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Primer for U.S. Lawyers on European Union Government and Law

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PRIMER FOR U.S. LAWYERS
on
EUROPEAN UNION GOVERNMENT AND LAW

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The European Union (EU) is simply a marvel. Against all odds, it has united a variety of nations and peoples, many of which have warred with each other throughout recorded history.² Below is the briefest of surveys of that marvel and it no doubt has all the defects of such an endeavor. Moreover, the EU bills itself as a “work in progress” and it is best understood as such. Hence, even the basics summarized here are subject to continuous and sometimes rapid change.

I. Perspective and History

Although the basic documents promise an “ever closer union,” EU development confronts an overarching tension between two philosophies. Many insist that it is a union of nations and hence its organization should be “intergovernmental.” Others envision it as ultimately a union of the peoples of Europe and its organization should be state-like or “supranational.” This tension runs throughout its development and forms the background for the governmental and legal principles surveyed here.

1. Basic documents

The basic or constitutional documents of the EU have been created by the various treaties signed by European nations admitted into the Union (“Member States”). These operative treaties have been consolidated into one unified document.³ This document combines two treaties: The Treaty on the European Union (TEU) , (the “Maastricht Treaty”) and The Treaty Establishing the European Community (TEC) . Unless otherwise stated, the treaty articles cited below refer to the TEC.

The European Council meeting in Laeken Belgium announced in December 2001 the intention to convene a “European Convention on the Future of Europe.” The result of that convention has been a constitutional “treaty,” which is generally referred to as the

² The preamble to the initial treaty, establishing the European Coal and Steel Community, referred to “age-old rivalries” and divisions by “bloody conflicts”.

³ Basic treaties: <http://eur-lex.europa.eu/en/treaties/index.htm> select “European Union - Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community”. (Both the “Treaty on European Union” (TEU) & “Treaty Establishing the European Community” (TEC).)

European Constitution.⁴ Although a number of Member States approved the Constitution, its referendum defeats in France and the Netherlands suspended adoption efforts. In 2007 some of the provisions of the proposed constitution were adopted but the remnants of the constitutional controversy might put ratification in doubt.

The treaty provisions, of course, have been implemented by a growing body of legislation. The “Official Journal of the European Union” provides the official publication of EU legislation and other measures.⁵ The treaties and legislation along with judicial embellishments, in the aggregate, are commonly referred to as the *acquis communautaire*.

Quick access to the treaties, legislation, case law, and other documents may be found at <http://eur-lex.europa.eu/index.htm>. Other research tools are listed at the end of this primer.

2. Evolution of the EU

After the Second World War, visionary Europeans recognized that integration was the key to a sustainable peace in Europe. While they were unable to bring about political union initially, they were able, with the support and encouragement of the US, to begin economic integration.⁶ Originally, there were three communities. The first was the European Coal and Steel Community (ECSC) established in 1951, creating the structure upon which the current EU is built. Treaties signed in Rome created the European Economic Community (EEC) and the European Atomic Energy Community (Euratom) in

⁴ <http://eur-lex.europa.eu/en/treaties/index.htm> select “Treaty Establishing a Constitution for Europe”.

⁵ <http://eur-lex.europa.eu/en/index.htm> select “Official Journal”.

⁶ As Secretary of State Marshall said in his famous speech at Harvard University in June 1947:

“It would be neither fitting nor efficacious for [the US] to undertake to draw up unilaterally a program designed to place Europe on its feet economically. This is the business of the Europeans.... The role of this country should consist of friendly aid in the drafting ... and of later support of such a program so far as it may be practical for us to do so.”

http://www.georgecmarshall.org/lt/speeches/marshall_plan.cfm.

See generally, DESMOND DINAN, EUROPE RECAST: A HISTORY OF THE EUROPEAN UNION, 26 (2004) (“What the Americans really wanted [in the 1950s] was what eventually happened in Europe . . . : a single market involving the free movement of goods, services, and capital.”).

1957. These communities had six original members: Germany, Belgium, France, Italy, Luxembourg and the Netherlands. The institutions of communities were officially merged in 1965 through what is commonly known as the Merger Treaty. The Treaty of European Union (TEU) created the “European Union” in 1992.⁷

As of 2006, the EU governed a population of about 494 million people and produces a GDP of \$14.5 trillion. Over the years it has enlarged through the “accession” of new European states. Ten new states were added in 2004 and two new members in 2007 to bring the current member list to 27: Germany, Belgium, France, Italy, Luxembourg, the Netherlands, United Kingdom, Ireland, Denmark, Greece, Spain, Portugal, Austria, Finland, Sweden, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic, Slovenia, Bulgaria and Romania. In the near future, “candidate countries,” currently Turkey, Croatia and Macedonia, may join their ranks. In addition, the EU has instituted a “neighbors” program to improve relations with several countries, not necessarily contiguous to its current boundaries, through liberalization of trade. The Member States are also members of the **Council of Europe** (discussed below), joining 46 countries whose ministers come together to promote democracy and human rights in Europe and around the world.

The TEU established a “three pillar” structure, which pushes the EU beyond commercial confederation and toward a true supranational government. The existing, trade oriented “community” forms the first pillar. The second pillar authorizes the establishment of “common positions” on foreign affairs and security policy. The third pillar covers criminal justice and home affairs. The powers of the EU institutions vary according to which pillar an action falls under. The discussion below focuses on actions under the first pillar, the basic European Community. Indeed, at present “EU law” is something of a misnomer and the law discussed is actually the law of the Community.

On December 13, 2007, the 27 leaders of the current Member States signed a treaty, “the Treaty of Lisbon,” which will modify the institutions, process and, perhaps, relationship between the EU the governments of the Member States.⁸ It incorporates the most compelling and least controversial aspects of the currently moribund “Constitutional

⁷ PAUL CRAIG & GRAINNE DE BURCA, EU LAW: TEXT, CASES, AND MATERIALS, 9-10 (3d ed. 2003) (Suggesting that this treaty accomplished political union).

⁸ The Treaty is to be called the “Treaty on the Functioning of the European Union. http://europa.eu/lisbon_treaty/index_en.htm A consolidated version of the Treaty will be created.

Treaty.”⁹ It will eliminate the “pillars” and thus end the distinction between the “Community” and the “Union.” Ratification, described below under “Primary legislation - Treaties,” may involve a long, drawn out process but it is hoped that the new treaty will be ratified by 2009. The treaty will make few significant substantive changes other than adding a section on energy and various cross-border functions. Perhaps most significant, the treaty formally cross-references the “Charter of Fundamental Rights,” giving it a formal status.

The Lisbon Treaty will make subtle but significant changes in EU institutions and processes. These changes are intended to make EU decisionmaking quicker and more transparent with better democratic controls. Some of these changes are:

- strengthening the role of the directly elected European parliament and the national parliaments;
- expanding the use of “qualified majority voting;”
- establishing a more flexible computation method for such voting, discussed below “Secondary legislation - statutory-type measures,” to take effect in 2014;
- streamlining the Commission to accommodate enlargement whereby only two-thirds of the Member States will have representation on a Commission but each Member State will have representation on two out of three Commissions.

There also will be a few key structural changes. The new treaty will make permanent the President of the European Council, discussed below, expressly to foster greater continuity and stability but actually to diminish the status of the Commission president. The treaty will establish the “High Representative of the Union for Foreign Affairs and Security Policy” served by a bureaucracy called “the European External Action Service.” This office is intended to strengthen coherence in external policy while not diminishing the foreign affairs role of the individual Member States.

3. Institutions

In understanding EU institutions, US lawyers must recognize that, whereas the US system is largely hierarchical, the EU system is best envisioned as a network. Walter Van

⁹ A constitutional “treaty,” which is generally referred to as the European Constitution, was drafted by a special constitutional convention and presented to the Member States for ratification. <http://eur-lex.europa.eu/en/treaties/index.htm> select “Treaty Establishing a Constitution for Europe”. Although a number of Member States approved the Constitution, its referendum defeats in France and the Netherlands suspended adoption efforts.

Gerven, long time EU scholar, observed: “While public authority was traditionally organized pyramidally along hierarchical lines, it is now *also* organized through numerous networks of public and private nuclei of power, making power move both vertically and horizontally.”¹⁰ Member States governments are directly involved in policymaking through the various EU institutions and intergovernmental relations. Some national parliaments have formed special scrutiny committees to keep close tabs on their representatives. In contrast to the US, implementation of EU law relies in large part on Member State legislative and executive bodies as well as their courts and hence EU institutions interact directly with Member State governments and governmental bodies. Hierarchies within these EU institutions themselves are somewhat ambiguous and officials may interact in a nearly infinite variety of ways. Outside organizations, such as the civil society, influence EU operations at the central and state levels. In sum, webs of policy influence move down from the central government, up from the Member States, horizontally among the states, across special interests and within the central and state institutions. The EU system of networks has spawned innovations in the organizational concepts and strategies.

The EU has four key institutions: the European Council, the Council of the European Union (Council), European Commission (Commission), European Parliament (Parliament), and the European Court of Justice (ECJ). However, there are several related or lesser institutions. Several officials have their own blog available through <http://blogs.ec.europa.eu/>.

The **European Council**, distinct from the Council of the European Union, is made up of the ministers of the Member States, the Heads of State or Government of the Member States and the President of the Commission, assisted by the ministers for Foreign Affairs and a Member of the Commission. TEU Article 4 provides: “The European Council shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof.”

In a sense, the EU has no individual who can be identified as the head of state. The Council **presidency** rotates among the states, each holding that office for 6 months according to a schedule. Therefore, the president of its executive body, the Commission (discussed below), tends to be the individual identified with the EU. The Lisbon treaty, if ratified, will give the Council a permanent the President to foster greater continuity and stability. So there will be a president of the European Council , a president of the

¹⁰ WALTER VAN GERVEN, THE EUROPEAN UNION: A POLICY OF STATES AND PEOPLES, 159 (2005) (emphasis added) (also noting recognition of this fact by the Commission n.7).

Commission, and the rotating presidency. The new Lisbon treaty, if ratified, will establish the **High Representative of the Union for Foreign Affairs and Security Policy** served by a bureaucracy called “the European External Action Service.” The US lament, “who you going to call,” seems even more poignant.

The “Council of the European Union,” **Council**, exercises the final legislative authority and hence to some extent is the top of the EU hierarchy. It usually meets in Brussels (in April, June and October it meets in Luxembourg). Each state (currently 27) is represented on the Council by a minister depending on the subject matter under consideration, who is authorized to commit their government. In fact, the Council, although nominally a single entity, assembles in one of nine configurations: General Affairs & External Relations Council (GAERC), Economic & Financial Affairs (Ecofin), Competitive Council, Justice & Home Affairs (JHA), Employment, Social Policy, Health & Consumer Affairs Council (EPSCA), Transportation, Telecommunication & Energy (TTE), Agriculture & Fisheries Council, Environmental Council, and Education, Youth, Culture Council.

While each state is represented, the vote is weighed in rough approximation of the state’s population (voting described under “legislation” below). Most of the votes are by “qualified majority,” a carefully worked out assignment of votes to avoid control by certain blocks, for example the small members or the large members.

The Council has its own General Secretariat staffed by permanent officials. It is similar to, but much smaller than, the Commission staff. It is divided into Directorates General and head by a Secretary General.

All the work of this Council is prepared or co-ordinated by the Committee of Permanent Representatives, known by its French acronym, “**COREPER.**” COREPER is made up senior national officials and to some extent represents the national governments. Article 207 provides “A committee consisting of the Permanent Representatives of the Member States shall be responsible for preparing the work of the Council and for carrying out the tasks assigned to it by the Council.” It is supported by a large number of working groups, at present between 150 to 250, made up of experts. It also receives views from other committees. COREPER plays an important part in legislation in part because it will consider and digest draft legislative proposals from the Commission and in part because it helps to set the Council’s agenda. It exercises largely invisible power well beyond its formal status. Indeed, it is commonly believed that 90% of Council matters are decided by COREPER before the Council meetings and are waived through by the Council.

The **Commission** is the hub of the EU, having significant equivalent powers along with most of the administrative responsibilities. The “College of Commissioners” is

directly involved in legislative and regulatory policymaking. As discussed below, the Commission initiates legislation and plays an important role throughout the legislative processes. The Commission provides the bureaucracy which implements EU policies. Most of its offices are in Brussels, making that city the de facto capital of the EU. Considering that it constitutes the EU main bureaucracy, it is surprising small, staffed by some 25, 000 permanent employees, many of whom are translators and interpreters. This lean bureaucracy is possible because much of the administrative work devolves to the Member States.

Forming the Commission is equivalent to forming a government in a parliamentary system. Upon the expiration of a Commission, a new president is selected and asked to select members of the “College of Commissioners.” Presently each Member State has at least one representation.¹¹ As would be expected, this selection process is extremely sensitive, requiring mollifying the Member States and yet also finding able commissioners. Member States often have particular interests and seek appointment of the commissioner engaged with that interest. Certain portfolios have higher status which also leads to competition among Member States. Still, the commissioners are duty bound to represent the interests of the EU and not their state. Finally, the entire Commission—President and other members— must be approved “as a body” by the Parliament. Parliament can remove a Commission as a body only and may not remove individual commissioners. The commissioners now communicate directly with the public through <http://www.youtube.com/eutube>.

The Secretariat-General - the elite Commission staff under the direction of the Commission President - has the central staff role. The Commission is divided into departments known as Directorates General. Each Directorate General is responsible for a specific policy area and is headed by a Director General who is responsible to the Commissioner assigned that policy area. There are also a number of specialized services, most prominent being “Legal Service,” which gives legal advice to all Directorates General and represents the Commission in legal proceedings. Each Commissioner is assisted by a “cabinet,” a group of officials personally appointed by and directly responsible to the Commissioner. The head of the cabinet (Chef de Cabinet) is a special advisor to the Commissioner. The heads meet regularly to coordinate activities and prepare for the Commission meetings. If the heads reach unanimous agreement on a question, their decision is normally adopted by the Commission without debate.

¹¹ The Lisbon Treaty, if ratified, would streamline the Commission to accommodate enlargement whereby only two-thirds of the Member States will have representation on a Commission but each Member State will have representation on two out of three Commissions.

The Commission itself makes decisions by a simple majority. It often makes decisions through a written procedure whereby draft decisions are circulated and adopted if there are no objections. Where it exercises powers delegated by the Council, it usually must submit draft measures to a special committee under a process called “comitology,” discussed below.

International trade agreements are negotiated by the Commission upon prior Council authorization and upon consultation with a special advisory committee appointed by the Council, known as “the Article 133 Committee.” Under Article 300, the Council concludes the agreements by qualified majority. That article excepts trade agreements from the general requirement that Council consult with Parliament before concluding an international agreement.

The **Parliament** is the only directly elected institution but has the least power of the three legislative institutions. It sits in both Brussels and Strasbourg. A consistent criticism of EU government is that it has a “democracy deficit.” To address that problem, Parliament over the years has been given increasing power. The complex legislative process, “co-decision,” meant to do so is described below.

Elections of the “Members of the European Parliament” (MEP) are governed by national election rules although an effort has been made to create uniform rules. The enlarged parliament has 732 MEP allocated according to national affiliation and the numbers of representatives must ensure appropriate representation of a Member State’s population. Article 191 expressly observes that “political parties at the European level are important as a factor for integration within the Union.” MEPs, in fact, sit according to their parties and not according to their national affiliation.

The courts, including the highest court, the **European Court of Justice**, located in Luxembourg, will be discussed separately below. The **European Central Bank** (ECB), in Frankfurt, controls the EU’s monetary policy. The **Court of Auditors** is the financial watchdog. Article 195 provides for a **ombudsman** appointed by Parliament.

Intergovernmental conferences have been held at crucial times to work out larger questions. These conferences may be convened, at the initiative of a Member State or the Commission, by the Council (upon consultation with Parliament). They are held with a view to amending the Treaty (TEU Article 48). They play a major role in European integration and institutional change.

The **Council of Europe**, meeting in Strasbourg, is not an institution of the EU but all the EU Member States are members of this Council. The Council of Europe is in essence a permanent summit arrangement in which the leaders of European states meet to

work out issues of common interest. It should not be confused with the Council of the European Union or the European Council. This Council includes 46 countries (the US has “observer status”). It lists as it aims: “defend human rights, parliamentary democracy and the rule of law; develop continent-wide agreement to standardize member countries’ social and legal practices; and promote awareness of a European identity based on shared values and cutting across different cultures.” Its component parts are: a committee of the 46 Foreign Ministers, an Assembly from the 46 national parliaments, “the Congress of Local and Regional Authorities” and a secretariat.

The **European Court of Human Rights** (ECtHR), also in Strasbourg, adjudicates cases enforcing the European Convention of Human Rights of 1950 (ECHR or Convention). The Court may fine states and force changes in domestic practices or procedures. If the state’s response is unsatisfactory, the Committee of Ministers of the Council of Europe may bring pressure and ultimately may expel the state. The EU is also bound by its own “Charter of Fundamental Rights of the Union” distinct from the Convention. While historically there has been some tension, the ECJ and ECtHR can generally be seen as working in concert to further human rights in Europe.

II. Basic Substantive Law

A massive body of legislative and judicial law has evolved in the 50 year history of the EU and this body is too extensive to even summarize in this short work. However, the basic substantive principles created by the treaties can be summarized.

The core of the substantive law is the “four freedoms:” the free movement of goods, workers, capital and the freedom of establishment and services. Of course, the law for each has developed differently but with some fundamental principles in common. The basics will be useful in understanding the functioning of the EU and its institutions.

Free movement of goods. The key freedom is the free movement of goods. Accomplishing this goal can be broken down into two large parts, one relatively simple part and the other much more complex. The simple task was to create a customs union to eliminate costs in crossing the borders. The more complicated undertaking was to eliminate discrimination against the goods of other members and ultimately to eliminate all obstacles to a “single market” for Europe.

Article 25 provides: “Customs duties on imports and exports and *charges having equivalent effect* shall be prohibited” (emphasis added). The first prohibition is a relatively straightforward implementation of the custom union goal set by Article 23. The phrase “charges having equivalent effect” took a bit more work. For example, Italy had a tax to discourage the exporting of its antiquities. The antiquities were considered “goods”

and the tax was prohibited despite its cultural purpose.¹² Inspection fees generally have been prohibited despite their health and safety purpose because they have the equivalent effect of a duty.¹³ Even though those fees did not discriminate, they still constituted an obstacle to the free movement of goods. As we will see, each freedom has witnessed a shift from preventing discrimination to the larger objective of eliminating obstacles to a single market.

This liberalizing law has developed in conjunction with the prohibition against “internal tax” that disadvantages cross-border activity. Article 90 contains two such prohibitions. Its first paragraph prohibits any internal tax that discriminates in favor of “similar domestic products.” Its second paragraph prohibits any tax that would constitute an “indirect protection.” The first paragraph then requires a comparison of domestic products with a group of imports and the law surrounding it deals largely with defining the market in which domestic products might compete with imports. The second paragraph is said to look more to the motives of the tax.

The cornerstone of the EU substantive law is the provision eliminating “quantitative restrictions” on goods from and to other members. Article 28 prohibits restrictions on imports and Article 29 prohibits restrictions on exports. Direct quantitative restrictions were relatively easy to ferret out. But both articles also prohibit “measures having equivalent effect” (“MEQR”). This phrase raised two categories of questions: what is a “measure” and what has the “equivalent effect” of a quantitative restriction.

The term “measure” has been given a very broad application by the ECJ. Actions not directly attributable to the government have been included. A leading early example is the Irish Goods Council case.¹⁴ The Council promoted Irish goods so that it engaged in an activity that discriminated against the goods of other members. The Court ruled that the fact that the government appointed some of its members and provided some financial support was sufficient to bring Council’s action under the prohibition. This case also made it clear that *promoting* domestic products could constitute a “restriction.”

Coverage of the phrase “equivalent effect” has evolved over the years. At first, it was primarily used to prevent discrimination against goods from other members. The

¹² Commission v. Italy, [1968] ECR 423.

¹³ E.g., *Bresciani v. Amministrazione Italiana delle Finanze*, [1976 ECR 129] (The fees constituted an obstacle because the border inspections benefit everyone and not just the importers.).

¹⁴ Commission v. Ireland, [1982] ECR 4005.

seminal *Dassonville* opinion, for example, focused attention on the discriminatory effect.¹⁵ The later *Cassis de Dijon* opinion shifted the inquiry to whether the measure might constitute an obstacle to the single European market even if not discriminatory.¹⁶ That case fundamentally change the nature of the inquiry. So, for example, any measure that hindered access to an internal market violated the treaty. Even a state's action which disadvantaged its own citizens could be covered.

Member States may, nonetheless, justify measures that would otherwise be an illegal obstacle to the free movement of goods. *Cassis* recognized several justifications: "fiscal supervision, the protection of public health, the fairness of commercial transactions and the defense of the consumers." Much of the subsequent jurisprudence has revolved around whether one of these justifications takes a measure outside the coverage of Articles 28 and 29. The scope of such justifications is confused by the expressed exclusions in Article 30 of measures justified on the grounds of: "public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic, or archaeological values; or the protection of industrial and commercial property." To some extent, the two are redundant but the *Cassis* exceptions might be said to mean that the described type of measure never fell under the prohibition while the Article 30 exceptions might mean the measure is covered but excused. Generally, the Court has been skeptical of any excuse for a measure that creates an obstacle or hinders access to all European markets.

Free movement of capital. The original Treaty of Rome provided less stringent protection for the free movement of capital. It envisioned a gradual transition toward a single internal capital market. The current treaty, Article 56, still provides a more conditional protection for the movement of capital than the other "freedoms." Hence, national governments find it easier to regulate in this area. Article 58 tells the member to "take all requisite measures to prevent infringement." The European Monetary Union (EMU) and the Euro facilitate the single capital market. The shift from national banks to the European Central Bank (ECB) centralizes monetary policy.

The agreement on a single currency, the "euro," was a major step toward integration. Of the 15 members at the time, only Britain, Denmark and Sweden refused to give up their national currency. Several new members have expressed interest in adopting the euro. To become a member of the "Euro Zone," an EU member must meet certain

¹⁵ Procureur du Roi v. Dassonville, [1974] ECR 837.

¹⁶ Rewe-Zentral v. Bundesmonopolyverwaltung fur Branntwein, [1979] ECR 649.

“stability” requirements regarding inflation and debt. A major controversy developed when the EU finance ministers suspended the stability rules for France and Germany.

Free movement of workers. The second most crucial freedom is the free movement of workers. Workers, being economic actors, have treaty rights not available to mere “persons”, although the increasing recognition of the concept of European citizenship has blurred the line.¹⁷ Americans will pause over the term “migrant workers.” Any type of worker moving from one state to another will have the freedoms of a migrant worker. The free movement means that a worker should not be disadvantaged by seeking employment in another country. Therefore, all benefits accruing to a domestic worker must be afforded a migrant worker. This protection also covers the worker’s immediate family and even former family members, such as an ex-spouse. In addition, migrant workers do not have to have a job or keep the job that brought them to the other country so long as they are seeking work in that country. The ECJ established that employment means that “for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.”¹⁸ On the other hand, the work cannot be “marginal and ancillary.”¹⁹ As with the other freedoms, the presumption is strongly in favor of the single market. Also, as with the other freedoms, this liberalization goes beyond discrimination and aims to protect access to the entire European labor market. Public employment is treated differently under Article 39, which expressly excludes “employment in the public service,” but the ECJ has interpreted this phrase so as to offer equal protection for all but those in policymaking type government positions.²⁰

Right of establishment and free movement of services. The right of establishment and freedom to provide services are similar but separated in the treaty. Rights, however, may ride on which covers a business. Generally, the right of establishment implies integration into the national economy and exists for a business which has equipped itself with some form of infrastructure in the host Member State. The right to provide services is transient. Both implicate the doctrine of “mutual recognitions”: the host state must accept those qualified to engage in an activity in their

¹⁷ Article 18 in particular provides: “Every citizen of the Union shall have the right to move and reside freely”

¹⁸ E.g. *Lawrie-Blum v. Land Baden-Wurttemberg*, [1986] ECR 2121.

¹⁹ *Levin v. Staatssecretaris Van Justitie*, [1982] ECR 1035 ¶ 17.

²⁰ *Commission v. Belgium*, [1980] ECR 3881.

own state. Generally, as with the other freedoms, this liberalizing law is not limited to eliminating discrimination but are aimed at assuring access to all markets.

Competition. In addition to the four freedom is the extremely important competition law. Articles 81-89 establish a pro-competition policy. Competition law has been an important aspect of the EU since its earliest days. Consequently, the law is extremely well-developed. However, it is still fluid. Negotiations in 2007 to save parts of the failed constitutional treaty resulted in the deletion of the undistorted competition purpose in Article 3 with the intent of allowing “national champions”. It suffices here to say that US lawyers will find the general principles to be familiar. One aspect worth noting here is that the EU’s administrative arm, the Commission, has even more power in antitrust enforcement than in the other aspects of EU law.

Gender discrimination. The EU developed a special law with respect to equal treatment of men and women. Article 141 establishes “the principle of equal pay for male and female workers.” Of the realities of the body of law created by this provision, Craig and De Burca observed: “It is evident that EC sex-equality law is a highly complex field whose aims are mixed and whose impact is inevitably confined, not only by the inherent limits of the formal concepts of equality..., and by the essential focus on employment-related discrimination, but also by the limits of law’s capacity to bring about change particularly in the face of entrenched social patterns and gender roles.”²¹ They end, however, with an expression of optimism.

International trade agreements. The EU and its members have been vigorous participants in global trade agreements, including those within the jurisdiction of WTO. Article 133 has increasingly moved the EU toward a stronger and more inclusive Common Commercial Policy (CCP). Legislation covers such matters as import quotas and surveillance and safeguard measures. Generally, exports to “third countries” must be free of quantitative restrictions.

III. Legislative Process

These basic substantive principles are implemented through several types of EU legislation. All these forms with judicial embellishments, in the aggregate, are commonly referred to as the *acquis communautaire*.

²¹ PAUL CRAIG & GRAINNE DE BURCA, EU LAW: TEXT, CASES, AND MATERIALS, 934 (3d 2003) (“Broader policy developments in recent years, however, show some cause for optimism.”).

“Primary legislation” is the consolidated treaty (TEC and TEU) which has taken near constitutional dimension (especially as the adoption of a constitution is more and more in doubt.) Thus, Americans will understand “secondary legislation” as the equivalent to statutes. These are increasingly implemented by “delegated legislation” and “soft law,” the equivalent of legislative rules and guidance documents respectively in the US administrative process. Article 254 establishes the “Official Journal of the European Union” as the official publication of EU legislation and other measures.²² Below is a summary of the processes for enacting statutory type instruments and implementing measures.

1. Treaty making - “primary legislation”

The EU has an advantage over the US in that it may efficiently change its constitutional document in response to overwhelming pressure for revision. Usually there is some groundwork towards revision including discussion during one or more of the “presidencies”. When pressure for revision reaches a certain point, amendments are debated and adopted by an intergovernmental conference. Upon adoption, the amendments are presented to the Member States for ratification. In many instances, the revisions are adopted by the national parliaments. On occasion, public pressure forces a referendum in some member states. For example, the referendum rejections in France and the Netherlands, and the near certainty of rejection in the UK, doomed the “constitution”, The need for referendums to ratify revisions pulled from the proposed constitution is becoming controversial because EU citizens seem to be looking for opportunities express dissatisfaction with a stronger EU.

2. Process for statutory type instruments - “secondary legislation”

The EU legislative process is extremely complex. First, legislation has different effects and is denominated by terms likely to be confusing to Americans. Second, three institutions share power over legislation. Third, there is more than one legislative process, and there is no general formula for determining which applies. Fourth, the legislative product may vary from generally applicable to applicable to only to those named.

Article 249 creates three types of legislation: “regulation,” “directive” and “decision.” Regulations are most like US statutes. They have binding force directly on Europeans without further action by the Member States. In contrast, directives are binding on the Member States only and each Member State must take some action for them to affect citizens. Directives often framework legislation and hence allow states freedom in

²² <http://eur-lex.europa.eu/en/index.htm> select “Official Journal”.

the way they implement EU law. They may require states to “harmonize” their laws. Decisions are binding only on those named, implying individual action. However, “collective decisions” may have somewhat general application. The impact of all three is affected by the doctrine of “direct effect” discussed below.

Legislative authority is divided among three institutions: Commission, Council and Parliament. Technically legislation must be proposed by the Commission. In reality, the Member States control the agenda setting through a complicated interplay among the European Council, the Council and the states holding the Presidency (the recent amendment calling for a permanent president may affect this). The Council considers the Commission’s proposal and sends it to Parliament. Parliament considers the proposal and interacts with the Council and the Commission in finalizing the legislation. Increasingly, the Council and Parliament share the power of adoption.

The Commission’s proposals are based on extensive study and consultation. Indeed, US lawyers will be amazed by the study and consultation that **precedes** EU legislation. Authors of an ABA study of the EU legislative processes observed: “The European process may have succeed to some extent in severing politics from policy analysis at the legislative level, and having developed an unusually interactive and transparent process for submitting comments to the Commission.”²³

The Commission engages its own and outside experts to study its proposals. It often develops a “Green Paper,” a document intended to begin discussion, particularly within the EU institutions and/or a “White Paper,” a document, which may or may not follow a Green Paper, containing a proposal for specific action. The Commission has committed itself to public consultation. There are a variety of opportunities for interests inside and outside Europe to participate in the legislative process. Nonetheless, as in the US, the EU struggles with both transparency and accountability. For Europeans, “transparency” connotes not only access to information as it does in the US but also a broad range of open government and participatory values. The EU makes considerable effort to foster participation, particularly through electronic methods such as “Your Voice in Europe”²⁴. Access is also available through the lobbying and public interest representation through privileging the “civil society.”

The treaty incorporates two major committees directly into the legislative process. The Council or Commission may be directed to consult the “Economic and Social

²³ ABA Project on the Administrative Law of the European Union, http://www.abanet.org/adminlaw/eu/Reports_Rulemaking_06-07-2007.pdf.

²⁴ http://ec.europa.eu/yourvoice/index_en.htm.

Committee” established by Article 257. It provides that “The Committee shall consist of representatives of the various categories of economic and social activity.” Article 263 establishes a “Committee of Regions” which is intended to represent regional and local bodies, even though representatives are designated along national lines. This committee must be consulted whenever legislation touches upon: economic and social cohesion, trans-European infrastructure, health, education, and culture.²⁵

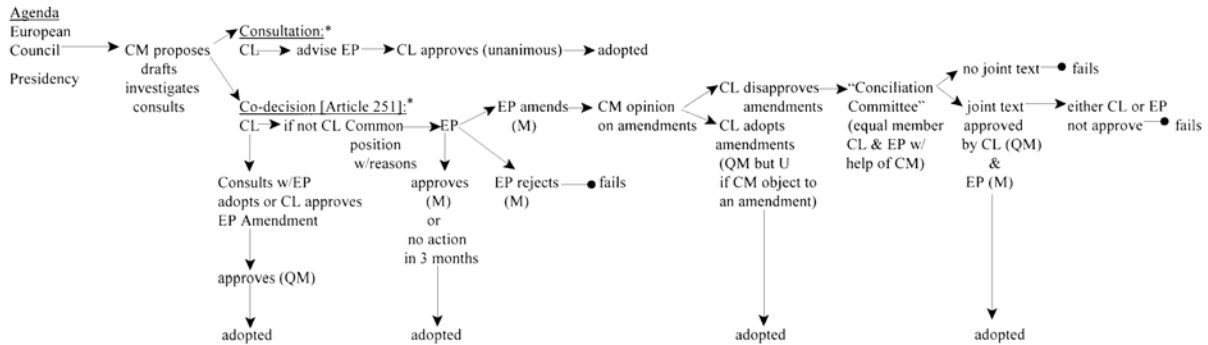
Individual treaty articles designate one of three possible legislative process: “consultation,” “cooperation” (Article 252), and “co-decision” (Article 251).²⁶ The **co-decision** process in Article 251 has become the dominant process. As in the others, the Commission initiates the legislation. Its proposal is sent through the Council to Parliament. The Council “consults” with Parliament. If the two agree, the Council may adopt the measure by a “qualified majority” described below. If there is no initial agreement, the Council adopts a “common position” and informs Parliament of that position with its reasons. Parliament must act within three months or the common position is adopted. If within that period, Parliament votes by absolute majority to reject the common position, then the measure fails. If Parliament offers amendments, then the Commission delivers an opinion on the amendments. The Council may adopt Parliament’s amendments, and the measure is deemed adopted but the Council must act unanimously if it approves any position opposed by the Commission. If the Council does not approve all the amendments then the Council President, with Parliament President, within six weeks convenes a “Conciliation Committee” with equal members from the Council and Parliament. This Committee seeks to agree on a “joint text” representing the Council and a majority of Parliament. The Commission advises and facilitates reconciliation. If the Committee agrees on a joint text, it may be adopted within six weeks by a qualified majority of the Council and an absolute majority of Parliament. If either does not approve the joint text, the measure fails. The deadlines may be extended but only if strictly necessary.²⁷

²⁵ The Maastricht Treaty added: structural funds and regional development funds; the Amsterdam Treaty added: transportation, environment, social matters, trans border cooperation, and social policy.

²⁶ Assent: In a limited group of particularly important matters specified in the Treaty (Articles 161, 192 & 300), Parliament must either accept or reject the proposal **as a whole** and may not offer amendments.

²⁷ Article 252 establishes the “cooperation” process which provides a lesser role for Parliament, including denying it the “third reading” of the above.

EU LEGISLATIVE PROCESS
Prepared by Charles Koch



CM = European Commission
 CL = EU Council
 EP = European Parliament
 QM = Qualified Majority (Article 205)
 M = Absolute Majority
 U = Unanimous

*Environmental legislation example:
 A.175 § 1 - Co-decision "in order to [protect environment, health]"
 A.175 § 2 - Unanimously after consulting EP in specific environmental areas including "fiscal nature," land planning, water and waste management.

The voting rules are designed to prevent voting blocks, protect small members from large and visa versa, and allocate to some extent power by population. Basically, the Council must approve legislation under one of three voting options: unanimity, simple majority, and qualified majority which is specifically designed to allocate power among the states and their populations.

Currently, a qualified majority is expressed by specific numbers in Article 205. The weights as of June 2007 (with Bulgaria and Romania included):

Germany, France, Italy and the United Kingdom	29
Spain and Poland	27
Romania	14
Netherlands	13
Belgium, Czech Republic, Greece, Hungary and Portugal	12
Austria, Sweden and Bulgaria	10

Denmark, Ireland, Lithuania, Slovakia and Finland	7
Cyprus, Estonia, Latvia, Luxembourg and Slovenia	4
Malta	3
 Total	 345

A qualified majority means at least 255 votes (or 73.91% of the total votes) representing at least a majority of the Member States are cast in favor. A blocking minority is 91 votes. In some cases, a favorable vote of two-thirds of the Member States is required along with the requisite number of votes. In addition, a Member State may request verification that the qualified majority represents at least 62% of the population and if it does not the measure fails.²⁸

Some articles still prescribe the “**consultation**” process. Parliament in this process is merely consulted. Its views have no binding force although they cannot be ignored as a practical matter. Consultation requires a unanimous vote of the Council and therefore has the effect of giving each Member State in essence a veto. A Member State may fight for consultation in areas of special concern to it but there has been a strong movement from consultation to co-decision. The recently negotiated treaty amendments continue this movement.

3. Process for promulgating “implement legislation”

Delegated legislation. As in all modern governments, the EU relies on its bureaucracy to provide the implementing detail, known in parliamentary systems as “delegated legislation” and in the US administrative law as “legislative rules.” These measures may be issued under three basic types of procedures. First, the Commission may be delegated authority to issue implementing measures. This authority was more prevalent in early EU legislation. Second, the Council itself may have the authority to issue implementing measures based on a proposal from the Commission. Third, the Commission may issue implementing measures under the indirect control of the Council

²⁸ If ratified, the Treaty of Lisbon, discussed above, will make this computation more flexible. The new system is based on the principle of double majority. Decisions will need the support of 55% of the Member States representing a minimum of 65% of the EU’s population. To prevent dominance by a few of the more populous Members States, a blocking majority must comprise at least four Member States or the qualified majority will be deemed to have been reached even if the population criterion is not met. It is hoped that this new system will take effect in 2014 with some transition accommodation to last until 2017.

through supervisory committees under the comitology procedures. The Council becomes involved only if the Commission and the appropriate committee, after negotiation, are unable to agree.

Perhaps, the most surprising aspect of the European legislative process for Americans is the prominence of committees and the process of “comitology.” Special committees monitor the Commission exercise of delegated power to promulgate “implementing measures.” The committees are forums for discussion and dialogue with the Commission. The procedures which govern relations between the Commission and the committees are based on models set out in the Council’s “comitology decision” of June 28, 1999, amended in 2006.²⁹

Currently, there are some 247 committees broken into five categories: advisory committees, management committees, regulatory committees, regulatory committees with scrutiny and safeguard committees.³⁰ Under the first, “advisory procedure,” the Commission must submit its proposal to a committee but a negative reaction does not affect the Commission’s powers. Under the second, “management procedures,” the relevant committee must approve the Commission’s draft by a qualified majority. Or, the Commission may adopt the committee recommendations and the amended proposal proceeds. Even if the Commission does not adopt the committee’s recommendations, the Commission’s proposal may still go forward but the Council is notified. The third is the old “regulatory procedure,” which required that, if the committee disagreed, the Commission must put its draft before the Council, which may reject it or pass it over the committee’s objection. The fourth was created by the 2006 amended Decision which added “regulatory procedure with scrutiny” whereby Parliament was given shared authority. The former is used when essential provisions are applied, not “quasi-legislative,” and the latter when non-essential provisions are deleted or supplemented, “quasi-legislative”. The Fifth is the “safeguard” committees which consider EU or Member State defensive measures in international trade cases.

Comitology was intended to increase accountability but many observe that in fact it has decreased transparency and added to the democracy deficit. For example, Ward described the comitology as a “network [that] strengthens its own power whilst further distancing governance from the principles of democracy, accountability and

²⁹. 1999/468/EC: Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission; 2006/512/EC: Council Decision of 17 July 2006 amending Decision 1999/468/EC.

³⁰ The actual number is in doubt but the magnitude is somewhere in this range.

transparency.”³¹ Bignami described the comitology process as “shrouded in secrecy” because it prevents MEP from checking bargaining within the committees.³² In the Rothmans Case, the CFI attacked the problem of transparency by ruling that the committees were under the Commission’s control.³³

Soft law. The EU institutions, particularly the Commission, are increasingly producing “soft law,” not technically binding but with real practical impact. Basically, these devices serve similar purposes to the various forms of guidance documents in the US administrative process. They create the same conundrum between the value of efficient advice and absence of public procedures.

Among the legislative type actions, Article 249 lists recommendations and opinions “which shall have no binding force.” The Commission has established a menu of other “soft law” devices, some of which they may classify as one of the treaty forms. Chief among these is perhaps “communications” which are sent to other institutions, particularly the Council or Parliament. Though not legally binding, they may have considerable impact. “Guidance notes” explain how Member States or the regulatory community should interpret and apply a EU measure. “Action plans” set out for a period the objectives, principles, and priorities. “Resolutions” are political statements by the Council or the Parliament which have no basis in the Treaties.

An informal interstate cooperation concept, “open method of coordination” (OMC), has emerged. Under OMC, the European Council establishes guidelines or “soft law” in a particular area, and the states are obliged to take the guidelines into account in establishing their domestic policies in those areas. In doing so, the states are to cooperate and learn from each other’s experience. This process appears to have been effective and states are cooperating to develop and propagate “best practices” based on the guidelines.³⁴

³¹ Ian Ward, *A CRITICAL INTRODUCTION TO EUROPEAN LAW*, 68 (2d ed. 2003).

³² Francesca Bignami, *The Democracy Deficit in European Community Rulemaking: A Call for Notice and Comment in Comitology*, 40 HARV. INT’L L.J. 451 (1999). The Second Comitology Decision sought to open up the process but with little success. *see* CARL FREDRIK BERGSTROM, *COMITOLOGY: DELEGATION OF POWERS IN THE EUROPEAN UNION AND THE COMMITTEE SYSTEM*, § 4.4.2.4 (2005)..

³³ *Rothmans International v. Commission*, [1999] ECR II-2463 ¶ 59.

³⁴ This process has been somewhat incorporated throughout the new constitution. One example is Article III-107 which provides in part: “With a view to achieving [social objectives], the Commission shall encourage cooperation between Member States and

4. Participation in the legislative process

There are a variety of opportunities for interests inside and outside Europe to participate in the legislative processes. Nonetheless, as in the US, the EU struggles with both transparency and accountability. For Europeans, “transparency” connotes not only access to information as it does in the US but also a broad range of open government and participatory values. The EU makes considerable effort to foster participation, particularly through electronic methods such as “Your Voice in Europe”. Access is also available through the lobbying and public interest representation, the “civil society.”

Lobbying. Lobbying, of course, is an important aspect of the legislative process. It is not nearly as regulated as in the US. However, there is an increasing demand for such regulation and efforts are underway to come to grips with lobbying.³⁵

Participation of the civil society. European governments, including the EU, have formally invited and facilitated participation by the public interest community, the “civil society” or public interest non-government organizations (NGOs). The Commission has included in this category organizations that: are not-for-profit, are voluntary, have some institutional or otherwise formal existence (as opposed to ad hoc and/or informal), are independent (particularly of government), and are not pursuing the commercial or professional interests of their members.³⁶ To date, much of these organizations’ influence occurs inside the Commission. Thus, the dialogue within a specialist directorate may include certain private organizations.³⁷ Special access to Parliament and the Council is more problematic but growing.³⁸

facilitate the coordination of their action in all social policy fields [listing seven].”

³⁵ E.g. Working Paper: Lobbying in the European Union: Current Rules and Practices, Constitutional Affairs Series (2003).

³⁶ Commission Discussion Paper, “The Commission and Non-governmental Organizations: Building a Stronger Partnership” (Prodi & Kinnock 1/18/00) [Transnational Associations, V. 52#3 135-50 (May/June 2000) (?)]

³⁷ Giampiero Alhadeff & Simon Wilson, “European Civil Society Coming of Age,” Global Policy Forum (May 2002).

³⁸ *Id.*

In addition to national support, many of these organizations receive support from the EU.³⁹ In its White Paper on European Governance, the Commission committed itself to contribute to a reinforced culture of consultation and dialogue in the EU.⁴⁰ The draft constitution is said to affirm this commitment in § I-147: “The institutions shall, by appropriate means, give citizens and *representative associations* the opportunity to make know and publicly exchange their views in all areas of Union action.” (emphasis added). While government support encourages effective representation of a wide range of society, such support also has the potential for coopting these organizations. Those organizations substantially funded by Member States might be likely to promote a state or regional point of view within the EU legislative machinery and the relevant committees. Those funded by an EU institution are likely to be supportive of that institution.⁴¹

IV Judicial Process

Through various jurisdictional devices, the EU Courts have been very active in evolving EU law. There is no doubt that had the Court not been extremely activist attainment of the single market goal would not be so far along. On the other hand, there is growing sense that the EU Courts exercise too much power.

1. EU Courts

The judicial power of the EU is vested in the European Court of Justice (ECJ) and a subordinate court, the Court of First Instance (CFI).⁴² With a few notable exceptions,

³⁹ European Citizen Action Service, “The Financial Relationship between NGOs and the European Commission (Oct. 2004) (But: “The question the sector is now asking is whether the Commission is likely to continue to fund NGOs at the level at which it has done in the past and, by the same token, to continue to develop its partnership with them.”

3

⁴⁰ Communication for the Commission, “Consultation document: Towards a reinforced culture of consultation and dialogue - Proposal for general principles and minimum standards of consultation of interested parties by the Commission” (COM (2002) 277 final).

⁴¹ “A rigged dialogue with society,” *The Economist* (US) 373.8398 (Oct. 23, 2004).

⁴² If ratified, the Lisbon treaty will include the entire court system under the heading “European Court of Justice of the European Union.” Within that system will be the European Court of Justice, the “General Court,” (renaming the Court of First

actions are filed and adjudicated in the CFI with appeals to the ECJ available on issues of law only. Currently, the CFI has original jurisdiction over EU legislation, failures to act, damages, references, review of judicial panels, staff cases and contract arbitrations.⁴³ The ECJ still has sole jurisdiction in actions against the Member States. These two courts will be referred to below as the “EU Courts”.⁴⁴ There are no EU local courts, the equivalent to “inferior” US federal courts, and hence Member State courts are an integrated part of the European judicial apparatus.

Article 220 has now added a third judicial layer, “judicial panels,” to take specialized cases.⁴⁵ These panels were originally established to hear staff cases which were originally to be the business of the CFI. They are increasingly employed in other matters. Article 225a provides that specialized panels to determine at first instance “certain classes of action” or “proceeding brought in specific areas” may be established by the Council. With the growing number of cases, the jurisdiction of these special panels can be expected to grow. In the future, these may even result in systems of “inferior” courts, still distinguished from the US federal system by the fact that their jurisdiction will be determined by subject matter rather than geography.

2. Jurisdiction

The EU Courts have jurisdiction over EU institutions and Member States to enforce compliance with EU law. Some aspects of jurisdiction compares to US judicial review but others will seem quite unfamiliar. The types of jurisdiction, listed by their popular name, are:

“Actions for annulment” - Article 230 authorizes the EU Courts to annul acts by EU institutions. Actions may be brought by Member States, the Council, or the Commission “on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or any rule of law relating to its application, or

Instance) and “Specialized Courts” (renaming the judicial panels).

⁴³ Article 225. If ratified, the Lisbon treaty would change the name of the Court of First Instance to the “General Court.”

⁴⁴ However, there are other EU Courts and tribunals. Staff cases are heard by a special court, the European Civil Service Tribunal. In addition, the Council may create “judicial panels.” Article 225a.

⁴⁵ Indeed, the Lisbon treaty will replace the term “judicial panel” with “specialized court(s).”

misuse of power.” At one time the European Parliament could only bring actions to protect its “prerogatives” but now it has the same rights as the other institutions. Private parties may bring action against a decision directed at them or “of direct and individual concern.” Article 231 provides: “If the action is well founded, the Court of Justice shall declare the act concerned to be void.”

“Failure to act” - Article 232 provides that EU institutions and Member States may bring an action against the Parliament, Council or Commission charging failure to act. Private persons may also bring such an action in certain circumstances.

“Infringement” - Articles 226 and 227 authorize suits against Member States for “infringing” on their EU obligations, generally failure to implement EU law. Article 226 authorizes the Commission to bring such enforcement actions and Article 227 allows other Member States to bring actions through the Commission. Most of these enforcement actions have been brought by the Commission. Commission actions have three formal phases. Before the formal enforcement action begins, however, the Commission usually sends a warning letter and most often that settles the matter. If that does not work, the Commission begins with the first phase by formally asking the member to explain its actions. If the Commission is still dissatisfied, it will issue a “reasoned opinion” which also often results in settlement. If settlement efforts fail, the Commission takes the second level formal action by bringing an ECJ action. If this does not result in settlement, the Court issues a judgment. The Member State is required to take the necessary measures to comply with the judgment. If state does not comply, the Court may go so far as to impose a lump sum or penalty payment.

“Damage actions” - Article 288 provides three types of liability for EU institutions. In general, actions are permitted against EU on both contract and tort. The EU Courts have added a fourth type of damage action, actions against the Member States. Such actions may be brought against the Member States for damages resulting from breach of EU law.

“Reference” - Article 234 authorizes any national court or tribunal, broadly defined, to ask the EU Courts for an interpretation of EU law applicable to the case before them. A large portion of EU law has been developed through references. The founders of the European Community, in contrast to the US founders, made the choice not to create an inferior court system. Therefore, EU law must be applied and hence interpreted by national courts. In order to assure uniform law, these courts are authorized and under certain circumstances compelled to seek interpretations from the EU Courts. In contrast to

the US, Member State courts as lowly as traffic courts may refer a question directly to the EU Courts.⁴⁶

“Plea of illegality” - Article 241 reopens the opportunity to challenge an EU measure upon individual application. Thus, one who did not have an opportunity to challenge a regulation or who did not avail themselves of that opportunity may invoke the grounds in Article 230 to show that the regulation was not applicable to their particular case.

Three types of jurisdiction of less importance to US lawyers are staff cases, “plenary jurisdiction” and those involving international agreements. Staff cases are actions by employees who have complaints concerning their employment. Plenary jurisdiction derives from French law and allows the Court to exercise its fullest powers. It has power under Article 229 “with regard to penalties,” so that it can not only cancel such penalties but also may alter the amount. Article 300¶6 authorizes the ECJ to review international agreements to assure that the agreement “is compatible with ... the Treaty.”⁴⁷

3. Procedures

The procedures of the ECJ were modeled after continental appellate courts in general and the French Council of State in particular. The CFI follows essentially the same procedures and hence the following description will apply to it.

The number of ECJ judges equals the number of Member States, currently 27. Usually, the judges sit in chambers of three or five judges; or in a Grand Chamber (13 judges) or, exceptionally, as a “full court.” They are appointed “by common accord” of the members which means that each state controls one appointment. Nonetheless, the judges are instructed to act independently and all evidence suggests that they do. Basically, a judge must be qualified to be a judge under national rules. They serve for 6 years with the possibility of reappointment. Over the years, it has proven to be an extremely able and diverse court.

The Court is assisted by two types of judges, not known in the US but often found in Continental appellate processes. One is the judge-reporter (reporter) who prepares the

⁴⁶ Under 28 U.S.C. § 1257, the U.S. Supreme Court may review the decisions of the highest state court. *see Lance v. Dennis*, 126 S.Ct. 1198, 1201 (2006).

⁴⁷ “Where the opinion of the Court of Justice is adverse, the agreement may enter in to force only in accordance with Article 48 of the Treaty of European Union [upon convening an intergovernmental conference].”

record for the Court. The other is the “Advocate-General” who advises the Court and is an important part of the decisionmaking process.⁴⁸ These will be described further below.

The procedure has four stages: (1) the written proceedings; (2) the investigation or preparatory inquiry; (3) the oral proceedings including the advocate-general’s opinion; (4) deliberation and judgment. The proceeding begins by the filing of an application (requete) with the Registrar.

This application is not just pleadings but must contain the applicant’s whole case. The applicant has the choice from among the official languages. The application is served on the defendant by the Registrar by registered mail. The defendant has one month to respond. The defendant’s submission usually has two parts: admissibility and substance.

Upon receiving the application, the case will be assigned by the Court’s president to one of his colleagues to act as **reporter**. Although all the papers will have previously been distributed to the entire Court, only the reporter is likely to have read them closely. The three-judge chamber to which that judge belongs will conduct the investigation. With the pleadings closed, the Court takes over the case and the process shifts from adversarial to inquisitorial. The hearing of witnesses is part of the investigative stage and not part of the oral proceeding. After the witnesses have given their evidence, they may be questioned by the judges. Or the witnesses may be examined by a judicial authority in the state where they permanently reside. Witnesses are in fact rarely heard and the Court usually asks the parties to respond to questions.

The case moves to the oral stage. Sometime before the hearing, the reporter issues a report which is communicated to the parties in advance and made public on the day of the hearing. The report sets out the facts of the case and summarizes the arguments. The oral proceedings generally include the presentations by opposing lawyers, questions from the Bench, very brief replies to opposing statements and the Advocate-General’s opinion.

The Court is “assisted” by a type of judicial officer with no counterpart in the US legal system, the **Advocates-General**. Advocates-General are judicial officers and they are expected to act “with complete impartiality and independence.” These judicial officers give their opinion on the case after considering the arguments and the record compiled by the reporter. Their opinions discuss the facts and expound on the law. Since the Advocates-General are judges, their opinions are part of the judicial deliberation, and hence the parties are given no opportunity to comment on the Advocates-General’s opinion unless they ask to reopen the case for that purpose. Because the Court’s own

⁴⁸ Article 222.

opinions are so terse, the Advocates-General's opinions offer the best insight into the various issues in a case.

The Court then deliberates. Only the judges are admitted to the Deliberation Room; neither the Advocate-General nor the registrar is present. The Court is required to give reasons for their decision. The decisions are collegial, meaning that there are no separate opinions. The authentic version of the judgment is in the language of the case. The operative part of the judgment is read at the next available public hearing either by the President or the reporter.

4. Nature of Review

Much of EU review law is borrowed from Continental legal systems. These systems and now the EU Courts have evolved complex and nuanced legal doctrine around them. The majority of this law has no close counterpart in US review law.

As in the US, EU Courts might determine whether a act complies with applicable EU measures. In contrast, the EU Courts give officials much less deference on interpretative question than in the US. On the other hand, in conducting this review, they instinctively feel more constrained by legislative language than US courts. However, since the EU Courts are derived from the French high administrative court, the Council of State, they feel justified in engaging in more policy analysis than they would if they followed the traditional standards of the Continental judiciary.

The dominant standard of review is "proportionality". This standard is used throughout continental Europe and is even migrating into the review of the common law Member States. Simply, a reviewing court assures that the governmental measure is proportionate to the problem it seeks to remedy. It is often applied, for example, to Member State regulations; so that even a justifiable health or safety regulation may be struck down if the Court identifies alternatives that pose less risk to the single market. Article 5 codifies this standard: "Any action by the Community shall not go beyond what is necessary to achieve the objective of this Treaty." The relationship between proportionality review and subsidiarity, discussed above, is manifest by this Article. Under it, the EU Courts must determine whether an objective is in fact "better achieved by the Community" and "cannot be sufficiently achieved by the Member States."

Also borrowed from continental legal systems are principles of "legal certainty". This phrase encompasses a variety of doctrines that recognize circumstances in which private persons have acquired a stake in the status quo that a given governmental action may not fairly displace. Most straightforward of these doctrines are restraints on retroactivity. This review also protects "legitimate expectations;" so that a court must

assure that the ideal of trust in the legal order is respected. A substantial body of very sophisticated review law as evolved from this ideal.

5. Administrative adjudications

The Commission and increasingly European agencies conduct the equivalent of US administrative adjudications. As in the US, procedures vary among the bodies having these special jurisdictions.

As in the US, administrative adjudications follow diverse forms and must be learned *in situ*, as practice in their individual regulatory context. Unlike the US, the EU has no Administrative Procedure Act (APA) to add some uniformity. Despite widespread deviations in practice, the APA establishes the Anglo-American trial as the norm. In contrast, the vast majority of the EU national systems follow what US lawyers call, often derisively, the “inquisitorial” model with a different set of fairness strategies. In addition, continental administrative law has evolved processes that also deviate from the Anglo-American procedural norms. Only three Member States, most influentially Britain, have common law systems. They have pushed the EU to adopt some common law procedural elements but their success has been intermittent. Thus, US lawyers can expect to find themselves somewhat disoriented by EU administrative adjudicative procedures. Some knowledge of the foundational principles of civil law processes will be valuable to a US lawyer dealing with the EU.⁴⁹

⁴⁹ The EU merger of common law and civil law legal cultures can then be a global tool for legal scholars and reformers and a necessity for an increasing number of US practitioners. See generally, Charles H. Koch, Jr., *Envisioning a Global Legal Culture*, 25 MICH. L. REV. 1 (2003). At present, civil law system or the civil law system mixed with other (such as religious or customary) is used in 54.77% of the world’s jurisdictions encompassing 62.69% of the world’s population and the common law system or some mix is used in 27.91% of the jurisdictions covering 39.67 of the population. University of Ottawa, World Legal Systems (2007) <http://www.droitcivil.uottawa.ca/world-legal-systems/eng-monde.php> select “statistics” select “Legal systems and demographics” (by population) or “Reparation of legal systems” (by jurisdictions).

V. Executive Functions

As discussed above, the Commission is the primary executive institution. It conducts various implementing activities. It investigates compliance and initiations actions against Member States and private individuals and organizations. As in the US, in the course of performing these executive functions, it creates a substantial body of policy. Much of this takes the form of “delegated legislation,” in the US rulemaking, as discussed above. Nonetheless, implementing authority is increasingly delegated to administrative agencies. In both cases, the validity of those delegations has been an issue. In addition, much of EU law is implemented through Member State institutions raising questions about the legal foundations of EU “federalism”. Governmental integration, however, even more than public policy integration, ebbs and flows.⁵⁰

1. The non-delegation doctrine

Early in the EU’s history, delegation of policymaking authority appeared to be prohibited. The EU found this restriction inconsistent with demands of modern government and the implementing institutions work around theoretical limitations. It seems legal principles have evolved a more nuanced approach to delegation.

The ECJ in the 1958 case of *Meroni v. the High Authority* severely limited delegations.⁵¹ This case was decided very early in the history of the European community and hence set the parameters in a much simpler governmental context. The Court held that institutions may not “confer upon the authority, powers different from those which the delegating authority itself received under the Treaty.” In addition, the Court held that the delegation must involve “clearly defined executive powers the exercise of which can, therefore, be subject to strict review in the light of criteria determined by the delegating authority.” It clearly prescribed that the exercise of this power “must be *entirely* subject to the supervision of the [delegating institution].” If all these conditions are not met then the delegation was felt to upset institutional balance envisioned in the Treaty. In the case at hand, the Court ruled that the delegation “gives those agencies a degree of latitude which implies a wide margin of discretion and cannot be considered as compatible with the requirements of the Treaty.”

⁵⁰ Herwig C.H. Hofmann & Alexander Turk, “The Challenges of Europe’s Integrated Administration,” *LAW, DEMOCRACY AND SOLIDARITY IN EUROPE’S POST-NATIONAL CONSTELLATION*, (Eirksen, Joerges & Rodl eds. 2006) (forthcoming).

⁵¹ [1958] ECR 11 (1957-1958)] & [1958] ECR 53 (1958).

Nonetheless, for some time, European scholars have suggested that limitations on delegation are not overly restrictive on the allocation of administrative authority. Indeed, the *Meroni* opinion might suggest to US administrative lawyers no more restriction than the current state of the US nondelegation doctrine. For example, the Court could be requiring “criteria determined by the delegating authority.” This requirement smacks of the “intelligible principles” first announced at the beginning of the 20th Century.⁵² It is urged that the practical impact of the *Meroni* decision is overstated. Geradin and Petit, for example, assert “that the implications of the *Meroni* doctrine should not be exaggerated.”⁵³ They reason that the Court’s reliance on institutional balance naturally leads to acceptance of delegation to improve the quality of the decisionmaking both by lowering the workload on the delegating entity and by transferring technical issues to experts.

The *Meroni* might be seen as the equivalent to *Field v. Clark* in US’s early years.⁵⁴ There, the Supreme Court upheld a statute which gave the President authority to impose retaliatory tariffs upon a finding that US businesses were being treated unfairly. The actual opinion could be said to similarly limit delegation because it found that the President “was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect.”⁵⁵ Perhaps it presages European development to note that this opinion has, over time, been characterized as an early recognition that Congress can make extensive delegations.

The ECJ has accepted the delegation of the authority to adopt “implementing measures,” an increasingly large category, so long as the delegation is to either to the Commission or the Council itself under Article 202.⁵⁶ Most delegation are to the

⁵² KOCH, ADMINISTRATIVE LAW AND PRACTICE, second § 12.13 (1997).

⁵³ Damien Geradin & Nicholas Petit, “The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform,” Monet Working Paper 01/04 at 15

⁵⁴ *Marshall Field & Co. v Clark*, 143 U.S. 649, 692 (1892) (Building on a case from the Republic’s formative years: *The Brig Aurora v. US*, 11 U.S. (7 Cranch) 382 (1813).).

⁵⁵ *Id.* at 693.

⁵⁶ CARL FREDRIK BERGSTROM, COMITOLOGY: DELEGATION OF POWERS IN THE EUROPEAN UNION AND THE COMMITTEE SYSTEM, §2.4.5 (2005).

Commission often under committee supervision through the comitology process discussed above.

In the end, the practical pressures of modern government will create acceptance of broad delegations. It appears that the ECJ has pursued a doctrine of the liberalizing European non-delegation doctrine. The Commission, however, believes that only an amendment to the treaty will clear the way for delegations.

2. National implementation of EU laws

The US Supreme Court has absolutely prohibited the “commandeering” of state and local legislative and executive branches. *New York v. United States*⁵⁷ invalidated federal efforts to direct state legislatures and *Printz v. United States*⁵⁸ invalidated federal efforts to command state and local executive officials. Thus, a federal administrative system cannot co-opt state authorities.

In contrast, the European system relies on the legislatures and executive officials to implement EU law. This approach results in a quite different configuration of the European administrative system. As discussed below, while “regulations” have “direct effect” whereby they apply directly to citizens and may be enforced by citizens, “directives” are directed to the Member States. Thus, EU structure counts on “commandeering” state governmental institutions.⁵⁹

Moreover, the crucial legislative institutions, Council and Commission, are not directly elected and have direct links to the Member State governments. The Council is made up of State government representatives and, while the Commissioners are to be committed to the interests of the Community as a whole, they hold their positions through the national governments. Thus, policymaking is largely controlled by the states. The EU policymaking network then necessarily incorporates government entities and officials in the Member States.

⁵⁷ 505 U.S. 144 (1992).

⁵⁸ 521 U.S. 898 (1997).

⁵⁹ In his dissent in *Printz v. United States*, Justice Breyer noted this contrast and observed: “They do so in part because they believe that such a system interferes less, not more, with the independent authority of the ‘state,’ member nation, or other subsidiary government, and helps to safeguard individual liberty as well.” 521 U.S. at 976.

Thus, a crucial question is the allocation of EU executive authority between national and EU authorities. Chiti characterizes this debate as between the “indirect administration model” and the “co-administration model.”⁶⁰ Under the indirect model, the EU authorities are not vested with any power and instead rely on the national bodies to attain EU objectives. Under the co-administrative model, competences are shared between the EU and the national administrations. He observes that the latter has come to be considered the accepted framework.

3. The Growth of administrative agencies

A variety of EU agencies have been established with special mandates and processes.⁶¹ European agencies have increased from four in 1993 to twenty-two in 2007. It is expected that this number will continue to increase. As in US administrative law, understanding these diverse institutions requires a search for common principles.

a. Categories. Necessarily, the agency categories recognize a coordination between national governmental institutions and European institutions. National agencies (which European scholars tend to lump together as “national regulatory agencies” or “NRAs”) perform much of the European administrative functions. A growing number of EU agencies (which Europeans call “European agencies” or “EAs”) have taken on some of the administrative responsibility but even so they tend to coordinate with NRAs.

General understanding might be built around Geradin’s identification of seven common features.⁶²

1. Agencies generally have a limited mandate, which is laid down by the establishing legislation and consists of tasks of a technical, scientific and managerial nature.
2. Most have very limited powers, usually relating to information and coordination, and may not issue binding decisions;
3. All operate under the direction of an executive director;
4. They have an administrative or management board, usually made up of representative from the Member States;

⁶⁰ Mario Chiti, *Decentralization and Integration into the Community Administration: A New Perspective on European Agencies*, 10 *The European L.J.* 402 (2004).

⁶¹ Mario Chiti, *The Emergence of a Community Administration: the Case of European Agencies*, 37 *Common Market L. Rev.* 309 (2000).

⁶² Damien Geradin, *The Development of European Regulatory Agencies: What the EU Should Learn from American Experience*, 11 *Col. J. of European L.* 1, 24-27 (2004).

5. They generally function through committees or committees form some part of their structure;
 6. They are decentralized in the sense both that they are withdrawn from the centralized responsibility of the Commission and they are located in various parts of the EU; and
 7. Most are created under Article 308, the generalized “necessary and proper” provision of the Treaty, sometimes in conjunction with more specific authority.
- Although not all agencies have all these characteristics, identification of these actual or potential characteristics creates some coherence.

Those who seek to create some order have proposed various systems of classification. Several commentators seek order by identifying functional categories. Xenophon Yataganas of the Commissions Legal Service Department, for example, divided existing agencies into four functional categories: 1) agencies serving the operation of the internal market (regulatory model); 2) agencies providing information through a network of partners (monitoring model); 3) agencies promoting social dialogue (cooperation model); and 4) agencies operating as subcontractors to the European public service (executive model).⁶³

Geradin and Petit assert that such “functional typology” cannot be the basis on which to propose reforms. Rather, they propose a classification based on the intensity of the prerogatives entrusted to the agencies for carrying out their missions.⁶⁴ “Executive agencies” include agencies that are responsible for (1) purely managerial tasks; (2) observatory roles; and (3) missions of cooperation. “Decisionmaking agencies” include all agencies that have the power to enact “legal instruments” or enjoy considerable influence over the adoption of Commission decisions, even though they lack formal decisionmaking authority. “Regulatory agencies” include those EU agencies that have the same powers as NRAs, “including the power to translate broad legislation guidelines into concrete instruments.” This last might not be permissible under the current nondelegation doctrine.

b. Administrative procedures. As in the US, EU agencies perform a variety of functions through specially designed processes. Indeed, the confusion is greater in the EU

⁶³ Xenophon A. Yataganas, “Delegation of Regulatory Authority in the European Union,” Jean Monnet Working Paper 3/01, *available at* <http://www.jeanmonnetprogram.org/papers/01/010301.html>.

⁶⁴ Damien Geradin & Nicolas Petit, “The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform,” Monet Working Paper 01/04 at circa 48

because it has no EU-wide procedural law to compare with the US's Administrative Procedure Act (APA). The Commission and scholars have been contemplating a uniform law but it has yet to emerge. Adding difficulty is the fact that EU procedural law must deal with both a cooperative network of EAs and NRAs.

Basically, European system is in much the same developmental phase as the US system at the time of the AG's Final Report in 1941.⁶⁵ Agencies have become much more important to European government and have an increasing impact on citizens. The drive for some uniformity seems irresistible. On the other hand, as in the US, uniformity must accommodate necessary diversity in process and mandate. In short, the nature of a uniform law is difficult to predict.

4. Emergence of transnational regulatory networks

The drive for pan-European regulatory regimes tempered by Member State sensitivities has resulted in the emergence of "transnational regulatory networks". These informal organizations are composed of experts, representatives of national regulatory institutions and sometimes stakeholders, who come to agreement among themselves, guided or supported by EU institutions. These bodies are often promoted by the Commission in order to further pan-European regulatory goals and develop common regulatory concepts and "best practices" in the context of particular regulatory regimes. For example, the Directorate General for Energy and Transportation set up the "European Forum for Electricity Regulation". This forum developed operational solutions for regulatory problems in creating a European internal electricity market. The "Council of European Energy Regulators" emerged in 2000 as a independent coordinating body of national energy regulatory authorities which works closely with the Commission. These bodies further the non-hierarchical, interwoven, negotiation-based system of decisionmaking developed to avert formal decisional obstacles.

VI. European Federalism

The nature of European "federalism" is a source of continual controversy. Therefore, a basic understanding of the "constitutional" principles that bind the nations in this union is necessary to understanding EU itself, present and future.

⁶⁵ FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE (1941).

1. Supremacy of EU law

The Treaty does not contain a supremacy clause as does the US Constitution. However, the ECJ, in an early display of its activism, established the supremacy of EU law within authority. *Costa v. Ente Nazionale Per L'Engergia Elettrica (ENEL)*, in 1964, firmly established that principle and has not been seriously challenged.⁶⁶ The Court ruled:

“The transfer by the states from their domestic legal system to the Community legal system of the rights and obligations arising under the treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail. Consequently Article 177 [now 234] is to be applied regardless of any domestic law, whenever questions relating to the interpretation of the Treaty arise.”

Another significant step was the Court's willingness to assert authority to derive “general principles of law.” This lawmaking is loosely based on EU Treaty Article 220's admonition that the Court “shall ensure that ... the law is observed.” Nonetheless, the assumption of this power expanded the opportunity for judicially created EU law. T. C. Hartley wrote: “The general principles of law are, therefore, an independent source of law and there can be little doubt that the Court would have applied them even if none of the Treaty provisions ... had existed.”⁶⁷

Acceptance, however, has been controversial. The Member States and particularly the Member State courts have accepted the notion at different rates and with varying degrees of skepticism.⁶⁸ US lawyers must remember that continental systems have parallel judicial systems each with its own highest court. Therefore, even within one Member State the degree of acceptance of European law may vary by court system. The two Members State which at one time were leaders, France and Germany, are important examples.

⁶⁶ [1964] ECR 1141.

⁶⁷ T.C. HARTLEY, *THE FOUNDATION OF EUROPEAN COMMUNITY LAW* 135 (5th ed. 2003).

⁶⁸ *See generally*, ANNE-MARIE SLAUGHTER, ALEC STONE SWEET & JOSEPH WEILER, *THE EUROPEAN COURTS & NATIONAL COURTS: DOCTRINE AND JURISPRUDENCE* (1998).

France has, in essence, three court systems headed by: Cour de Cassation (general courts), judicial section of Conseil d'Etat ("Council of State," or administrative courts), and Conseil Constitutionnel (constitutional court, called a council for conceptual reasons). For various political and jurisprudential reasons each accepted supremacy at different rates. Supremacy was accepted readily by the general courts, headed by the Cour de Cassation. Various reasons are given, including a sense that European law enhanced their influence. On the other hand, the Council of State perhaps saw the ECJ as a threat to its power. It resisted supremacy for some time. The Constitutional Council was likewise reluctant to concede too much power to the ECJ.

Germany has five court systems and a constitutional court. The tax court and the labor court were slow to accept supremacy of European law in those areas. The German Constitutional Court was particularly resistant to ECJ supremacy. Indeed, even though a detente of sorts has been reached, the Constitutional Court has not accepted complete supremacy. In a body of cases, known as the Solange ("so long as") opinions, the Constitutional Court resisted ECJ authority over conflict between European law and the German Basic Law (constitution), particularly regarding human rights. In the end, it was mollified by the development of EU human rights laws. It ultimately said that "so long as" the ECJ and European law adequately protected human rights, it would not assert independent authority. However, it has not irrevocably conceded away authority.

Other Member States and their various courts have also shown a reluctant acceptance of supremacy. It might be that a growing Euroskepticism, as evidenced by the rejection of the Constitution, may embolden Member State courts to challenge ECJ supremacy. For now, supremacy can be considered a well-established principle.

Still controversial, however, is jurisdiction to determine jurisdiction or in Europe "Kompetenz-Kompetenz." Various Member State courts have shown particular reluctance to concede to the ECJ the power to allocate competence between Member State courts and the EU courts. Several Member State courts, e.g. the German Federal Constitutional Court, insist on the power to engage in ultra vires review EU measures.⁶⁹ Yet, this fight has been avoided by the simple fact that Member State courts do not find EU measures ultra vires. Here the detente between the ECJ and the Member States judiciary is especially fluid.

⁶⁹ ANNE-MARIE SLAUGHTER, ALEC STONE SWEET & JOSEPH WEILER, *THE EUROPEAN COURTS & NATIONAL COURTS: DOCTRINE AND JURISPRUDENCE*, 95-98 (1998).

2. Direct effect

The doctrine of “direct effect” determines the extent to which EU law operates directly on its citizens without action by the Member States. This doctrine expresses a “highly political idea” that the EU is an organization of persons and not states. Not only Member States then but individuals must be considered the subject of EU law. The direct effect of the treaty and the various categories of legislation raise separate analytical questions. A general test, summarized below, has emerged for determining the direct effect of laws within these categories.

Many **treaty** articles may have direct effect and hence persons may derive rights and duties directly from those articles. Especially in the early years, this authority was important because both the EU and Member State institutions were slow to enact implementing legislation. Rights derived directly from the treaty could be enforced without this legislation.

The direct effect of “secondary legislation” listed in Article 249 varies. **Regulations** are given direct effect. As with treaty provisions, direct effect of regulations allowed EU legislation to take effect regardless of state action or inaction. Direct effect for regulations is based on expressed provision of Article 249, which states that they are “directly applicable in all Member States.” **Decisions** are also given direct effect because Article 249 provides that a decision is “binding in its entirety upon those to whom it is addressed.” **Directives**, however, created a special problem. By definition, directives are only binding on the Member States and they are not effective until a Member State takes the necessary action. Nonetheless, the Court has given directives direct effect if the action can somehow be traced back to the state. **International agreements** may also be given direct effect. However, the ECJ has ruled that GATT norms generally lack direct effect in national courts on account of “the spirit, the general scheme and the terms of the general agreement” but this ruling is not without exceptions.

The Court’s basic test for direct effect is fairly straightforward: the measure must be clear and unambiguous, it must be unconditional, and its operation must not necessitate further action by the EU or national authorities. Over time, the Court has further developed these factors. The Court demand for precision under the first factor has varied. As to the second factor, the Court has held that a right is not considered conditional just because the provision establishes some objective factors or event. Rather, the right is conditional if its effect depends on the judgment or discretion of any EU institution, national body or some other independent authority. Inaction may satisfy the third element. Thus, for example, a measure may have direct effect after the time limit for the implementing measure has passed whether the required action has been taken or not.

Direct effect may be either horizontal or vertical. Vertical direct effect means that the effect comes down through the state and hence if the direct effect is vertical it must be based on Member State measures. Horizontal direct effect means that European citizens have rights and duties relative to each other. The treaty and regulation because they have direct application have horizontal direct effect without regard for the action of a Member State. Decisions have direct effect as to the party named in the decision. Directives, since they apply only to the Member States, should not have horizontal direct effect. However, the ECJ has given directives some horizontal direct effect where the action can be said to involve an “organ of the state.” If a national court is considered an organ of the state then that court must give a measure direct effect and hence apply it to the private parties. It may be that an administrative tribunal must give a directive horizontal direct effect because the administrative tribunal is under the state’s duty to comply with the directive.

National courts are less reluctant to adopt an expansive application of direct effect than they are to concede supremacy. Therefore, they will give EU measures the direct effect ordered by the ECJ.

3. Loyal cooperation

Treaty Article 10 imposes a “duty of loyalty” on the Member States. Member States “shall take all appropriate measures, whether general or particular, to ensure fulfilment of [their EU] obligations;” “shall facilitate the achievement of the Community’s task,” and “abstain from any measure which could jeopardize the attainment of the objectives of this Treaty.” The ECJ has based specific and concrete obligations on this Article. Obligations recognized by the Court include assurance of effective, deterrent and proportional enforcement of EU law, judicial protection of EU rights; and assumption of liability for any loss or damages to individuals as a result of breaches of EU obligations.

4. Subsidiarity

The EU, despite the pressure for an ever-closer union, has not been immune from the global devolution movement. The EU has embodied these notions in the doctrine of “subsidiarity.” The subsidiarity doctrine manifests a growing sense that the EU unduly infringes on Member State sovereignty.⁷⁰ In short, it expresses a preference for social

⁷⁰ The doctrine began to emerge from several different venues in the early 1980s. The 1992 “Maastricht Treaty,” formally the Treaty on European Union (TEU), incorporated the concept into the basic law. For a discussion of the Amsterdam Treaty’s treatment of subsidiary and the experience with that principle between the TEU and the

policy decisionmaking at the level nearest those who will be affected while still achieving the desired shared goal. Article 5 now expressly provides:

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore . . . be better achieved by the Community.

The EU “federalism” controversy is very familiar to US lawyers but US federalism and subsidiarity contrast. Bermann distinguished the two concepts: “U.S. federalism places greater emphasis on the presence of an overall balance of power between the federal government and the states than on respect for any single rule for allocating competences among the different levels of government.”⁷¹ US federalism principles may look to an array of justifications for centralized decisionmaking in a particular area of public policy. The federal government may decide that a solution should be sought at the national level without having to formally justify that choice. The EU subsidiarity doctrine focuses only on: “the relative capacities of federal and state government to deal effectively or adequately with the problem or policy at hand.”⁷² Subsidiarity is a formal restraint in which the central government may take action only if it can demonstrate that it is the better actor. Otherwise, the solution to a perceived problem must be left to the local authority. Therefore, EU subsidiarity places the burden on the EU institutions, including the EU Courts, to demonstrate that centralization is superior. US federalism, on the other hand, leaves to the US Congress the choice between federal and state authority. EU subsidiarity then both empowers a reviewing court to restrain central authority and restrains the central adjudicative bodies from themselves asserting power. US federalism provides no such clear constraint on political choice.⁷³

Amsterdam Treaty, *see* Christian Timmermans, *Subsidiarity and Transparency*, 22 FORDHAM INT’L L.J. 106 (1999) (concluding: “Judge Pescatore . . . feared that subsidiarity would set us back into the dark times of anarchy of the nation states. I am happy to say now in 1998 that after five years of subsidiarity, the Community is still very much alive”).

⁷¹. George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 450 (1994).

⁷² *Id.* at 451.

⁷³ US federalism has not been immune from the devolution movement and hence the Supreme Court increasingly protects state sovereignty.

5. Substate independence

The 27 Member States are in reality themselves often confederations of various nationalities, ethnic groups and language groups. In some, these groups and regions have attained some degree of autonomy. In others, the groups are part of the national fabric and are subsumed in the national identity. Still in others, these groups and regions hunger for some independence. Many groups cannot be defined easily within existing national boundaries. The EU's federal structure then actually brings together and must govern a union of "peoples."

RESEARCH TOOLS

Treaties:

Basic treaties: <http://eur-lex.europa.eu/en/treaties/index.htm> select “European Union - Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community”. (Both the “Treaty on European Union” (TEU) & “Treaty Establishing the European Community” (TEC).)

Draft constitution: <http://eur-lex.europa.eu/en/treaties/index.htm> select “Treaty Establishing a Constitution for Europe”

Databases:

EU in the US: <http://www.eurunion.org/>

Statistics:

http://epp.eurostat.ec.europa.eu/portal/page?_pageid=1090,30070682,1090_33076576&_dad=portal&_schema=PORTAL

General information: http://europa.eu/index_en.htm

Legal materials: <http://eur-lex.europa.eu/en/index.htm>. Includes primary and secondary legislation, preparatory acts, some caselaw, and more.

Official documents: <http://eur-lex.europa.eu/en/index.htm> select “Official Journal”

Quick definitions: http://europa.eu/index_en.htm select tab “documents” then select “glossary”

Public notice and comment, “Your Voice in Europe”:

http://ec.europa.eu/yourvoice/index_en.htm.

Official blog: <http://www.youtube.com/eutube>; individual blogs available through <http://blogs.ec.europa.eu/>

Substantive areas: http://europa.eu/index_en.htm select tab “activities”; <http://www.abanet.org/adminlaw/eu/home.html#Sector> - The ABA Project on the Administrative Law of the European Union reported on the regulatory processes for

competitions, state aids, trade regulation, pharmaceutical licensing, trademarks, food safety, telecommunications, environmental, workplace, and financial services.

Lexis:

Scroll down to “Find Laws by Country or Region” at the bottom of the screen; select "European Union". Choose from Treatises, case law, legislation and regulation, or commentaries and treatises. Documents are largely from Eur-Lex (to which direct access is described above) and European publishers.

Westlaw:

Lexis gets its data from Europa/Eur-Lex but Westlaw also has the same data. Select “Directory”; then “International/Worldwide Materials”; then “EU”; scroll to the bottom to folders labeled "Cases", "Legislation", etc.

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