1 Union institutions

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Introduction

The creation of governmental institutions is *the* central task of all constitutions. Each political community needs institutions to govern its society; as each society needs common rules and a method for their making, execution, and arbitration. The European Treaties establish a number of European institutions to make, execute, and arbitrate European law. The Union's institutions and their core tasks are defined in Title III of the Treaty on European Union (TEU). The central provision here is Article 13 TEU:

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.[1]

The provision lists seven governmental institutions of the European Union. They constitute the core "players" in the Union legal order.[2] What strikes the attentive eye first is the number of institutions: unlike a tripartite institutional structure, the Union offers more than twice that number. The two institutions that do not – at first sight – seem to directly correspond to "national" institutions are the (European) Council and the Commission. The name "Council" represents a reminder of the "international" origins of the European Union, but the institution can equally be found in the governmental structure of Federal States. It will be harder to find the name "Commission" among the public institutions of States, where the executive is typically referred to as the "government". By contrast, central banks and courts of auditors exist in many national legal orders.

Where do the Treaties define the Union institutions? The provisions on the Union institutions are split between the Treaty on European Union and the Treaty on the Functioning of the European Union in the following way:

[1] Article 13(1) TEU. Paragraph 2 adds: "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 practise mutual sincere cooperation."

[2] While the Treaties set up seven "institutions", they do acknowledge the existence of other "bodies". First, according to Article 13 (4) TEU, the 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". The composition and powers of the "Economic and Social Committee" are set out in Articles 301–4 TFEU. The composition and powers of the "Committee of the Regions" are defined by Articles 305–7 TFEU. In addition to the Union's "Advisory Bodies", the Treaties also acknowledge the existence of a "European Investment Bank" (Articles 308–9 TFEU; as well as Protocol No. 5 on the Statute of the European Investment Bank).

Table 1 Treaty provisions on the Institutions

Provisions on the Institutions			
EU Treaty – Title III		**FEU Treaty – Part VI – Title I – Chapter 1**	
Article 13	Institutional Framework	Section 1	European Parliament (Arts. 223–234)
Article 14	European Parliament		
Article 15	European Council	Section 2	European Council (Arts. 235–236)
Article 16	Council	Section 3	Council (Arts. 237–243)
Article 17	Commission	Section 4	Commission (Arts. 244–250)
Article 18	High Representative	Section 5	Court of Justice (Arts. 251–281)
Article 19	Court of Justice	Section 6	European Central Bank (Arts. 282–284)
		Section 7	Court of Auditors (Arts. 285–287)
Protocol (No.3): Statute of the Court of Justice Protocol (No.4): Statute of the ESCB and the ECB Protocol (No.6): Location of the Seats of the Institutions etc. (Internal) Rules of Procedure of the Institution			

The four sections of this chapter will concentrate on the classic four Union institutions: the Parliament, the Council, the Commission, and the Court.[3]

1. The European Parliament

Despite its formal place in the Treaties, the European Parliament has never been the Union's "first" institution. For a long time it followed, in rank, behind the Council and the Commission. Its original powers were indeed minimal. It was an "auxiliary" organ that was to assist the institutional duopoly of Council and Commission. This minimal role gradually increased from the 1970s onwards. Today the Parliament constitutes – with the Council – a chamber of the Union legislature. Directly elected by the European citizens,[4] Parliament constitutes not only the most

[3] For an analysis of the three other Union institutions, see R. Schütze, *European Constitutional Law* (Cambridge University Press, 2012), Chapters 3 and 4.

[4] Article 10(2) TEU: "Citizens are directly represented at Union level in the European Parliament."

democratic institution; in light of its elective "appointment", it is also the most supranational institution of the European Union.

This section will analyse two aspects of the European Parliament. First, we shall look at its formation through European elections. A second subsection provides an overview of Parliament's powers in the various governmental functions of the Union.

(a) Formation: electing Parliament

When the European Union was born, the European Treaties envisaged that its Parliament was to be composed of "representatives of the peoples of the States".[5] This characterization corresponded to its formation. For the European Parliament was not directly elected. It was to "consist of delegates who shall be designated by the respective Parliaments from among their members in accordance with the procedure laid down by each Member State".[6] European parliamentarians were thus – delegated – *national* parliamentarians. This formation method brought Parliament close to an (international) "assembly". The founding Treaties did nonetheless breach the classic international law logic already in two ways. First, they had abandoned the idea of sovereign equality of the Member States by recognizing different sizes for national parliamentary delegations.[7] Second, and more importantly, the Treaties already envisaged that Parliament would eventually be formed through "elections by direct universal suffrage in accordance with a uniform procedure in all Member States".[8]

When did the transformation of the European Parliament from an "assembly" of national parliamentarians into a directly elected Parliament take place? It took two decades before the Union's 1976 "Election Act" was adopted.[9] And ever since the first parliamentary elections in 1979, the European Parliament ceased to be composed of "representatives of the peoples of the States". It constituted henceforth the representative of a European people. The Lisbon Treaty has – belatedly – recognized this dramatic constitutional change. It now characterizes the European

[5] Article 137 EEC. See also Article 20 ECSC. [6] Article 138 EEC. See also Article 21 ECSC.

[7] Originally, the EEC Treaty granted thirty-six delegates to Germany, France and Italy; fourteen delegates to Belgium and the Netherlands; and six delegates to Luxembourg.

[8] Article 138 (3) EEC. See also Article 21 (3) ECSC.

[9] "Act concerning the Election of the Members of the European Parliament by direct universal Suffrage." The Act was adopted in 1976 ([1976] OJ L278/5).

Parliament as being "composed of representatives of the Union's citizens".[10]

What is the size and composition of the European Parliament? How are elections conducted? The Treaties stipulate the following on the size and composition of the European Parliament:

> 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.[11]

The European Parliament has a maximum size of 751 members.[12] While relatively big in comparison with the (American) House of Representatives, it is still smaller than the (British) House of Lords.[13] The Treaties themselves no longer determine its composition.[14] It is the European Council that must decide on the national "quotas" for the Union's parliamentary representatives. The distribution of seats must however be "degressively proportional" within a range spanning from six to ninety-six seats. While the European Council has not yet taken a formal decision, it has given its political endorsement to a proposal by the European Parliament.[15] In its proposal, Parliament

[10] Article 14 (2) TEU. [11] *Ibid.*

[12] The 2009 Parliamentary Elections were still held under the pre-Lisbon arrangement. Under that arrangement, there existed only 736 seats with Germany having 99 seats. To bring the number up to 751 and to reduce the German MEPs by three, Spain proposed a Treaty amendment to Protocol (No. 36) on Transitional Provisions. However, the final proposal suggested adding 18 MEPs for the 2009–14 parliamentary term *without* reducing the mandate of the three (already) elected German MEPs. Parliament would thus – temporarily – have 754 members! This proposal has received the consent of the Commission, the Parliament, and the European Council (see Decision of the European Council of 17 June 2010 on the examination by a conference of representatives of the governments of the Member States of the amendments to the Treaties proposed by the Spanish Government concerning the composition of the European Parliament and not to convene a Convention (2010/350/EU)).

[13] To compare: the (American) House of Representatives has 435 members. The (British) House of Commons has 648 members, while the (British) House of Lords currently has 829 members.

[14] This had been the case prior to the Lisbon Treaty.

[15] See Declaration (No. 5) on the political agreement by the European Council concerning the draft Decision on the composition of the European Parliament. For the draft decision, see European Parliament Resolution (11 October 2007) on the composition of the European Parliament ([2008] OJ C227/132).

Table 2 Distribution of seats in the European Parliament (Member States)

Member State (Seats)		
Belgium (22)	Ireland (12)	Austria (19)
Bulgaria (18)	Italy (72+1)[17]	Poland (51)
Czech Republic (22)	Cyprus (6)	Portugal (22)
Denmark (13)	Latvia (9)	Romania (33)
Germany (96)	Lithuania (12)	Slovenia (8)
Estonia (6)	Luxembourg (6)	Slovakia (13)
Greece (22)	Hungary (22)	Finland (13)
Spain (54)	Malta (6)	Sweden (20)
France (74)	Netherlands (26)	United Kingdom (73)

provided a definition of "degressively proportional",[16] and has suggested the concrete distribution of seats among Member States shown in Table 2.

The national "quotas" for European parliamentary seats constitute a compromise between the democratic principle and the federal principle. For while the democratic principle would demand that each citizen in the Union has equal voting power ("one person, one vote"), the federal principle insists on the political existence of States. The result of this compromise was the rejection of a *purely* proportional distribution in favour of a *degressively* proportional system. The degressive element within that system unfortunately means that a Luxembourg citizen has ten times more voting power than a British, French, or German citizen.

How are the *individual* members of Parliament elected? The Treaties solely provide us with the most general of rules: "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."[18] More precise rules are set out in the (amended) 1976 Election Act. Article 1 of the Act commands that the elections must be conducted "on the basis of proportional representation".[19] This outlaws the

16 *Ibid.*, para. 6: "[T]he principle of degressive proportionality means that the ratio between the population and the number of seats of each Member State must vary in relation to their respective populations in such a way that each Member from a more populous Member State represents more citizens than each Member from a less populous Member State and conversely, but also that no less populous Member State has more seats than a more populous Member State[.]"

17 This additional seat was added, on Italian intransigence, by the Lisbon Intergovernmental Council; see Declaration (No. 4) on the Composition of the European Parliament: "The additional seat in the European Parliament will be attributed to Italy."

18 Article 14 (3) TEU.

19 Article 1 (1) and (3) of the 1976 Election Act (supra n. 9).

traditionally British election method of first-past-the-post.[20] The specifics of the election procedure are however principally left to the Member States.[21] European parliamentary elections thus still do not follow "a uniform electoral procedure in all Member States", but are rather conducted "in accordance with principles common to all Member States".[22] The Treaties nonetheless insist on one common constitutional rule: "every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State".[23]

(b) Parliamentary powers

When the 1951 Paris Treaty set up the European Parliament, its sole function was to exercise "supervisory powers".[24] Parliament was indeed a passive onlooker on the decision-making process within the first Community. The 1957 Rome Treaty expanded Parliament's functions to "advisory and supervisory powers".[25] This recognized the active power of Parliament to be consulted on Commission proposals before their adoption by the Council.[26] After sixty years of evolution and numerous amendments, the Treaty on European Union today defines the powers of the European Parliament in Article 14 TEU as follows: "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."[27] This definition distinguishes

20 This condition had not been part of the original 1976 Election Act, but was added through a 2002 amendment. This amendment was considered necessary as, hitherto, the British majority voting system "could alone alter the entire political balance in the European Parliament" (F. Jacobs et al., *The European Parliament* (Harper Publishing, 2005), 17). The best example of this distorting effect was the 1979 election to the European Parliament in which the British Conservatives won 60 out of 78 seats with merely 50 per cent of the vote (*ibid.*).

21 Article 8 of the 1976 Election Act: "Subject to the provisions of this Act, the electoral procedure shall be governed in each Member State by its national provisions." Under the Act, Member States are free to decide whether to establish national or local constituencies for elections to the European Parliament (*ibid.*, Article 2), and whether to set a minimum threshold for the allocation of seats (*ibid.*, Article 3).

22 Both alternatives are provided for in Article 223 (1) TFEU.

23 Article 22 (2) TFEU.

24 Article 20 ECSC.

25 Article 137 EEC.

26 *Roquette Frères* v. *Council* (*Isoglucose*), Case 138/79, [1980] ECR 3333.

27 Article 14 (1) TEU.

between four types of powers: legislative and budgetary powers as well as supervisory and elective powers.

(i) Legislative powers

The European Parliament's primary power lies in the making of European laws. This involvement may take place at two moments in time. Parliament may informally propose new legislation.[28] However, it is not – unlike many national parliaments – entitled to formally propose bills. The task of making legislative proposals is, with minor exceptions, a constitutional prerogative of the Commission.[29]

The principal legislative involvement of Parliament starts therefore later, namely after the Commission has submitted a proposal to the European legislature. Like other federal legal orders, the European legal order acknowledges a number of different legislative procedures. The Treaties now textually distinguish between the "ordinary" legislative procedure and a number of "special" legislative procedures. The former is defined as "the joint adoption by the European Parliament and the Council" on a proposal from the Commission.[30] Special legislative procedures cover various degrees of parliamentary participation. Under the "consent procedure" Parliament must give its consent before the Council can adopt European legislation.[31] This is a cruder form of legislative participation that essentially grants a negative power. Parliament cannot suggest positive amendments, but must take-or-leave the Council's position. Under the "consultation procedure", by contrast, Parliament is not even entitled to do that. It merely needs to be consulted – a role that is closer to a supervisory function than to a legislative one.[32] Exceptionally, a

[28] Article 225 TFEU: "The European Parliament 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."

[29] On this power, see Chapter 2 – Section 1 (a) below. [30] Article 289 (1) TFEU.

[31] For example: Article 19 TFEU, according to which "the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation".

[32] For example: Article 22 (1) TFEU, which states: "Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed

special legislative procedure may make Parliament the dominant legislative chamber.[33]

Importantly, the Parliament's "legislative" powers may also extend to the external relations sphere. After Lisbon, Parliament has indeed become an important player in the conclusion of the Union's international agreements.

(ii) Budgetary powers

Parliaments have historically been involved in the adoption of national budgets. For they were seen as legitimating the *raising* of revenue. In the words of the American colonists: "No taxation, without representation". In the European Union, this picture is somewhat inverted. For since Union revenue is fixed by the Council and the Member States,[34] the European Parliament's budgetary powers have not focused on the income side but on the expenditure side. Its powers have consequently been described as the "reverse of those traditionally exercised by parliaments".[35]

Be that as it may, Parliament's formal involvement in the Union budget started with the 1970 and 1975 Budget Treaties. They distinguished between compulsory and non-compulsory expenditure, with the latter being expenditure that would not result from compulsory financial commitments flowing from the application of European law. Parliament's powers were originally confined to this second category. The Lisbon Treaty has however abandoned the distinction between compulsory and non-compulsory expenditure, and Parliament has thus become an equal partner, with the Council, in establishing the Union's annual budget.[36]

(iii) Supervisory powers

A third parliamentary power is that of holding the executive to account. Parliamentary supervisory powers typically involve the power to question, debate, and investigate.

A soft parliamentary power is the power to *debate*. To that effect, the European Parliament is entitled to receive the "general report on the activities of the Union" from the Commission,[37] which it "shall discuss in open

arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament[.]"

[33] For example: Article 223 (2) TFEU – granting Parliament the power, with the consent of the Council, to adopt a Statute for its Members.

[34] See Article 311 TFEU on the "Union's own resources".

[35] D. Judge and D. Earnshaw, *The European Parliament* (Palgrave, 2008), 198.

[36] Article 314 TFEU. [37] Article 249 (2) TFEU.

session".[38] And as regards the European Council, the Treaties require its President to "present a report to the European Parliament after each of the meetings of the European Council".[39] Similar obligations apply to the European Central Bank.[40] The power to *question* the European executive is formally enshrined only for the Commission: "The Commission shall reply orally or in writing to questions put to it by the European Parliament or by its Members."[41] However, both the European Council and the Council have confirmed their willingness to be questioned by Parliament.[42] Early on, Parliament introduced the institution of "Question Time" – modelled on the procedure within the British Parliament.[43] And under its own Rules of Procedure, Parliament is entitled to hold "an extraordinary debate" on "a matter of major interest relating to European Union Policy".[44]

Parliament also enjoys the formal power to *investigate*. It is constitutionally entitled to set up temporary Committees of Inquiry to investigate alleged contraventions or maladministration in the implementation of European law.[45] These (temporary) committees complement Parliament's standing committees. They have been used, inter alia, to investigate the (mis)handling of the BSE crisis.

Finally, European citizens have the general right to "petition" the European Parliament.[46] And according to a Scandinavian constitutional tradition, the European Parliament will also elect an "ombudsman". The European Ombudsman "shall be empowered to receive complaints" from any citizen or Union resident "concerning instances of maladministration in the activities of the Union institutions, bodies or agencies". S/he

[38] Article 233 TFEU. [39] Article 15 (6) (d) TEU. [40] Article 284 (3) TFEU.
[41] Article 230 TFEU – second indent.
[42] The Council accepted this political obligation in 1973; see Jacobs, *The European Parliament* (supra n. 20), 284.
[43] Rule 116 Parliament Rules of Procedure. For acceptance of that obligation by the Commission, see Framework Agreement on relations between the European Parliament and the European Commission, [2010] OJ L304/47, para. 46.
[44] Rule 141 Parliament Rules of Procedure.
[45] Article 226 (1) TFEU. For a good overview of the history of these committees, see M. Shackleton, "The European Parliament's New Committees of Inquiry: Tiger or Paper Tiger?", 36 (1998) *Journal of Common Market Studies*, 115.
[46] According to Article 227 TFEU, any citizen or Union resident has the right to petition the European Parliament "on any matter which comes within the Union's field or activity and which affects him, her or it directly". See also Article 20 (2) (d) TFEU.

"shall conduct inquiries" on the basis of complaints addressed to her or him directly or through a member of the European Parliament.[47]

(iv) Elective powers

Modern constitutionalism distinguishes between "presidential" and "parliamentary" systems. Within the former, the executive officers are independent from Parliament, whereas in the latter the executive is elected by Parliament. The European constitutional order sits somewhere "in between". Its executive was for a long time selected without any parliamentary involvement. However, as regards the Commission, the European Parliament has increasingly come to be involved in the appointment process. Today, Article 17 TEU describes the involvement of the European Parliament in the appointment of the Commission as follows:

> 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 ... The Council, by common accord with the President-elect, shall adopt the list of the other persons whom it proposes for appointment as members of the Commission. They shall be selected, on the basis of the suggestions made by Member States ... The President, the High Representative of the Union for Foreign Affairs and Security Policy and the other members of the Commission shall be subject as a body to a vote of consent by the European Parliament. On the basis of this consent the Commission shall be appointed by the European Council, acting by a qualified majority.[48]

The appointment of the European executive thus requires a dual parliamentary consent. Parliament must – first – "elect" the President of the Commission. And it must – secondly – confirm the Commission as a collective body. (Apart from the President, the European Parliament has consequently not got the power to confirm each and every Commissioner.)[49] In light of this elective power given to Parliament, one

[47] Article 228 TFEU. [48] Article 17 (7) TEU.
[49] However, Parliament may request each nominated Commissioner to appear before Parliament and to "present" his views. This practice thus comes close to "confirmation hearings" (Judge and Earnshaw, *The European Parliament* (supra n. 35), 205).

is indeed justified in characterizing the Union's governmental system as a "semi-parliamentary democracy".[50]

Once appointed, the Commission continues to "be responsible to the European Parliament".[51] Where this consent is lost, Parliament may vote on a motion of censure. If this vote of mistrust is carried, the Commission must resign as a body. The motion of collective censure mirrors Parliament's appointment power, which is also focused on the Commission *as a collective body*. This blunt "nuclear option" has never been used.[52] However, unlike the appointment power, Parliament has been able to sharpen its tools of censure significantly by concluding a political agreement with the Commission. Accordingly, if Parliament expresses lack of confidence in an *individual* member of the Commission, the President of the Commission "shall either require the resignation of that Member" or, after "serious" consideration, explain the refusal to do so before Parliament.[53] While this is a much "smarter sanction", it has also never been used due to the demanding voting requirements in Parliament.

Parliament is also involved in the appointment of other European officers. This holds true for the Court of Auditors,[54] the European Central Bank,[55] and the European Ombudsman.[56] However, it is not involved in the appointment of judges to the Court of Justice of the European Union.

2. The Council

The 1957 Rome Treaty had charged the Council with the task "to ensure that the objectives set out in this Treaty are attained".[57] This task involved the exercise of legislative as well as executive functions. And while other institutions would also be involved in these functions, the Council was to

[50] P. Dann, "European Parliament and Executive Federalism: Approaching a Parliament in a Semi-Parliamentary Democracy", 9 (2003) *European Law Journal*, 549.

[51] Article 17 (8) TEU.

[52] Once, however, the European Parliament came close to using this power when in 1999 it decided to censure the Santer Commission. However, that Commission chose collectively to resign instead.

[53] Framework Agreement (supra n. 43), para. 5. However, this rule had been contested by the Council; see Council Statement concerning the Framework Agreement on relations between the European Parliament and the Commission ([2010] OJ C287/1).

[54] Article 286 (2) TFEU. [55] Article 283 (2) TFEU. [56] Article 228 (2) TFEU.

[57] Article 145 EEC.

be the central institution within the European Union. This has dramatically changed with the rise of two rival institutions. On one side, the ascendancy of the European Parliament has limited the Council's legislative role within the Union. On the other side, the rise of the *European* Council has restricted the Council's executive powers. (Importantly: the European Council is not identical with the Council. It constitutes a separate Union institution composed of the Heads of State or Government of the Member States.)[58] Today, the Council is best characterized as the "federal" chamber within the Union legislature. It is the organ in which national governments meet.

What is the composition of this federal chamber, and what is its internal structure? How will the Council decide – by unanimity or qualified majority? And what are the powers enjoyed by the Council? This second section addresses these questions in four subsections.

(a) Composition and configurations

Within the European Union, the Council is the institution of the Member States. Its intergovernmental character lies in its composition. The Treaty on European Union defines it as follows: "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."[59] Within the Council, each national minister thus represents the interests of "his" Member State. These interests may vary depending on the subject matter decided in the Council. And indeed, depending on the subject matter at issue, there are different Council configurations.[60] And for each configuration, a different national minister will be representing "his" State. While there is thus – legally – but one single Council, there are – politically – ten different Councils.

The existing Council configurations are as follows:

[58] Article 15 (2) TEU. For an analysis of the European Council, see Schütze, *European Constitutional Law* (supra n. 3), Chapter 3 – Section 3.

[59] Article 16 (2) TEU.

[60] Article 16 (6) TEU: "The Council shall meet in different configurations, the list of which shall be adopted in accordance with Article 236 of the Treaty on the Functioning of the European Union." While the European Council has not yet adopted the list, the Council was itself entitled to lay down the list (see Article 4 of the Protocol (No. 36) on Transitional Provisions). This happened with Council Decision 2009/878, [2009] OJ L315/46.

Table 3 Council configurations

	Council Configurations
1	General Affairs
2	Foreign Affairs
3	Economic and Financial Affairs
4	Justice and Home Affairs
5	Employment, Social Policy, Health and Consumer Affairs
6	Competitiveness (Internal Market, Industry and Research)
7	Transport, Telecommunications and Energy
8	Agriculture and Fisheries
9	Environment
10	Education, Youth and Culture

What is the mandate of each Council configuration? The Treaties only define the tasks of the first two Council configurations.[61] The "General Affairs Council" is charged to "ensure consistency in the work of the different Council configurations" below the General Affairs Council.[62] The "Foreign Affairs Council", on the other hand, is required to "elaborate the Union's external action on the basis of strategic guidelines laid down by the European Council and ensure that the Union's action is consistent".[63] The thematic scope and functional tasks of the remaining Council configurations are constitutionally open. They will generally deal with the subjects falling within their nominal ambit.

(b) Internal structure and organs

The Council has developed committees to assist it. From the very beginning, a committee composed of representatives of the Member States would support the Council.[64] That committee was made permanent under the 1957 Rome Treaty.[65] The resultant "Committee of *Permanent* Representatives" became

[61] Article 16 (6) TEU. [62] *Ibid.* [63] *Ibid.*

[64] The Committee beneath the ECSC Council was called "Commission de Coordination du Conseil des Ministres" (Cocor). Its members were not permanently residing in Brussels.

[65] The Rome Treaty contained, unlike the 1951 Paris Treaty, an express legal basis for a Council Committee in Article 151 EEC. While the provision did not expressly mention that these representatives would be permanent representatives, this had been the intention of the Member States (E. Noel, "The Committee of Permanent Representatives", 5 (1967) *Journal of Common Market Studies*, 219). The Merger Treaty formally established the Committee of Permanent Representatives (*ibid.*, Article 4).

known under its French acronym: "Coreper". The Permanent Representative is the ambassador of a Member State at the European Union. S/he is based in the national "Permanent Representation to the European Union". Coreper has two parts: Coreper II represents the meeting of the ambassadors, while Coreper I – against all intuition – represents the meetings of their deputies. Both parts correspond to particular Council configurations. Coreper II prepares the first four Council configurations – that is the more important political decisions; whereas Coreper I prepares the more technical remainder.

The function of Coreper is vaguely defined in the Treaties: "A Committee of Permanent Representatives of the Governments of the Member States shall be responsible for preparing the work of the Council."[66] The abstract definition has been – somewhat – specified in the following way: "All items on the agenda for a Council meeting shall be examined in advance by Coreper unless the latter decides otherwise. Coreper shall endeavour to reach agreement at its level to be submitted to the Council for adoption."[67] In order to achieve that task, Coreper has set up "working parties" below it.[68] (These working parties are composed of national civil servants operating on instructions from national ministries.) Where Coreper reaches agreement, the point will be classed as an "A item" that will be rubber-stamped by the Council. Where it fails to agree in advance, a "B item" will need to be expressly discussed by the ministers in the Council. (But importantly, even for "A items" Coreper is not formally entitled to take decisions itself. It merely "prepares" and facilitates formal decision-making in the Council.)

(c) Decision-making and voting

The Council will – physically – meet in Brussels to decide. The meetings are divided into two parts: one dealing with legislative activities, the other with non-legislative activities. When discussing legislation, the Council must meet in public.[69] The Commission will attend Council meetings.[70] However,

[66] Article 16 (7) TEU and Article 240 (1) TFEU. See also Article 19 of the Council Rules of Procedure.

[67] Article 19 (2) Council Rules of Procedure.

[68] *Ibid.*, Article 19 (3). Under this paragraph, the General Secretariat is under an obligation to produce a list of these preparatory bodies. For a recent version of this list, see General Secretariat of the Council of the European Union, 20 July 2010, POLGEN 115.

[69] Article 16 (8) TEU.

[70] According to Article 5(2) Council Rules of Procedure, the Council may however decide to deliberate without the Commission.

it is not a formal member of the Council and is thus not entitled to vote. The quorum within the Council is as low as it is theoretical: a majority of the members of the Council are required to enable the Council to vote.[71]

Decision-making in the Council will take place in two principal forms: *unanimity* voting and *majority* voting. Unanimity voting requires the consent of all national ministers and is provided in the Treaties for sensitive political questions.[72] Majority voting however represents the constitutional norm. The Treaties here distinguish between a simple and a qualified majority. "Where it is required to act by a simple majority, the Council shall act by a majority of its component members."[73] This form of majority vote is rare.[74] The constitutional default is indeed the qualified majority: "The Council shall act by a qualified majority except where the Treaties provide otherwise."[75]

What constitutes a qualified majority of Member States in the Council? This has been one of the most controversial constitutional questions in the European Union. From the very beginning, the Treaties had instituted a system of *weighted votes*. Member States would thus not be "sovereign equals" in the

Table 4 Weighted votes system within the Council

Weighted Votes – Member States: Votes	
Germany, France, Italy, United Kingdom	29
Spain, Poland	27
Romania	14
Netherlands	13
Belgium, Czech Republic, Greece, Hungary, Portugal	12
Austria, Bulgaria, Sweden	10
Denmark, Ireland, Lithuania, Slovakia, Finland	7
Cyprus, Estonia, Latvia, Luxembourg, Slovenia	4
Malta	3
Qualified Majority: 255/345	

[71] *Ibid.*, Article 11 (4).

[72] Important examples of sensitive political issues still requiring unanimity are foreign affairs (see Article 31 TEU), and "the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation" (see Article 113 TFEU).

[73] Article 238 (1) TFEU.

[74] For example: Article 150 TFEU. Most matters that allow for simple majority are (internal) procedural or institutional matters.

[75] Article 16 (3) TEU.

Council, but would possess a number of votes that correlated with the size of their population. Table 4 shows the system of weighted votes that applies today.

The weighting of votes is to some extent "degressively proportional". The voting ratio between the biggest and the smallest State is ten to one – a ratio that is roughly similar to the degressively proportional system for the European Parliament. However, the voting system also represents a system of symbolic compromises. For example, the four biggest Member States are all given the same number of votes – despite Germany's significantly greater demographic magnitude.[76]

In the past, this system of weighted votes has been attacked from two sides: from the smaller Member States as well as the bigger Member States. The smaller Member States have claimed that it favours the bigger Member States and have insisted that the 255 votes must be cast by a majority of the States. The bigger Member States, by contrast, have complained that the weighting unduly favours smaller Member States and have insisted on the political safeguard that the 255 votes cast in the Council correspond to 62 per cent of the total population of the Union. With these two qualifications taken into account, decision-making in the Council demands a *triple* majority: a *majority* of the weighted votes must be cast by a *majority* of the Member States representing a *majority* of the Union population.

This triple majority system will govern decision-making in the Union until 2014. From 1 November 2014 a completely new system of voting is to apply in the Council. This revolutionary change is set out in Article 16 (4) TEU:

> 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. The other arrangements governing the qualified majority are laid down in Article 238(2) of the Treaty on the Functioning of the European Union.[77]

[76] According to the Union's official census figures (see Council Decision 2010/795, [2010] OJ L338/47), the German population exceeds that of France – the second most populous State of the Union – by about 17 million people.

[77] The Treaty recognizes an express exception to this in Article 238 (2) TFEU which states: "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,

This new Lisbon voting system will abolish the system of weighted votes in favour of a system that grants each State a single vote. In a Union of twenty-seven States, 55 per cent of the Council members correspond to fifteen States. But this majority is again qualified from two sides. The bigger Member States have insisted on a relatively high population majority behind the State majority. The population threshold of 65 per cent of the Union population would mean that any three of the four biggest States of the Union could block a Council decision. The smaller Member States have thus insisted on a qualification of the qualification. A qualified majority will be "deemed attained", where fewer than four States try to block a Council decision.

The new Lisbon system of qualified majority voting is designed to replace the triple majority with a simpler double majority.[78] And yet the Member States – always fearful of abrupt changes – have agreed on two constitutional compromises that cushion the new system of qualified majority voting. First, the Member States have revived the "Ioannina Compromise".[79] The latter was envisaged in a "Declaration on Article 16 (4)",[80] and is now codified in a Council Decision.[81] According to the Ioannina Compromise, the Council is under an obligation – despite the formal existence of the double majority in Article 16 (4) TEU – to continue deliberations, where a fourth of the States or States representing a fifth of the Union population oppose a decision.[82] The Council is here under the procedural duty to "do all in its power" to reach – within a reasonable time – "a satisfactory solution" to address the concerns of the blocking Member States.[83]

This soft mechanism is complemented by a hard mechanism to limit qualified majority voting in the Council. For the Treaties also recognize – regionally

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."

78 However, the "Protocol on transitional provisions" grants any Member State the right to choose between the "old" and the "new" Union system of voting in the period between 1 November 2014 and 31 March 2017 (*ibid.*, Article 3 (2)). See also "Declaration (No. 7) on Article 16(4) of the Treaty on European Union and Article 238(2) of the Treaty on the Functioning of the European Union", in particular (draft) Articles 1–3.

79 The compromise was negotiated by the Member States' foreign ministers in Ioannina (Greece) – from where it takes its name. The compromise was designed to smooth the transition from the Union of twelve to a Union of fifteen Member States.

80 Declaration (No. 7) on Article 16(4) (supra n. 78) contains a draft Council Decision.

81 The Council formally adopted the decision in 2007 (see Council Decision 2009/857, [2009] OJ L314/73).

82 *Ibid.*, Article 4.

83 *Ibid.*, Article 5.

limited – versions of the "Luxembourg Compromise".[84] A patent illustration of this can be found in the context of the Union's Common Foreign and Security Policy which contains the following provision: "If a member of the Council declares that, for vital and stated reasons of national policy, it intends to oppose the adoption of a decision to be taken by qualified majority, a vote shall not be taken."[85] A Member State can here unilaterally block a Union decision on what it deems to be its vital interest.

(d) Functions and powers

The Treaties summarize the functions and powers of the Council as follows: "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."[86]

Let us look at each of these four functions. First, the Council has traditionally been at the core of the Union's legislative function. Prior to the rise of the European Parliament, the Council indeed was the Union "legislator". The Council is today only a co-legislator, that is: a branch of the bicameral Union legislature.[87] And like Parliament, it must exercise its legislative powers in public.[88] Second, Council and Parliament also share in the exercise of the budgetary function. Third, what about the policy-making function? In this respect, the *European* Council has overtaken the Council. The former now decides on the general policy choices, and the role of the Council has consequently been limited to specific policy choices that implement the general ones. Yet, these choices remain significant and the Council Presidency will set "its" agenda. Fourth, the Council has significant coordinating functions within the European Union. Thus, in the context of general economic policy, the Member States are required to "regard their economic policies as a matter of common concern and shall coordinate them within the Council".[89] The idea of an "open method of coordination" experienced a renaissance in the last decade.[90]

84 On the "Luxembourg Compromise", see Schütze, *European Constitutional Law* (supra n. 3), Chapter 1 – Section 2(b).

85 Article 31 (2) TEU.

86 Article 16 (1) TEU.

87 On this point, see Chapter 2 – Section 1(a) below.

88 Article 16 (8) TEU.

89 Article 121 (1) TFEU.

90 On the "open method of coordination", see G. de Búrca, "The Constitutional Challenge of New Governance in the European Union", 28 (2003) *European Law Review*, 814.

3. The Commission

The technocratic character of the early European Union expressed itself in the name of a third institution: the Commission. The Commission constituted the centre of the European Coal and Steel Community, where it was "to ensure that the objectives set out in [that] Treaty [were] attained".[91] In the European Union, the role of the Commission was, however, gradually "marginalized" by the Parliament and the Council. With these two institutions constituting the Union legislature, the Commission is today firmly located in the executive branch. In guiding the European Union, it – partly – acts like the Union's government. This third section analyses the composition of the Commission first, before exploring the relationship between the President and "his" college. A final subsection looks at the functions and powers of the Commission.

(a) Composition and election

The Commission consists of one national of each Member State.[92] Its members are chosen "on the ground of their general competence and European commitment from persons whose independence is beyond doubt".[93] The Commission's term of office is five years.[94] During this term, it must be "completely independent". Its members "shall neither seek nor take instructions from any Government or other institution, body, office or entity".[95] The Member States are under a duty to respect

[91] Article 8 ECSC.
[92] Article 17 (4) TEU. The Lisbon Treaty textually limits this principle in a temporal sense: it will theoretically only apply from the date of entry into force of the Treaty of Lisbon to 31 October 2014. Thereafter, Article 17 (5) TEU states: "As from 1 November 2014, the Commission shall consist of a number of members, including its President and the High Representative of the Union for Foreign Affairs and Security Policy, corresponding to two thirds of the number of Member States, unless the European Council, acting unanimously, decides to alter this number." This provision had been a centrepiece of the Lisbon Treaty, as it was designed to increase the effectiveness of the Commission by decreasing its membership. However, after the failure of the first Irish ratification referendum, the European Council decided to abandon this constitutional reform in order to please the Irish electorate, see Presidency Conclusions of 11–12 December 2008 (Document 17271/1/08 Rev 1).
[93] Article 17 (3) TEU. [94] *Ibid.* [95] *Ibid.*

this independence.[96] Breach of the duty of independence may lead to a Commissioner being "compulsorily retired".[97]

But how is the Commission selected? Originally, the Commission was "appointed".[98] The appointment procedure has subsequently given way to an election procedure. This election procedure has two stages. In a first stage, the President of the Commission will be elected. The President will be nominated by the European Council "[t]aking into account the elections to the European Parliament", that is: in accordance with the latter's political majority.[99] The nominated candidate must then be "elected" by the European Parliament. If not confirmed by Parliament, a new candidate needs to be found by the European Council.[100] With the election of the Commission President begins the second stage of the selection process. In accord with the President, the Council will adopt a list of candidate Commissioners on the basis of suggestions made by the Member States.[101] With the list being agreed, the proposed Commission is subjected "as a body to a vote of consent by the European Parliament", and on the basis of this election, the Commission shall be appointed by the European Council.[102] This complex and compound selection process constitutes a mixture of "international" and "national" elements. The Commission's democratic legitimacy thus derives partly from the Member States, and partly from the European Parliament.

(b) The President and "his" College

The Commission President helps in the selection of "his" institution. This position as the "Chief" Commissioner *above* "his" college is clearly established by the Treaties.[103] "The Members of the Commission shall carry out the duties devolved upon them by the President *under his*

[96] Article 245 TFEU – first indent.
[97] Article 245 TFEU – second indent. See also Article 247 TFEU: "If any Member of the Commission no longer fulfils the conditions required for the performance of his duties or if he has been guilty of serious misconduct, the Court of Justice may, on application by the Council acting by a simple majority or the Commission, compulsorily retire him." On the replacement procedure, see Article 246 TFEU.
[98] Articles 9 and 10 ECSC.
[99] The term of the Commission runs in parallel with that of the Parliament.
[100] Article 17 (7) TEU – first indent. [101] Article 17 (7) TEU – second indent.
[102] Article 17 (7) TFEU – third indent.
[103] N. Nugent, *The European Commission* (Palgrave, 2000), 68: "The Commission President used to be thought of as *primus inter pares* in the College. Now, however, he is very much *primus*."

authority."[104] In light of this political authority, the Commission is typically named after its President.[105]

The powers of the President are identified in Article 17 (6) TEU, which reads:

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.

The three powers of the President mentioned above are formidable. First, s/he can lay down the political direction of the Commission in the form of strategic guidelines. The Presidential guidelines will subsequently be translated into the Commission's Annual Work Programme. Second, the President is entitled to decide on the internal organization of the Commission.[106] In the words of the Treaties: "[T]he responsibilities incumbent upon the Commission shall be structured and allocated among its members by its President." The President is authorized to "reshuffle the allocation of those responsibilities during the Commission's term of office",[107] and may even ask a Commissioner to resign. Third, the President can appoint Vice-Presidents from "within" the Commission. Finally, there is a fourth power not expressly mentioned in Article 17 (6) TEU: "The President shall represent the Commission."[108]

[104] Article 248 TFEU (emphasis added).
[105] For example: the current Commission is called the "Barroso Commission".
[106] Due to its dual constitutional role, some special rules apply to the High Representative of the Union. Not only do the Treaties determine the latter's role within the Commission, the President will not be able *unilaterally* to ask for her resignation. (See Article 18 (4) TEU: "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.") On the role of the High Representative, see Schütze, *European Constitutional Law* (supra n. 3), Chapter 3 – Section 4 (b)(iii).
[107] Article 248 TFEU. [108] Article 3 (5) Commission Rules of Procedure.

Table 5 Commission College: President and portfolios

President	
Agriculture and Rural Development	Health and Consumer Policy
Climate Action	Home Affairs
Competition	Industry and Entrepreneurship
Development	Inter-Institutional Relations and Administration
Digital Agenda	Internal Market and Services
Economic and Monetary Affairs	International Cooperation, Humanitarian Aid and Crisis Response
Education, Culture, Multilingualism and Youth	Justice, Fundamental Rights and Citizenship
Employment, Social Affairs and Inclusion	Maritime Affairs and Fisheries
Energy	Regional Policy
Enlargement and European Neighbourhood Policy	Research, Innovation and Science
Environment	Taxation and Customs Union, Audit and Anti-Fraud
Financial Programming and Budget	Trade
Foreign Affairs & Security Policy	Transport

What are the "ministerial" responsibilities into which the present Commission is structured? Due to the requirement of one Commissioner per Member State, the "Barroso Commission" had to divide the tasks of the European Union into twenty-six (!) "portfolios". Reflecting the priorities of the current President, they are as setout in Table 5.

Each Commissioner is thereby responsible for "his" portfolio, and will be assisted in this by his own cabinet.[109]

(c) Functions and powers

What are the functions and corresponding powers of the Commission in the governmental structure of the European Union? The Treaties provide a concise constitutional overview of its tasks in Article 17 TEU:

[109] Article 19 (1) Commission Rules of Procedure: "Members of the Commission shall have their own cabinet to assist them in their work and in preparing Commission decisions. The rules governing the composition and operation of the cabinets shall be laid down by the President."

The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. 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. It shall initiate the Union's annual and multiannual programming with a view to achieving interinstitutional agreements.[110]

The provision distinguishes six different functions. The first three functions constitute the Commission's core functions. First, the Commission is tasked to "*promote* the general interests of the Union" through initiatives. It is thus to act as a "motor" of European integration. In order to fulfil this – governmental – function, the Commission is given the (almost) exclusive right to *formally* propose legislative bills.[111] "Union acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise."[112] The Commission's prerogative to propose legislation is a fundamental characteristic of the European constitutional order. The right of initiative extends to (multi)annual programming of the Union,[113] and embraces the power to make proposals for law reform.[114]

The second function of the Commission is to "*ensure* the application" of the Treaties. This function covers a number of powers – legislative and executive in nature. The Commission may thus be entitled to apply the Treaties by adopting secondary legislation. This secondary legislation may

[110] Article 17 (1) TEU.
[111] We saw above that the Parliament or the Council can informally suggest legislative bills to the Commission. Indeed, the great majority of Commission bills originate outside the Commission (see Nugent, *The European Commission* (supra n. 103), 236).
[112] Article 17 (2) TEU. For an exception, see Article 76 TFEU on legislative measures in the field of police and judicial cooperation in criminal matters.
[113] Under Article 314 (2) TFEU, the Commission is entitled to propose the draft budget: "The Commission shall submit a proposal containing the draft budget to the European Parliament and to the Council not later than 1 September of the year preceding that in which the budget is to be implemented."
[114] This is normally done through "White Papers" or "Green Papers". For a famous "White Paper", see EU Commission, Completing the Internal Market: White Paper from the Commission to the European Council (COM(85) 310). For a famous "Green Paper", see EU Commission, Damages Actions for Breach of the EC Antitrust Rules (COM(2005) 672).

be adopted directly under the Treaties;[115] or, under powers delegated to the Commission from the Union legislature.[116] In some areas the Commission may also be granted the executive power to apply the Treaties itself. The direct enforcement of European law can best be seen in the context of European competition law,[117] where the Commission enjoys significant powers to fine – private or public – wrongdoers. These administrative penalties sanction the non-application of European law.

The third function of the Commission is to act as guardian of the Union. It shall thus "*oversee* the application" of European law. The Treaties indeed grant the Commission significant powers to act as "police" and "prosecutor" of the Union. The policing of European law involves the power to monitor and to investigate infringements of European law. The powers are – again – best defined in the context of European competition law.[118] Where an infringement of European law has been identified, the Commission may bring the matter before the Court of Justice. The Treaties thus give the Commission the power to bring infringement proceedings against Member States,[119] and other Union institutions.[120]

4. The Court of Justice of the European Union

"Tucked away in the fairyland Duchy of Luxembourg",[121] and housed in its "palace", lies the Court of Justice of the European Union. The Court constitutes the judicial branch of the European Union. It is composed of various

[115] See Article 106 (3) TFEU: "The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States."
[116] On delegated legislation, see Schütze, *European Constitutional Law* (supra n. 3), Chapter 7 – Section 2.
[117] See Article 105 (1) TFEU: "[T]he Commission shall ensure the application of the principles laid down in Articles 101 and 102. On application by a Member State or on its own initiative, and in cooperation with the competent authorities in the Member States, which shall give it their assistance, the Commission shall investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end."
[118] See Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty ([2003] OJ L1/1), Chapter V: "Powers of Investigation".
[119] Article 258 TFEU. For an extensive discussion of this, see Chapter 8 – Section 1 below.
[120] On this point, see Chapter 8 – Sections 2–4 below.
[121] E. Stein, "Lawyers, Judges, and the Making of a Transnational Constitution", 75 (1981) *American Journal of International Law*, 1.

courts that are linguistically roofed under the name "Court of Justice of the European Union" and includes the "Court of Justice", the "General Court" and "specialized courts".[122] The Court's task is to "ensure that in the interpretation and application of the Treaties the law is observed".[123] This fourth section starts by analysing the Union's judicial architecture, before surveying the judicial powers of the Court of Justice of the European Union.

(a) Judicial architecture: the European court system

When the European Union was born, its judicial branch consisted of a single court: the "Court of Justice". The (then) Court was a "one stop shop". All judicial affairs of the Union would need to pass through its corridors.

With its workload having risen to dizzying heights, the Court pressed the Member States to provide for a judicial "assistant". And the Member States agreed to create a second court in the Single European Act which granted the Council the power to "attach to the Court of Justice a court with jurisdiction to hear and determine at first instance", that was "subject to a right of appeal to the Court of Justice".[124] Thanks to this definition, the newly created court was baptized the "Court of First Instance".[125] With the Lisbon Treaty, the Court has now been renamed the "General Court". The reason for this change of name lies in the fact that the Court is no longer confined to first instance cases. Instead, "[t]he General Court shall have jurisdiction to hear and determine actions or proceedings brought against decisions of the specialized courts".[126] What are the "specialized courts" in the European Union? The Union has currently only one specialized court: the "Civil Service Tribunal".[127] And while the Commission had long proposed a European "Patent Court" as a second specialized court,[128] it has not yet been established.

[122] Article 19 (1) TEU. [123] *Ibid.* [124] Article 11 (1) Single European Act.

[125] The Court was set up by Council Decision 88/591 establishing a Court of First Instance of the European Communities ([1988] OJ L319/1).

[126] Article 256 (2) TFEU.

[127] Council Decision 2004/752 establishing the European Union Civil Service Tribunal ([2004] OJ L333/7). See also N. Lavranos, "The New Specialised Courts within the European Judicial System", 30 (2005) *European Law Review*, 261.

[128] Commission Proposal for a Council Decision establishing the Community Patent Court and concerning appeals before the Court of First Instance (COM(2003) 828 final). For a discussion of this proposal, see A. Arnull, *The European Court of Justice* (Oxford University Press, 2006), 151–2.

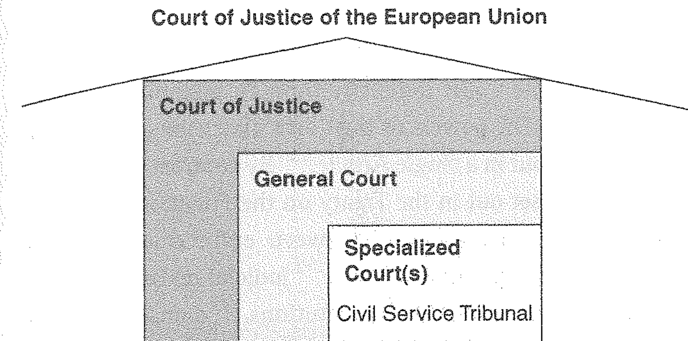

Figure 1.1 Structure of the Court of Justice of the European Union

The Court of Justice of the European Union thus represents a three-tiered system of courts.[129] The architecture of the Union's judicial branch can be seen in Figure 1.1.

(b) Jurisdiction and judicial powers

The traditional role of courts in modern societies is to act as independent arbitrators between competing interests. Their jurisdiction may be compulsory, or not. The jurisdiction of the Court of Justice of the European Union is compulsory "within the limits of the powers conferred on it in the Treaties".[130] While compulsory, the Court's jurisdiction is thus limited. Based on the principle of conferral, the Court has no "inherent" jurisdiction.

The functions and powers of the Court are classified in 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.

[129] In terms of the European Union's judicial reports, there are thus three different prefixes before a case. Cases before the Court of Justice are C-Cases, cases before the General Court are T-Cases (as the French name for the General Court is "Tribunal"), and cases before the Civil Service Tribunal are F-Cases (stemming from the French "fonction publique" for civil service).

[130] Article 13 (2) TEU.

The provision classifies the judicial tasks by distinguishing between direct and indirect actions. The former are brought directly before the European Court. The latter arrive at the Court indirectly through preliminary references from national courts. The powers of the Court under the preliminary reference procedure are set out in a single Article.[131] By contrast, there exist a number of direct actions set out in the Treaty on the Functioning of the European Union. The TFEU distinguishes between enforcement actions brought by the Commission or a Member State,[132] judicial review proceedings for actions and inactions of the Union institutions,[133] damages actions for the (non-)contractual liability of the Union,[134] as well as a few minor jurisdictional heads.[135]

In light of its broad jurisdiction, the Court of Justice of the European Union can be characterized as a "constitutional", "administrative", and an "international" court as well as an "industrial tribunal". Its jurisdiction includes public and private matters. And while the Court claims to act like a "continental" civil law court, it has been fundamental in shaping the structure and powers of the European Union as well as the nature of European law. The (activist) jurisprudence of the Court will thus be regularly encountered in the subsequent chapters of this book.

[131] Article 267 TFEU. The provision is analysed in Chapter 7 – Sections 1 and 2 below.
[132] Articles 258–60 TFEU. The provisions are analysed in Chapter 8 – Section 1 below.
[133] Articles 263–6 TFEU. The provisions are analysed in Chapter 8 – Sections 2 and 3 below.
[134] Articles 268 and 340 TFEU. The provisions are analysed in Chapter 8 – Section 4 below.
[135] Articles 269–74 TFEU.

Union legislation 2

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Introduction

British constitutionalism defines (primary) legislation as an act adopted by the Queen-in-Parliament. Behind this "compound" legislator stands a legislative procedure. This legal procedure links the House of Commons, the House of Lords and the monarchy. European constitutionalism also adopts a procedural definition of legislative power. However, unlike British constitutional law, the Treaties distinguish two types of legislative procedures: an ordinary legislative procedure and special legislative procedures. Article 289 TFEU states:

1. 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. This procedure is defined in Article 294.
2. In the specific cases provided for by the Treaties, the adoption of a regulation, directive or decision by the European Parliament with the participation of the