Chapter 1 Introduction

Contents

Introduction

The European Union (EU) today encompasses 25 countries with a combined population of 455 million people. Within the boundaries of the European Union, a common market has been established. All trading barriers between the participating Member States have been abolished and the entire area comprises a single market for goods and services and, within most of the area, for workers, selfemployed persons and companies. A single set of trade rules applies across the EU and there is a common customs tariff wherever goods from countries outside the EU enter its borders. It is the largest trading block in the world, with the world's greatest overall GDP (one quarter of the global total).

The European Economic Community was created by the Treaty of Rome in 1957 with the aim of fostering economic growth and increased productivity among the six participating Member States (France, Germany, Italy, Belgium, the Netherlands and Luxembourg. The UK was not one of the founder members but joined in 1973) and these figures reflect the success of this enterprise. But the EEC itself built on the success of the earlier European Coal and Steel Community (ECSC) which had been established among the same six countries, and the impetus behind this earlier Community had been to prevent another war in Europe by placing the production of coal and steel, the materials of war, under common control. The participating Member States, including the ancient enemies, France and Germany, signed the Treaty of Paris in 1951, which established ECSC and created a

common market in coal and steel. The aim was to eradicate the possibility of another war breaking out among the participating Member States and this aim has been met. Conflict in Europe ignited the two world wars of the twentieth century, but in 2005, as well as celebrating the 60th anniversary of the end of the Second World War, Europe could also celebrate 'the longest period of peace Western Europe has ever known'. This may also be attributed to a large extent to the success of the European Union.

There are some restrictions on free movement of workers to and from the new Member States which acceded to the Union in 2004. The Treaty of Paris was for fifty years duration. It came into force in 1952 and therefore terminated in 2002 when its functions were taken over by the EC. Belgium, the Netherlands and Luxembourg are sometimes referred to as the 'Benelux countries'. Speech 9th May 2005, EU External Relations Commissioner Benita Ferrero-Waldner.

The European Economic Community was renamed the European Community in 1993, reflecting its development into a Community the aims and competences of which were not purely economic but, increasingly, reached into a wider social and even political sphere. Also in 1993, the broader European Union was founded on the European Community (see Chapter 2 for details) and this Union expanded co-operation between the Member States beyond the areas covered by the Treaty of Rome into foreign policy and defence and policing and judicial co-operation. As yet, this further co-operation is at an early stage and you are not concerned with it on this course.

Community law is supreme over UK law (see Chapters 2).
Where there is conflict between national law and Community law, Community law prevails and national law must be disapplied. The judgments of the European Court of Justice are now the ultimate authority in the judicial hierarchy of the UK. The role that Community law plays in the national legal systems is increasingly important.

There can be no question that the economic and social landscape of modern Europe has been shaped by the law which flows from the European Community Treaty, the Treaty of

Rome. It is this law which you will study on this course. It is fast changing, with the case law of the Court of Justice of the European Union, the ECJ, playing a very important role. The institutions and methodology of law-making in the Community are unfamiliar and will require careful attention in the early stages of the course, but it is a subject where slowly the overall structure becomes clear. You are studying the emergence and development of 'a new legal order' which is still changing; many of the most important cases are recent and this makes EC law interesting, dynamic and relevant. Although there is no question that the rejection of the new Treaty establishing a Constitution for Europe in referenda in France and the Netherlands has been a setback for those who look to further integration, the impact of European Union law on many aspects of life in the United Kingdom and other Member States remains highly significant.

We hope you will enjoy the course!

1.1 Using the subject guide

The subject guide has been specially written for you by experts who lecture and examine in the subject. It covers the entire syllabus.

The subject guide will tell you what parts of the textbooks to read –and when to do so. It also contains a number of activities and sample examination questions.

These exercises have been designed to help you understand and remember the key points in EU law. It is very important that you do them. Answer the activities in your own words before you look at the feedback. If the feedback shows that you did not really understand the topic, you should work through those sections of the subject guide again.

Other skills

Among the skills you are required to develop as part of your studies, are the use of IT in legal research and the practice of verbal skills. You should:

_ use the Internet to find out more about key topics, and to read and research cases and issues

_ spend time developing verbal presentations of topics. You can practice verbal delivery either by yourself – of with groups of friends and family.

1.2 Readings

Legislation and judicial decisions

The main primary legislative text to which you will refer is the consolidated version of the Treaty of Rome, the Treaty establishing the European Community. This Treaty has been amended by the four subsequent treaties. These are:

_ The Single European Act (SEA).

_ The Treaty on European Union (TEU) known as the Maastricht Treaty.

_ The Amsterdam Treaty (ToA).

_ The Treaty of Nice (ToN).

Of these four treaties, only the TEU exists as a separate document in your collection of legislative materials; for this course, only the first seven articles are likely to be relevant, Arts 1–7 TEU.

The SEA, ToA and ToN are important because they significantly amended the EC (European Community) Treaty; the ToA and ToN also amended the Maastricht Treaty.

Among other changes, the ToA renumbered the articles of the EC Treaty and the TEU. New numbers are always cited; the old numbers are sometimes given in brackets and you will see them referred to in cases. You should always cite the new numbers.

There is a substantial amount of secondary legislation which you will study, together with the principal judgements of the European Court of Justice (ECJ) and the Court of First Instance (CFI). If you study the subject guide you should have no difficulty in passing the examination.

Legal documents

The best compilation of legislation is:

_ Foster, N. (ed.) Blackstone's EC Legislation 2005/2006. (OUP/ Blackstone).

You must purchase this book as you may take a copy of it into the examination with you. It is essential. Check in your copy of the *Regulations* to see which other statute books you may take into the exam.

Textbooks

An inexpensive introductory textbook, which includes cases and materials is:

_ Bainbridge, T. The Penguin Companion to European Union. (London: Penguin Books Ltd, 1998) second edition

[ISBN 0140268790].

A comprehensive textbook, is:

_ Craig, P. and G. De Búrca EC Law Text, Cases and Materials. (Oxford: Clarendon Press, 2002) third edition [ISBN 0199249431].

These books should be used in conjunction with a case-book. A good case-book is:

_ Weatherill, S. Cases and Materials on EU Law. (Oxford: Oxford University

Press, 2003) sixth edition [ISBN 0199258783].

We have set out the reading in the chapters which follow for Horspool, Craig and de Búrca and Steiner and Woods. You are not required to read the same material in all three of the recommended texts. There are also alternative books available. The following books would be suitable for the course, if you prefer their style.

Alternative text books are:

_ Hanlon, J. European Community Law. (London: Thomson, Sweet & Maxwell 2003) third edition [ISBN 0421798505].

_ Deards, E. and S. Hargreaves European Union Law. (Oxford: Oxford University Press, 2004) [ISBN 0198700717].

_ Fairhurst, J. and C. Vincenzi Law of the European Community. (Harlow: Pearson Education Ltd, 2003) third edition [ISBN 0582473462].

Useful further reading

Books which you may wish to refer to (if you have finished your essential reading only!) are the following:

_ Wyatt, D. and A. Dashwood European Community Law. (London: Sweet & Maxwell, 2000) fourth edition [ISBN 0421680407].

_ Arnhull, A. The European Union and its Court of Justice. (Oxford: Oxford University Press, 1999) [ISBN 0198258984].

_ Brown, L. N. and T. Kennedy The Court of Justice of the European Communities. (London: Sweet & Maxwell, 2000) fifth edition [ISBN 0421681209].

In the rest of this guide we refer to these textbooks in abbreviated form, such as:

Steiner and Woods, Chapter 2: 'Institutions of the EC: composition and powers' pp.33–34.

On EC constitutional and administrative law

An excellent book in this area is:

_ Hartley, T.C. The Foundations of European Community Law. (Oxford: Oxford University Press, 2003) fifth edition [ISBN 0198765312].

_ Lenaerts, K. and P. Van Nuffel Constitutional Law of the European Union. (London: Sweet & Maxwell, Thomson 2005) [ISBN 0421886102].

_ Craig, P. and G. De Búrca (eds), The Evolution of EU Law. (Oxford: Oxford University Press, 1999) [ISBN 0198765083].

_ Usher, J. General Principles of Law. (European Law Series, London: Longman, 1998) [ISBN 0582277493].

_ Usher, J. EC Institutions and Legislation. (European Law Series, London: Longman, 1998).

On substantive law

Barnard, C. The Substantive Law of the European Union. (Oxford: Oxford University Press, 2004) [ISBN 0199251355].

On competition

The best standard textbook on this area is:

_ Whish, R. Competition Law. (London: Butterworths, 2003) fifth edition [ISBN 0406959501].

_ Korah, V. An Introductory Guide to EC Competition Law and Practice. (Oxford: Hart, 2000) seventh edition [ISBN 1901362272].

Periodicals (journals)

The principal English-language journals that publish articles on EC law are:

_ *Common Market Law Review* (CMLRev)

_ *European Law Journal* (ELJ)

_ *European Law Review* (ELRev)

_ *International and Comparative Law Quarterly* (ICLQ)

_ *Journal of Common Market Studies* (JCMS)

_ *Legal Issues of Economic Integration* (LIEI)

_ *Modern Law Review* (MLRev)

_ *Yearbook of European Law* (YEL).

The abbreviations given in parentheses will be used throughout this guide for references to these journals. You are also strongly encouraged to develop the habit of reading a quality newspaper every day: the best regular source of information on EU law is the *Financial Times*.

Useful web site addresses

_ Court of Justice of the European Communities: http://curia.eu.int/en/index.htm

_ European Parliament: http://www.europarl.eu.int

_ Council of the European Union: http://ue.eu.int

_ European Commission: http://europa.eu.int/comm/index_en.htm

_ Commission Competition Directorate web site: http://europa.eu.int/comm/competition/index_en.html

_ European Research Papers Archive (ERPA): http://eiop.or.at/erpa/

_ The Jean Monnet archive of research papers on EC Law: http://www.jeanmonnetprogram.org/1.3

1.4 Terminology and abbreviations

AJCL American Journal of Comparative Law

CCT Common Customs Tariff

CFI European Court of First Instance

CFSP Common Foreign and Security Policy

Commission European Commission

COREPER Committee of Permanent Representatives (French acronym)

EAEC European Atomic Energy Community

EBLR European Business Law Review

EC European Community (EEC is correct only pre 1 November 1993)

EC Treaty Treaty of Rome

ECB European Central Bank

ECJ European Court of Justice

ECOSOC Economic and Social Committee

ECSC European Coal and Steel Community

EEA European Economic Area

EFTA European Free Trade Association

EMS European Monetary System

EP European Parliament

ERM Exchange Rate Mechanism

EU European Union

Euratom European Atomic Energy Community

GATT General Agreement on Tariffs and Trade

ICLQ International and Comparative Law Quarterly

ILJ Industrial Law Journals

IRLR Industrial Relations Law Reports

LIEI Legal Issues of Economic Integration

LQR Law Quarterly Review

nyr not yet reported

OJ Eng. Sp. Ed Official Journal of the EC, English Special Edition (pre-1973)

PL Public Law

SEA Single European Act

ToA Treaty of Amsterdam

ToN Treaty of Nice

TEU Treaty on European Union/Maastricht Treaty

YEL Yearbook of European Law

Chapter 2 The European Union legal order

Contents

Introduction

This chapter introduces you to the legal order of the European Union. The European Union itself was created by the Treaty on European Union (TEU) and includes, apart from the European Community, two additional areas of co-operation between the Member States described later in this chapter. This course is concerned with European Community law which derives from the European Community Treaty, the Treaty of Rome.

The legal system of the European Community has been described as *sui generis* by the European Court of Justice, meaning that it is 'of its own, unique type', unlike any other legal system in the world.

The Member States (now 25 of them) belong to a supranational organisation governed by institutions to which the Member States have transferred certain powers and to which they have also given competence to enact legislation (within limited areas) which binds those signatory states.

The European Economic Community (later called the European Community) was established by the Treaty of Rome in 1957 (the EEC Treaty). The background to the creation of the European Economic Community (EEC) is described and then the essential

features of the ‘common market’ which it created are briefly explained. These are then described and analysed in detail in subsequent chapters.

The effectiveness of European Community law has been greatly increased by the case law of the European Court of Justice, the main court of the European legal order and one of the original Community institutions established by the Treaty of Rome. In its early case law, the Court of Justice created two principles of fundamental importance to the Community legal order, which are essential to the effectiveness of Community law. These are the principles of ‘direct effect’ established in *Case 26/62 Van Gend en Loos* v *Nederslande Administratie der Belastingen* CMLR [1963] 105 and the twin principle of supremacy of Community law, laid down in *Case 6/64 Costa* v *ENEL* [1964] ECR 585. This chapter analyses these cases and introduces these principles which are explored in greater depth in later chapters.

Finally, this chapter provides you with an outline of the changes to the Treaty of Rome (the EEC Treaty) and to the European Community legal order introduced by subsequent treaties. This is intended as an initial guide for you, but also as a point of reference for your later studies. Those developments which are of particular significance are highlighted; on this course you are not expected to know all the changes introduced by later Treaties in detail.

In effect, this chapter is intended to provide you with a map which will help you to find your way round European Community law.

Because everything in European Community law is quite unfamiliar – the institutions, the forms of secondary legislation, the structure –this is a difficult subject to study at the beginning. However, you will find it quickly becomes clearer as you progress through the different areas.

Learning outcomes

By the end of this chapter and the relevant reading, you should be able to:

_ State what were the six founding Member States of the EEC.

_ Explain what the ECSC and Euratom are.

_ State what the Council of Europe and the European Convention on Human Rights (ECHR) are.

_ Identify the essential elements that create a common market.

_ Identify the four original institutions of the EEC and which institutions have been added since.

_ State when the EEC became the EC.

_ Describe the three pillar structure of the European Union.

_ Explain what is meant by the principle of 'dual vigilance'.

_ Describe the 'teleological' approach of the ECJ.

_ Summarise the significance of the Van Gend judgment.

_ Define 'direct effect' and give a brief account of its part in creating the Community legal order.

_ State the conditions for 'direct effect' of a Treaty Article.

_ Explain what is meant by the supremacy of Community law and why supremacy is essential for the effectiveness of Community law.

_ Explain why the ECHR and the European Court of Human Rights are not part of the European Union.

_ Describe the benefits of a common market and give a general account of what gives rise to these benefits.

_ State the essential features of the EEC created by the Treaty of Rome.

_ Explain the relationship between the European Community and the European Union.

_ Explain what is meant by a Qualified Majority Vote (QMV) in the context of Community law and the difference between voting by unanimity and by qualified majority for Community law.

2.1 Background to the establishment of the European Economic Community (EEC)

Essential reading

_ Bainbridge, T. The Penguin Companion to European Union.' pp.1–10.

_ Materials Pad pp. 1-17

_ EU Documents (distributed at class)

The European Economic Community was established by the Treaty of Rome in 1957 with the aim of establishing a common market within the signatory states. The establishment of the EEC was a momentous and historical step in the process of the integration of Europe, the final outcome of which is still to be determined. It must be remembered that the EEC was established in the aftermath of the devastation caused by the Second World War when the economies of the nation states of Europe lay in ruins.

Origins: common market in coal and steel

The first step towards integration in Europe was taken by the French foreign minister, Robert Schumann, who promoted the plan put forward by Jean Monnet, a French businessman turned administrator. Jean Monnet was a committed federalist who suggested putting coal and steel resources, in particular, those of France and Germany, under common ownership and control. Other countries were invited to join.

It was intended that placing these raw materials, which are essential for waging war, under common ownership would make it impossible for another World War to start in Europe.

Rivalry over the coal producing areas of Europe, the Ruhr and the Saar, would be contained and French fear of Germany would be neutralised. It was intended that the nations of Europe, France and Germany in particular would be bound together in peaceful, economic co-operation.

So the first step towards co-operation and integration took place in 1951 with the signing of the **Treaty of Paris** by the six founding Member States of the European Communities:

Germany, Italy, France and the Benelux countries (the Netherlands, Luxembourg EU Law and Belgium). This Treaty created the ECSC, The European Steel and Coal Community, which set out to create a common market in coal and steel.

The significance of the ECSC is that it created supranational institutions, the High Authority, an Assembly, a Council and a Court with powers over the signatory states. It represented an important first step in the integration of Europe.

Britain objected to the supranational element with its implications for national sovereignty, and refused to join. Attempts by the same six countries (the United Kingdom again not taking part) to create a European Defence Community with a common army led to the signing of the European Defence Community Treaty in 1952, but it was never ratified. The plan at that time to set up a common army which also required a common foreign policy was over-ambitious and the whole initiative finally came to nothing.

Euratom

However, the six Member States met in Messina in Italy in 1955 and an intergovernmental committee chaired by the Belgian Prime Minister, Paul-Henry Spaak, was set up. This published a report, called the Spaak report, which set out the plan for two further communities, the European Atomic Energy Community, Euratom, and the European Economic Community. Euratom was to place the development of nuclear energy for peaceful purposes under common control of the Member States but of course it was the establishment of the EEC, setting up a common market among the signatory states, which is of central significance.

The Council of Europe

Note that in 1949 the Council of Europe was established. This is an entirely separate organisation from the European Community. It is an international organisation based in Strasbourg which aims to strengthen democracy, human rights and the rule of law; it is responsible for the European Convention on Human Rights (ECHR) which was drawn up

in 1950. This is a Treaty and was ratified in 1953. It allows individuals from signatory countries who have exhausted their domestic remedies to bring actions in the European Court of Human Rights in Strasbourg (ECtHR), enforcing their human rights protected by the Convention. The Council of Europe and the European Court of Human Rights are institutionally **entirely separate from the institutions and Court of Justice of the EC** (you may wish to consult your notes on **Public law**).

Summary

After the Second World War, the economies of the nation states of Europe were in ruins. There were two overwhelming needs in Europe – to rebuild the economic viability of the countries of Europe and to ensure that another World War could never break out because of conflict between Germany and France. To achieve the latter, six countries signed the Treaty of Paris in 1951 to place coal and steel under common ownership and control and then signed the Treaty of Rome in 1957 to establish a 'common market' within their borders. This Treaty also established Euratom, for the six countries to jointly develop nuclear power. The European Coal and Steel Community (ECSC), Euratom and the European Economic Community (EEC) created by these treaties established institutions with supranational powers, the first step in the integration of Europe.

Reminder of learning outcomes

By this stage you should be able to:

_ State what were the six founding Member States of the EEC

_ Explain what the ECSC and Euratom are

_ State what the Council of Europe and the European Convention on Human Rights (ECHR) are.

2.2 The European Economic Community established by the Treaty of Rome 1957

Essential reading

You should read at least one of the following

_ Bainbridge, T. The Penguin Companion to European Union.'

_ Materials Pad pp. 17- 21

_ EU Documents (distributed at class)

The Treaty of Rome was signed on 25 March 1957 with the aim of establishing a common market within the signatory states.

The aims of the Treaty of Rome establishing the EEC were strongly economic in nature. In the aftermath of the war, the economic reconstruction of Europe was an overwhelming necessity. The economies of the nation states of Europe were devastated by the Second World War and the creation of a common market was perceived as a way to rebuild these economies and to make Europe economically independent of America; at that time Europe was dependent on American aid delivered through the Marshall plan.

The purpose of establishing a common market was to increase wealth, growth and productivity in Europe and make Europe independent of American aid.

2.2.1 What is a common market?

A common market is a form of economic integration between participating states. The first and essential step in the establishment of a common market is the removal of customs duties between the Member States. Thus, goods produced in any Member State are free to circulate and move across borders within the common market without incurring custom duties.

What about goods produced outside the common market? The Member States set up a Common Customs Tariff which sets common customs duties for goods imported into the common market from third countries (i.e. countries outside the common market).

Customs duties will be charged at the same rate on these goods wherever they enter the common market, whichever country they enter into. So, for example, a watch from Russia will pay the same duty whether it enters Italy, France or Germany.

Consequently, these imported goods are also free to circulate without incurring customs duties within the common market.

The removal of barriers to trade within the common market goes much further than this. The aim is to remove all barriers to free movement of goods, whether fiscal, physical or technical.

It is not only goods that are to circulate freely. The common market set up by the Treaty of Rome in 1957 guaranteed **four freedoms**:

_ Free movement of goods.
_ Free movement of workers.
_ Free movement of services and freedom of establishment.
_ Free movement of capital.

Underlying the whole idea of the common market is the principle that there should be no discrimination between Member States (Article 12 EC). This means that there should be no discrimination against the goods or persons from other Member States: the principle of non-discrimination established in the original Treaty of Rome as part of the common market did not afford protection to persons or goods from third countries.

The original Treaty of Rome also contained provisions establishing a Competition Policy (Articles 81–89 EC) to ensure competition was not distorted. This protects the consumer from, for example, cartels and monopolies artificially inflating prices. It also ensures that the common market is not partitioned by companies deciding to share out national markets. A competition policy is an important element. The idea is that companies can produce goods and sell them throughout the whole area of the common market, leading to economies of scale, greater competitiveness, higher growth and greater incentive to

innovate, giving the consumer the benefits of lower prices and greater choice. The end result is a growth in productivity for all participating countries. Where a common market is fully realised, the markets of the participating countries will become merged into one market, like that of a single country in the integration of the market as well as determining what sort of market – competitive and fair to consumers and small and medium companies – the common market should be.

The original common market had rules prohibiting state aids; it created a Common Commercial Policy and a Common Agricultural Policy (CAP). Additionally, there was a Common Transport Policy and a Common Fisheries Policy.

Harmonisation and deregulation

It was expected that the common market would partly be achieved by harmonisation of standards across the Member States, achieved by secondary legislation enacted by the Community institutions. In practice it has proved difficult to achieve agreement on common standards and the approach taken, led by the ECJ, has been *deregulation*, the achievement of free trade by the removal of national laws which create obstacles to free movement.

The original concept of a common market also encompassed the gradual harmonization of fiscal (tax) and social policy and ultimate convergence of economic and monetary policy.

2.2.2 Supranational institutions and treaties

Most importantly, as the foundation of the EEC and to implement the common market, the Treaty of Rome established **four supranational institutions** with legislative, executive and judicial powers to carry out these policies. These were:

_ The Council of the European Union (formally called the Council of Ministers)
_ The European Parliament.
_ The European Commission.
_ The European Court of Justice.

The aims and objectives of the EEC are set out in the Preamble to the Treaty of Rome and in Art 2.

The Preamble talks of the determination to '*lay the foundations of an ever closer union among the peoples of Europe*', the resolution of the Member States '*to ensure economic and social progress*' and affirms the objective of achieving '*constant improvements of the living and working conditions*' of the peoples of Europe.

Art 2 of the original EEC Treaty gave the aims of the EEC in 1957 as the establishment of a common market through which would be promoted '*harmonious development of economic activities, a continued and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the states belonging to it*.'

So, whilst there was always **an idealistic strand** in the impetus toward European integration, the primary aims and objectives of the EEC **were largely economic** in nature, centred on the creation of the common market.

Since 1957 the scope of competence of the European Community has been greatly increased by a series of treaties amending the original Treaty of Rome. The European Union itself was established by the Treaty on European Union which came into force in competence of the EU, that is the fields of activities where it has competence to act, now extends into many, and ever increasing, areas, including many aspects of social policy. This development will be traced later in this chapter as we consider the various treaties.

The result is that there are few areas of life now untouched by European Community law (one obvious example is the criminal law). This expansion has deepened the concerns over the lack of democratic accountability of the Community. This has been addressed primarily by increasing the powers of the European Parliament, which is another development traceable through consideration of the later treaties.

The law with which we are concerned stems from the Treaty of Rome (the EEC Treaty) establishing what was originally the EEC and now is simply the EC (European Community).

Summary

The EEC Treaty founded a ‘common market’. A common market is a form of economic integration where there are no barriers to trade between the participating states. The common market in Europe established the four freedoms, free movement of goods, workers, services and capital. It set up a common customs tariff and a competition policy, among other policies. The underlying principle is that of non-discrimination, enshrined in Art 12 EC. This prohibits discrimination against goods, persons or services from other Member States. The aim of a common market is to increase wealth and productivity within the participating states by economies of scale and greater competitiveness.

Reminder of learning outcomes

By this stage you should be able to:

_ State when the EEC became the EC.

_ Describe the three pillar structure of the European Union.

_ Explain what is meant by the principle of ‘dual vigilance’.

_ Describe the ‘teleological’ approach of the ECJ.

_ Identify the four original institutions of the EEC.

_ Identify the essential elements that create a common market.

2.3 The principles of direct effect and supremacy of European Community law

Essential reading

_ Bainbridge, T. The Penguin Companion to European Union.'

_ Materials Pad, pp.22–29.

_ EU Documents (distributed at class)

2.3.1 How the ECJ approaches treaties

The Treaty of Rome reflects the civil law tradition of the majority of Member States and is what is described as a 'framework treaty'.

This means that it was intended that it would be interpreted and filled out by secondary legislation and case law of the European Court of Justice (ECJ). The ECJ has indeed played a very important role in the development of the EC. In its judgments it takes a purposive approach; this is also called a 'teleological' approach. The teleological approach is very different from that of the UK courts which is generally literal, as you will remember from studying English Legal System (ELS) and purposive only under certain conditions. The creativity of the ECJ using a purposive approach goes very much further than that of the UK courts.

Using the teleological approach, the ECJ looks to the preamble of Treaty and to its aims and objectives as set out in Arts 2 and 3 EC and draws on these principles to determine the outcome of its cases. There are two other principles which underlie its case law –the requirement of effectiveness – *effet utile* in French – and the requirement for the uniform application of Community law in all the Member States. The use of these principles has led to case law which is astonishingly creative by ELS standards.

The Court may refer to the s*pirit of the treaty* or to principles *inherent in the system of the treaties* to develop new doctrines. The ECJ has not hesitated to rewrite the Treaty on occasion. The ECJ has also incorporated a set of human rights and general principles into the Community legal order which was never mentioned in the original Treaty of Rome

(EEC Treaty). This is dealt with in Chapter 3 and is an outstanding example of how the Court has constitutionalised the treaties.

The most important case in Community law, and one of the most important cases of this century, is *Van Gend en Loos* in 1963. In this EU Law case the Court decided that an individual could rely on a Treaty Article and enforce it in his own national court although the Treaty Article had not been legislated into the Member State's legal system. This is called the principle of 'direct effect'. Normally the question of the operation of an international treaty in the domestic legal system is determined by the constitutional law of the individual country concerned. In this case, the Court of Justice decided that **it** had jurisdiction to decide the effect of the Treaty of Rome on a Dutch citizen.

The original EEC Treaty has been called 'one of the legislative masterpieces of the twentieth century' (see 'The court of justice and judicial activism' by Tridimas [1996] 21 EL Rev 199, 205).

However, it left open the question of the status of individuals in the system. As Lenaerts writes 'it was in no way obvious from the outset, how Community law could operate directly upon the people in the Member States'.

(Constitutionalism and the Many Faces of Federalism.' Koen Lenaerts *The American Journal of Comparative Law* Vol 38 1990 p.208). In *Van Gend en Loos* the Court addressed this problem and at one stroke transformed the legal status of the Treaty from a conventional, if far-reaching, Treaty governed apparently by the normal rules of international law, into the foundation of a *sui generis* 'new legal order' that would operate directly for the benefit of the citizens of the signatory states.

2.3.2 Van Gend en Loos

The facts of the case took place in the first stage of the establishment of the EEC when customs duties had not yet been abolished but where there was a clear prohibition in Article 12 of the EEC Treaty (now Art 25 EC) of any **increase** in customs duties.

Van Gend en Loos was a company importing urea formaldehyde (a kind of glue) from Germany into the Netherlands (Holland), where a custom duty was imposed. In 1958, when the EEC Treaty came into force, the duty on this product was fixed at 3 per cent. Despite the prohibition on increases of customs duties, the Dutch government in 1959 entered into a Benelux Customs Protocol which had the effect of increasing the duty on this particular product to 8 per cent. The company, Van Gend en Loos, forced to pay this increased duty, brought an action challenging the legality of the increase under Community law in the Amsterdam Customs Court, called the Tariefcommissie. The Tariefcommissie made an Article 234 EC reference to the ECJ. An Article 234 reference can be made where a point of Community law is raised in a national court; the national court has discretion to decide to refer the question to the ECJ under Article 234 to obtain a ruling on the point of Community law (see Chapter 4).
Nothing is said in the Treaty about the effect of Treaty Articles on individuals.

The question asked by the Tariefcommissie was this:
'Whether Article 12 EEC has an effect within the territory of a Member State, in other words, whether on the basis of this Article citizens of the Member States can enforce individual rights which the court of the Member State should protect'.

You should remember details of the Van Gend in Loos case.
Practice giving an oral description of the facts and outcome (2–3 minutes).
We can rewrite the question as 'what was the effect on national law of the EEC Treaty and, crucially, does an individual have standing to enforce provisions of the Treaty?'
Under normal rules of international law the effect of treaties on domestic law was undoubtedly a question of national constitutional law. The problem with leaving it to be

determined by the national court applying domestic law was that then the EEC Treaty would have different legal effects in the various Member States according to the rules of their domestic legal systems.

The Belgian and Dutch government argued forcefully that this was a matter of national constitutional law. The Netherlands government claimed in these proceedings that 'the EEC Treaty does not differ from a standard international Treaty'.

In a **hugely significant** constitutional judgment, The Court of Justice stated that:
'The Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subject of which comprise not only the Member States but also their nationals...It follows from the foregoing conclusions that, according to *the spirit, the general scheme and the wording of the Treaty,* Art. 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect.'

2.3.3 The need for direct effect

Direct effect, whereby an individual can enforce provisions of Community law, initially Treaty Articles, directly in their own national courts, was essential if the Community legal order was to be effective.

In *Van Gend* the ECJ held that an Article of the EEC Treaty could have direct effect if it was:
_ Clear and precise
_ Unconditional
_ Its operation did not depend upon further action by national or EC authorities in other words if it was justiciable, which means it can be simply applied by a court.
Direct effect, not mentioned in the Treaty, was to become the mainstay of the new legal order: see 'The directly effective provisions of Community law are the backbone of the Community's legal system.' (Schermers and Waelbroeck, *Judicial Protection in the European Communities.* p.125.)

It is defined as the principle **that individuals can enforce their Community law rights directly in their own national courts**. It is essential for the effectiveness of Community law because it means that individuals can seek remedies for breaches of Community law in their own national courts.
The mechanism for enforcement against Member States set out in the Treaty itself was an action that the Commission would take against the Member State for a breach of Community law under Article 226 EC, finally taking the Member State to the ECJ. This action, a typical mechanism of international law, takes many years.

Additionally, the individual does not receive a remedy and, until the Treaty on European Union in 1993, there was no sanction against a Member State which failed to remedy the breach after the ECJ had declared it to be in breach.

The Court refers to this when it stated in *Van Gend*:
'The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 [now Articles 226 and 227 EC] to the diligence of the Commission and of the Member States'.
Pescatore says that the judges in this case had '*une certaine idée de l'Europe*' and that it is this idea which has been decisive and not arguments based on the legal technicalities of the matter.' Perhaps instead, we can say that the decision was informed by a certain idea of law, that the individual accorded a right must be able to enforce it.

In the *Van Gend* case, the ECJ:
_ created the principle of direct effect.
_ laid down the conditions for direct effect of a Treaty Article.
_ stated that the EEC Treaty was not simply another international treaty but the foundation of 'a new legal order'.

2.3.4 Costa v ENEL

In 1964, Case 6/64 *Costa* v *ENEL* [1964] ECR 585 established the second of the 'twin constitutional principles' of Community law, the supremacy of that law over national law legislated both prior and subsequent to the Community law.

Even more than direct effect, this principle was clearly essential if Community law was to be applied uniformly in the different Member States and its clear articulation was a prerequisite for legal certainty, nevertheless it was *not* mentioned in the Treaty.

Costa v *ENEL* concerned an electricity bill demand sent by the newly nationalised Italian electricity board to Mr. Costa, who refused to pay on the grounds that the Italian laws under which the electricity companies had been nationalised were in conflict with EEC Treaty Articles.

The European Court of Justice gave a judgment clearly stating the unique status of the EEC Treaty and of EC law. It said that: 'it follows from all these observations that the law stemming from the Treaties, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.'

It said also that the EEC Treaty, 'by contrast with ordinary international treaties...had 'created its own legal system which...became an integral part of the legal systems of the Member States and which *their courts are bound to apply*.'

Thus the principle of supremacy of EC law over all national law, whether passed before or after, was established.

If you consider that the point of Community law is that it should be both effective and uniformly applied throughout the Member States, it should be clear that the supremacy of Community law is 'Une certaine idée de l'Europe' (French) ='a particular idea of Europe'.

See Pescatore, 'The Doctrine of Direct Effect: An infant disease of Community Law', 63 (1983) 8 EL Rev p.158.

See Deidre Curtin, 'The decentralized enforcement of community law rights: judicial snakes and Ladders' in Constitutional Adjudication in European community and national Law, ed. O' Keeffe pp.33, 36. *necessary*. Otherwise, Community law would only have effect depending on what national law had subsequently repealed bits of Community law, and consequently the law would be different in every Member State.

Summary

The European Court of Justice has played an important role in enhancing the effectiveness of European Community law. It has used a purposive or teleological approach, drawing on the aims and objectives of the treaties, which has enabled it to be highly creative in developing new principles. Two of these principles which have been of huge significance in deepening the impact of Community law and its integration into the national legal systems are 'direct effect', established in the *Van Gend en Loos* case and the supremacy of Community law over national law, established in *Costa* v *ENEL*.

In these cases, the ECJ referred to the necessity for the effectiveness and uniformity of Community law, two principles which have underpinned all its subsequent constitutional case law.

Reminder of learning outcomes

By this stage you should be able to:

_ Summarise the significance of the Van Gend judgment

_ Define 'direct effect' and give a brief account of its part in creating the Community legal order

_ State the conditions for 'direct effect' of a Treaty Article.

2.4 The development of the EU legal order in subsequent treaties

Essential reading

_ Bainbridge, T. The Penguin Companion to European Union.'

_ Materials Pad pp.29–29.

_ EU Documents (distributed at class)

2.4.1 Synopsis of the development of the Community to 1999 Treaty of Paris 1951

The EEC (European Economic Community)

The EEC was established to create a common market in Europe based on the principle of non-discrimination between Member States (Art 7 in 1957 now Art 12 EC), characterised by the four freedoms, of goods, services, capital and people (both workers and self-employed persons), a Common Customs Tariff, a Competition Policy, rules on anti-dumping and state aids, a Common Commercial Policy and Common Agricultural Policy. Also a Transport Policy and the Common Fisheries Policy.

The EEC originally had four institutions, The Council of Ministers, the Commission, the European Parliament, and the Court of Justice.

These will be described in detail in Chapter 3.

The Treaty sets out the structure and the powers of the institutions as well as the competencies of the Community; it also outlines its legislative and judicial processes and provides the legal base for the secondary legislation. However it is what is known as a '*traite cadre*', a framework treaty, and it was always envisaged that it would be completed by case law of the ECJ and secondary legislation.

This is a brief summary, as introduction and for later reference, and should be used in conjunction with reading in the textbooks.

1965 The Merger Treaty

To begin with, the three Communities had separate institutions, but these were amalgamated in 1965 in the Merger Treaty. The High Authority of the ECSC was merged with Euratom and the EEC Commission to form a single body, the present Commission; and the Council of the ECSC and Euratom were joined with the Council of Ministers (as it was then called) of the EEC.

The Luxembourg Accords Voting procedure: QMV and unanimity

Under the original Treaty of Rome in 1957, the Council (composed of representatives of the Member States) was the only legislative body (although legislation had to be initiated by the Commission).

The voting procedure for the Council is of immense importance. The basic voting procedure in the Treaty is by simple majority, and this is the default mode, used when no particular method of voting is specified. However, this is rare; usually Treaty Articles lay down that a particular form of voting should be followed, either unanimity or qualified majority vote. The difference between these two is of enormous significance: where a vote must be taken by unanimity, every country has a veto. No Member State is bound by any measure which it opposes; this form of decision-making is intergovernmental. In these circumstances, any Member State can choose to be intransigent and refuse to compromise. It has been described as ‘decision-making in the shadow of the veto’.

Where, however, the vote is by qualified majority vote (QMV) then the decision-making is supranational, any country can be over-ruled and bound by a decision which it has opposed if the necessary majority is in favour. Because no single Member State can block the passage of legislation under a qualified majority vote, the pressure is on Member States to reach workable compromises whereby each Member State gets some, at least, of what they want. Member States must trade concessions to reach an agreement amongst enough Member States to get the required majority. Such a consensus is far easier to achieve than unanimity.

The qualified majority voting system for the EC is based on an allocation of votes per Member State. The numbers of votes are allocated according to each country's population. These voting weights are set out in Art 205 EC. Out of a total of 321 votes allocated amongst the 25 Member States, 232 (72.3 per cent) are required for a qualified majority. As you can see, the required majority greatly exceeds the 51 per cent needed for a simple majority. Alliances of big and small Member States come together in various formations to create a majority.

In the new system of qualified majority voting introduced by the Treaty of Nice and in effect since 2005, an additional requirement allows a Member State to ask for confirmation that the vote in favour in a qualified majority vote also represents at least 62 per cent of the total population of the Union. If not, the required majority will be deemed not to have been reached. It was intended that after a transitional period, the Council would move from unanimous to qualified majority voting in many areas. However, when the time came, the French, under de Gaulle, refused to give up the veto. Between 1965 and 1966 the French protest took the form of the 'empty chair' policy where they refused to attend meetings in the Council, leading to total legislative paralysis, and a compromise was finally reached in 1966 called the 'Luxembourg Accord' or 'Luxembourg Compromise'. This was a non-legally binding agreement that, where a matter was considered to concern important national interests, discussion would continue until unanimous agreement was reached.

Hence the veto was preserved and the result was stagnation in the Community for nearly two decades as a result of paralysis in the decision-making process in the Council.

1972–1986, the Community enlarges and develops

1972 Accession of the UK, Denmark and Ireland

1981 Accession of Greece

1986 Accession of Spain and Portugal

1970 Budgetary Treaty and Own-resources Decision

Two **Budgetary Treaties** were passed. The first, of 1970, changed the basis of the Community's finances to the Community's own financial resources (instead of national contributions) and strengthened the role of the Parliament in the budgetary process.
The Parliament henceforth adopted the budget in conjunction with the Council.

1975 Second Budgetary Treaty

The powers of the Parliament in the budget were further increased in the second Budgetary Treaty of 1975 giving the Parliament control over non-compulsory spending.
This Treaty also established the **Court of Auditors.**

1979 Direct elections to the European Parliament

The European Parliament became the only directly elected international organisation in the world. Its democratic mandate gave it a new legitimacy.

1986 The Single European Act (SEA)

Nearly twenty years after the Treaty of Rome, the SEA was the first amendment of the Treaty. The impetus for the SEA was a White Paper written by Lord Cockfield (a British Commissioner) published by the Commission which enumerated the trade barriers, physical, fiscal and technical, which still existed within the common market, of which there were approximately 282. The White Paper concluded that all the Member States would greatly benefit in terms of productivity and wealth if these barriers were removed.
The result was the decision to launch a programme to complete the 'single' or 'internal' market by a deadline of 31 December 1992.

Effectively, this was a re-launch of the common market, although now the emphasis was on dismantling national trade barriers rather than on harmonisation of laws.

Introduction of QMV under Art 95 EC

In order to achieve this target, the Single European Act **introduced QMV** (Qualified Majority Voting) for measures to complete the single market in a new Article 100a (now Art 95 EC); this broke the deadlock in the Council and was highly effective in getting the Community going again: the single market project has been judged a success.

The co-operation procedure

The SEA also introduced a new legislative procedure (the cooperation procedure) used for some areas of the Treaty which greatly increased the Parliament's role. Up to this time, the Parliament had only had the right to be consulted on legislation, sometimes.

Now it played a greater role, and where the Parliament vetoed a measure, unanimity was required in the Council to pass it.

This procedure has now been replaced by the 'co-decision' procedure (see below) throughout the Treaties except for provisions relating to Economic and Monetary Union but its introduction in the SEA is still significant as a very important step in the enhancement of the powers of the European Parliament.

The assent procedure

The European Parliament was also given a veto over the accession of new Member States and over the conclusion of association agreements under the **assent procedure.**

Enlargement of Community competence

The SEA also began the process of enlarging the competence of the Community by adding research and development, economic and social cohesion and environmental policy to the competencies listed in Art 2. The competencies of the Union set out the areas where the Union has competence to legislate.

Court of First Instance

The SEA prepared for the introduction of the Court of First Instance (actually established in 1989).

The European Council

The SEA referred to the European Council (this is **not** one of the Community institutions and is discussed in Chapter 3 below) and placed its meetings on a formal footing.

The SEA brought about these changes by amending the original Treaty of Rome.

1992 The Treaty on European Union (TEU)

This Treaty is of the utmost importance. It was signed in 1992 with the intention that it should come into effect in January 1993 but this date was delayed until November of that year because of the 'no' vote by the Danish people in a referendum on whether to ratify the treaty, and legal challenges in the UK (*R* v *Sec of State for Foreign and Commonwealth affairs ex parte Rees-Mogg* [1994] 2 WLR 115) and Germany (*Brunner* v *European Union Treaty* [1994] 1 CMLR 57). The vote to ratify the Treaty in the UK parliament was passed by the narrowest of margins after it was made a vote of confidence by the Conservative Government.

The Treaty created the European Union with a **three pillar structure**. It also substantially amended the Treaty of Rome adding citizenship, subsidiarity, economic and monetary union, many new competencies, a new legislative procedure, co-decision, which made the Parliament a co-legislator as well as strengthening the role of the European Parliament in other ways and it also renamed the **European Economic Community** as the **European Community** (EC), reflecting its wider sphere of influence.

Establishment of The European Union The three pillar structure

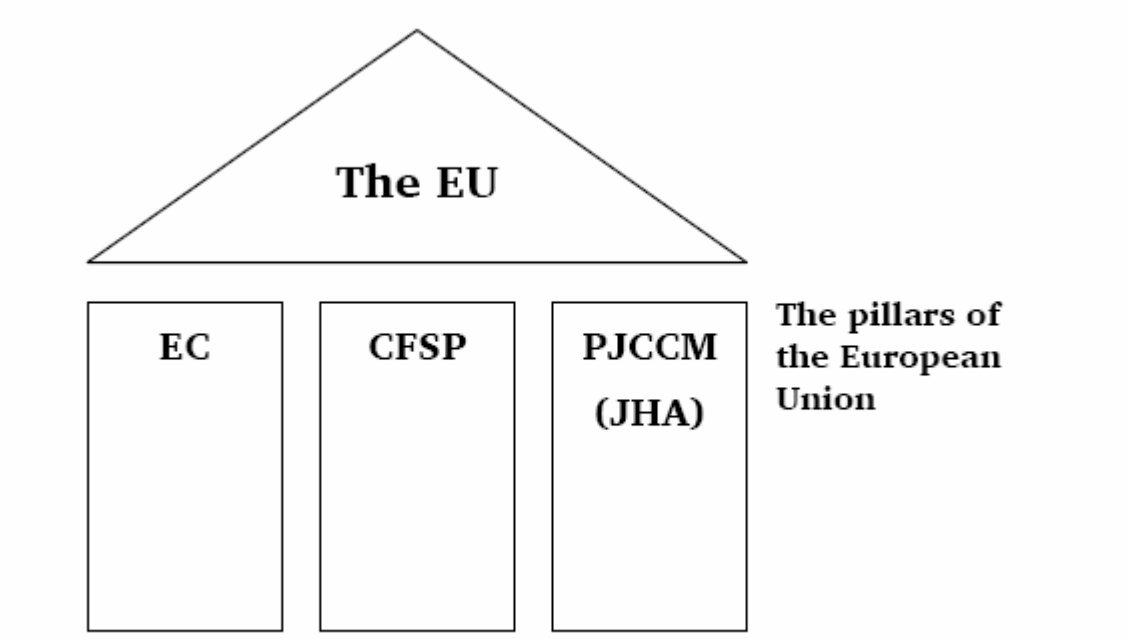
The Treaty on European Union (the Maastricht Treaty) which came into effect in 1993, created the European Union. The Union comprises the European Community (EC), which together with ECSC and Euratom is now the first pillar of the Union.

Two more 'pillars' were added to the European Union. The second and third pillars were:

_ The Common Foreign and Security Policy (CFSP)

_ Justice and Home Affairs (JHA).

These were areas of intergovernmental co-operation between the Member States which are governed by different institutional arrangements than the European Community pillar.



The pillars of the European Union

There is very little decision-making by QMV; the Council, usually acting by a unanimous vote and the European Council (see below) are the most important institutions.

The Common Foreign and Security Policy

The second pillar is the Common Foreign and Security Policy (CFSP) [Arts 11–28 TEU]. This is the beginning of a common foreign and defence policy for the European Community. Because this is a sensitive area affecting national sovereignty, the framework of this pillar is intergovernmental. The leading institutions are the European Council and the Council; the default method of voting is by unanimity although provision is made for voting by QMV by derogation.

The roles of the Parliament and Commission are limited; the Commission is to be 'fully associated' [Art 18.4 TEU] and the Parliament is to be consulted and informed [Art 21 TEU], although it is specified that its views are to be taken into consideration.

Justice and Home Affairs

The third pillar is what was originally called Justice and Home Affairs (JHA) (Arts 20–45 TEU) now called **Police and Judicial Co-operation in Criminal Matters** (PJCCM). This is concerned: with policy matters relating to movement of persons across borders (asylum, immigration and third country nationals, the control of international crime and co-operation by police and judicial authorities).

This pillar is also essentially intergovernmental, with a unanimous vote required except for the adoption of implementing measures.

Member States as well as the Commission have the right of legislative initiative in these two pillars. To conclude, the European Community became the first pillar of the Union and the two areas discussed above are the second and third pillars respectively. These two pillars are not governed by the same law as the European Community pillar and they are

intergovernmental in nature. The default method of decision-making is by unanimity and the institutions other than the Council have a reduced role.

Changes to the Treaty of Rome by the TEU

The TEU substantially amended the Treaty of Rome (by Art 8 TEU).

The main changes were as follows:

Introduction of citizenship of the Union

See Arts 17–22 EC [Arts 8–8e EC].

Introduction of the principle of subsidiarity in Art 5 EC [Art 3b]

The principle of subsidiarity in general states that decisions should be taken at the lowest level possible, as close to the individual as possible. In the Treaty it refers to the relationship between the Member States and the EC and states that, in areas of shared competence, decisions should be taken at the Member State level except where the objectives of the action cannot be sufficiently achieved by action by the Member States and therefore for reasons of scale or efficiency should be dealt with at a Community level.

This principle has to be taken into account by the Commission when proposing legislation; it has to justify all proposed legislation with reference to subsidiarity. There has been a reduction in the volume of legislation proposed by the Commission since subsidiarity came into effect which could be a result its review of proposals with regard to the principle.

Economic and monetary union

Title VII Economic and Monetary Policy Arts 98–124 EC

The TEU introduced the aim of establishing EMU and introducing a common currency by 1st January 1999. Countries which wished to participate had to meet the convergence criteria. On 1 January 1999, eleven countries joined: Belgium, Italy, France, Spain, Portugal, the Netherlands, Luxembourg, Germany, Austria, Finland and Ireland. Greece has since met the criteria and joined, Denmark and the UK obtained an opt-out and Sweden was found not to meet the criteria and did not join. A single currency and interest rate now prevails across Euroland. The interest rate is set by a new institution, the European Central Bank (replacing the European Monetary Institute) which takes decisions regarding the currency.

Its current president is Jean-Claude Trichet. A committee was set up to determine economic policy, The Council of Economic and Finance Ministers (ECOFIN).

This third pillar was substantially amended by the Treaty of Amsterdam when it was re-named Police and Judicial Co-operation in Criminal Matters (PJCCM) and a large section dealing with visas, asylum and immigration and judicial cooperation in civil matters was moved back into the EC Treaty, into a new Title IV Arts 61–69 EC, concerned with establishing an area of Freedom, Security and Justice.

Although it is important to know that these pillars exist and when they were introduced, no detailed knowledge of the second and third pillars is required for this course.

See Maher, ‘Legislative Review by the EC Commission: Revision without Radicalism’ in Shaw and More (eds) New Legal Dynamics of the EU, (1996, Oxford, Clarendon Press) ISBN 0198262183.

The second part of the third stage of the single currency commenced on 1 January 2002 with the issuing of Euro bank-notes and currency.

New competencies added

_ Art 2 was amended to include: convergence of economic policies, social protection, economic and social cohesion

_ Art 3 environment, health, education and training, flowering of cultures of Member States, development co-operation, consumer protection, energy, civil protection and tourism.

The co-decision procedure

Art 251 EC. A new legislative procedure was introduced by TEU which effectively makes the European Parliament a co-legislator with the Council. It gives the Parliament a veto over legislation.

Originally, this was only used in limited areas of the Treaty. See Chapter 4.

Enhanced role of the Parliament

The role of the Parliament was strengthened in other ways. It was enabled:

_ To request the Commission to initiate a legislative proposal: Art 192 EC [Art 138b EC]

_ To set up temporary committees of inquiry: Art 193 EC [Art 138c EC]

_ To appoint an Ombudsman: Art 195 EC [Art 138e].

The Commission as a whole was made subject to a vote of approval by the Parliament: Art 214 EC [Art 158 EC].

1995 Accession of Finland, Sweden and Austria

Norway rejected membership in a referendum.

2.4.2 1997 The Treaty of Amsterdam (ToA)

The Treaty of Amsterdam came into effect in 1999.

Renumbering of Treaty Articles

Most importantly the ToA renumbered all articles of the Treaty of Rome and The Treaty on European Union. It then substantially amended both treaties.

Treaty of Rome amendments:

New aims and objectives

ToA added new aims and objectives under Art 2: Equality between men and women, 'sustainable' development, a high level of protection and improvement of the environment.

Environment

Environmental concern was incorporated both in Art 2 EC and also in a new Art 6 EC.

Co-decision procedure

The ToA greatly simplified the co-decision legislative procedure. It also expanded the scope of application of the Co-Decision procedure (see TEU), and the co-operation procedure was replaced by co-decision in all areas except EMU.

New competence to combat discrimination

A new competence in this area was introduced by Article 13 EC giving the Council powers to 'take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'. Several Directives have now been legislated on this legal base. See Chapter 3.

The Social Chapter

The Social Chapter Protocol was repealed and its provisions were incorporated into the EC Treaty itself after its ratification by the incoming Labour government. It is included in the Treaty under a new Title XI, Arts 136–145 EC.

Enhanced co-operation (or variable geometry)

Art 43 TEU (the parent provision), Art 40 TEU and Art 11 EC.

ToA marked the introduction of 'variable geometry', a new institutional procedure whereby groups of Member States may act on initiatives together within the framework of the EU, to establish closer co-operation. This means that groups of State can decide to integrate further, creating a Europe of concentric circles. Economic and monetary union was not established using this procedure, as it was set up by TEU, but it is an example of this type of variable geometry.

Powers of the EP in regard to the appointment of the Commission

Art 214 EC was amended so that now the European Parliament's approval is required for the appointment of the President of the Commission.

The procedure for enhanced geometry was amended by the Treaty of Nice, see below.

Increased transparency and protection of liberty, democracy and human rights

ToA marks a greater commitment to openness and freedom of information.

_ Art 1 TEU: Decisions are now to be taken 'as openly as possible'.

_ Art 2 TEU introduces the aims of promoting 'a high level of employment' and the aim of maintaining and developing the Union as an area of 'freedom, security and justice'.

_ Art 6 TEU states that the Union is founded on principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law.

_ Art 7 TEU: 'serious and persistent breach' of these principles leads to suspension of rights for a Member State.

_ Protection of human rights under Art 6.2 TEU [Art F] is made justiciable under Art 46 TEU [Art L].

_ Art 43 TEU: Introduction of variable geometry in the intergovernmental second and third pillars.

Provisions of the other important treaties mentioned, the SEA and Treaties of Amsterdam and Nice (ToA and ToN) are never referred to separately as they only amended the

Treaty of Rome (SEA) or The Treaty of Rome and the Treaty on European Union (the Treaties of Amsterdam and Nice amended both the former Treaties). The new numbers introduced by the ToA will always be given with the old numbers sometimes added in brackets.

You must only use the new numbers.

2.4.3 The Treaty of Nice

The Treaty came into force on 1 February 2003.

The major changes to the EC Treaty are as follows, and include the changes implemented by the Protocol on Enlargement:

Qualified Majority Voting (QMV)

Change from unanimous voting to qualified majority voting in 39 areas.

Institutions

The Commission

Provisions to change the composition of the Commission were adopted under the Protocol on Enlargement. When the ten new Member States joined the European Union in May 2004, the number of Commissioners rose to thirty but, as agreed, when the new Commission took office in November 2004, **the five largest member states** (France, Germany, Italy, Spain and the United Kingdom) **lost their second Commissioners** and the new Commission, which took office on 22 November 2004, has 25 Commissioners. The new Commission is under the Presidency of Jose Manuel Barroso.

All these changes to institutional structures are summarised in the chapter on institutions (Chapter 3).

_ The EC will have one Commissioner per Member State until it reaches 27 members. After that, a rotational system will be introduced.

In this course, the two treaties you will need to refer to are, most importantly, the Treaty of Rome as amended by the SEA, the TEU and the Treaties of Amsterdam and Nice. The Treaty articles take the form of Art 11 EC. You will also, to a lesser extent, need to refer to the Treaty on European Union. The Treaty Articles in this Treaty take the form of Art 11 TEU.

_ Art 214: Nomination of the President of the Commission shall now be by the Council, meeting in the composition of Heads of State or Government (rather than by common accord of the Member States) and will by QMV.

_ Both the choice of the members of the Commission and the vote approving the appointment of the President and other members of the Commission as a body will now be QMV.

_ The President's powers over the organisation of the Commission are increased:

Art 217: The Commission President is to determine the internal organisation of the Commission so that it acts consistently, efficiently and on the basis of collective responsibility.

Art 217(4): A member of the Commission is to resign if requested by the President of the Commission after obtaining the collective approval of the Commission.

European Parliament

Art 189: the maximum number of MEPs is increased to 732.

European Parliament's standing under Art 230 and Art 300

Art 230: The European Parliament now is a privileged applicant for bringing an action for judicial review. It is not restricted to actions to protect its prerogatives.

Art 300(6): The European Parliament *c*an also now obtain the opinion of the ECJ as to whether an agreement is compatible with the provisions of the Treaty.

The Council of the European Union

Until the new allocation of votes in the Treaty of Nice, the smaller countries had proportionately more votes in relation to their populations compared to the larger Member States. The new weighting redresses the balance to some extent whilst still leaving them with an advantage.

However, in a very significant new development, a QMV now may also require that the qualified majority comprise at least 62 per cent of the total population of the Union.

This increases the importance of Germany, with its big population, relative to the other large Member States with which it has a parity of votes in the Council.

The Commission

Art 4 (2) states that when the Union consists of 27 Member States, Art 213(2) EC shall be amended to lay down that the number of members of the Commission shall be less than the number of Member States, and will be chosen according to a rotation system based on the principle of equality, according to implementing arrangements adopted by the Council, acting unanimously.

Art 4(4) states that up to that point, any state which accedes to the Union shall be entitled to have a Commissioner.

The Judicial Structure

In order to address the problem of a large backlog of cases and consequent long delays certain changes to the judicial structure were introduced by ToN. However, they have not yet been brought into effect. These have been set out in Chapter 3.

Enhanced cooperation

The procedure for setting up enhanced cooperation (variable geometry) has been simplified by the Treaty of Nice.

Under Clause A, '*General Principles for Enhanced Cooperation*', to be inserted into TEU, the requirement for enhanced cooperation has been changed from requiring 'at least a majority' of States (Art 43(1)(d) TEU) to 'a minimum of eight States.'

It is no longer possible for one Member State to veto closer cooperation by other States. All that a Member State who wishes to prevent enhanced cooperation going ahead can do is to request that the matter be referred to the European Council.

May 2004 Accession of Estonia, Lithuania, Latvia, Poland, Hungary, the Czech Republic, Slovakia, Slovenia, Malta and Cyprus.

At the Laeken meeting of the European Council, it had been decided to set up a Convention to consider the future of Europe.

The Convention was chaired by former French President Valery Giscard d'Estaing and was composed of 113 members both from current Member States and from what were then the applicant countries. The representatives were drawn from governments, national Parliaments, the European Parliament and the Commission. The Convention reported in 2003. There was then a long period of consultation and revision before the final text for 'the Treaty establishing a Constitution for Europe' was finalised.

The proposed Treaty establishing a Constitution for Europe

A summary of the most important changes contained in the proposed Treaty establishing a Constitution for Europe is set out below. Following the rejection of the Treaty in referenda held in France and the Netherlands, both founder members of the EC, it seems very unlikely that the Treaty will be ratified.

Unless the Treaty is miraculously revived, it is only of general interest to you and you will not be examined on its provisions.

The Commission has prepared an overview of the main provisions of the proposed Constitution which can be accessed at:

http://europa.eu.int/constitution/download/oth180604_3_en.pdf

Helpful fact sheets can be located at:

http://europa.eu.int/scadplus/constitution/index_en.htm

The official summary of the Constitution (which can be accessed at the web site above) states that: 'The integration of the Charter of Fundamental Rights into the text, the clear acknowledgement of the Union's values and objectives as well as the principles underlying the relationship between the Union and its Member States, allow us to call this basic text a 'Constitution.'

It also contains a clearer presentation of the distribution of competencies and a simplified set of legal instruments and procedures. In future, European laws will be known as laws.

In legal terms, however, the Constitution remains a Treaty and therefore it will enter into force only when all Member States have ratified it.'

As stated above, such ratification is now unlikely.

The main changes that the Treaty would have brought about:

Values and principles

The Union's values are listed in Art I-2. It is clear that the project begun in 1957 has travelled a long way.

As well as those values which are already accorded status as core values of the Union under Art 6 TEU, The Union also respects human dignity and the rights of persons belonging to minorities.

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

The Union's objectives (Art I-3) are to promote 'peace, its values and the well-being of its peoples.'

The principle of the dual legitimacy of the Union is set out in Art I- 45, the principle of representative democracy: 'citizens are directly represented at Union level in the European Parliament. Member States are represented in the European Council by their heads of State or Government and in the council by their governments, themselves democratically accountable either to their national parliaments, or to their citizens.'

There is emphasis on transparency of proceedings of the Union institutions, bodies, offices and agencies, which 'shall conduct their work as openly as possible (Art I-49).

The European Parliament is to meet in public ‘as shall the council when considering and voting on a draft legislative act.’

_ The Charter of Fundamental Rights is incorporated into the Treaty. This will make the Charter legally binding and is thus a momentous development in the protection of fundamental rights and freedoms. The Charter is further discussed in Chapter 4.

Specific changes

_ The removal of the three pillar system.

Under the Constitution, the separate pillars will be integrated into one text and one legal framework so the European Community is merged with the European Union. This is a most important development whereby the distinction between the three pillars is abolished and the different areas of Union activity, currently under separate institutional arrangements, the EC, the CFSP and PJCCM, are all are brought within one institutional framework.

_ The European Union will have legal personality (Art I-6) and will be able to conclude international agreements.

Under the TEU ‘the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States’.

_ The supremacy of European Union law is stated in the Treaty (for the first time) (Art 1-5a).

_ Competencies are defined and specified in the new Constitution; the allocation of competence is a typical characteristic of constitutions.

_ The Treaty states that the ‘limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality’ (Art I-9 (1)).

_ ‘Under the principle of conferral, the Union shall act within the limits of the competences conferred upon it by the Member States’ (Art I-9 (2)).

_ For the first time, the areas of exclusive competence of the EU and areas of shared competence where it shares competence to act with the Member States are enumerated and defined (Arts I-12 and Art I-13).

_ Legislative procedures are reduced to six.

_ Legislative acts are re-named.

_ A right of citizens’ initiative is introduced. A petition with at least one million signatures obtained from a number of Member States may be sent to the Commission inviting it to take a legislative initiative, provided the latter is compatible with the Constitution and, in particular, with the Charter of Fundamental Rights (Art I-46).

_ The accession of the European Union to the ECHR is facilitated and anticipated under the new Constitution.

Aims and objectives: the Constitution adds the promotion of scientific and technological advance, of solidarity between generations and of the protection of children’s rights. Cultural and linguistic diversity, and the safeguarding and enhancing of Europe’s cultural heritage, also become Union objectives.

All the following changes are concerned with institutional arrangements and are described at greater length in Chapter 3.

A greater role for national parliaments

_ National Parliaments are to be informed about all new initiatives from the Commission and if one third of them considers that a proposal does not comply with the principle of subsidiarity, the Commission must review the proposal.

_ The Commission must send national parliaments: consultation documents; the legislative programme; all draft legislation, (which must be sent at the same time that it is sent to the Council and the European Parliament).

_ The Council of Ministers must send the agendas and minutes of its meetings to the Member States' governments and to the national parliaments

The European Council

_ The European Council will become an EU institution albeit without the power to legislate.

_ It will have a permanent President, elected by QMV of its members, for a renewable term of 2 1/2 years.

The European Parliament

_ The European Parliament will have a maximum number of members of 750.

_ The allocation of seats has not yet been determined but there will be from 6 to 96 per Member State and the numbers will be decided before the 2009 election.

_ It will be responsible for electing the President of the Commission, on a proposal from the European Council made by QMV.

European Union Minister of Foreign Affairs.

_ There will be the creation of a **Foreign Affairs Council** chaired by an EU Minister of Foreign Affairs.

_ The Minister of Foreign Affairs will be appointed by QMV of the European Council with the assent of the President of the Commission.

_ The appointment also requires a vote of approval by the European Parliament.

He/she will:

_ conduct the European Union's Common Foreign and Security Policy

_ chair the Foreign Affairs Council

_ serve as **Vice-President of the Commission** thus having a 'two-hatted' role straddling the two institutions.

_ carry out the Union's external policy.

Quality Majority Voting in the Council

Instead of the present system of weighted votes, each Member State will have one vote. The threshold for a QMV will be raised to at least 55 per cent of Member States. [This must also constitute at least 15 Member States - this ceases to be of significance when the Union reaches a membership of 27 countries]. This must also equate to 65 per cent of the population of the Union. From 1 September 2009, the blocking minority of 35 per cent must also equate to at least 4 Member States.

QMV is to be the general rule except in regard to taxation, Common Foreign and Security measures and Social Policy. There will be a 'passerelle' provision allowing the European Council to decide, by unanimity, that QMV voting will be used in the future in some specified area. This will enable such an alteration to be made without necessitating Treaty amendment.

The Commission

There will be one Commissioner per Member State until 2014.

Thereafter there will be a rotational system with two-thirds of the Member States having a Commissioner at any time.

The European Court of Justice

Its competence will be broadened to include Foreign Policy and certain areas of Freedom, Security and Justice.

The wording of the provision on **Judicial Review** will be changed to allow any natural or legal person standing to institute proceedings against regulatory acts which are of direct concern to him and which do not entail implementing measures (see relevant section below).

The Treaty establishing a Constitution has not yet been ratified and is not in force.

Reminder of learning outcomes

By this stage you should be able to:

_ explain what is meant by the supremacy of Community law and why supremacy is essential for the effectiveness of Community law.

_ explain why the ECHR and the European Court of Human Rights are not part of the European Union

_ describe the benefits of a common market and give a general account of what gives rise to these benefits

_ state the essential features of the EEC created by the Treaty of Rome.

_ explain the relationship between the European Community and the European Union

_ explain what is meant by a Qualified Majority Vote (QMV) in the context of Community law and the difference between voting by unanimity and by qualified majority for Community law.