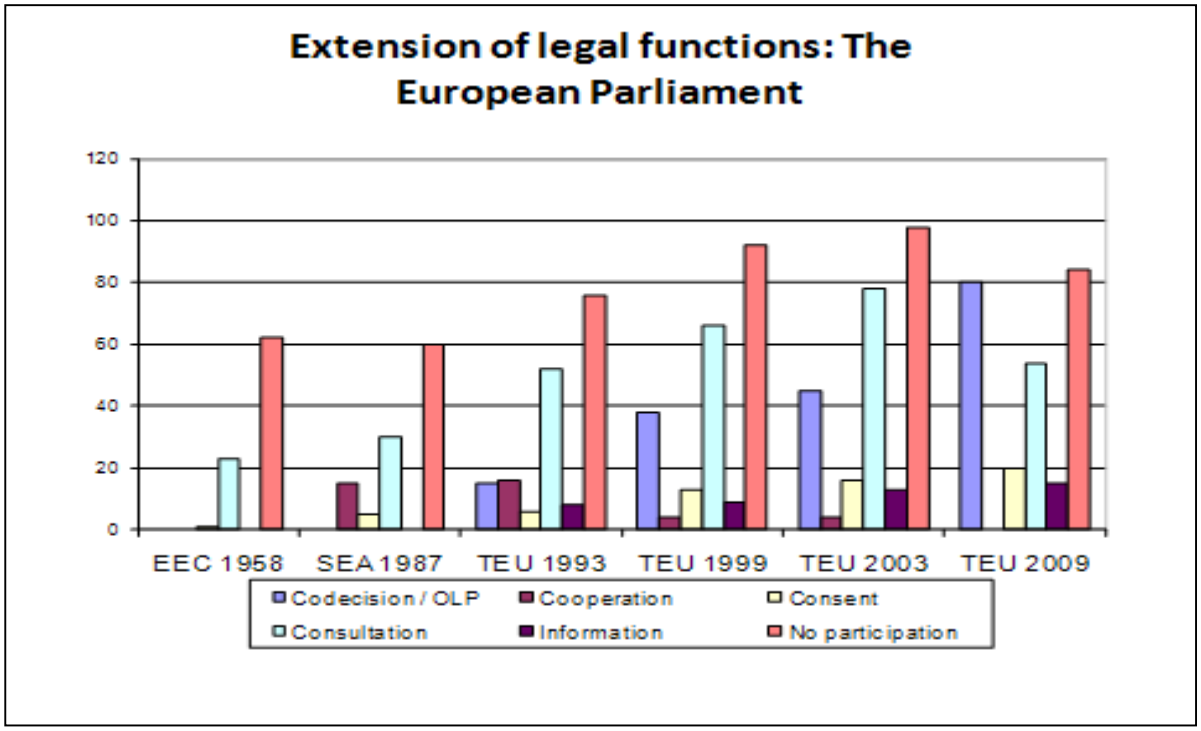
Recommendations and **opinions** shall have no binding force.

Note: Emphasis added by author.

For adopting binding decisions, the treaty provisions designed several procedures. In view of the legal involvement of the EP, the following major types can be discerned (see also Figure II.4.2):

- No participation
- Right to be informed
- Consultation Consent (giving veto power to the EP)
- Equal status of co-decision in the 'Ordinary Legislative Procedure' (OLP)

Figure III 13.2: Extension of legal functions: The European Parliament



Source: Jean Monnet Chair 2014.

The most significant rules are those for the 'Ordinary Legislative Procedure' (OLP).

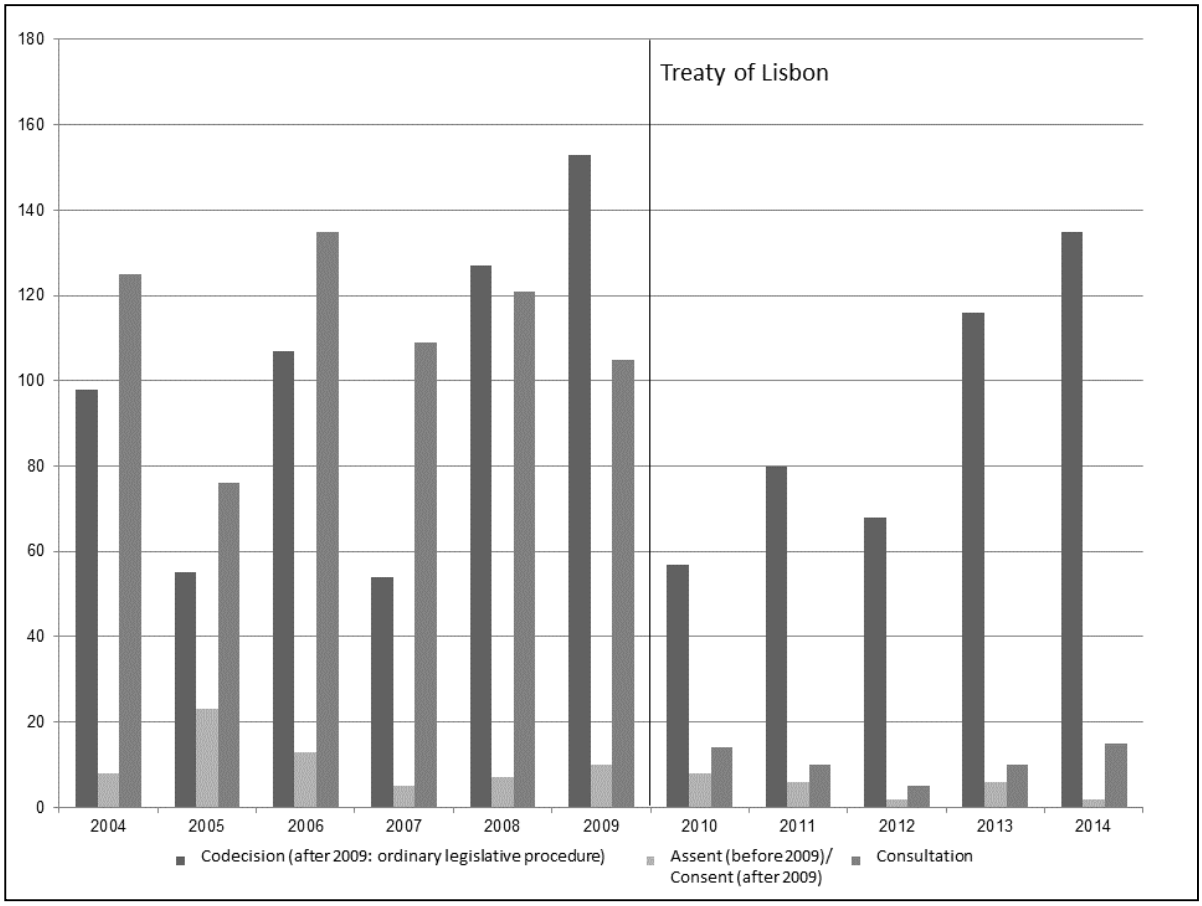
13.1 Ordinary Legislative Procedure: Rules and Patterns

Document III.13.2: Treaty Rules for the OLP

Art. 289(1) TEU
The ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission.

The Lisbon treaty has again enlarged the scope of the potential use of the OLP (see Figure III.13.1). The use of this procedure for legislative acts has relatively increased up to 89% of all legislative acts.

Figure III.13.1: Application of Legislative Procedures 2004-2014



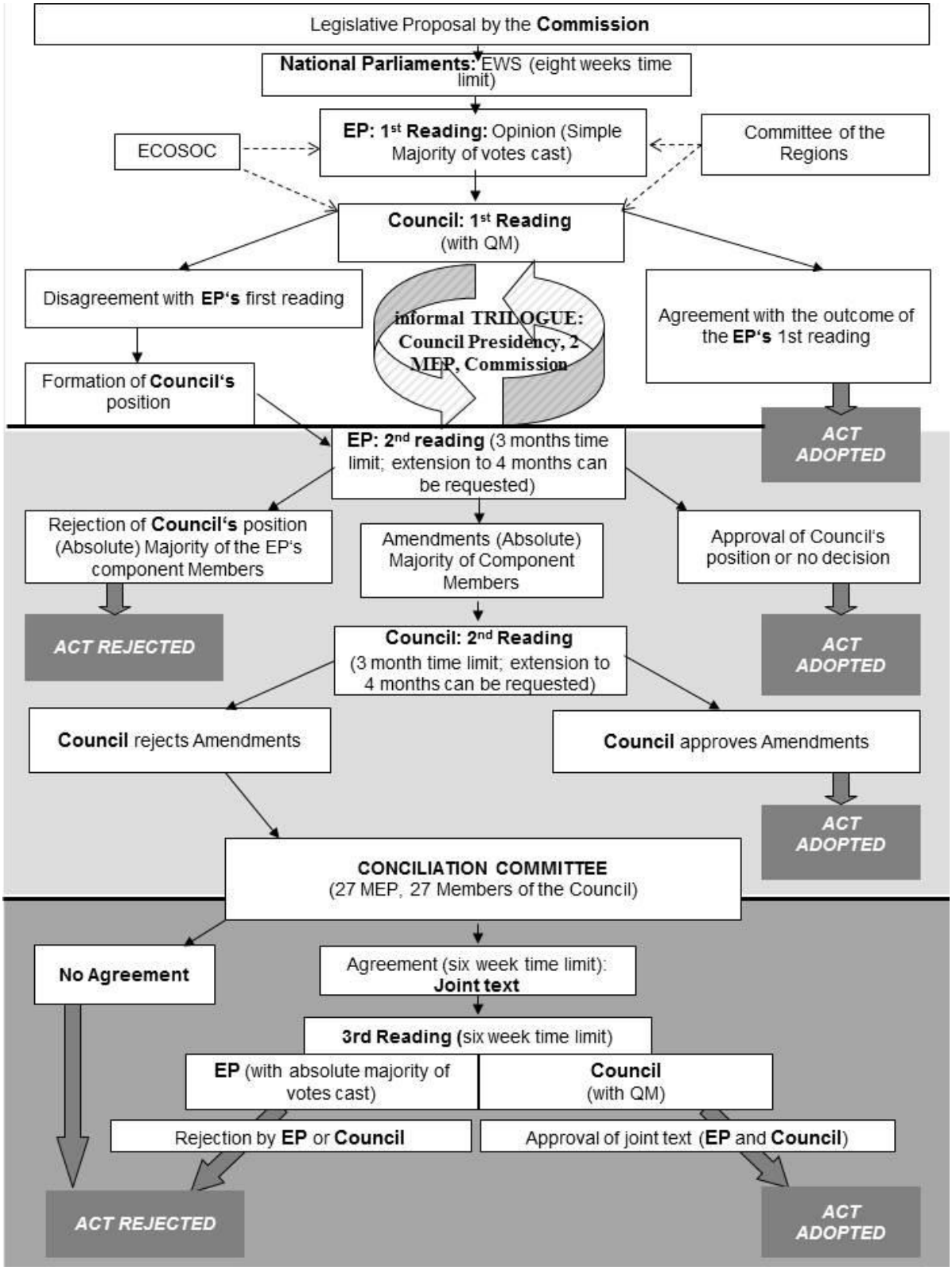
Source: translation of Wessels 2019f, p. 12

The European Parliament and the Council 'exercise jointly' these legislative functions, (see also Chapter II.4 and Chapter II.7) on a wide range of areas for example for single market acts, immigration, energy, transport, the environment and consumer protection and significant issues of Justice and Home Affairs (JHA).

It marks a general trend towards a bicameral system in the decision-making architecture: the increased involvement of the European Parliament shall help to increase the democratic legitimacy of decisions taken at the European level.

We will look at this phase in a step by step analysis: Figure III.13.2 illustrates the readings of the EP and the Council according to the ordinary legislative procedure.

Figure III.13.3: The Ordinary Legislative Procedure



Source: Jean Monnet Chair Wolfgang Wessels 2013.

The procedure starts with the Commission who has the monopoly of initiative (see Chapter II.5). It will send a legislative proposal to national parliaments for the Early Warning System,

but also to the European Parliament and the Council (Art. 294(2) TFEU). Although the Commission can be asked to submit a proposal by the Council, the EP and the citizens' initiative (see Chapter II.8.1) it remains the exclusive gate keeper. Within the Early Warning System, national parliaments can submit 'reasoned opinions' to the Commission within eight weeks if they feel that the principle of subsidiarity was violated by the Commission's proposal. Although the highly formalized EWS procedures precedes the OLP, it is not laid down in Art. 294 TFEU but in the chapter on democratic principles and the first two protocols of the treaties (see Chapter III.13.3). The proposals are also submitted to grand committees, i.e. the 'Economic and Social Committee' and the 'Committee of the Regions', which act as advisors (Art. 13(4) TEU). Their opinions should be taken into account, but their influence is apparently limited.

The first reading of the Commission's proposal starts with the EP. This text will be first discussed in the relevant Committee under the guidance of a rapporteur. The committee will then submit a draft proposal to the EP plenary which adopts a position. In this first reading, only a simple majority of the EP is required.

In its first reading, the Council can either approve the Parliament's position so that the act is adopted 'in the wording which corresponds to the position of the European Parliament' (Art. 294(4) TFEU) or it adopts its own position and communicates it to the European Parliament. For this act, it needs a qualified majority.

In a case of a disagreement between the two legislative chambers there is a second reading in both the EP and the Council. The European Parliament has to react within three months. It has three options:

If the EP

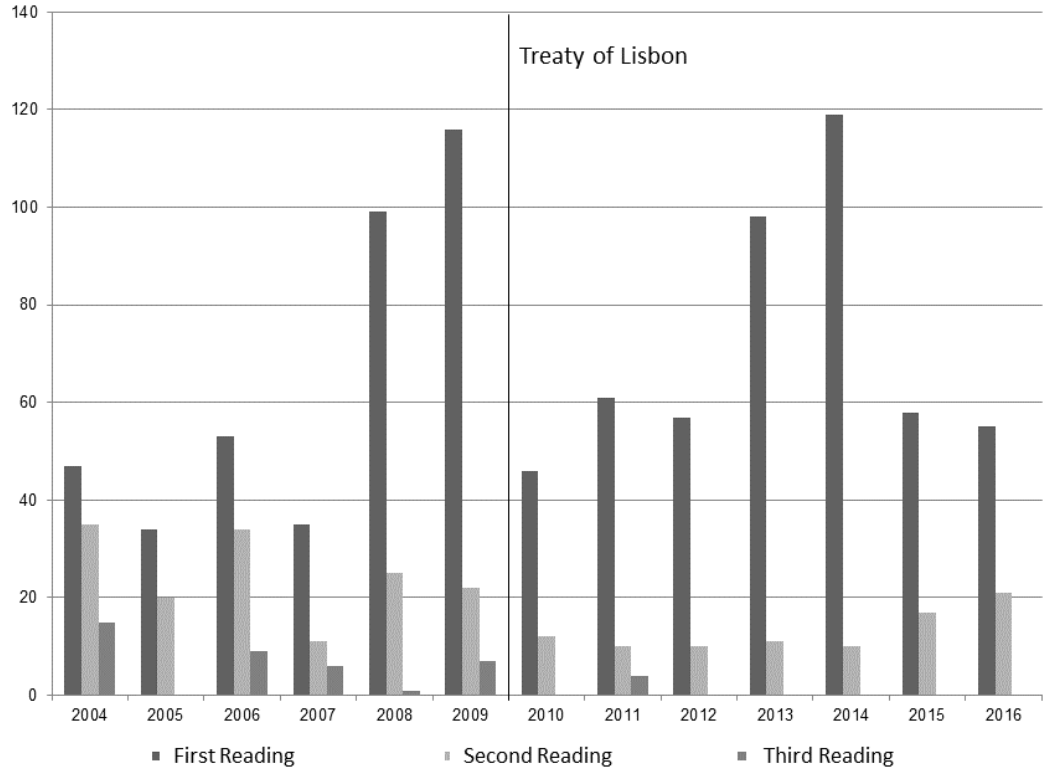
(a) approves the common position of the Council or has not taken a decision, the act in question is deemed to have been adopted in accordance with that common position;
(b) rejects the common position, the proposed act is deemed not to have been adopted; for this act, the EP needs an (absolute) majority of its component members,
(c) proposes amendments to the common position which also need an (absolute) majority of its component members, the amended text is then forwarded to the Council and to the Commission again, which shall deliver an opinion on those amendments.

In the latter case, the Council will also have a second reading on the amended draft. It also has to react within three months. The Council has two options: it can approve the amendments of the European Parliament; then the act is adopted. For that decision it needs a qualified majority. If the Council does, however, not approve the amendments of the EP, the President of the Council, in agreement with the President of the European Parliament, convenes a meeting of the Conciliation Committee.

The Conciliation Committee, which is composed of the members of the Council (or their representatives; i.e. 28 in 2013) and an equal number of representatives of the European Parliament, has the task of reaching an agreement on a joint text. In case of on-going conflict this committee might adopt the draft by a qualified majority of the members of the Council (or their representatives) and by a majority of the representatives of the European Parliament. The Commission takes part in the Conciliation Committee's proceedings and takes all the necessary initiatives with a view to reconciling the positions of the European Parliament and the Council.

If the Conciliation Committee approves a joint text, a third reading takes place in both legislative chambers. The European Parliament, acting by majority of the votes cast, and the Council, acting by a qualified majority, have to adopt the joint text. If either of the two institutions fails to approve the proposed act, it shall be deemed to not have been adopted. Where the Conciliation Committee does not approve a joint text, the proposed act is finally rejected. The Commission can then submit a new proposal which means that the process will start again.

Figure III.13.4: EU Legislative Acts in the OLP – Adopted Acts Sorted by Reading



Source: translation of Wessels 2019f, p. 12

The statistics on real world patterns (see Figure III.13.1) show that both chambers increasingly agree already in the first reading. Thus a major part of legislation, including controversial issues, is done in a 'fast track'. A major device to find an early consensus is the informal trilogue (see Figure III.13.2) in which few representatives of the three institutions informally search for an agreement. They often succeed in bridging controversial positions. A major reason is to shorten the cumbersome long process through the three readings and to save time and energy i.e. transaction costs[38].

13.2 Special Legislative Procedures: Consultation and Consent

Another important legislative procedure is the consultation-procedure which is mentioned in Art. 289 TFEU and applies in a limited number of cases such as discrimination (Art. 19 TFEU), the freedom of movement (Art. 21 TFEU), the right to vote (Art. 22 TFEU or

[38] HÉRITIER, A. 2012. Institutional Change in Europe: Co-decision and Comitology Transformed. *JMCS Journal of Common Market Studies,* 50**,** 38-54..

diplomatic protection (Art. 23 TFEU). It was for a long time one of the standard procedures to involve the European Parliament in the decision-making process at the European level. Even though the Council is not bound by the substance of the EP-motion, a failure to consult the EP represents a major violation of the treaty provisions. This could result in an annulation of a legal act by the Court of Justice of the European Union.

The procedure of 'consent' (formerly known as the 'assent' procedure) is applied to some quasi-constitutional legal acts of the EU. The EP is given the power of a veto player: The EP must express its consent either by the majority vote of its present members or by the (absolute) majority vote of its component members (e.g. accession to the EU according to Art. 49 TEU). If the EP does not give its consent, the legal act cannot enter into force. Even though the procedure of consent does not attribute the EP the right of substantial co-legislation, practice has shown that it can influence the Council's decision making by the anticipatory threat of vetoing an act .

General Remarks: Variations of a Bicameral System

The exercise of legislative and budgetary functions signals a complex approach in which the Commission, the EP, the Council (and de facto also the European Council) interact to prepare, agree and implement various legislative and budgetary acts.

The general rule is that the EP and the Council 'jointly' exercise these functions. Such a bicameral system is merging and pooling national and European sources of legitimacy. As in other bicameral systems (e.g. in the United States or Germany) the need to find consensus leads to a complex and cumbersome process.

Questions

1. Identify and describe procedures for passing legal acts.
2. Describe the three readings of the OLP.
3. Describe the composition and the functions of the Conciliation Committee.
4. Describe the composition and the functions of the Trilogue.
5. What is the right of the EP in the case of
   (a) consultation and
   (b) consent?
6. Discuss: As a consequence of the OLP the Commission has lost its influence.
7. Discuss: The process of informal dialogue reduces the role of the EP.
8. Discuss the strengths and weaknesses of the bicameral system.

Essential Reading

Héritier, Adrienne (2012): 'Institutional Change in Europe: Co-decision and Comitology Transformed', *JMCS Journal of Common Market Studies*, 50(1): pp. 38-54.

Reh, Christine/Héritier, Adrienne/Bressanelli, Edoardo/Koop, Christel (2011): 'The Informal Politics of Legislation. Explaining secluded Decision-Making in the European Union', *Comparative Political Studies*, December 2011: pp. 1-31

Funda Tekin/Wolfgang Wessels: Entscheidungsverfahren, in: Werner Weidenfeld/Wolfgang Wessels (Hrsg.): Europa von A bis Z, Taschenbuch der Europäischen Integration, Auflage, Baden-Baden 2014:pp:143-159.

13.3 Economic Governance: Towards a 'gouvernement économique'?

High on the agenda of the European institutions are issues of economic governance. Economic governance consist of various policy filed – such as monetary, fiscal, and other economic and social policies. They are usually regarded as the most important or at least the most often discussed areas of the EU policy-making. The performance and profile of the European institutions in this area is difficult to capture. The term 'economic governance' is only useful for a first general orientation as this policy field is characterised by a confusing array of institutions, processes, mechanisms and instruments (Begg, 2011: 337-339). To consider the EU's performance in the economic realm, this chapter takes a closer look at five different pillars of 'modes of governance' (see for the term Diedrichs et al., 2011, see also Figure 13.1, Héritier and Rhodes, 2011).

Figure III.13.5 Economic Governance: Five Pillars

	1. Pillar	2. Pillar	3. Pillar	4. Pillar	5. Pillar
Domain	Community Policies (former European Community Pillar)	Monetary Policy	Fiscal Policy	Social / Economic Employment Policy	EU Budget
Items/ Issues	– Common/Single Market – 4 freedoms – competition/ public subsidies – Common Agriculture Policy – Sectoral Policies, Environment, Energy, Social, Regional Policy – Common commercial policy	Monetary Union: Euro	Stability and Growth Pact Fiscal Compact	Employment Youth unemployment 'European Semester' Demography, pensions systems gender equality	Income: Own resources (up to 1% of EU GNP) Expenditure/ Multiannual Financial Framework Expenditure: CAP regional/social policies research external action No Keynesian policy, credits for programme countries development
Mode of gover-nance/ institu-tional arrange-ment	Supranational Mode of Governance Ordinary Legislative Procedure (OLP)	ECB 'technocratic government' by European Central Bank as Trustee	‚hard coordination' via direct sanctions Common rules on thresholds and limits of public debts and public deficit ‚programme countries' Troika (ECB, COM, IMF)	‚Soft coordination' no direct sanctions Open Method of Coordination: naming, shaming, blaming Best practices	

Source: Compiled by the author (see also Wessels and Linsenmann, 2002: 66-70).

Aside from analysing each pillar, this chapter also discusses the general role of the European Council as an emerging '*gouvernement économique*' (Commissariat Général du Plan, 1999: 188, Gillissen, 2011: 112-114, Jabko, 2011: 10-13, Van Rompuy, 2010b).

13.4.1 Creating and Revising the Economic Monetary Union

The creation of the Economic and Monetary Union (EMU) is generally acknowledged as one of the most outstanding accomplishments of the European Council underlining its role as constitutional architect. It took several decades to shape the EMU. It is a policy field characterised by a high level of differentiation which means that Member States are to different degrees involved in the Economic and Monetary Union. This differentiation increased with the outbreak of the Eurozone crisis.

Following the Single European Act, the European Council re-launched plans for EMU: It installed the 'Delors Committee' in which, under the chairmanship of the President of the Commission, national central bankers were given the task of 'studying and proposing concrete stages leading towards this union' (Hannover, June 1988). After the upheaval caused by the end of the European post-war order in 1989, and in light of German unification, the 'generation of 1989' adopted an agreement on far-reaching provisions for the Monetary Union and some less binding rules for the Economic Union at the Maastricht summit (December 1991). Pushed by different economic interests and considerable (geo-) political pressures, national leaders agreed on a far-reaching and history-making set of decisions.

Following the fundamental agreement in the move towards EMU, the European Council took pivotal decisions on several occasions. At the Madrid summit in December 1995 the European Council confirmed 1 January 1999 as the starting date for stage three of EMU. In Dublin in December 1996, it adopted basic features of the single currency, inter alia a new exchange rate mechanism and the legal framework for the Euro.

Following the entry into force of the EMU in 1999, the provisions for EMU were revised to a limited degree only (Umbach and Wessels, 2008: 55-57). In reaction to the crisis after 2008, the European Council intensified again its work as a constitutional architect.

In the crisis years, '[s]afeguarding the Eurozone's financial stability was […] the overriding objective' (Van Rompuy, 2012c: 6). The European Council and increasingly the Euro Summit met with unprecedented frequency. These summits at the highest level served its members – often also including the President of the European Central Bank (ECB) – as the key arena in

which to react to the dramatic turbulence and serious challenges that were unravelling throughout the continent. As an unintended consequence of earlier acts of treaty-making, members of the European Council were forced to take decisions reaching - both in scope and depth - far beyond the conventional concepts and doctrines of European economic policies before the crisis.

Remarkably, the Heads of State or Government initially adopted many important agreements without changing the relevant provisions of the TFEU. Some of these decisions by the Union's highest executive leaders however implied interpretations of the EMU treaty provisions which proved to be highly controversial among lawyers and economists. The decision to provide financial assistance to Greece by the voluntary use of bilateral credit lines seemed to run counter, if not to the legal wording, then to the spirit of the treaties as interpreted by many commentators (see Müller-Graff, 2011: 291).

The chief national executives also used the European Council and the Euro Summit to act again as the constitutional architect to change treaty provisions: The European Council adopted the 'Decision amending the TFEU with regard to the setting up of the European Stability Mechanism' (ESM) and laid down the concrete formulations for this Treaty amendment (March 2011). The Heads of State or Government of the participating member states also agreed on the 'Treaty establishing the European Stability Mechanism' and of the 'Treaty on Stability, Coordination and Governance in the Economic and Monetary Union' outside the EU primary law. Under pressure from external shocks, intense clashes are reported to have occurred between the chief executives of creditor states who pushed for fiscal discipline, while the debtor states called for solidarity.

German Chancellor Merkel apparently played a key role as a 'reluctant hegemon' by offering leadership, but only under external pressure to do so (see especially Bulmer and Paterson, 2013, Schäfer, 2013, The Economist, 2013)

13.4.2 Rules and Patterns for Hard and Soft Coordination

One central item in the 1990s – and then also from 2010 onwards – was the fiscal discipline of the Euro states. At few but significant moments the Union's institutions have adopted and revised procedures of 'hard coordination' for sanctioning excessive government deficits. By agreeing on the Stability and Growth Pact, they set rules for the surveillance of national fiscal policies and respective enforcement measures. Later on, however, the member states agreed

to harden the rules of the Stability and Growth Pact. This was a reaction to the instability in the Eurozone. Most member states also adopted a separate treaty, the TSCG, which supposedly introduced even more stringent measures regarding excessive deficits. The result is an increased differentiation. Depending on whether a country adopted the common currency, the so-called "Euro-Plus-Pact" from 2011 or the TSCG from 2013 onwards, different forms of hard coordination apply. Although the European Commission can in principle enforce sanctions against individual Member States, the governance mode of 'hard coordination' always requires the consent of the Member States as well.

EU institutions have also launched and used a range of measures in the field of economic, employment and social policies (Art.5 TFEU). These forms of 'soft coordination' are based on moral persuasiveness and peer-pressure without the threat of direct sanctions (see Dyson 2008a). The EU institutions were active in preparing, deciding and monitoring programmes such as the 'Lisbon strategy' and the ´EU 2020 strategy´, which set goals and guidelines for economic and social policies of the Member States.

The aim of the Lisbon Strategy was to bring about 'the transition to a competitive, dynamic and knowledge based economy' (Lisbon, March 2000). As a major part of this strategy, the European Council formulated the 'open method of coordination' (Lisbon, March 2000). This mode of governance relies on the naming, blaming and shaming of recalcitrant Member States. It was supposed to be a more effective incentive for the national implementation of agreed measures (Diedrichs, 2011: 211-216, Shaw, 2011). Within this 'Lisbon Strategy' as well as its follow-up, 'the EU 2020 strategy' and the 'Pact for the Euro' – later coined 'Euro Plus Pact' (March 2011; Euro Summit March 2011), the EU institutions have repeatedly linked economic, employment and social issues.

13.4.3 The EU Budget

In every political system the size and the distribution of the public budget is of high political importance. With the 'financial provisions' of the EU (Part Six, Title II TFEU), primary law fixes quasi-constitutional rules for establishing the EU budget. In granting 'own resources' to the Union, Member States determine to what degree they choose to empower the Union 'to provide itself with the means necessary to attain its objectives and carry through its policies' (Art. 311 TFEU). Besides determining the amount of available financial resources, national governments decide about the main categories of expenditure and their respective amounts through the 'multiannual financial framework' (Art.312 TFEU).

The ‘financial provisions’ of the Lisbon TFEU (Art. 310-319 TFEU) do not include the European Council into these formal procedures, except for one unlikely and exceptional case of ‘authorising the Council to act by a qualified majority when adopting the regulation’ (of laying down the multiannual financial framework) (Art.312(2) TFEU).

However, as in other policy domains perceived as being of vital interest for Member States, the European Council has played a key role in reaching the main agreements in defining and using financial provisions. From the very first summit, the Heads of State or Government have put issues concerning the Community budget high on their agenda, and following the entry into force of the Lisbon Treaty, the members of the European Council have continued to exercise ‘the power of the purse’. Though without any direct empowerment contained in the relevant treaty provisions, the Heads of State or Government – as the ultimate decision-makers – have adopted fundamental agreements concerning the Union’s budget both on the income and on the expenditure side.

Since then, the European Council took de-facto decisions regarding the financial packages referred to as ‘Delors I and II’ or ‘Agenda 2000’. Again, within the enlarged Union ‘the European Council reached agreements on the ‘Financial Perspectives 2007-2013’ (December 2005) and on those for the years 2014-2020 in February and June 2013.

Concerning the rules on the income side (that is the Union’s ‘own resources’), the leaders of the Member States have not given up their competence to determine the budgetary amounts to be allocated to the EU level. One key agreement reached by the members of the European Council was to limit the size of the EU’s own resources to around 1% of the Union’s Gross National Income. Concerning the expenditure side, the European Council has adopted agreements regarding the tasks and activities that the EU institutions should finance from the Union’s own resources. According to the Lisbon rules (Art. 312 TFEU), the Council of Ministers - and not the European Council - shall adopt the regulation for the multiannual financial framework. However, the practice of agreeing on the multiannual financial framework in 2013 showed that the European Council remains the key decision-making institution in this area, although it has to share this responsibility with the EP.

These decisions have also considerable impact on the autonomy of the Union’s budgetary authorities as ‘the annual budget shall comply with the multiannual financial framework’ (Art.

312(1) TFEU). The procedures for the annual budget (Art. 314 TFEU) envisaged joint decision-making of the EP and the Council (see Art. 14(1) and 16(1) TEU).

The deliberations inside the EU institutions are difficult as the parties are confronted with the need to find a compromise between opposing interests with highly sensitive distributive effects. The pattern of cleavages within the EU institutions is rather obvious and quite stable between net-contributors who pay in more than they get from EU funds, and net-receivers whose receipts are higher than their payments.

13.3.4 Conclusion: Towards a Crisis-Driven 'Gouvernement Économique'

Looking at the multi-faceted performance of the European Council in this policy area, the Heads of State or Government have been highly engaged in both system- and policy-making. In conclusion, the European Council has arguably emerged as some kind of 'economic government' in the 'centre of economic governance' (Puetter, 2012: 175). In such a view, 'the European Council has taken over executive powers in economic policies that formerly belonged to national decision making´ (De Schoutheete and Micossi, 2013: 4) or, in the words of its first permanent President: 'The European Council becomes something like the '*gouvernement économiqu*e' […]. The financial and economic crisis obliges us to take steps on this road' (Van Rompuy, 2010a).

Most observers stress the intergovernmental character of the European Council's activities, in particular the acts of the Heads of State or Government to create treaties outside the EU's legal framework. Some characterize major parts of these activities as 'deliberative intergovernmentalism' (Puetter, 2012). However, others argue that the European Council has, in several ways, acted as the primary driving agent for a significant process of spill-over, involving a move towards supranational surveillance of Members States by the Commission and the European Court of Justice (see Van Rompuy, 2012cb: 6, Fabbrini, 2013: 1024-25).

My analysis claims that the European Council has been the key institution in a transformative process that is driving a vertical fusion between the national and the EU levels, and a horizontal fusion that is taking place between the different EU institutions. The chief national executives have merged their economic agendas and economic instruments from across the national and EU levels. They also have increasingly exercised a shared management of competences and instruments jointly with other EU institutions (see Wessels, 2009, Howarth, 2008b, Linsenmann et al., 2007a).

In reaction to the crisis, the European Council directed policies across a fragmented set of different pillars of economic governance. This practise might change if and when the chief national executives see less need to stabilize the Eurozone.

13.4 External Action: A Two Pillar Architecture

The EU´s external action covers a wide range of policy fields and involves several EU institutions. In a narrow sense, 'external action' would only cover 'traditional' foreign policy and diplomacy. But in a wider sense, we have to take into account all policy fields that have international implications. This includes policy fields such as trade or development policy which have been on the agenda of the EU since its creation, are genuine external policies and have direct links to the more 'traditional' parts of external action. The term also covers policy fields that are comparatively 'new' on the EU agenda, such as eenvironment and climate or migration policy. In a general sense, the TEU features a broad set of external action objectives (see Art. 3(5) TEU and Art.21(2) TEU).

Document III.13.3: General TEU Provisions on the EU´s External Action - 1

Article 3(5) TEU

In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

Article 21(2) TEU

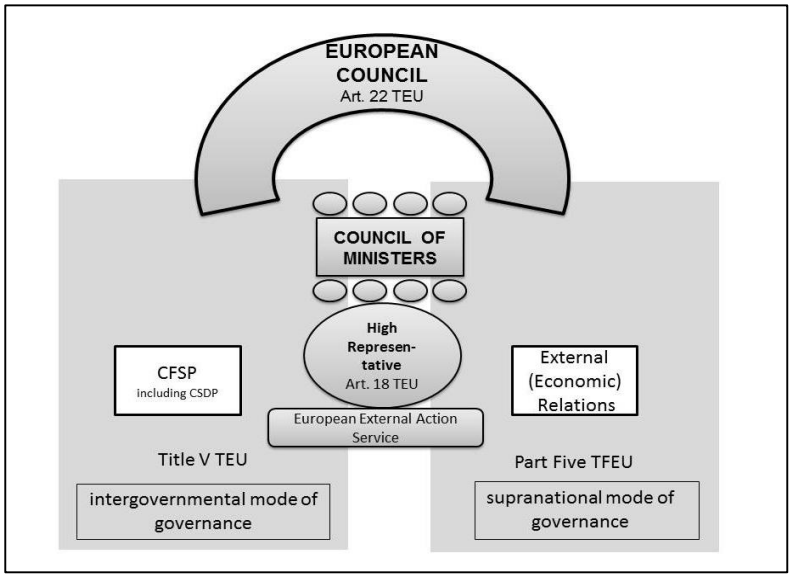
The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:
(a) safeguard its values, fundamental interests, security, independence and integrity;
(b) consolidate and support democracy, the rule of law, human rights and the principles of international law;

(c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, […], including those relating to external borders;
(d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;
(e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade;
(f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development;
(g) assist populations, countries and regions confronting natural or man-made disasters; and
(h) promote an international system based on stronger multilateral cooperation and good global governance.

In the case of the EU we generally distinguish between two different modes of governance: the common foreign and security policy (CFSP), including the common security and defense policy (CSDP) and other areas of external relations, such as trade policy, development policy or the European neighbourhood policy. This two pillar structure has existed since the creation of the EPC in the 1970s – which eventually developed into the CFSP in the 1990s.[39] Despite of some efforts this gap has not been abolished by the Treaty of Lisbon:

[39] As follow-up to the European Political Cooperation (EPC) as launched by the The Hague Summit in 1969, the common foreign and security policy was established with the Maastricht Treaty in 1993.

Figure III.13.6: The two Pillars of EU External Action



Source: Wessels 2014.

The distinction between the two pillars is important because it has implications for the roles and competences of the particular institutions. The CFSP pillar largely excludes the Commission and the European Parliament and is dominated by the member state´s national interests. Thus, we would characterise the CFSP**Fehler! Textmarke nicht definiert.** pillar as intergovernmental. The other pillar can be characterised as supranational because competences in these policy fields have been partly or completely conferred from the national to the EU level. The Commission, the EP and the Council play a significant role in these areas. Some institutions and offices, especially the European Council and the High Representative are involved in both pillars. In the following, both pillars will be described in more detail.

13.4.1 Common Foreign and Security Policy and Common Foreign and Defence Policy: Objectives, Tasks and Performances

Member States have revised the rules for working together in official declaration and treaty revisions (see Table…). The CFSP aims at bringing together the foreign policies of the different Member States in order to 'define and pursue common policies and actions' (Art. 21(2) TEU). The Lisbon Treaty has brought about some institutional innovations in this policy area such as the new post of a 'High Representative of the Union for Foreign Affairs and Security Policy' and the creation of the 'European External Action Service' (see Chapter II.9).

According to the relevant treaty provisions, the EU´s CFSP 'shall cover all areas of foreign policy and all questions relating to the Union's security' (Art. 24(1) TEU) and follows specific rules of procedure (see Document III.13.4).

Document III.13.4: TEU Provisions on the Roles of Procedures EU´s External Action

Article 24(1), 2nd para. The common foreign and security policy is subject to specific rules and procedures. It shall be defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise. The adoption of legislative acts shall be excluded. The common foreign and security policy shall be put into effect by the High Representative of the Union for Foreign Affairs and Security Policy and by Member States, in accordance with the Treaties. The specific role of the European Parliament and of the Commission in this area is defined by the Treaties. The Court of Justice of the European Union shall not have jurisdiction with respect to these provisions (…).

The EU has tried to establish itself as a key player in international issues, taking positions in East-West tensions or the conflict in the Middle East and the Arab Spring. The EU's CFSP is based on diplomacy to resolve conflicts and bring about international understanding.[40]
In practice, this implies dealing with international crises all over the globe and peace building processes, especially in the EU's neighbourhood. To this end, the European Council adopts conclusions on crises situations or conflicts, thereby sending political messages or calling for action. It can also adopt sanctions (called 'restrictive measures' in EU jargon) such as arms embargos following Art. 215 TFEU .
Another part of the CFSP pillar is the EU´s common security and defence policy (CSDP). Until Maastricht, the term defence policy was not put on the EU´s agenda. The *Petersberg tasks,* adopted by the Western European Union in 1992, listed security and military priorities such as peacekeeping and crisis management and pushed for the development of respective capabilities ((Western European Union, 1992)). After the EU incorporated the *Petersberg tasks* into the Amsterdam Treaty and after the British-French declaration of St Malo called for a bigger role of the EU in security policy, the Cologne European Council in 1999 decided to integrate the WEU into the EU ((European Council, 1999: 68)). In 2003, the European Council

[40] http://europa.eu/pol/cfsp/index_en.htm (last accessed: 21.08.2013).

adopted the European Security Strategy which identifies five main threats for the European Countries: terrorism, proliferation of weapons of mass destruction, regional conflict, state failure and organised crime. This document - even though it mainly envisages civilian and diplomatic means – underlines that as last resort the Member States of the EU might also use military means (Jopp, 2011).

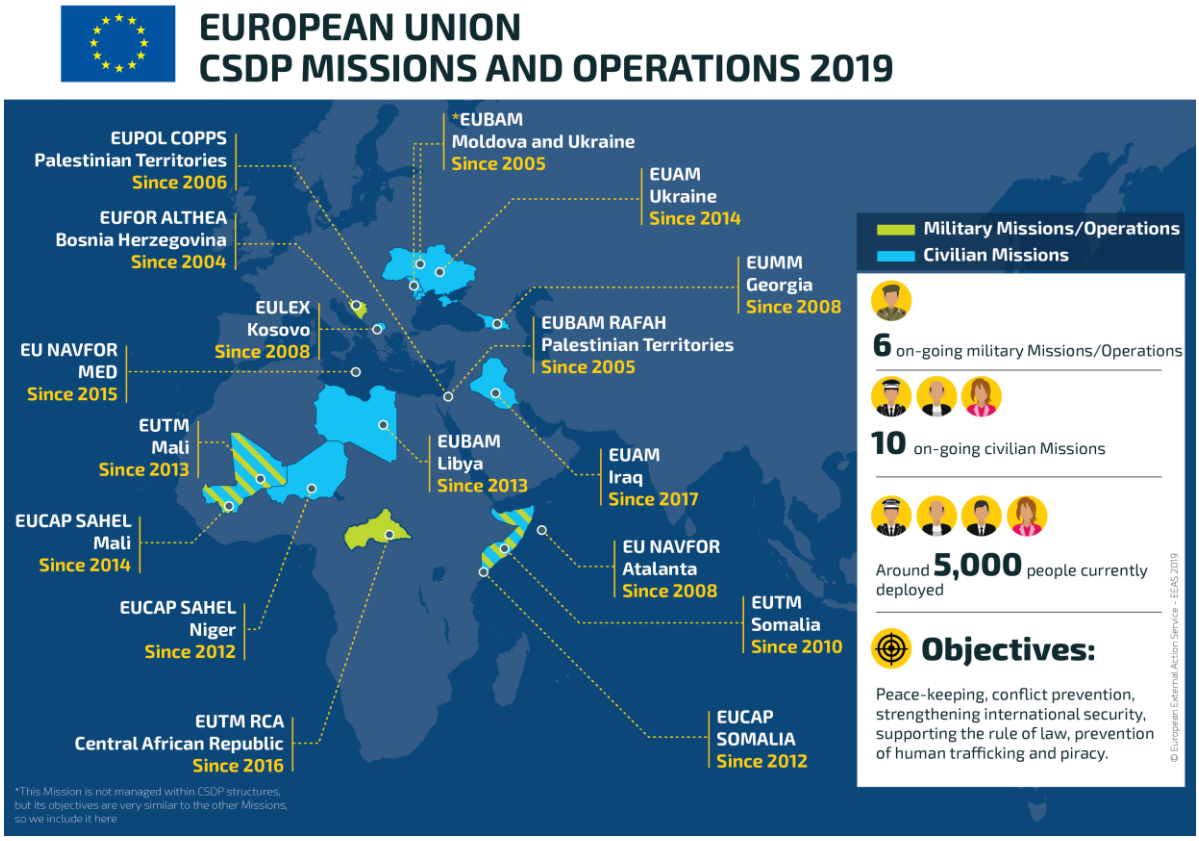
The Lisbon Treaty has further extended the scope of CSDP (see Document III.13.5. below)

Document III.13.5: TEU Provisions for Civilian and Military assets

Art. 42(1) The common security and defence policy shall be an integral part of the common foreign and security policy. It shall provide the Union with an operational capacity drawing on civilian and military assets. The Union may use them on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter. The performance of these tasks shall be undertaken using capabilities provided by the Member States.

So far, most of the more than 20 missions (see figure III.13.5 below) in the framework of CSDP have had a civilian character. Some missions were however military in nature, for instance the salient Atalanta mission to combat piracy at the Horn of Africa. But even though usually civilian and diplomatic means prevail, the Treaty of Lisbon also foresees 'the progressive framing of a common Union defence policy' which could lead to a 'common defence' (Art 42(2) TEU). A new element of the TEU is the permanent structured cooperation for a subgroup of Member States 'whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area' (Art. 42(6) TEU).

Figure III.13.7: On-going Missions and Operations within the CFSP



Source: https://eeas.europa.eu/topics/military-and-civilian-missions-and-operations/430/military-and-civilian-missions-and-operations_en **(last accessed: 23.07.2019).**

In the CFSP and CSDP, the European Council and the Council, being the two institutions that represent the Member States´ interests, have a dominant position. According to the treaty (Art. 24(1) TEU, see Document III.13.5), the European Council and the Council shall define and implement the foreign policy. All decisions in this area – with only some exceptions – have to be taken by unanimity. This rule strengthens again the role of each individual member state as each of them can exercise a veto. The decisions taken by the European Council and the Council shall then be implemented by the High Representative.

The Commission and the European Parliament play a subordinated role. The EP has little influence through the budget: Except expenditures concerning military or defence, CFSP expenditures are part of the Unions budget. One major indicator for its intergovernmental character is the fact that the Court of Justice of the EU is excluded from passing rulings in this pillar. As legislative acts are excluded from CFSP, instruments at the disposal of the EU include the adoption of general guidelines, decisions on positions, the implementation of

actions and the strengthening of cooperation between the Member States (Bopp and Wessels, 2008).

13.4.2 Other Areas of (Economic) External Action

Part Five of the TFEU stipulates the legal provisions of the economic dimensions of the external action: common commercial policy, development cooperation, economic, financial and technical cooperation with third countries. Most of the decisions taken in this pillar are taken in general according to the Ordinary Legislative Procedure (see chapter III.14.1)).

Common Commercial Policy

The common commercial policy comprises the EU´s trade relations to non-EU states or international organisations. The EU is the largest market and the world's leading trading power, accounting for 19% of the world´s import and export.

Figure III.13.8: EU Import and Export of Goods 2017

V

Source:
http://www.europarl.europa.eu/resources/library/images/20180803PHT09210/20180803PHT09210_original.jpg (last access: 23.07.2019).

The EU is the main trading partner for 80 countries in the world. The common commercial policy was one of the first policy fields of the early European Economic Community in 1957. The EU holds the exclusive competences in the area of trade, making trade policy one of the most integrated policy fields of the EU. Individual Member States are not allowed to legislate or conclude trade agreements in this policy field.
In the Treaty of Lisbon, the rules on the common commercial policy are laid down in Art. 21 TEU and Art. 206-207 TFEU. According to these articles, the EU´s aim is to 'encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade' (Art. 21(2e) TEU).

Development cooperation and humanitarian aid

Similar to the common commercial policy, development cooperation has also been an important policy field since the Rome Treaty.. The primary objective of this policy field is the 'reduction and […] eradication of poverty' (Art. 208(1)). The first agreements in this policy field were concluded with former French and British colonies which formed the Group of African, Carribean and Pacific (ACP) States. EU development cooperation in the following years until today focussed on these states, although the EU funds also cooperation with states from other regions. Instruments are diverse and include for example trade preferences, financial and technical assistance or assistance for environmental protection and the health system. In recent years the promotion of democracy and human rights as well as security considerations have become more important parts of development cooperation (Tannous, 2011).

Table 13.1: Historical development of EU development cooperation with African, Caribbean and Pacific (ACP) countries

Agreement	Year	Member states	Funding	Instruments
Rome Treaty	1957	EEC-6 31 Colonies	€ 569 mio. 1959-1964	Association 1st European Development Fund (EDF) Trade preferences

Yaunde I	1963	EEC-6 18 frankophone African States	€ 730 mio. 1965-1970	Association 2nd EDF Trade preferences
Yaunde II	1969	EEC-6 21 African States	€ 887 mio. 1971-1975	Association 3rd EDF Trade preferences
Lome I	1975	EC-9 46 ACP states	€ 3 bn 1976-1980	Partnership 4th EDF Trade preferences Sytem of Stabilisation of Export Earnings (STABEX)
Lome II	1979	EC-9 58 ACP states	€ 4,2 bn 1981-1985	Partnership 5th EDF Trade preferences STABEX System of Stabilisation of Export Earnings from Mining Products (SYSMIN)
Lome III	1984	EC-10 65 ACP states	€ 7,8 bn 1986-1990	Partnership 6th EDF Trade preferences STABEX SYSMIN
Lome IV	1990	EC-12 70 ACP states	€ 11,6 bn 1991-1997	Partnership 7th EDF Trade preferences STABEX SYSMIN
Lome IV2	1995	EC-15 70 ACP states	€ 13,2 bn. 1998-2002	Partnership Conditionality 8th EDF Trade preferences STABEX SYSMIN
Cotonou	2000	EU-15 (today EU-28) 79 ACP states	€ 13,8 bn (2000-7) € 22,7 bn (2008-13) Budget for 2014-2020 in negotiation	Partnership and dialogue Conditionality Economic Partnership Agreements

Source: Own compilation, based on http://ec.europa.eu/europeaid/index_en.htm

The key difference between development cooperation and humanitarian aid is that the former focusses more on long-term projects that might be influenced by political considerations, while the latter is strictly short-term and impartial in nature.

In a general sense, both development cooperation and humanitarian aid belong to the shared competences of the EU although a better description is 'parallel' competence: 'the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs' (Art. 4 TEU). We see that in contrast to for instance the shared policy fields environment and energy policy, conduction of a Union policy in development cooperation or humanitarian aid does not prevent the Member States from conducting their one one in parallel. The development policy of the Union and the Member States is supposed to 'complement and reinforce each other' (Art. 208(1) TFEU) which also allows the Union to independently conclude agreements with third parties (Art. 209(2)TFEU).

Economic, Financial and Technical Cooperation with Third Countries

Besides financing and conducting development cooperation with developing countries in various regions of the world, the EU also conducts so called 'Economic, Financial and Technical Cooperation with Third Countries', particularly in its direct neighbourhood (see document 13.6 below).[41]

Document 13.6: Economic, Financial and Technical Cooperation with Third Countries

Art. 212(1)
Without prejudice to the other provisions of the Treaties, and in particular Articles 208 to 211, the Union shall carry out economic, financial and technical cooperation measures, including assistance, in particular financial assistance, with third countries other than developing countries. Such measures shall be consistent with the development policy of the Union and shall be carried out within the framework of the principles and objectives of its

[41] One main difference between this mode of cooperation and traditional development cooperation are the rules that are attached to Official Development Aid (ODA). These rules the EU commits itself to in the framework of the OECD foresee for instance concessional financial terms. The Economic, Financial and Technical Cooperation with Third Countries is more flexible in this regard.

external action. The Union's operations and those of the Member States shall complement and reinforce each other.

The EU puts special emphasis on building ‘a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation.’ (TEU Art. 8 (1)). The main instrument to achieve this is the European Neighbourhood Policy (ENP). The ENP is mainly composed of an Eastern Partnership – with the countries Armenia, Azerbaijan, Belarus, Georgia, Moldova, and Ukraine - and the Southern dimension - Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Palestine, Syria, Tunisia. The EU strives to conclude agreements with these countries that ‘may contain reciprocal rights and obligations as well as the possibility of undertaking activities jointly’. (TEU Art. 8 (2)). One prominent example is hereby the framework of – sometimes politically contested - association agreements that the EU wants to conclude with countries such as Ukraine.

Questions

1. Explain the difference between the terms ‘external action‘, ‘CFSP’ and ‘external relations’.
2. Describe the decision-making procedure for:
   (a) CFSP/CSDP
   (b) common commercial policy
   (c) international agreements.
3. Discuss: The two pillar structure weakens the EU’s international profile.
4. Discuss: Without a supranational mode of governance the EU is a weak international player.

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13.5 The Area of Freedom, Security and Justice: Pre-Constitutional and Pre-Legislative Functions

On its broad, state-like agenda of public policies, the European Council has intensively dealt with another core area of national sovereignty: justice and home affairs (JHA) issues. The Heads of State or Government have repeatedly and increasingly used the European Council to shape procedural and institutional opportunities for the Union's involvement in significant issues of this policy field, which the Amsterdam Treaty labelled as an 'area of freedom, security and justice' (AFSJ).

Despite the significance of matters traditionally regarded as 'domestic affairs', successive generations of European Council members have discussed a growing list of items from this domain of national policies (see for example Lavenex, 2010: 457, Monar, 2010c: 23). The record of the European Council shows these activities as well as a considerable increase in their scope and intensity, together with the promulgation of significant system-making agreements within this traditionally sensitive area of governance.

Through their activities and agreements the Union's political leaders have reacted to what they perceived as a growing popular demand for coordinated trans-border cooperation: '[T]he area of freedom, security and justice is a key priority for citizens' (June 2008). The need for stronger involvement by the EU in this area is partly the consequence of a spill-over from other Community activities, particularly as a result of a Union without internal borders and from the Economic and Monetary Union (EMU) (Monar, 2010c: 38). In part, it is also a reaction to external shocks, notably the terrorist attacks in New York and Washington (2001), Madrid (2004) and London (2005). The European Council's activities exhibit a clear and proactive strategy in terms of the fight against illegal migration and international crime. Facing these challenges, national governments have, within and via the European Council, increasingly developed the ASFJ into a policy area with significant EU involvement (see Nilsson and Siegl, 2010).

This chapter deals with the European Council's system-making agreements and policy-making guidelines. By way of conclusion, I argue that this set of activities offers an example of an integration pattern in which the European Council promotes a step by step process of vertical and horizontal fusion.

Creating and Adapting the Area of Freedom, Security and Justice: Main Agreements

The 1957 ECC treaty did not explicitly mention issues of justice and home affairs. Furthermore, when the Heads of State or Government launched their ambitious programme for joint policy-making at The Hague (1969) and Paris (1972) summits, the broad agenda for future common or coordinated activities did not include this domain of public policy (see Chapter 3). However, at its first session in Dublin (1975) the European Council already dealt with the issue of trans-border terrorism, which had become an issue of central importance for its members. Since then, the involvement of national leaders has profoundly changed the EU's way of dealing with JHA issues. Through its activities, the European Council has acted as constitutional architect, framing and agreeing on respective treaty provisions and revisions (see Table 15.1).

Table 13.2 ***The European Council and the Area of Freedom, Security and Justice: Main Agreements 1975-2014***

Year and Place	Topic
December 1975 Rome	Launch of the TREVI Group of senior officials of Justice and Home Affairs ministries
1993 Maastricht Treaty	Creation of the (intergovernmental) 'third pillar': 'cooperation in the fields of justice and home affairs'

May 1999 Amsterdam Treaty	Revision of Maastricht provisions and partial communitarisation: Creation of the 'area of freedom, security and justice'
October 1999 Tampere	The Tampere Milestones: 'Towards a Union of Freedom, Security and Justice'
2003 Nice Treaty	Introduction of the flexibility procedure of enhanced cooperation
November 2004 Brussels	The Hague Programme: 'Ten priorities for the next five years'
December 2009 Brussels	The Stockholm Programme: 'An open and secure Europe serving and protecting citizens'
2009 Lisbon TEU/TFEU	Abolition of the pillar structure: The AFSJ as 'shared competence'
June 2014 Brussels	Definition of the strategic guidelines for legislative and operational planning for the coming years of the AFSJ

Source: Compiled by the author. Adapted from Treaty articles, Presidency Conclusions and Conclusions of the European Council.

One starting point for the European Council's system-making efforts within the sphere of justice and home affairs was an initiative put forward by the French President Giscard d'Estaing in 1977, in which he proposed the creation of 'a European judicial area' (Brussels, December 1977). The Presidency Conclusions remarked that '[t]he European Council took note of a communication from the President of France on developing legal cooperation between the Member States' (Brussels, December 1977).

As an important pre-constitutional step, the European Council created the informal, purely intergovernmental grouping of senior officials from justice and home affairs ministries in Rome (December 1975) (Lewis and Spence, 2010: 86). This set-up, named after the 'Trevi" Fountain in Rome received the mandate to deal with all issues of 'terrorism, radicalism, extremism and violence international'.

Later, in 1984, the European Council asked an *ad hoc* committee on 'a People's Europe' to prepare '… a study of the measures which could be taken to bring about the abolition of all police and customs formalities for people crossing intra Community frontiers' in the near future (Fontainebleau, June 1984).

At the first significant treaty revision, with the signing of the Single European Act in 1986, the Heads of State or Government did not include any issues of justice and home affairs in primary law. However, after the SEA they continued to initiate several specific forms of cooperation (Lavenex, 2010: 459) – for example regarding the free movement of persons (Rhodos, December 1988) and Europol, the European Police Office, which in 1991 the German Chancellor proposed in Luxembourg (Elsen, 2010: 262). At the summit concluding the Maastricht Treaty, the Heads of State or Government then formalised some of these activities in the Union's primary law. This treaty created a new, so-called 'third pillar' which the legal provisions labelled as 'cooperation in the fields of justice and home affairs' (Title VI of the TEU (Maastricht)). The political leaders also placed some relevant items relating to justice and home affairs, for example regarding visa regulations, in the so-called 'first (EC) pillar' of the Maastricht temple structure (see Art.100c(3) TEU (Maastricht)). In the amendments made to the Maastricht Treaty in Amsterdam (1997), the Heads of State or Government again revised respective articles of primary law. They adopted an extended set of provisions for the area of freedom, security and justice (see Titles VI and Title VII TEU (Amsterdam)). They also integrated the so-called 'Schengen agreement' on the abolishment of border controls into the EU's primary law. Even though treaty provisions moved some issues from the third to the first pillar, the Amsterdam treaty kept a two-pillar structure for these matters. Revisions in the Nice Treaty (2001) added procedures that enable more flexibility in working together, the so-called 'enhanced cooperation' in this policy field (Art.40 TEU (Nice)).

The new provisions of the Lisbon TEU and TFEU abolished the pillar structure. The 'area of freedom, security and justice' was classified as a 'shared competence' (Art.4 TFEU).

According to this category of competence 'the Union may legislate and adopt binding legal acts' (Art.2(2) TFEU) in essential areas of justice and home affairs. The relevant Lisbon provision includes 'policies on border checks, asylum and immigration', 'judicial cooperation in civil matters', and 'judicial cooperation in criminal matters' and 'police cooperation' (Title V TFEU). To exercise these shared competences, the ordinary legislative procedure (OLP) is used, which is the key process in the Community method. However, provisions in this area also include some notable exceptions such as the 'emergency break' (Piris, 2010: 185-187) that allows for a national veto in the Council for cases of judicial cooperation in criminal matters (Arts.82(3) and 83(3) TFEU), and the right of initiative for a group of at least nine Member States to establish a 'European Public Prosecutors's Office' (Art.86 (4) TFEU) (see Monar, 2010c: 47).

Traditionally, it has not been easy for the European Council to reach agreements in such highly sensitive areas with strongly divergent views about competencies for the EU. To reach consensus, the Union's leaders have pursued a strategy of allowing a high degree of flexibility in applying the relevant treaty provisions. This attitude led to different forms of opt-outs for Denmark, Ireland and the United Kingdom within the treaty framework (see Tekin, 2012: 74, Monar, 2010a, Nilsson and Siegl, 2010). By developing and accepting such a method of differentiated integration in this area, the European Council has significantly contributed to the shaping of Europe's legal and political geography.

Using its power to engineer procedural arrangements (see Chapter 5), the European Council has taken decisions regarding the establishment of European agencies and offices relevant to this policy area. Of specific importance are Europol (Maastricht, December 1991), Eurojust (Tampere, October 1999) and Frontex (November 2004) together with creation of the office of the EU's Counter Terrorism Coordinator (March 2005)(de Kerchove and de Biolley, 2010: 233).

Setting and Reviewing Pre-Legislative Guidelines

Aside from creating and shaping procedural and institutional opportunities for dealing with justice and home affairs within the EU's architecture, the European Council has repeatedly adopted guidelines and objectives for this policy area. Of specific importance in this context

are successive five-year programmes which have served to frame and review some major concepts for the area of freedom, security and justice (see Table 15.1.)

The special Tampere summit in June 1999 was a first defining moment for the development of an AFSJ-agenda. As a follow-up to the Amsterdam Treaty, it was exclusively devoted to the AFSJ (Nilsson and Siegl, 2010: 70). With the so-called 'Tampere milestones', the European Council set out guidelines for 'a common EU asylum and migration policy', 'a Genuine European Area of Justice', 'a Union-wide fight against crime' and 'stronger external action' (Tampere, October 1999). The Union's chief executive leaders also defined a significant role for their own institution in monitoring the implementation of these milestones. The wording demonstrates high ambitions, as '[t]he European Council is determined to develop the Union as an area of freedom, security and justice by making full use of the possibilities offered by the Treaty of Amsterdam. The European Council sends a strong political message to reaffirm the importance of this objective and has agreed on a number of policy orientations and priorities which will speedily make this area a reality …. It will keep under constant review progress made towards implementing the necessary measures and meeting the deadlines set by the Treaty of Amsterdam … and the present conclusions' (Tampere, October 1999).

In 2004, the European Council followed its own commitment by adopting 'The Hague Programme' as the next stage of this process. The Programme set out 'ten priorities' for strengthening freedom, security and justice in the European Union. The text highlights the role the European Council attributes to itself, outlining how '[f]ive years after the European Council's meeting in Tampere … it is time for a new programme to enable the Union to build on these achievements and effectively meet the new challenges …. To this end, it adopted a new multi-annual programme for the next five years' (November 2004).

Similarly in 2009, the European Council adopted 'a new multiannual programme for the years 2010-2014'. This 'Stockholm Programme' aims at 'an open and secure Europe serving and protecting the citizens' (December 2009) (Guild et al., 2010).

In 2014, following its own commitment, the European Council defined the strategic guidelines for the AFSJ in the coming years and 'calls on the EU institutions and the Member States to ensure the appropriate legislative and operational follow-up to these guidelines and will hold a mid-term review in 2017' (June 2014).

As well as launching framework programmes with a long list of objectives, the European Council has repeatedly put forward statements and declarations on sets of specific problems. One priority issue over the past three decades has been the threat of terrorism. As early as 1975, the UK-Government insisted on a European Council declaration regarding the activities of the IRA (Dublin, March 1975). In July 1976 the European Council published a first statement on 'combating terrorism' (Brussels, July 1976). Since then, the European Council has been seen to react particularly in response to dramatic events. Following the 9/11 terrorist attacks in the USA, the European Council adopted 'a plan of action' with concrete measures 'to combat terrorism' in an extraordinary meeting on 21 September 2001 (Gant, September 2001). Also, it published a 'general declaration on terrorism' some days after the Madrid bombings on 11 March 2004 (March 2004**).** Through these activities the European Council served again as a collective European voice expressing shared views and common positions, acting – to a limited degree – as a crisis manager.

Another major area of concern for the Heads of State and Government has been illegal migration (see for example October and December 2013; Brussels, December 2003 Edinburgh, December 1992) leading to the 'European Pact on migration and asylum' (June 2012; June 2010; December 2008).

The European Council has also adopted statements on other themes such as fraud (see for example Madrid, December 1995; Essen, December 1994), sexual exploitation of children and trafficking of human beings (Dublin, December 1996), money-laundering (Nice, December 2000; October 1999), as well as anti-Semitism, racism, xenophobia (see for example Amsterdam, June 1997; Copenhagen, December 1993; Dublin, June 1990), asylum issues (see for example London, December 1986) and data protection (June 2014).

In exceptional cases the Heads of State or Government have made concrete decisions on AFSJ matters. An example of this saw the adoption of the 'European Arrest Warrant' following the 9/11 terrorist attacks in New York and Washington, when the European Council acted as 'the ultimate decision making authority' (Nilsson and Siegl, 2010: 72).

However, the European Council has not only dealt with items relating to internal security. It has also articulated positions on issues related to the 'area of freedom and justice'.

As part of this, the European Council played a major role in drafting and promoting the 'Charter of Fundamental Rights' (see Chapter 11). In terms of the programmatic substance of

the achievements that have been made in this area, the agreements of the European Council exhibit a 'delicate balance' between safeguarding internal security and preserving fundamental rights (Bopp et al., 2010: 89-90, Guild et al., 2008).

The Lisbon Institutional Arrangement: A Limited but Significant Role

Whereas the Maastricht Treaty had allocated a central position to the European Council in the institutional architecture of the 'second' (CFSP) pillar (see Chapter 14), the treaty provisions for the so-called third pillar did not include specific functions for the European Council. Given the previously mentioned activities of the European Council, there was, as in many other policy areas, a considerable gap between the legal provisions of the treaty when set against the actual activities and impact of the European Council.

However, the Lisbon TFEU defines the role of the European Council more explicitly and more accurately in terms of its actual performance. The treaty provisions for this policy area envisage three tasks for the European Council: Firstly, 'The European Council shall define the strategic guidelines for legislative and operational planning' (Art.68 TFEU). This formulation addresses some major pre-legislative functions of the European Council, as they have been developed over the past decades. Under this article, the European Council is legally empowered to define all major objectives for the Commission, the European Parliament and the Council in the subsequent ordinary legislative procedure, together with setting deadlines for the Commission and the Council.

Secondly, the TFEU formalises a further task for the European Council, in dealing with the 'emergency brake'(Piris, 2010: 185) in the area of 'judicial cooperation in criminal matters' (see Art.82(3) and 83(3) TFEU). These TFEU provisions outline that '[w]here a member of the Council considers that a draft directive … would affect fundamental aspects of its criminal justice system, it may request that the draft directive be referred to the European Council', and then: 'after discussion, and in case of consensus the European Council shall, within four months of this suspension, refer the draft back to the Council' (Art.82(3) TFEU). In this procedure, the European Council takes on the role as highest instance of political appeal (see Chapter 5). Such a role is also allocated in the case of the politically sensitive establishment of a 'European Public Prosecutor's office': 'in the absence of unanimity in the Council, a group of at least nine Member States may request that the draft regulation be referred to the

European Council' (Art.86 (1) TFEU) which in the event of reaching 'consensus … shall, within four months of this suspension, refer the draft back to the Council …' for adaption (Art.82(3) TFEU). In the first five years following the entry into force of the Lisbon Treaties, the European Council has not been asked to exercise the powers outlined in these articles.

A third task consists of an early warning function, as laid down in the 'solidarity clause' (Title VII TFEU), where 'The European Council shall regularly assess the [terrorist] threats facing the Union in order to enable the Union and its Member States to take effective action' (Art.222(4) TFEU).

Conclusion: Patterns of a Fusion Engine

In comparison with legal provisions in the CFSP architecture and for some procedures in areas of the economic governance, the treaty-based provisions for the European Council remain modest within ASFJ. However, a consideration of the legal provisions should not underestimate the European Council's actual impact as a norm-entrepreneur, ultimate decision-maker and highest instance of political appeal. The list of activities shows that this key institution has extensively pursued pre-constitutional and pre-legislative functions.

By way of conclusion, the activities and agreements of the European Council in the area of AFSJ exhibit a significant evolution of the EU system by which the European Council exercises a dynamic role as constitutional architect. I observe a pattern of consecutive phases in which the European Council has step by step changed the JHA governance. In the first phase of problem solving attempts, national leaders recognised the need to work together in this policy domain and, therefore, agreed on non-binding informal procedures, particularly the TREVI-Group in the 1970s and other working groups in the 1980s. Faced with the unsatisfying output of this cooperation, in a second phase they initiated, a complex set of intergovernmental rules in the third pillar of the Maastricht treaty. However, this upgraded set of treaty provisions also resulted in ineffective practices: Prompted by the challenges on their agenda, national leaders were pushed to 'communitarise' the previously intergovernmental set of procedures in the Lisbon treaty (Piris, 2010: 177-178).

In this transformation process, EU leaders have repeatedly and increasingly shifted competences vertically from national to Union level. At the same time, they have in the role as constitutional architect changed the horizontal balance towards the ordinary legislative

procedure, reinforcing the Community method with strong powers for supranational EU institutions. But at the same time the European Council also remained in a strong position, setting programmatic guidelines and acting as the highest instance of political appeal. It has reached several agreements which have led to a vertical and horizontal fusion of responsibilities, competences and instruments. Thus, in view of its institutional roles, the European Council has acted as a fusion engine (see Chapter 2). Following such an analysis, the AFSJ might serve as a case to be tested in other fields of the Union's governance such as environmental and climate policies (see Chapter 10).

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