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The Institutional Framework of the EU

Armin Cuyvers

2.1 An Evolutionary Supranational Framework

This chapter discusses the original institutional set-up of the European Union as well as the key evolutionary steps that led to its current institutional reality.¹ The initial institutional framework forms an important comparator for the EAC today, which is still in its relatively early days. The evolutionary developments are both important to indicate which institutional challenges may arise in the future and to illustrate what possible solutions and their consequences are. In addition, they serve as an illustration of those areas where the institutional system of the EU was also not yet sufficiently developed in the beginning, and those areas where the system got it right from the beginning.

To simplify comparison, this chapter first discusses each institution in turn, following the sequence of discussion in the EAC chapter. In addition, each section will refer to some of the standard works on the different institutions for those who would like to engage in a further comparison.

2.2 From Assembly to Parliament

What became the ‘European Parliament’ started life as a relatively powerless ‘European Assembly’ of the European Coal and Steel Community (ECSC).² This Assembly was not directly elected but consisted of representatives of national

1 On this issue also see G. De Búrca, ‘The Institutional Development of the EU: A Constitutional Analysis’, in: P. Craig and G. de Búrca (eds), *The Evolution of EU law* (OUP 1999), 55.

2 See chapter II of the 1951 Treaty of Paris (ECSC Treaty). For a more elaborate discussion of the European Parliament see amongst others P. Dann, ‘The Political Institutions’, in: A. Von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law* (2nd ed., Hart Publishing 2010), 247, D. Earnshaw and D. Judge, *the European Parliament* (2nd edn, Palgrave 2008), R. Corbett, F. Jacobs and M. Shackleton (eds), *The European Parliament* (7th edn, John Harper Publishing 2007), M. Westlake, ‘“The Style and the Machinery”: The Role of the European Parliament in the EU’s Legislative Process’, in: P. Craig and C. Harlow (eds), *Lawmaking in the European Union* (Kluwer, 1998), ch. 5, or P. Pierson, ‘The Path to European Integration: A Historical Institutionalist Analysis’ 29 *Comparative Political Studies* (1996), 123.

assemblies or parliaments (the so called double-mandate). The Assembly, moreover was largely an advisory body without formal powers. Most importantly, it could not adopt or block legislation. The Assembly only had the right to be consulted, and its opinions or comments were not binding on the other institutions. It is fair to say, therefore, that in the early days of European integration the Assembly played only a minor role, and real democratic representation of national interest was done via the Council.

One of the main evolutionary trends in the institutional history of the EU, however, is the gradual empowerment of what is now the European Parliament. As the EU sought to increase its democratic legitimacy, each consecutive Treaty-amendment gave more and more power to the European Parliament. With the Single European Act of 1968, for example, the Assembly was formally renamed the 'European Parliament', an important symbolical step.³ As of 1979, the European Parliament became directly elected through national elections. With the Treaties of Maastricht, Amsterdam, Nice and especially Lisbon, the European Parliament also got increasing powers over the budget and legislation. Today, the European Parliament controls the budget and is co-legislator in the large majority of fields covered by EU competences.⁴ As such, the European Parliament has actually accrued more formal rights and powers than several Member State parliaments. With this background in mind, let us turn to the current composition, powers and operation of the European Parliament.

2.2.1 *Composition of the European Parliament*

The European Parliament consists of 751 members including its President, who are elected for a period of five years.⁵ One of the major issues in the European Parliament is the division of seats. On the one hand, there are significant differences in the population of each Member State. Germany, for example, has over 80 million inhabitants, where Malta only has around 450.000. If Malta were given an equal number of MEP's to Germany, this would seriously undermine the vote of German citizens. Vice versa, if seats in the European Parliament would be divided proportionally, the influence of Maltese citizens would be negligible.

3 Article 3 SEA.

4 See Article 14(1) TEU. For the ordinary legislative procedure, in which the European Parliament acts as a co-legislator with a veto right and the power to table amendments, see Article 294 TFEU.

5 Article 14(2) TEU.

The solution chosen in the EU is to use a *degressively proportional system*. No Member State shall have less than six, or more than 96 MEP's. The result is that the citizens of smaller states are (heavily) overrepresented, whilst those of large states are underrepresented, but that nevertheless the populations of bigger states retain far greater influence on the whole.⁶

According to the TEU, the function of MEP's is to represent 'the Union's citizens'. Consequently, they should represent the people and not the Member States as such. At the same time, MEP's are elected in national elections and seats are divided per Member State. A Danish citizen, therefore, can only cast his vote for a Danish candidate in the Danish elections for the European Parliament. No European parties exist either. This also means that national parties usually retain control of national lists for the European Parliament, and therefore of who is ultimately elected.⁷ These factors mean that MEP's retain linked to the Member States and represent the different *member peoples* as such rather than all EU citizens as a whole.⁸

2.2.2 *Functions and Powers of the European Parliament*

The three primary functions of the European Parliament concern legislation, the budget, and political control. In terms of legislation, the starting point is that the European Parliament does not have the right of initiative. Only the European Commission, and in a few cases the Council, can initiate legislation.⁹ The legislative powers of the Parliament, therefore, revolve around amending and adopting Commission proposals.

6 For the serious, if not always convincing, concerns of the German Constitutional Court concerning this system of representation and the principle of 'one man, one vote', see BVerfGE, 2 BvE 123,267, 2 BvE 2/08 (2009) *Lissabon Urteil*.

7 See for an alternative suggestion the plan developed by former MEP Andrew Duff, calling for transnational lists for the election of 25 MEP's, creating a truly European election. The serious national political opposition to this proposal reflects the remaining national focus and foundation of the European Parliament. See European Parliament, Committee on Constitutional Affairs, Second Report on a proposal for a modification of the Act concerning the election of the Members of the European Parliament by direct universal suffrage of 20 September 1976, A7-0027/2012, 1 February 2012.

8 A. Cuyvers, *The EU as a Confederal Union of Sovereign Member Peoples, Exploring the potential of American (con)federalism and popular sovereignty for a constitutional theory of the EU*, (Diss. Leiden, Wöhrmann 2013), 313.

9 The Parliament may, however, request the European Commission to investigate a certain topic or to develop a legislative proposal on a certain field (Article 225 TFEU). The Commission may ignore or reject such requests, but of course does so at its own peril, and is legally obligated to state reasons.

The precise powers of the Parliament, moreover, depend on the legal basis underlying the proposed legislation.¹⁰ Under most legal bases, including the vital Article 114 TFEU on the internal market, the so called ‘ordinary legislative procedure’ applies.¹¹ Under this procedure the European Parliament is a full co-legislator that can veto legislation and can propose amendments. The adoption of legislation, however, always requires the approval of the Council of Ministers as well.

In addition to the ordinary legislative procedure, two main special legislative procedures exist as well, each with increasingly reduced powers for the European Parliament. Firstly, under the consent procedure, the Council formally adopts an act, but the European Parliament must give its consent. Here the Parliament can block an act, but not (formally) amend it. Secondly, under the consultation procedure, the Parliament only has to be consulted. It is the Council that adopts the act and that may also reject or ignore any observations made by the Parliament. Clearly under this last procedure the power of the European Parliament is limited. At the same time, the European Parliament can of course always threaten to use its blocking powers in *other* ongoing legislative procedures to incentivize the Commission and Council to take its views into serious consideration.

The European Parliament must also consent to the multi-annual five year framework for EU expenditure, and may veto the annual budgets based on this framework.¹² On the expenditure side, therefore, the Parliament has significant powers. On the revenue side, however, the power of the Parliament is limited. Most crucially, Parliament, and the EU as a whole, lack the power to directly levy taxes, and thereby to increase its own revenues when desired. It is the Member States that retain ultimate control over taxing and the revenue available to the EU. To put the relative financial power of the EU and its Member States into perspective, the EU controls just over 1% of European GDP, whereas most Member States control around 50% of their national GDP.

The main power of the Parliament in terms of political control concerns the appointment and dismissal of the Commission. To begin with, the European Parliament must approve the candidate-president of the European Commission, who is nominated by the European Council, taking into account the outcome of the elections for the European Parliament. In 2014, however, the European Parliament for the first time used this power of approval to increase its control over the selection of the Commission President as

10 On legal bases and EU competences see chapter 3.

11 Article 294 TFEU. Before Lisbon this procedure was known as the co-decision procedure.

12 Articles 312(1) and 314 TFEU.

such. Most political groupings in the European Parliament selected their own candidate for the Commission presidency, the so called *Spitzenkandidaten*. The Parliament's position was that the European Council should then select the candidate of the political grouping that won the elections for the European Parliament, as this would increase the democratic legitimacy of the Commission. As it turned out, the political grouping of Juncker, the European People's Party (EPP), became the largest. Juncker, however, faced strong political opposition, especially from the UK. Despite this opposition, Juncker was eventually selected by the European Council and approved by the Parliament. It now remains an open question of EU law whether this has created a legally or politically binding precedent, or whether the next time round the European Council will select its own candidate, daring the Parliament to actually reject the candidate it puts forward.

Once the Commission President has been approved, the Parliament also has to approve the entire College of Commissioners as assembled by the President and the Member States. Equally, the European Parliament has the power, at any time, to dismiss the entire Commission.¹³ Both the power to approve and to dismiss the Commission, however, only applies to the Commission as a body. The Parliament does not have the formal right to reject or dismiss individual Commissioners, even though it can place effective political pressure on a Commissioner to withdraw or resign 'voluntarily', or on the President of the Commission to withdraw or dismiss an individual Commissioner.¹⁴

In addition to its powers of approval and dismissal, Parliament also has the right to challenge the validity of any EU legal act before the Court of Justice of the European Union (CJEU), to request answers or reports from most other institutions, and to receive a report from the President of the European Council after each summit.¹⁵ In addition, the European Parliament of course organizes hearings and debates, and tries to exert its influence via resolutions.

13 Article 17(7) TEU. Under Article 234 TFEU such a motion of censure requires a two-thirds majority.

14 See Article 17(6) TEU on the power of the Commission President to dismiss individual Commissioners. See on this point also the Order of the CJEU in Case C-394/15 *P Dalli v. Commission* ECLI:EU:C:2016:262 as well as the interinstitutional agreement between the Parliament and the Commission on this point: <http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/docs/framework_agreement_ep-ec_en.pdf>.

15 Articles 263, 249, 284(3), 228 TFEU and Article 15(6)(d) TEU. On the direct action under Article 263 TFEU, see further chapter 7. On the effective use of litigation by the Parliament, which is also of interest to the EALA, see for example M. McCowan, 'The European

2.2.3 *Operation of the European Parliament*

As there are no pan-European parties, but MEP's also do not represent their Member State as such, the European Parliament is organized in Political Groupings. These groupings bring together MEP's from the different national parties that are ideologically more or less aligned, such as social-democrats, liberals, or Christian-democrats.¹⁶ These Political Groupings, and their leadership, wield most political power in the European Parliament.

The European Parliament, moreover, is organized as a 'working' Parliament. Most of the work of the Parliament is carried out in Committees, where MEP's from the different Political Groupings work on specific subjects.¹⁷ Most issues are settled in Committee before they reach the plenary for a confirmation vote by the plenum. Consequently, when one is interested in a specific field or act, it is crucial to focus on the debates in the relevant Committee. In most cases, including in the adoption of legislation or tabling amendments, the Parliament decides by an ordinary majority.¹⁸

2.3 The European Council

Today, the European Council today is one of the most powerful and interesting institutions of the EU.¹⁹ This makes it all the more interesting that the institution did not even exist at the conception of the EU. It was only with the Treaty of Lisbon in 2009 that the European Council, the EU counterpart of the EAC Summit, formally became an institution of the EU.²⁰ Long before that time, however, the European Council already was a *de-facto* institution of the EU.

Parliament before the Bench: ECJ Precedent and EP Litigation Strategies' (2003) 10 *JEP* 974.

16 For an overview of the eight current Political Groupings see <<http://www.europarl.europa.eu/aboutparliament/en/20150201PVL00010/Organisation-and-rules>>.

17 For an overview of the Committees see <<http://www.europarl.europa.eu/committees/en/parliamentary-committees.html>>.

18 Article 231 TFEU.

19 See for example Editorial Comments 'An ever Mighty European Council' 46 *CMLRev* (2009), 1383, and for an elegant and insightful discussion of this body, L. Van Middelaar, *The Passage to Europe, How a Continent became a Union* (2014, Yale University Press). For a more general overview see amongst others U. Puetter, *The European Council and the Council: New Intergovernmentalism and Institutional Change* (OUP, 2014), or J. Werts, *the European Council* (Harper, 2008).

20 Article 15 TEU.

The European Council started life as an informal meeting of Heads of State. It was created during the Paris summit of December 1974, on the initiative of then French President Valéry Giscard d'Estaing as an informal forum for discussion.²¹ The first actual European Council took place in Dublin on 11 March 1975. Even though the European Council did not have any formal powers, or even formal existence, under the EU Treaties, a body comprising all Heads of State or Government obviously wields significant power and influence. Over time, and as European integration deepened, European Council meetings gradually became more frequent, and the role of the European Council became more prominent. The role and existence of the European Council was subsequently formally recognized for the first time in the Treaty of Maastricht in 1992. It was only with the Treaty of Lisbon, however, that the European Council became one of the seven official institutions of the EU.

2.3.1 *Composition of the European Council*

First and foremost, the European Council consists of all the EU Heads of State or Government.²² Where a Member State has both a Head of State and a Head of Government, such as Germany and France, it is up to the Member State to indicate which one of the two represents the highest political authority and hence will attend the European Council. For Germany, the prime-minister (or *Bundeskanzler*) attends, instead of the President of the German Republic, who has more of a ceremonial function. In France, the situation is reversed, as the French President wields the highest political authority, not the French prime-minister.

Since Lisbon, the European Council has a permanent president. This President is elected by the European Council itself for a period of two and a half years, renewable once. So far, the president has always been a former head of state or government himself.²³ The President primarily coordinates and builds consensus as he chairs sessions and manages the agenda.

The President of the European Commission is also *ex officio* a member of the European Council, although she does not represent a Member State and

21 See on the evolution of the European Council and its significance for European integration also L. van Middelaar, *The Passage to Europe. How a Continent Became a Union* (Yale University Press, 2014).

22 Article 15 TEU.

23 The first President of the European Council was Herman van Rompuy, the former Belgian Prime minister. As of 2014, the second President is Donald Tusk, former Prime-Minister of Poland.

therefore has a different position. The High Representative for Foreign Affairs, on the other hand, is not a full member but may ‘take part’ in the work of the European Council.

2.3.2 *Functions and Powers of the European Council*

In line with its political weight, the main function of the European Council is to lay out the general direction the EU should take and provide the political leadership to get there. As the Treaties officially term it, the European Council shall ‘provide the Union with the necessary impetus for its development’ and ‘define the general political directions and priorities thereof.’²⁴ Increasingly, however, the European Council is also the institution that steps in in times of crisis. Both during the euro crisis and the refugee crisis, for example, it was the European Council that took center stage and decided on many crucial issues. In *Brexit* as well, the European Council will likely play a leading role. As they say in Brussels, these issues are ‘*Chefsache*’, requiring the political authority of the European Council to take actual decisions.

The function of crisis management, however, sits somewhat uneasily with the limited formal powers of the European Council, which were primarily formulated with the agenda-setting function in mind.²⁵ The European Council can adopt conclusions and take decisions, but has no explicit legislative or executive powers. Consequently, it cannot initiate legislation, adopt EU laws, spend EU money or take executive action. Formally, moreover, it has no direct authority over other institutions such as the Commission or the Council of Ministers. In practice, however, the European Council can often act through the other institutions, or through the Member States they collectively control. After all, the Council of Ministers, that does have legislative powers, is composed of national ministers that usually answer to their own Heads of State and Government sitting in the European Council. The European Commission usually also has clear incentives to cooperate with the European Council, especially in crisis situations where action is needed, as well as additional Member State funds. Overall, therefore, the functions of the European Council are steadily increasing, as are its (informal) powers to fulfill these additional functions. The shifts this increasingly executive role of the European Council lead

24 Article 15 TEU.

25 L. van Middelaar, ‘Taking decisions or setting norms. EU Presidencies between executive and legislative power in a crisis-driven Union’, in: Steunenbergh et al. (eds), *Fit for the Future. Reflections from Leiden on the functioning of the EU* (Eleven International Publishing, Den Haag, 2016), 11 and L. van Middelaar, ‘The return of politics: The European Union after the crises in the euro zone and Ukraine’, *Journal of Common Market Studies* 54 (2016) n° 3, 495.

to in the nature and functioning of the EU form one of the major institutional and constitutional questions of the moment.

2.3.3 *Operation of the European Council*

The European Council meets at least twice every six months, but can meet much more often where developments require. In the context of *Brexit*, moreover, the European Council holds 'informal' meetings of the 27 remaining Member States. Almost always, the European Council decides by consensus. One of the key functions of the President of the European Council, therefore, is to prepare meetings well, explore the political lay of the land, and find the zone of possible agreement before the meeting. This is not to say that the European Council cannot be the scene of vehement debate and disagreement, but, as all participants know, the result has to be a consensus.

One telling detail about the functioning of the European Council is that it normally meets with just its members, no advisors being present. This means that the Heads of State and Government normally meet without any civil servants or ministers, adding to the intimacy and intensity of the meetings and the collegial nature of the body.

2.4 The Council of Ministers of the EU

Not to be confused with the European Council, the Council of Ministers is the representative body of the Member States in the EU.²⁶ The Council has been one of the main institutions since the ECSC and fulfills many different functions. Consequently, the Council is hard to pin down into one of the traditional categories of the *Trias Politica*. It is a body that consists of the national executives, forms part of the EU legislature but also plays an important role in the execution of EU law and policies. The Council itself, moreover, only forms the top of the iceberg, as the institution rests on a large amount of committees of national civil servants preparing its work.

²⁶ For a more elaborate analysis of the Council see *inter alia* U. Puetter, *The European Council and the Council: New Intergovernmentalism and Institutional Change* (OUP, 2014), F. Hayes-Renshaw and H. Wallace, *The Council of Ministers* (2nd edn, Macmillan, 2006), M. Westlake and D. Galloway, *The Council of the European Union* (3rd edn, Harper Publishing, 2004).

2.4.1 *Composition of the Council*

As its name appropriately suggests, the Council of Ministers is composed of ministers of the different Member States.²⁷ The actual ministers attending a meeting of the Council, however, depends on the topic of discussion. On questions of finance, for example, it will be the ministers of finance that meet, on questions of transport the ministers of transport, etc.²⁸ All in all, the Council meets in ten different configurations. There is no formal hierarchy, but the General Affairs Council, composed of the Ministers of Foreign Affairs, has a general coordinating role.²⁹ Despite this coordination, one of the major challenges facing the Council is safeguarding consistency between the different configurations.

The Eurogroup is an *informal* body comprised of the finance ministers of the Eurozone countries. The Commissioner for Economic and Financial Affairs, Taxation and Customs as well as the President of the European Central Bank may also take part in Eurogroup meetings. As such, the Eurogroup is not formally a part of the Council.³⁰ At the same time, during the ‘informal’ meetings, which normally take place right before the Economic and Financial Affairs (ECFIN) configuration of the Council, Eurogroup members can coordinate their position and hence influence the ultimate decisions taken in the Council. Consequently, the Eurogroup in practice has an important impact on the functioning of the Council.

2.4.2 *Functions and Powers of the Council*

The main functions of the Council concern legislation and the budget, policy making, coordination of execution and the foreign policy of the EU.³¹ In addition, the Council prepares the work for the European Council and follows up on European Council conclusions.

With the European Parliament and the European Commission, the Council is part of the EU legislature. Unlike the Parliament, there are no legislative procedures that exclude the Council. Consequently, no legislation

27 Article 16 TEU.

28 Where the issues being discussed touch on multiple portfolio's, more than one minister may attend, voting power not being affected.

29 For an overview, see <<http://www.consilium.europa.eu/en/council-eu/configurations/>>.

30 The Eurogroup started in 1998, but its existence was first recognized in the Lisbon treaty via Article 137 TFEU and Protocol 14 on the Eurogroup. This recognition, however, does not alter the informal status of the Eurogroup.

31 Article 16 TEU.

can be adopted without the Council, even though in most cases the Council needs the European Parliament to pass a law.³² Equally, the Council determines the budget, together with the European Parliament. Through the Council, therefore, the Member States retain their influence over EU legislation and the budget, even though, as we will see below, the Council can often decide by a qualified majority, meaning no single Member State can block legislation.

The Council also plays a particularly important role in foreign relations. Considering the political sensitivity of foreign relations, this area has remained largely intergovernmental. Member States simply were unwilling to surrender this field to full supranationalism. Consequently, the Foreign Affairs Council, and the Member States, retain a primary role in foreign policy. In many fields of foreign affairs, for example, the Commission does not have the right of initiative, and the Council can decide without the European Parliament. Nevertheless, over time, the role of both the Commission and the Parliament in external relations has clearly increased. To better coordinate EU foreign policy, the Treaty of Lisbon also introduced the High Representative of the Union for Foreign Affairs and Security Policy.³³ This almost impossible job comes with three hats. The High Representative simultaneously is a Vice-President of the European Commission for foreign affairs, chairs the Foreign Affairs Council, and as High Representative heads the European External Action Service (EEAS), the diplomatic body of the EU. As we shall see in chapter 5, however, the stage has become increasingly crowded when it comes to EU foreign relations, with the High Representative, the President of the European Commission, the President of the European Council, the rotating President of the Council of Ministers and the different Heads of State and Government competing for position. Even on this crowded stage, however, and despite the role of the European Council in major international crises, the Council remains the central institution for EU external relations competences.

2.4.3 *Operation of the Council*

Most Council configurations meet around once or twice a month, usually in Brussels. The Council has a rotating presidency. Every six months, a new Member State takes over the presidency, which currently means that a Member

32 The Council can delegate certain authority to adopt acts to the European Commission, or grant the Commission the power to adopt implementing acts, but these acts remain under the ultimate control of the Council itself and do not form legislative acts under EU law. See Articles 289–291 TFEU.

33 Article 18 TEU.

State holds the presidency once every 14 years.³⁴ The presidency *inter alia* sets the agenda, chairs meetings, represents the Council internally and externally, and tries to find consensus, and in doing so can exercise a certain albeit limited influence over decision making.³⁵ To ensure consistency with such frequent rotations, three Member States together form a so called *troika*, that should coordinate their consecutive presidencies. Since Lisbon, moreover, both the Foreign Affairs Council and the Eurogroup have permanent presidencies. The Foreign Affairs Council is chaired by the High Representative, whereas the Eurogroup elects its own president for renewable periods of two and a half years.³⁶ These permanent presidencies aim to increase consistency, coherence and the capacity to act in times of crises for these vital groups.

In terms of *decision making* the Council uses different mechanisms, ranging from simple majority voting, via qualified majority voting to unanimity. Of these mechanisms, qualified majority voting, or QMV in EU lingo, is the most important and common one. A qualified majority requires at least 55% of the Member States (usually fifteen) that together represent at least 65% of the EU population. By requiring at least fifteen states this formula protects smaller Members States, ensuring that they remain relevant for decision making. The population requirement, on the other hand, respects the larger populations represented by the more populous states.³⁷ In the resulting balance, smaller states are overrepresented but in absolute terms the biggest states wield most influence.

QMV has been vital for the success of the EU. Initially, the Council primarily operated via unanimity. Especially with more and more Member States joining, however, decision making by unanimity can lead to paralysis because each Member State can block an entire proposal. Over time, therefore, the Member

34 Articles 16(9) TEU and 236(b) TFEU. The order is determined in Decision 2007/5/EC, EURATOM [2007] OJ L1/11. In light of *Brexit*, the UK has indicated it will not assume its presidency in 2017.

35 Cf. for the pre-Lisbon situation A. Warntjen, 'Steering the Union: The Impact of the EU Presidency on Legislative Activity' (2007) 45 *JCMS*, 1135.

36 Article 18(3) TEU and Protocol 14 Article 2.

37 See Articles 16(4) and 238(2) TFEU. Conversely, a blocking minority requires at least four Member States, meaning that even three Member States that represent more than 35% of the EU population cannot block legislation. After heated negotiations, moreover, the Lisbon treaty also introduced a transitional scheme which can be invoked by Member States until 31 March 2017, and which makes it easier for certain states like Poland to block legislation. See Article 16(5) and the Protocol on transitional provisions.

States agreed to switch to QMV in ever more areas.³⁸ This switch of course reduces the ultimate control a Member State has over legislation. At the same, this loss should also not be exaggerated. To begin with, even in QMV areas, the Council always strives for consensus and tries to avoid a vote. In approximately 80% of cases that fall under QMV the Council decides by consensus.³⁹ In practice, therefore, states are not often outvoted, although the *possibility* of a vote alone of course already affects the negotiations, and may promote the willingness to compromise. Since Lisbon the Council meets in public when it deliberates or votes on a draft legislative act, so as to increase transparency.⁴⁰

2.4.3.1 COREPER and Committees

As stated, the Council only forms the tip of a legislative iceberg. Directly below the Council sits COREPER (*Comité des représentants permanents*), a body of permanent representatives of the Member States in Brussels.⁴¹ COREPER is split into COREPER I, which consists of the deputy representatives, and COREPER II, which consists of the permanent representatives or ambassadors of the Member States to the EU. COREPER prepares all the meetings of the Council. It designates files as either A or B matters. A matters are already agreed in COREPER and only require rubberstamping by the Council. B matters are the more complex dossiers on which the Council itself must decide.⁴² In turn, the work of COREPER is prepared by over 250 different working groups of *national* civil servants. It is in these working groups that the national experts of the civil service meet, negotiate and draft, and that vital preparatory work is done. Here as well it is vital to understand how the EU institutional system builds on and is integrated with the national systems, as opposed to some separate federate bureaucracies.

38 The Single European Act of 1986 formed a watershed moment in this regard, as decision making by QMV was accepted for the vital field of the internal market (now Article 114 TFEU).

39 Most of the cases that do come to a vote, moreover, concern agriculture and fisheries, and therefore directly opposed and quantifiable interests. See F. Hayes-Renshaw, W. van Aken and H. Wallace, 'When and Why the Council of Ministers of the EU Votes Explicitly' (2006) 44 *JCMS*, 161, 165 or M. Matilla, 'Contested Decisions: Empirical Analysis of Voting in the Council of Ministers' (2004) 43 *EJPR*, 29.

40 Article 16(8) TEU. These public sessions can even be followed via live streams. Of course this does not prevent Ministers from negotiating in more private settings.

41 Article 16(7) TEU and 240(1) TFEU.

42 On the significant influence of COREPER also see M. Westlake and D. Galloway, *The Council of the European Union* (3rd edn, Harper Publishing, 2004), 201.

2.5 The European Commission

The European Commission is the supranational body that represents the general European interest.⁴³ It participates in legislation, forms part of the EU executive, and has several semi-judicial and enforcement powers. The European Commission also represents one of the important institutional innovations that sets the EU apart from 'normal' international organizations.⁴⁴ Right from the start, with the High Authority of the ECSC, the need was felt for a supranational body that could safeguard the effectiveness of rules and defend the common interest instead of more direct national interests. History had shown that purely intergovernmental institutions would not suffice to turn the EU's ambitions into reality. The Commission, therefore, is one of the most characteristic EU institutions and a key ingredient to the EU's success. The EU Commission, moreover, is a far more developed institution than the EAC Secretariat, both in terms of competences and staff. At the same time, the power of the Commission should also not be overstated. The Commission functions within an institutional balance with the European Council, the Council and the European Parliament. Each of these institutions represent their respective interests, and needs the others to realize its aims. The Commission, therefore, is not the 'government' of the EU.⁴⁵ It does, however, provide a vital authority that can help draft and adopt rules that take the general European interest into account and subsequently enforce those rules to turn them into a living reality.

2.5.1 *Composition of the Commission*

The College of Commissioners consists of one Commissioner per Member State.⁴⁶ The Commission has a president and a number of vice-presidents, one

43 See more generally on this important and interesting institution D. Spence (ed), *The European Commission* (3rd edn, Harper, 2006), Temple Lang, 'How Much do the Smaller Member States Need the European Commission: The Role of the Commission in a Changing Europe' 39 *CMLRev* (2002), 315, or L Hooghe, *The European Commission and the Integration of Europe* (CUP, 2002).

44 Cf. D. Curtin and M. Egeberg, 'Tradition and Innovation: Europe's Accumulated Executive Order' (2008) 31 *West European Politics*, 639.

45 Cf. also D. Curtin, *Executive Power in the European Union: Law, Practises and the Living Constitution* (OUP, 2009).

46 Although Article 17(4) TEU states that as of 1 November 2014 the Commission will be reduced to two-thirds of the Member States, this reduction was blocked by a decision from the European Council as enabled by the last sentence of this paragraph. This decision was linked to the first Irish no to Lisbon, after which Ireland received a promise that

of which is the High Representative discussed above.⁴⁷ All commissioners are appointed for a five year, renewable term.⁴⁸ Commissioners should represent the general interest of the Union. They must hence be ‘completely independent’ from their own Member States and may not accept any instructions.⁴⁹

The appointment of the Commission starts with the selection of its President. Taking into account the results of the election to the European Parliament, the European Council proposes a candidate, which must then be elected by the European Parliament.⁵⁰ The President-elect then works with the Council to assemble the rest of the commissioners, based on the lists of names suggested by the Member States, and to divide the different portfolio's between them. Subsequently, the College of Commissioners has to be approved, as a body, by the European Parliament.⁵¹ Once in office, the Commission can also be fired, again only as a body, by the European Parliament.⁵² In addition, the President has the authority to ask individual Commissioners to resign.⁵³

Each Commissioner has a personal *Cabinet* of around eight persons to support her work. The real manpower of the Commission is located in the different Directorates-General, where about 25.000 civil servants work on

it could keep its Commissioner, and other Member States then wanted the same. See Conclusions of the European Council of 11 and 12 December 2008, par. 2 (17271/1/08).

47 In 2014, Jean-Claude Juncker, as President of the Commission, introduced a system with one *first Vice-President* (Frans Timmermans) and multiple ordinary Vice-Presidents. This system is based on the discretionary power of the Commission President.

48 Article 17(3) TFEU.

49 Article 17(1) and (3) TFEU.

50 In 2014 the European Parliament for the first time applied the so called ‘*Spitzenkandidaten*-procedure’ whereby each political faction in the Parliament nominated its own candidate for Commission President. The Parliament claimed that the European Council would then be obligated to select the candidate of the faction that won the elections for the European Parliament. After a long political battle, the European Council indeed selected Jean-Claude Juncker, the winning candidate. It is as yet unclear, however, if this now forms a binding convention of EU law, or if the European Council can or will ignore the EP candidate next time.

51 Formally, therefore, the European Parliament cannot reject individual Commissioners, but only accept or reject the entire Commission, a nuclear option. In practice, the Parliament does organize individual hearings for the Commissioners, and can pressure the President-elect to withdraw one or more of his candidates.

52 Article 234 TFEU.

53 Article 17(6) TFEU. See also Case C-394/15 P *Dalli v Commission* ECLI:EU:C:2016:262. In addition, the Court of Justice of the EU, on the application of the Council or the Commission, may compulsorily retire a Commissioner as well under Article 245 TFEU. See on this point Case C-432/04 *Commission v. Cresson* [2006] ECR I-6387.

particular areas such as Agriculture, Competition, Migration or Trade. These Directorates-General do not report to individual Commissioners, but work for the Commission as such. This increases the relative autonomy of these Directorates-General, which has both benefits and some draw-backs.

2.5.2 *Functions and Powers of the Commission*

The Commission has a broad array of functions and powers, ranging from the administrative, via the legislative to the quasi-judicial. Like the Council, therefore, it is hard to fit the Commission in the traditional model of the *Trias Politica*.

Firstly, the Commission participates in legislation. In most areas except the Common Foreign and Security Policy the Commission has the *exclusive* right of initiative. Consequently, a proposal from the Commission is usually necessary for any legislation to be adopted.⁵⁴ During the legislative process, moreover, the Commission retains the right to withdraw its proposal, which gives it continued influence over the legislation. In addition, legislative acts of the Council and Parliament often *delegate* significant rule-making or implementing powers to the Commission.⁵⁵ The Commission is then requested, for example, to fill-in a framework directive with more specific rules or to adopt implementing acts.⁵⁶ Combined, these powers give the Commission serious legislative and quasi-legislative powers. This power also ensures a strong voice for the general European interest in EU legislation.

Secondly, the Commission is best known for being the EU 'executive', although the EU *administration* may be a more precise term.⁵⁷ The Commission administers the EU's revenue and budget and is also in charge of many EU programs. In

54 Article 17(2) TFEU. The Commission also has the initiative for the budget, see Article 314(2) TFEU. Note though that in practice most proposals are initiated by the Commission on the basis of request by other institutions (Article 225 and 241 TFEU), the need to update legislation, or international obligations. Around 5% of proposals are fully based on the Commission's own initiative for new legislation. See the House of Lords European Union Committee, *Initiation of EU Legislation* (22nd Report, 2007–08 Session).

55 See Article 290 and 291 TFEU.

56 Often, where power is delegated to the Commission, the use of this power is overseen by Committees of Member State representatives. These Committees sometimes can refer a matter back to the Council. This entire process of supervision is known as 'Comitology'. See Regulation 182/2011/EU laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, *OJ* [2011] L 55/13, and the Framework Agreement on relations between the European Parliament and the European Commission, *OJ* [2010] L 304/47.

57 Cf. H. Hoffmann and A. Türk (eds), *EU Administrative Governance* (Edward Elgar, 2006).

addition, the Commission plays a central role in negotiating agreements with third countries, including accession treaties, and in maintaining international relations on behalf of the EU, except in the field of the Common Foreign and Security Policy.⁵⁸ During the *Brexit* negotiations, for example, the Commission is also likely to play a central role in negotiating the actual legal technicalities of withdrawal, even if the main political decision making will take place in the European Council and the Council.

Although the Commission therefore fulfills vital administrative functions, again its role should not be overstated. To begin with, its administrative capacity is limited, certainly when one compares the Commission staff of around 25,000 with the tens of millions of civil servants employed by the Member States. A key role for the Commission, therefore, is to coordinate with the much larger national bureaucracies, which are the primary implementers of EU law and policies. The EU administration should therefore be seen as a compound structure, where the EU administration must cooperate with national administrations to be effective.⁵⁹ Even at the EU level itself, moreover, the Commission does not have the capacity to provide all the executive and administrative capacity needed, especially in highly technical areas that require a lot of expertise. For that reason, over 40 regulatory agencies have been developed. These agencies have widely varying powers and tasks, ranging from mere advisory powers to enforcement and rule setting powers. They cover specific fields such as Food Safety, Chemicals or Medicines, and form an important part of the EU administration. Most of these bodies cooperate with the Commission, but they are nevertheless separate and distinct legal entities, that wield significant power.⁶⁰

Thirdly, the Commission has important enforcement and quasi-judicial functions and powers. To begin with, the Commission is the so called 'watch dog' of EU law. It checks whether Member States fully comply with EU law. If they do not, the Commission may start an infringement procedure. A Member State is then first given notice and given a chance to explain or where necessary to improve its compliance with EU law. If the Member State does not comply, the Commission may bring the Member State before the Court of Justice.⁶¹ The

58 EEA and High Representative.

59 D. Curtin, *Executive Power in the European Union: Law, Practises and the Living Constitution* (OUP, 2009), A. Cuyvers, *The EU as a Confederal Union of Sovereign Member Peoples, Exploring the potential of American (con)federalism and popular sovereignty for a constitutional theory of the EU*, (Diss. Leiden, Wöhrmann 2013), 141.

60 See also M. Busuioc, *European Agencies: Law and Practises of Accountability* (OUP, 2013).

61 Article 258 TFEU.

CJEU, when it finds a violation, may then order the Member State to comply, or in a second round of infringement impose a (serious) fine.⁶² In a large majority of cases, however, Member States already comply with the suggestions of the Commission before the case proceeds to court.⁶³ This general role of the Commission as guardian of the Treaties has proven especially important as experience has shown that Member States will rarely police each others compliance with EU law, largely due to the political costs of doing so. An effective power of enforcement and infringement therefore seems an important building block for successful regional integration.

The Commission also has special and far reaching powers in the enforcement of EU competition law. The Commission itself can impose fines on companies that partake in prohibited cartels or abuse a dominant position on the EU market.⁶⁴ The Commission may also order Member States to recover illegal or unlawful state aid granted to undertakings.⁶⁵ As the recovery order of over 13 billion euro in the case of Ireland and Apple demonstrates, these can be far reaching powers, even if all Commission decisions can be challenged before the Court of Justice.

2.5.3 *The Functioning of the Commission*

The Commission formally functions under the principle of collegiality. This principle means that all decisions should be taken collectively by the College of Commissioners, and that the College is also collectively responsible for all decisions taken. Only minor decisions, or 'acts of management' may be delegated to individual Commissioners.⁶⁶ In practice, most decisions are prepared by one or more Commissioners and then approved by the College in its weekly Wednesday meeting. Only a limited number is discussed, and an even lower number is put to a vote, as consensus is the preferred outcome. When the College votes, however, it only requires an ordinary majority.

Over time, moreover, the functioning of the Commission has become increasingly 'presidential', as the President of the Commission acquired more and more power and influence. The President is of course elected first and therefore already involved in the initial selection of Commissioners and the division of portfolios. In addition, the President may also reallocate or change portfolios during the term of office, take over certain policy fields, or even

62 Article 260(2) TFEU. See for more details chapter 7.

63 Cf Case C-286/12 *Commission v Hungary*, ECLI:EU:C:2012:687.

64 Articles 101, 102 and 105 TFEU, as well as Regulation 1/2003 [2003] OJ L1/1.

65 Articles 107 and 108 TFEU.

66 Case C-137/92 P *Commission v. BASF* [1994] ECR I-2555.

request individual Commissioners to resign.⁶⁷ More generally, the President sets the political agenda and direction of the Commission as a whole, and also represents the Commission in the European Council, the European Parliament, and the world at large. In 2014, President Juncker moreover used his powers to introduce the new post of ‘first Vice-President’ and to give all Vice-Presidents of the Commission the power to block proposals from Commissioners in ‘their’ project teams. It is to be seen if these innovations will be taken over in later Commissions.

2.6 The European Court of Justice

The European Court of Justice is the judicial body of the EU, and has been part of the institutional set-up from the start.⁶⁸ It ensures ‘that in the interpretation and application of the Treaties the law is observed.’ The Court of Justice has played a crucial role in the success of European integration, especially in the creation of an effective internal market and the development of EU law. Indeed the Court has been a vital engine for integration during several deep crises, and has helped shape the process known as ‘integration through law’, which helped the EU to become an effective supranational organization without becoming a federal state. For where substantive power largely remains with the Member States, law becomes a crucial tool for effective integration.⁶⁹

67 Article 17(7) TFEU. Of course the President normally will check this with the relevant national governments as well.

68 See on this important institution and its role in European integration generally K. Alter, *The European Court’s Political Power: Selected Essays* (OUP, 2009), or G. de Burca and J.H.H. Weiler, *The European Court of Justice* (OUP, 2001). For a nice overview and discussion of several seminal cases of the CJEU and the role they played in European integration see M.P. Maduro and L. Azoulai (eds), *The Past and Future of EU Law: The Classics of EU law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing, 2010).

69 See famously M. Cappelletti, M. Seccombe, and J.H.H. Weiler, *Integration Through Law—European and the American Federal Experience, Vol. I* (De Gruyter 1986), and J.H.H. Weiler, ‘The Transformation of Europe’ 100 *Yale Law Journal* (1991), 2403. For a further discussion on the importance of rule by law for (con)federal organization see A. Cuyvers, *The EU as a Confederal Union of Sovereign Member Peoples, Exploring the potential of American (con)federalism and popular sovereignty for a constitutional theory of the EU*, (Diss. Leiden, Wöhrmann 2013), 180.

Like the Commission, the Court is a truly supranational body. It has compulsory jurisdiction over all EU law.⁷⁰ The Court can therefore ensure that EU law is interpreted properly and coherently in all different Member States, and that all parties respect their obligations.⁷¹ The Court thereby forms another of the crucial institutional innovations that set the EU apart from 'ordinary' international organizations and that contributes to the actual effectiveness of the EU. Without the Court it can safely be said the EU would never have come close to the level of integration reached today. Again, however, the power of the Court and EU law should also not be overstated. Ultimately integration succeeds because it serves the needs of the Member States and the Member Peoples, not just because of the law. Rather, the law is simply one necessary tool in allowing integration to bring concrete benefits to all parties involved. In addition, the Court of Justice heavily relies on a close cooperation with national courts, as it obviously cannot oversee the application of EU law to over 500 million people. Much of the credit for making EU law work, therefore, is also owed to the national courts.

2.6.1 *Composition of the Court of Justice*

The *institution* entitled the 'Court of Justice of the European Union' actually consists of two courts. The highest of these is somewhat confusingly also called 'the Court of Justice of the European Union'. The second, lower court is now called the 'General Court', but was previously entitled 'the Court of First Instance' (CFI). In addition, the Treaty allows for specialized courts to be set up, for example in the field of intellectual property.⁷² So far, however, only the Civil Service Tribunal was set up in this manner to adjudicate staff cases, only to be scrapped in 2016 after the enlargement of the General Court.⁷³

The Court of Justice consists of one judge per Member State and 11 Advocates-General that provide legal opinions to assist the Court in its work. The General Court also used to consist of one judge per Member State, but in 2016 was enlarged to two judges per Member State to increase its capacity. Judges and Advocates-General are appointed by common accord of the governments of the Member States, after each Member State nominates its own

70 The only main exception concerns the Common Foreign and Security Policy, see Article 24(1) TEU and Article 275 TFEU. For other, smaller, limitations see Article 269 and 276 TFEU.

71 On the vital importance of the Courts complete jurisdiction over all aspects.

72 Article 19(1) TEU.

73 Council Decision 2004/752/EC, Euratom of 2 November 2004, establishing the European Union Civil Service Tribunal [2004] OJ L333/7.

candidate.⁷⁴ Before being appointed, however, the suitability of candidates must be assessed by a panel of seven members, comprised of former members of the Court of Justice and the General Court, members of national supreme courts or lawyers of recognized competence.⁷⁵ Judges and Advocates-General are appointed for renewable periods of six years.⁷⁶ Both courts choose their own presidents for renewable periods of three years.

2.6.2 *Powers and Functions of the Court of Justice and the General Court*

The general function of both EU Courts is to ensure that EU law is observed throughout the EU. The main power they have to fulfill this function is the final say on the interpretation and application of EU law. Ultimately, it is always up to the CJEU to determine both the scope and the correct interpretation of EU law, and *all* national and EU bodies are bound by this interpretation. The CJEU jealously safeguards this ultimate say on the interpretation and application of EU law. For example, the CJEU has so far blocked the setting up of any alternative courts or bodies that would have the power to interpret parts of EU law but would not be subject to the jurisdiction of the CJEU itself.⁷⁷ This strict position is largely to safeguard the unity and coherence of Union law, which could suffer if its interpretation differed per Member State or if multiple separate bodies could interpret it independently from each other. The jurisdiction of the EU Courts, moreover, is obligatory, and cannot be rejected by the Member States in individual cases. On this point, therefore, we see a clear difference between the exclusive and ultimate jurisdiction of the CJEU, and the more fragmented jurisdiction of the East African Court of Justice.

Concerning the relationship between the Court of Justice and the General Court, it can generally be said that the General Court acts as a court of first instance for individuals and companies, whereas most other issues go straight to the CJEU.⁷⁸ For example, the CJEU deals with cases between the institutions

74 Articles 253 and 354 TFEU.

75 This is the so called 'Article 255 panel'. The conclusions of the panel are not made public, but it is known that several judges have been rejected based on the opinion of this panel.

76 This system has been criticized as it creates the risk that judges avoid 'upsetting' their own Member State so as to not endanger their reappointment. In practice, however, this risk is largely avoided by the fact that judgments are given by the Court as such, and no dissenting opinions are given, which usually hides the opinion of individual judges.

77 See especially CJEU Opinion 2/13 on the draft agreement providing for the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms ECLI:EU:C:2014:2454.

78 For a more detailed overview of these legal remedies see the companion chapters 7 and 8.

and conflicts between the EU and Member States,⁷⁹ including infringements.⁸⁰ In addition, the CJEU answers preliminary references from national courts, has appellate jurisdiction over the General Court on points of law, and may provide opinions on international agreements.⁸¹ The General Court, on the other hand, hears all actions by individuals and companies challenging an EU act, also in the field of competition law, holding the EU liable for non-contractual damages.⁸² Although the General Court is not formally bound by the judgments of the Court of Justice, it considers itself *de facto* bound to follow the jurisprudence of the CJEU.⁸³

In the future, the General Court may also receive the power to answer certain preliminary references.⁸⁴ It is important to note, however, that neither the CJEU nor the General Court have a general appellate jurisdiction over national courts. It is never possible, therefore, to appeal a judgment from a national court to the General Court or the CJEU directly.

2.6.3 *The Functioning of the Court of Justice and the General Court*

The Court of Justice normally sits in chambers of five or three judges. In complex or important cases, or where a Member State or an institution so requests, the CJEU will sit as a ‘Grand Chamber’ of 15 judges. Such judgment also tends to carry greater weight. In truly exceptional cases the CJEU can sit as a ‘full court’ with all 28 judges. Clearly such judgments carry special significance.⁸⁵ The CJEU normally receives a written Opinion from an Advocate-General on a case, even though under certain expedited procedures it decides to only hear the Advocate-General orally or to do without an opinion altogether.

The General Court hears most cases in chambers of three judges, but may also sit in chambers of five or in some cases with a single judge.⁸⁶ Where the case requires, however, the General Court may also sit as a Grand Chamber of 15 or a full court.⁸⁷ The General Court does not yet have Advocates-General, but may

79 Except for conflicts between Member States and the Commission, the ECB or the European Council, see Articles 263 and 265 TFEU.

80 See Articles 258, 259, 260, 263, and 265 TFEU.

81 Articles 118(1), 265 and 267 TFEU.

82 Articles 263, 265 and 340 TFEU.

83 *Kadi II* GC.

84 Article 256(3) TFEU.

85 See Article 251 TFEU together with the Statute of the Court (n. 205), art. 16, as well as Case C-370/12 *Pringle* ECLI:EU:C:2012:756.

86 See Council Decision 1999/291 [1999] OJ L114/52, and the Statute (n. 205) Art. 50.

87 *Idem*.

acquire them in the future. In addition, the General Court can exceptionally ask one of its judges to act as an Advocate-General in a particular case.⁸⁸

The General Court and the Court of Justice do not issue dissenting opinions. As one of the core functions of the EU courts is to guard the unity and consistency of EU law, it is important that they speak with one voice. One consequence of this choice is of course that decisions may form compromises between different views within the EU courts, which may undermine their clarity and internal consistency. At the same time, such compromise judgments also fit with the collective nature of European integration, which should take different views into account. They also prevent the dangerous fragmentation that can take place where strong dissenting views may threaten the uniform application of EU law, especially in Member States whose national interests are best served by the minority view.

One major challenge for the functioning of the CJEU, as for all EU institutions, is posed by the 24 official and working languages of the EU. Although the Courts predominantly use French as a working language, judgments need to be translated into all official languages, and parties are allowed to submit written and oral pleadings in their own language. The CJEU therefore requires a very large, and highly specialized, team of lawyer-linguists, and translation actually forms a major source of delay.

2.7 Other Institutions and EU Bodies

In addition to the institutions discussed above, Article 13 TEU also establishes the European Central Bank (ECB) and the Court of Auditors (CoA) as formal EU institutions, bringing the total to seven. The ECB is an independent central bank with the exclusive competence over monetary policy of Eurozone (including interest rates), and the primary task of ensuring price stability. Its governing body is composed of representatives of Member State central banks together with the board of the ECB itself.⁸⁹ Especially after the euro crisis the ECB has acquired an increasingly central position, which will be discussed in more detail in chapter 13.

The Court of Auditors checks the books of the EU. It examines the accounts of all revenue and expenditure of the Union, and checks if these

88 Statute (n 205) Article 49.

89 Article 282(1) TFEU and Protocol no 4 on the statute of the European System of Central Banks and of the European Central Bank.

are in accordance with the rules. A negative opinion, however, will not block expenditure.⁹⁰ The CoA consists of one member per Member State.

As will also be clear from the above, moreover, the institutions only form the top layer of all EU bodies that allow the EU to function and fulfill its many tasks. Especially important are the over 40 agencies and the many committees in which national civil servants meet, as these provide the EU with the vital expertise, capacity, and bridge to the national administrations where most of the work has to be done. As long as the overwhelming majority of administrative and executive capacity remain with the Member States, after all, the institutional structure and functioning of the EU must reflect and support the multilevel nature of the EU. Conversely, as national systems become such a vital part of supranational regional integration, each national system must also gradually adapt and evolve to include its new functions with the EU system, an evolution that has not yet been completed in the EU and that is causing part of the problems the EU is experiencing today.

90 Article 285 TFEU.