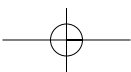
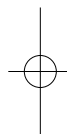
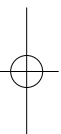


PART I

COMMUNITY INSTITUTIONS



INTRODUCTION

Although people often think of ‘the Community’ as a single entity, there are in law two Communities: the most important is the European Community (EC), formerly known as the European Economic Community (EEC); the other is the European Atomic Energy Community (Euratom). Euratom is limited to nuclear energy; the EC covers everything else.

Originally, there were three Communities. The third was the European Coal and Steel Community (ECSC). This was actually the first to be established: the ECSC Treaty was signed on 18 April 1951. The Treaty stated that it was concluded for a period of fifty years.¹ It entered into force on 23 July 1952 and therefore terminated in 2002. When it expired, the ECSC’s functions were taken over by the EC.

The signatories to the ECSC Treaty were the six original Member States: Germany, Belgium, France, Italy, Luxembourg, and the Netherlands. The United Kingdom was invited to take part, but declined to do so. The signing took place in Paris – for this reason it is sometimes called the ‘Treaty of Paris’ – and the French version was the sole authentic text. Four principal institutions were created: the Council (representing the Member States), the Commission (a supranational executive, which was originally called the ‘High Authority’), the Assembly, and the Court. Except for the Assembly, which normally met in Strasbourg, they were all located in Luxembourg.

The EC Treaty, then known as the EEC Treaty, and the Euratom Treaty² were both signed in Rome on 25 March 1957 and entered into force on 1 January 1958. They were concluded for an unlimited period.³ The United Kingdom was again invited to participate but dropped out of the preliminary discussions. The signatories were therefore the same six States, but this time the texts in each of their official languages – German, French, Italian, and Dutch – were equally authentic. Separate Commissions and Councils were created for each of the new Communities, but all three shared the same Assembly and Court.⁴ The new Councils and Commissions met in Brussels.

The three Treaties contained many common features, but there were also important differences. One difference was that the ECSC Treaty was more specific as regards the policy to be pursued; the EC Treaty, on the other hand, was concerned mainly with creating a framework, and left the creation of policy to the Community institutions. The consequence of this was that the institutions were required to play a more creative role

¹ Art. 97 ECSC.

² The reason a separate Treaty was signed governing the non-military use of atomic energy was the fear that the EC Treaty might be rejected by the French Parliament. It was hoped that, in such an eventuality, at least the Euratom Treaty could be saved.

³ Art. 312 [240] EC; Art. 208 Euratom.

⁴ The establishment of a single Assembly and Court for the three Communities was effected by a separate Treaty, the Convention on Certain Institutions Common to the European Communities, which entered into force on the same date as the EC and Euratom Treaties. It was repealed by Art. 9 of the Treaty of Amsterdam, its operative provisions having been moved to the other Treaties.

in the EC. This difference was in turn responsible for another distinction between the ECSC and EC Treaties: under the former, the Commission had much more independent power (and the Council correspondingly less) than under the EC Treaty. In the EC, therefore, the balance of power was more in favour of the Council.

On the purely legal level, the EC and Euratom Treaties are very similar – many provisions concerning legal remedies are identical – while significant differences were to be found in the ECSC Treaty. This can be explained by the fact that the EC and Euratom Treaties were drafted at the same time and the drafters were obviously influenced by the experience gained from the operation of the ECSC Treaty.

It was, of course, illogical and inconvenient for the two most important Community institutions to be triplicated; so a Merger Treaty (officially known as the Treaty Establishing a Single Council and a Single Commission of the European Communities) was signed in Brussels on 8 April 1965 and entered into force on 1 July 1967.⁵ This Treaty did not merge the Communities themselves but merged the three Commissions to form a single Commission and merged the three Councils to form a single Council. The new Council and Commission were located in Brussels.⁶ In order to compensate Luxembourg for this loss, it was agreed that some Council meetings would be held there. In addition, certain other Community activities are run from Luxembourg, and the European Court still sits there. The European Parliament sits in Strasbourg but holds some sessions, as well as its committee meetings, in Brussels;⁷ its secretariat is based in Luxembourg.⁸ The end result is highly inconvenient and inefficient and shows that, even in the simplest matters, the common interest has to give way to national interests.

The next step was the widening of Community membership. Britain's original attitude of disdain changed in the early 1960s and in 1961 the Conservative Government of Mr Harold Macmillan took the decision to seek entry. Initially Britain's application was blocked by General De Gaulle; but Britain persevered, and on 22 January 1972 the Final Act was signed which embodied the instruments of accession of the United Kingdom, Ireland, Denmark, and Norway.⁹ Norway dropped out when a referendum showed that

⁵ It was repealed by Art. 9 of the Treaty of Amsterdam, its operative provisions having been moved to the other Treaties.

⁶ For a long time the Community institutions were given only temporary seats and it was not until the 1992 Edinburgh Summit that these were made permanent. See now the Protocol on the Location of the Seats of the Institutions and of Certain Bodies and Departments of the European Communities and of Europol, a Protocol to the Treaty of Amsterdam.

⁷ For litigation prior to the Edinburgh decision on the seat of the Parliament, see *Luxembourg v. European Parliament*, Case 230/81, [1983] ECR 255 and *France v. European Parliament*, Cases 358/85, 51/86, [1988] ECR 4821. For litigation subsequent to the Edinburgh decision, see *France v. European Parliament*, Case C-345/95, 1 October 1997.

⁸ Attempts by the Parliament itself to rationalize the situation by moving its staff to its places of work were declared illegal by the European Court at the suit of Luxembourg: *Luxembourg v. European Parliament*, Case 108/83, [1984] ECR 1945. See also *Luxembourg v. European Parliament*, Cases C-213/88, C-39/89, [1991] ECR I-5643.

⁹ The new Member States actually joined the EC and Euratom through ratification of the Treaty of Accession and the ECSC by depositing an instrument of accession on the basis of the Decision of Accession. The latter was a decision of the Council of the European Communities under Art. 98 ECSC. The terms of admission are laid down in the Act of Accession which is an integral part of both the Treaty of Accession and the Decision of Accession.

a majority of the Norwegian electorate opposed entry; but the other three new Member States joined the Community on 1 January 1973. English, Danish, and Irish became official Community languages and the translations into these languages of the EC and Euratom Treaties were declared to be authentic texts.

Greece was the next country to join. On 28 May 1979 the Treaty of Accession and other relevant instruments were signed in Athens, and Greece became the tenth Member State on 1 January 1981. Spain and Portugal followed. The relevant instruments were signed on 12 June 1985 and membership came into effect on 1 January 1986. The Community then had twelve Member States, and the official languages included Greek, Portuguese, and Spanish.

In 1991, negotiations were concluded with the members of the European Free Trade Area (EFTA) – Norway, Sweden, Finland, Iceland, Switzerland, Liechtenstein,¹⁰ and Austria – for an agreement to establish the European Economic Area (EEA).¹¹ This agreement, which some saw originally as a substitute for membership, was intended to integrate the EFTA countries economically into the Community without giving them a role in its institutions. In the relevant areas,¹² Community law from all sources – treaty provisions, legislation, and rules laid down by the European Court – was made applicable to them.¹³ This covered not only the law as it existed when the agreement was concluded, but also new legislation which might be adopted in the future, as well as future decisions of the European Court. Under the terms of the agreement, if the EFTA countries refused to accept these new rules, they risked losing their rights in the sector in question. This scheme had great attractions – it created the world's largest trading area¹⁴ – but it also had serious drawbacks. In particular, it meant that the EFTA countries would have to apply rules of law in the making of which they would have had virtually no say.¹⁵

In 1991 the EEA Agreement was declared by the European Court to be incompatible with the EC Treaty.¹⁶ The reasons for this were complex, but they centred around the European Court's objection to the creation of a rival court, the proposed EEA court. Since this would have had jurisdiction to interpret EEA law, it would have had great influence on the development of Community law. The European Court's objections were not assuaged by the fact that the majority of judges on the EEA court would have been judges from the European Court; indeed, this was an added grievance.¹⁷

¹⁰ At the time, Liechtenstein was not a member of EFTA but had applied to join.

¹¹ On the Community side, the parties were the EC (then known as the EEC) and the ECSC as legal entities and the twelve individual Member States; on the EFTA side they were the states listed above.

¹² These include free movement of goods (but only regarding products originating in the Contracting States), persons, services, and capital. Agriculture is excluded.

¹³ In some cases modifications were made.

¹⁴ Though smaller in area than the territory covered by the North American Free Trade Agreement (NAFTA), it had more consumers and a greater gross domestic product.

¹⁵ For details, see Reymond, 'Institutions, Decision-Making Procedure and Settlement of Disputes in the European Economic Area' (1993) 30 CMLRev. 449; Cremona, 'The "Dynamic and Homogeneous" EEA: Byzantine Structures and Variable Geometry' (1994) 19 ELRev. 508; Christiansen, 'The EFTA Court' (1997) 22 ELRev. 539.

¹⁶ *First EEA Case*, Opinion 1/91, [1991] ECR I-6079.

¹⁷ See, further, Hartley, 'The European Court and the EEA' (1992) 41 ICLQ 841.

The agreement was then amended to meet the European Court's objections and the new version was approved by the Court in 1992.¹⁸ A further setback occurred when the agreement was rejected by the Swiss voters in a referendum, which meant that Switzerland had to drop out.¹⁹ However, it eventually came into force on 1 January 1994 between the Community countries and Norway, Sweden, Finland, Iceland, and Austria. Liechtenstein joined later, after a referendum in 1995.

Even before the EEA Agreement had come into force, most of the EFTA countries had applied to join the Community. The Swiss dropped out of these negotiations when their electorate rejected the EEA,²⁰ but Austria, Finland, Norway, and Sweden persevered. The Accession Treaty for these countries was signed on 24 June 1994. Referendums in Austria, Finland, and Sweden approved membership; but the Norwegian electorate again rejected it. On 1 January 1995, Austria, Finland, and Sweden became Member States of the Community; only Iceland, Liechtenstein, and Norway remained in EFTA. The Community then had fifteen members; Finnish and Swedish are official Community languages.²¹

The next group of new members consisted of eight former Communist countries in Eastern Europe (Lithuania, Latvia, Estonia, Poland, the Czech Republic, Slovakia, Hungary, and Slovenia) and two Mediterranean islands (Malta and Cyprus). They joined on 1 May 2004. The Community then had twenty-five members; Lithuanian, Latvian, Estonian, Polish, Czech, Slovak, Hungarian, Slovenian, and Maltese became official languages. Bulgaria and Romania joined on 1 January 2007, adding their languages to the total. There are now twenty-seven Member States and twenty-two official languages. The translation difficulties are immense.

In 1985 Greenland left the Community following a referendum held in 1982 in which there was a narrow majority in favour of withdrawal. Greenland was not a Member State but, being associated with Denmark (though with internal self-government), was part of the Community.²²

The structure of the Community has already undergone considerable change in the course of its development. In addition to the treaties previously mentioned, amendments have been made by the first and second Budgetary Treaties, 1970 and 1975, and by the Single European Act of 1986, which came into force on 1 July 1987. Other changes have resulted from the establishment of political (constitutional) conventions and practices which have developed without any formal legal foundation.

Further changes resulted from the Maastricht Agreement, officially known as the Treaty on European Union (TEU). This was signed in Maastricht, a provincial town in

¹⁸ *Second EEA Case*, Opinion 1/92, 10 April 1992. The Agreement was finally signed in Oporto, Portugal, on 2 May 1992.

¹⁹ As a result, the Agreement had to be amended by a Protocol signed in Brussels on 17 March 1993.

²⁰ In 2001, a referendum was held in Switzerland on a proposal that the Government should commence negotiations for membership of the EU. It was rejected by a majority of approximately 3:1.

²¹ For further details, see Goebel, 'The European Union Grows: The Constitutional Impact of the Accession of Austria, Finland and Sweden' (1995) 18 *Fordham International Law Journal* 1092; Lee Miles (ed.), *The European Union and the Nordic Countries* (1996).

²² It is now associated with the Community. For further details, see Weiss, 'Greenland's Withdrawal from the European Communities' (1985) 10 *ELRev.* 173.

the Netherlands, on 7 February 1992 and came into force on 1 November 1993. Of all the amending treaties, this had the most difficult birth. It was rejected by a referendum in Denmark (though this was reversed in a later referendum, held after a Community summit in Edinburgh had produced a gloss on the Treaty provisions of most concern to Denmark)²³ and almost rejected by a referendum in France. Opinion polls in both Germany and Britain showed considerable opposition.

In the United Kingdom, the necessary legislation²⁴ was passed only after great turmoil; indeed, it could have brought the Government down.²⁵ The anti-Maastricht forces then resorted to the courts: an action was brought by a well-known journalist, Lord Rees-Mogg, for a declaration that the United Kingdom could not lawfully ratify the Treaty.²⁶ Only when this had failed, was the way open for British ratification.

In the end, Britain was not the last country to ratify. Germany's ratification was delayed even longer by legal proceedings in the Constitutional Court and, though ratification was eventually permitted, the judgment makes clear that the German Constitution (*Grundgesetz*) imposes definite limits on Germany's participation in a federal Europe.²⁷

The Treaty on European Union brought about important changes of a conceptual kind. The European Economic Community (EEC) was renamed the European Community (EC) and a new entity was created, the European Union. This is 'founded on the European Communities, supplemented by the policies and forms of co-operation' established by the Treaty on European Union.²⁸ The latter are two in number: a 'common foreign and security policy'²⁹ and 'co-operation in the fields of justice and home affairs'.³⁰ The European Union (EU) has its own citizenship: Article 17(1) [8(1)] EC declares that every person holding the nationality of a Member State is a citizen of the Union.³¹

The most important achievement of the Treaty on European Union was the establishment of a common currency for the Community – the euro. However, the United

²³ The meeting was held on 12 December 1992 and resulted in a Decision and a Declaration by all the Member States, and a Declaration by Denmark alone. For the contents and legal effect of these instruments, see Hartley, 'Constitutional and Institutional Aspects of the Maastricht Agreement' (1993) 42 ICLQ 213 at 234–7; Howarth, 'The Compromise on Denmark and the Treaty on European Union: A Legal and Political Analysis' (1994) 31 CMLRev. 765.

²⁴ The European Communities (Amendment) Act 1993.

²⁵ This was not due to any widespread anti-European sentiment among British MPs: officially at least, the Treaty enjoyed overwhelming support. However, the die-hard anti-Community faction in the parliamentary Conservative Party, though small, was greater than the Conservative majority. This was exploited by the Labour Party, which voted for motions that, though not ostensibly anti-Maastricht, would have had the practical effect of killing the Bill. In this way, Labour could embarrass the Government without compromising their official support for the Bill. It was finally passed in the Commons only when the Prime Minister stated that he would call a general election if the Government lost the vote. Since the Conservative Party would almost certainly have lost the election and many Conservative rebels would have lost their seats, this threat of self-destruction proved effective. For a full discussion, see Rawlings, 'Legal Politics: The United Kingdom and the Ratification of the Treaty on European Union' [1994] PL 254.

²⁶ *R v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Lord Rees-Mogg* [1993] 3 CMLR 101; [1994] 2 WLR 115 (DC).

²⁷ *Bundesverfassungsgericht*, 12 October 1993, [1993] NJW 3047; [1994] 1 CMLR 57. For constitutional proceedings in France, see *Conseil Constitutionnel*, 9 April 1992, [1993] 3 CMLR 345; see also Oliver, 'The French Constitution and the Treaty of Maastricht' (1994) 43 ICLQ 1.

²⁸ Art. 1 [A] TEU.

²⁹ See Title V [V] TEU.

³⁰ See Title VI [VI] TEU.

³¹ See Shaw, 'The Many Pasts and Futures of Citizenship in the European Union' (1997) 22 ELRev. 554.

Kingdom,³² Denmark,³³ and Sweden³⁴ have rejected it and the new Member States are not yet ready for it; so at present it applies in only twelve of the twenty-seven Community countries.

Another feature of the Treaty on European Union was the so-called 'Social Chapter', which was intended to develop the social dimension of the Community. It was originally drafted as a chapter of the EC Treaty, but the United Kingdom refused to accept it; so it had to be adopted in the form of a separate treaty, the Agreement on Social Policy, to which the United Kingdom was not a party. When the Labour Party won the election in 1997, they decided to opt in. Effect was given to this by the Treaty of Amsterdam 1997, which re-inserted the Social Chapter into the body of the EC Treaty.

The Treaty of Amsterdam was signed in 1997, and came into force on 1 May 1999. Although it ended Britain's opt-out on social policy, it established a new one on passport controls. It makes provision for the abolition of entry controls on persons travelling from one Member State to another.³⁵ The scheme started with two agreements, signed in Schengen, Luxembourg, in 1985 and 1990 between France, Germany, and the Benelux countries, under which it was agreed that controls would be gradually lifted. Subsequently, all the other Member States except Britain and Ireland also joined. Two non-member States, Iceland and Norway, became associated with the scheme. These agreements were brought into the main body of Community law through a Protocol annexed to the Treaty on European Union and the EC Treaty by the Treaty of Amsterdam.³⁶ Two further Protocols allow Britain and Ireland a permanent opt-out.³⁷ A fourth Protocol gives a more limited opt-out to Denmark.

The Treaty of Amsterdam also saw the insertion into the Treaty on European Union of a new Title³⁸ on what was then known as 'closer co-operation' (further developed and renamed 'enhanced co-operation' in the Treaty of Nice). Once called 'variable geometry', this means allowing some Member States to go ahead with further integration while others opt out.

The next major development was the Treaty of Nice,³⁹ which was signed on 26 February 2001 and entered into force on 1 February 2003. Although originally

³² The United Kingdom is not obliged to adopt the common currency unless the British Government and Parliament so decide: see the Protocol on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland.

³³ See the Protocol on certain provisions relating to Denmark; see also the Decision of the Heads of State and Government, section B, adopted at the Edinburgh Summit on 12 December 1992. Denmark held a referendum in September 2000, in which adoption of the euro was rejected.

³⁴ Since the Treaty gives it no opt-out and it meets the criteria for adoption of the euro, Sweden's refusal to join is actually illegal, but no one wants to make an issue of this.

³⁵ Arts 61–69 [73i–q] EC, introduced by the Treaty of Amsterdam.

³⁶ Protocol Integrating the Schengen *Acquis* into the Framework of the European Union.

³⁷ Protocol on the Application of Certain Aspects of Article 14 [7a] of the Treaty Establishing the European Community to the United Kingdom and Ireland; Protocol on the Position of the United Kingdom and Ireland (see Art. 69 [73q] EC). An interesting feature of the first of these Protocols is that it expressly provides that Art. 14 [7a] EC, which in some quarters is viewed as already requiring the abolition of controls, will not preclude these two countries from continuing to operate passport controls on persons entering their territory, even if they come from another Member State.

³⁸ Title VII [VIa]. See also Art. 11 [5a] EC.

³⁹ Published in OJ 2001, C 80. For a summary of its provisions, see Bradley, 'Institutional Design in the Treaty of Nice' (2001) 38 CMLRev. 1095.

rejected by the voters of Ireland, it was accepted in a second referendum held in October 2002. Its main purpose was to reform the institutions of the Community in preparation for further enlargement.

A Charter of Fundamental Rights was adopted by proclamation of the Commission, Council, and Parliament in December 2000.⁴⁰ It has as yet no binding force.

The most ambitious project in recent times has been the attempt to give the Community a Constitution. A body known as the 'European Convention' or the 'Convention on the Future of Europe' was set up for the purpose. It consisted of representatives of:

- the existing Member States and the applicant Member States;
- the national parliaments of the existing and applicant Member States;
- the European Parliament; and
- the Commission.

It was chaired by a former President of France, Mr Valéry Giscard d'Estaing.

In due course it produced a Constitution, contained in a draft treaty, the Treaty Establishing a Constitution for Europe. After a setback at a meeting of the Heads of State or Government in Brussels on 12 and 13 December 2003, it was finally agreed by the national Governments in October 2004. It then had to be ratified by each Member State according to its constitutional requirements. In many Member States, this required a referendum. Although the approval of the voters was obtained in several states, the process ground to a halt when the Constitution was rejected, first by the people of France and then by the people of the Netherlands.⁴¹ Since France had initiated the process of European integration and the Netherlands is its most enthusiastic supporter, this was a serious blow. It was therefore decided to suspend the ratification process in order to consider what to do next. At the time of writing (1 January 2007), no further steps have yet been taken.

In law there are still two Communities, though there is only one set of institutions. The powers of the institutions vary, depending on the Treaty under which they are acting. The best analogy is that of two commercial companies with the same shareholders and the same board of directors: in law there are two legal persons; in reality there is only one. The European Union may be regarded as the legal and political concept which gives expression to this underlying unity.

It is not easy to compare the Community with other political entities: it contains some of the features of a traditional international organization and, less prominently, some features of a federation.⁴² Perhaps it is best regarded as the forerunner of a new

⁴⁰ OJ 2000, C 364/8.

⁴¹ This must have come as a relief to the British Government, since it was politically committed to a referendum in the United Kingdom, a referendum in which the Constitution would almost certainly have been rejected.

⁴² Interestingly, the federal elements are strongest with regard to the judicial and legal system of the Community; they are weakest in the political area, including such vital matters as legislative and executive powers, taxation, and defence: see Hartley, 'Federalism, Courts and Legal Systems: The Emerging Constitution of the European Community' (1986) 34 Am. Jo. Comp. L. 229. For a full and detailed study of this question, see M. Cappelletti, M. Seccombe, and J. Weiler (eds), *Integration Through Law* (1986) (3 vols).

breed of enhanced international organizations which have real power over their Member States. Though less advanced, the WTO and the Council of Europe (European Convention on Human Rights) are other examples. The term 'supranational' is often used to refer to the features which distinguish such organizations.

The hybrid nature of the Community must constantly be borne in mind when considering its structure. The three political organs – the Council, the Commission, and the Parliament – each contain both inter-governmental and supranational elements, though the former are more noticeable in the case of the Council and the latter in the case of the Commission.

The most important characteristic of a traditional international organization is that it is basically only a form of institutionalized inter-governmental co-operation. It is based on the principle that no Member State may be bound without its consent. If the decisions of the organization are taken by majority vote, they are no more than mere declarations; if, on the other hand, they are to have any real 'bite', they must be approved by each Member State.

In contrast to this, the organs of the Community have a significant measure of autonomy, and unanimity is required only in special cases. Nor can it be doubted that the Community has real teeth: Community law is binding on Member States and (in many cases) on individuals; it is frequently applied by national courts. Moreover, in certain cases fines can be levied on companies, individuals, and even Member States for breach of Community law. The decisions of the Community derive their binding force from the fact that they are taken by organs endowed with the appropriate power by the Treaties – the constitution of the Community – and not because each decision has been individually agreed to by the Member States. These features give the Community its supranational character.

FURTHER READING

JOHN GILLINGHAM, *European Integration, 1950–2003* (2003). JEAN-CLAUDE PIRIS, *The Constitution for Europe: A Legal Analysis* (2006).

WALTER VAN GERVEN, *The European Union, A Polity of States and Peoples* (2005).

1

THE POLITICAL INSTITUTIONS

According to the Treaties,¹ the Community has five institutions – the Commission, the Council, the European Parliament, the Court of Justice, and the Court of Auditors.² The first three are political institutions; they will be dealt with in this chapter. The Court of Justice and the Court of Auditors will be considered in Chapter 2.

THE COMMISSION

The Commission is intended to give expression to the Community interest. Its most important activities are formulating proposals for new Community policies, mediating between the Member States to secure the adoption of these proposals, co-ordinating national policies, and overseeing the execution of existing Community policies.

COMPOSITION

Each Member State is at present entitled to one Commissioner.³

The procedure for appointing Commissioners is as follows.⁴ The first step is for the Council, meeting in the composition of Heads of State or Government (European Council) and acting by a qualified majority, to nominate the person it intends to appoint as President of the Commission. The nomination then has to be approved by

¹ See Arts 7 [4] EC and 3 Euratom.

² Though founded earlier, the Court of Auditors attained institutional status only as a result of the Treaty on European Union. Other important organs, which do not have the status of institutions, include the Economic and Social Committee, the Committee of the Regions (both of which assist the Council and Commission), the European System of Central Banks (ESCB), the European Central Bank (ECB), and the European Investment Bank. The Treaty on European Union made provision for the establishment of the Committee of the Regions, the ESCB, and the ECB; the others were established earlier.

³ Art. 45(2) of the 2003 Act of Accession (for the ten new Member States) and Art. 45 of the 2005 Act of Accession (Bulgaria and Romania). There was a plan to reduce the size of the Commission by ending the right of each Member State to have a Commissioner: Art. 4(1) of the Protocol to the Treaty of Nice on the Enlargement of the European Union. This should have gone into operation once the number of Member States reached twenty-seven, something that happened when Bulgaria and Romania joined in 2007; however, the Acts of Accession cited above made provision for the right to continue at least until 31 October 2009.

⁴ Arts 214 [158] EC and 127 Euratom (as amended by the Treaty of Nice).

the European Parliament. Next, the Council draws up a list of the other persons it intends to appoint as members of the Commission. In doing so, it acts by a qualified majority and in agreement with the President-elect. In addition, the list of nominees must be in accordance with the proposals made by each Member State. The last requirement seems to mean that a Commissioner from a given Member State cannot be anyone other than the person nominated by that state.

The entire Commission – President and other members – must be approved ‘as a body’⁵ by the European Parliament, after which the Commission is formally appointed by the Council, acting by a qualified majority. The appointments are for a (renewable) period of five years.

Members of the Commission cannot be dismissed during their term of office by the national governments or by the Council, but the whole Commission must resign *en bloc* if a vote of no confidence is passed by the European Parliament.⁶ Commissioners cannot be dismissed individually in this way; but the European Court can compel a Commissioner to retire on grounds of serious misconduct or because he no longer fulfils the conditions required for the performance of his duties.⁷ Moreover, under an amendment brought in by the Treaty of Nice, a Commissioner must resign if the President of the Commission so requests, provided the Commission as a whole agrees.⁸ This could be used to get rid of a Commissioner who was incompetent or whose activities were politically objectionable.

According to the Treaties, Commissioners are supposed to be above national loyalties. It is provided by Articles 213(2) [157(2)] EC and 126(2) Euratom:

The members of the Commission shall, in the general interest of the Community, be completely independent in the performance of their duties.

In the performance of these duties, they shall neither seek nor take instructions from any government or from any other body. They shall refrain from any action incompatible with their duties. Each Member State undertakes to respect this principle and not to seek to influence the members of the Commission in the performance of their tasks.

Any overt breach of these principles could lead to the compulsory retirement of the Commissioner concerned.⁹

⁵ This means that the Parliament must approve or reject all of them together: it cannot reject one and approve the rest. It can, however, threaten to reject the whole Commission unless the unacceptable Commissioner stands down. Prospective candidates must appear before the Parliament to answer questions, a procedure which seems to be modelled on American confirmation hearings.

⁶ Arts 201 [144 EC] and 114 Euratom.

⁷ Arts 216 [160] EC and 129 Euratom. The procedure is set in motion by an application by the Council or Commission.

⁸ Art. 217(4) EC, as amended by the Treaty of Nice. This means that there will be six different ways in which a Commissioner may cease to hold office: (1) death; (2) expiry of his term of office; (3) individual (voluntary) resignation; (4) collective (compulsory) resignation (following a motion of no confidence in the European Parliament); (5) compulsory retirement by the Court; (6) compulsory resignation at the request of the President. Except in the first and fifth of these cases, he remains in office until his successor has been appointed. See Arts 215 [159] EC and 128 Euratom.

⁹ It is further stated that a Commissioner must not engage in any other occupation, whether gainful or not, during his term of office (though in practice certain academic activities are allowed). After he has ceased to hold office, he must behave with integrity and discretion as regards the acceptance of appointments and benefits.

These provisions do not, however, prevent governments (or private interests) from lobbying individual Commissioners or the Commission as a whole. The balance of power in the Community is such that, though the Commission is an independent force in its own right, it cannot fulfil its functions without the co-operation of national governments. Consequently, it is very much concerned with national interests, and one of its most important tasks is the reconciliation of national policies with Community objectives. Therefore, even in those cases where the Commission is legally empowered to take action independently of the Council, it will still pay careful attention to national susceptibilities.

Portfolios are allocated to Commissioners so that each is responsible for one or more subjects. At one time, this was done by agreement among the Commissioners themselves, with the President playing a pivotal role. However, a Declaration attached to the Treaty of Amsterdam stated that the Inter-Governmental Conference which adopted the Treaty considered that the President should enjoy broad discretion in the allocation of tasks.¹⁰ The Treaty of Nice now states explicitly that the President allocates responsibilities among the members of the Commission. He may also reshuffle portfolios during the Commission's term of office.¹¹ These developments suggest that his role will come to resemble that of a British Prime Minister. No doubt the lobbying by Member States to get their Commissioners the best jobs will continue as before.

The Commission works under the political guidance of its President.¹² It is divided into departments known as Directorates General. Not all of these are of equal importance or prestige; hence the scramble for portfolios. Each Directorate General is headed by a Director General, who is responsible to the relevant Commissioner. Directorates General are subdivided into Directorates (headed by a Director) and these in turn are made up of Divisions (each under a Head of Division). There are also a number of specialized services. One of these is the Legal Service, which gives legal advice to all Directorates General and represents the Commission in legal proceedings. Appointments to the higher posts are subject to intense national rivalry. The decision is taken by the Commissioners themselves and depends in part on ensuring that each country maintains its share of posts. This means that the best person will not always get the job, a fact which is damaging to morale.

Disregard of these obligations could lead to compulsory retirement (if he is still in office) or loss of pension. Proceedings under this provision were brought for the first time in 1999, when the Council applied to the Court for an order depriving Mr Bangemann of his pension rights because he accepted a position with a Spanish telecommunications company. Mr Bangemann was the outgoing Commissioner responsible for telecommunications in the disgraced Santer Commission. The proceedings were withdrawn when he agreed not to take up the position for a year, and not to engage in negotiations with Community institutions for two years. Deprivation of pension rights can also be used to punish misbehaviour in office that does not come to light until afterwards. This happened to Ms Cresson, who was also a member of the Santer Commission. She had given her dentist a scientific appointment with the Commission, even though he was clearly unqualified. The Court found that she had committed a breach of the obligations arising from her office, but decided not to deprive her of her pension. This was in *Commission v. Edith Cresson*, Case C-432/04, 11 July 2006, a case suggesting that the Court takes a fairly relaxed attitude towards nepotism.

¹⁰ Declaration 32 adopted by the Conference.

¹¹ Art. 217(2) EC, as amended by the Treaty of Nice.

¹² Prior to the Treaty of Nice, this was laid down by Art. 219 [163] EC. Now, the relevant provision is Art. 217(1) EC.

Each Commissioner is assisted by his *Cabinet*, a group of officials personally appointed by him and directly responsible to him, who are not necessarily on the permanent staff of the Commission. The head of the *Cabinet* (*Chef de Cabinet*) plays an important role as his Commissioner's right-hand man. The *Chefs de Cabinet* of all the Commissioners meet regularly to co-ordinate activities and prepare the ground for Commission meetings. If the *Chefs de Cabinet* reach unanimous agreement on a question, their decision is normally adopted by the Commission without debate.¹³

Officials of the Commission (and the other Community institutions) enjoy various privileges and immunities under Community law,¹⁴ the most important of which are immunity from legal proceedings in national courts in respect of acts performed by them in their official capacity¹⁵ and immunity from national income tax on their Community salary.¹⁶ They are, however, subject to a special Community income tax, though the rate of taxation is low. All the privileges and immunities enjoyed by Community officials are granted to them solely in the interests of the Community, and the institution concerned is obliged to waive the immunity whenever such waiver is not contrary to the interests of the Community.¹⁷

LEGISLATIVE POWERS

Under the ECSC Treaty, the Commission was the main legislative authority, though sometimes it had to obtain the approval of the Council. Under the EC and Euratom Treaties, on the other hand, it has legislative powers in only a few cases, though, where granted, these powers enable the Commission to enact legislation in the true sense.¹⁸ Moreover, the European Court has held that, whenever the EC Treaty confers a specific task on the Commission, it impliedly grants the Commission the powers (including legislative powers) that are indispensable in order to carry out that task.¹⁹ In a much wider range of cases, the Commission enjoys powers delegated to it by the Council. Here the basic principles must be laid down in the Council measure which delegates the power: the Commission can then adopt measures that fill in the details.²⁰

¹³ Compare the role played by COREPER with regard to the Council (discussed below).

¹⁴ See the Protocol on the Privileges and Immunities of the European Communities, Arts 12–16. These privileges and immunities also apply to members of the Commission.

¹⁵ As to the meaning of this, see *Sayag v. Leduc* (No. 1), Case 5/68, [1968] ECR 395.

¹⁶ Member States are also prohibited from taking an official's salary into account for the purpose of determining the tax payable by the official's spouse: *Humblet v. Belgium*, Case 6/60, [1960] ECR 559.

¹⁷ Protocol on the Privileges and Immunities of the European Communities, Art. 18. See *Weddel & Co. BV v. Commission*, Case C-54/90, 1992 [ECR] I-829.

¹⁸ *France, Italy and United Kingdom v. Commission*, Cases 188–190/80, [1982] ECR 2545 (paras 4–7 of the judgment). See, further, *France v. Commission*, Case C-202/88, [1991] ECR I-1223; *Spain v. Commission*, Cases C-271, 281, 289/90, [1992] ECR I-5833.

¹⁹ *Germany v. Commission*, Cases 281, 283–5, 287/85, [1987] ECR 3203 (para. 28 of the judgment). See Hartley, 'The Commission as Legislator under the EEC Treaty' (1988) 13 ELRev. 122. However, the Commission has no implied power under the EC Treaty to conclude international agreements, even on a subject matter (such as competition) with regard to which it has internal executive power: *France v. Commission*, Case C-327/91, [1994] ECR I-3641.

²⁰ See Chap. 4.

DECISION-MAKING PROCEDURE

The Commission takes decisions by a simple majority vote.²¹ Frequently, however, use is made of the so-called 'written procedure' under which draft decisions are circulated among the Commissioners and, if no objections are made within a given period, the proposal is regarded as adopted.

Special procedures are followed where powers are delegated by the Council to the Commission. In order to retain some measure of control, the Council usually provides for the establishment of a committee to which the Commission must submit drafts of measures it intends to adopt under the delegated power. These committees are composed of representatives of the national governments under the chairmanship of a Commission official.

The Single European Act attempted to put this system on a more regular footing by making provision for a framework-decision establishing the principles and rules to be followed.²² The first such decision was adopted by the Council in 1987.²³ It has now been replaced by a decision adopted in 1999.²⁴ This decision sets out a number of procedures which may be required in any given case by the instrument delegating the power.

Under the first, known as the advisory procedure, the committee's functions are purely advisory. The Commission must put a draft of the measure before the committee,²⁵ but an unfavourable opinion does not affect the Commission's powers.²⁶

Under the second, known as the management procedure, the Commission must put the draft before the committee, and the chairman sets a time-limit within which it must give its opinion. The committee votes according to the same system of weighted voting as the Council itself (explained below) and a decision can be adopted only if a 'qualified majority' of votes is obtained. The chairman has no vote. If the Commission follows the committee's opinion (or if the committee gives no opinion within the time-limit), the Commission may adopt the draft and this will be definitive. Even if the Commission does not follow the committee's opinion, it may still adopt the measure, but in this case it must

²¹ Arts 219 [163] EC and 132 Euratom. ²² Art. 10 SEA, amending Art. 202 [145] EC.

²³ Decision 87/373, OJ 1987, L197/33. This decision differed considerably from the Commission proposal: see OJ 1986, C70/6. It was subject to criticism by the Commission (see Press Release IP (89) 803 of 31 October 1989; see also the declarations in the Council minutes for the proceedings in which the decision was adopted, published by the news agency 'Europe', 28 October 1987: Docs. No. 1477) and was challenged by the European Parliament in the European Court, although the action was dismissed as inadmissible: *European Parliament v. Council*, Case 302/87, [1988] ECR 5615. The Declaration Relating to the Council Decision of 13 July 1987, adopted by the Amsterdam Inter-Governmental Conference (Declaration 31 annexed to the Treaty of Amsterdam), called for the amendment of Decision 87/373 by the end of 1998. The new decision was in fact adopted on 28 June 1999.

²⁴ Council Decision 99/468/EC, OJ 1999 L184/23, amended by Council Decision 2006/512/EC, OJ 2006 L200/11.

²⁵ Failure to do so would probably constitute an infringement of an essential procedural requirement, leading to the annulment of the measure under Art. 230 [173] EC.

²⁶ The chairman of the committee (who is a Commission appointee) fixes the time-limit within which the committee must give its opinion, and if no opinion is given within this time, the Commission can go ahead without it. Presumably the time-limit would have to be reasonable.

immediately communicate it to the Council. The Commission may defer the application of the measure for a limited period²⁷ and the Council may then adopt a different measure (which replaces the Commission measure) provided it acts within this period.²⁸

The third system, which is the least favourable to the Commission, is known as the regulatory procedure. Under it, the committee gives its opinion in the same way as under the management procedure. However, the Commission may proceed immediately to adopt the measure only if it follows the committee's opinion. If it does not, or if no opinion is given, the Commission must put a draft measure before the Council.²⁹ If the Council does not act within the period specified by the instrument under which the power was originally delegated,³⁰ the Commission may adopt its draft. If, on the other hand, the Council rejects the draft, the Commission cannot adopt it.³¹ The Commission may submit an amended proposal to the Council. It may also resubmit its original proposal, if it believes that the Council will drop its opposition. Alternatively, it may submit a proposal for an original (non-delegated) legislative act under an appropriate provision of the Treaty.

A special procedure³² may be applied where the original instrument gives the Commission the power to take safeguard measures (measures designed to deal with emergencies). The Commission takes the decision (without reference to any committee) and notifies the Council and the Member States. The Council, acting by a qualified majority, may then take a different decision. If it does not act within a time-limit laid down in the original instrument, the Commission's decision stands. However, the original instrument may lay down a variant, under which the Commission decision is revoked, unless the Council confirms (or amends) it within the time-limit.

An amendment to Decision 99/468 was adopted in 2006 to meet the European Parliament's objection that its interests were insufficiently protected under the existing procedure.³³ The amendment applies only where the original instrument was adopted under the 'co-decision' procedure (discussed below), a procedure under which the Council shares legislative power with the Parliament. The amendment requires a special procedure, known as the 'regulatory procedure with scrutiny', to be followed where the proposed delegated legislation seeks to amend the original instrument by either deleting provisions from it or by adding new provisions to it.³⁴ Where this occurs, a draft of the

²⁷ It may not be greater than three months: Art. 4(3) of Decision 99/468.

²⁸ The Council acts by a qualified majority.

²⁹ The Commission must also inform the European Parliament. If the instrument which originally conferred the delegated power was adopted under the co-decision procedure (explained below), and the Parliament considers that the draft measure exceeds the implementing powers provided for in the original instrument, it will inform the Council of its position. The Council must take this into account when it exercises its powers. The Parliament also has a general power under Art. 8 of Decision 99/468 to consider whether draft implementing measures which have been submitted to a committee would exceed the implementing powers provided for in the instrument under which the power was originally delegated. If it decides that this is the case, it will inform the Commission, which must take the Parliament's opinion into account.

³⁰ The period may not be longer than three months: Art. 5(6) of Decision 99/468.

³¹ The Council again acts by a qualified majority. ³² Art. 6 of Decision 99/468.

³³ Council Decision 2006/512/EC, OJ 2006 L200/11.

³⁴ It applies only to amendments of non-essential elements in the original instrument. However, amendments to essential elements cannot be made by delegated legislation: see *Einfuhr- und Vorratsstelle v. Köster*,

delegated measure must be sent to the Council and the Parliament for scrutiny. Either of these two institutions may object to it on one of the following grounds:

- it goes beyond the implementing power conferred by the original instrument;
- it is incompatible with the aim or content of the original instrument; or
- it violates the principles of 'subsidiarity' or 'proportionality' (discussed in later chapters).³⁵

Where such an objection is made, the measure cannot be adopted by the Commission. In such a case, the Commission would have to amend it to meet the objection, or the measure would have to be adopted by the Council and Parliament under the co-decision procedure.³⁶

ASSESSMENT

In the early days of the Community, Commission officials were often idealists. Today, they are more concerned with furthering their careers. Although few are actually corrupt, there seems to exist a widespread culture of looking after one's own interests and ignoring those of the Community. This came most glaringly to light in the scandal surrounding the Santer Commission (discussed below), in which the whole Commission resigned after a report by a committee of independent experts set up by the European Parliament said that it was increasingly difficult to find anyone in the Commission with 'even the slightest sense of responsibility'.³⁷ Despite these shortcomings, the Commission enjoys a powerful position in the Community, mainly because it is seen as being above national rivalries. This raises the question whether it is right for a bureaucracy that is subject to little political control to determine policy in the Community.

THE COUNCIL

The Council is the body where the interests of the Member States find direct expression. It takes the final decision on most EC legislation (often acting jointly with the Parliament), concludes agreements with foreign countries, and, together with the Parliament, decides on the Community budget. It consists of the delegates of the Member States, each state being represented by a government minister who is authorized to commit his government.³⁸ When general matters are discussed, Member States will normally be

Case 25/70, [1970] ECR 1161, discussed in Chap. 4. It also applies only if the proposed delegated legislation is of general scope, but this will almost always be the case.

³⁵ Subsidiarity is discussed in Chap. 4 and proportionality in Chap. 5.

³⁶ For further discussion, see 'Editorial Comment' (2006) 43 CMLRev.1243 at pp. 1245–9.

³⁷ Committee of Independent Experts, *First Report on Allegations of Fraud, Mismanagement and Nepotism in the European Commission* (15 March 1999). See Tomkins (1999) 62 MLR 744.

³⁸ Arts 203 [146] EC and 116 Euratom.

represented by their foreign ministers; but other ministers will attend for specialist discussions: for example, ministers of agriculture for meetings dealing with agriculture and ministers of finance for financial meetings. Meetings of foreign ministers are often called the 'general Council' and meetings of other ministers are referred to, collectively, as 'sectoral', 'specialized', or 'technical' Councils and, individually, as the 'agricultural Council', 'financial Council', etc.³⁹ Ministers attending Council meetings are usually accompanied by officials. A representative of the Commission also takes part in the proceedings.

The Presidency of the Council rotates among the Member States at six-monthly intervals.⁴⁰ While it holds the Presidency, a Member State will provide the President (chairman) for all meetings of the Council and other Community bodies on which the Member States are represented.⁴¹ The functions of the President are to call meetings, to preside at them, to call for a vote, and to sign acts adopted at the meeting. The Presidency also involves a general responsibility to ensure the smooth running of the Council. The Member State holding the Presidency has the role of mediator between the Member States in the search for agreement. In matters coming within the common foreign and security policy, it represents the European Union *vis-à-vis* the outside world.⁴² In recent years, the Presidency has become increasingly important, and the Member States vie with each other to achieve maximum progress during their term of office.

The Council has its own General Secretariat staffed by permanent officials.⁴³ It is similar to, but much smaller than, the Commission staff. It is divided into Directorates General and headed by a Secretary General. It has its own Legal Service.

COREPER

The ministers are able to be in Brussels only for short periods. In order to provide continuity, a Committee of the Permanent Representatives of the Member States, usually known by its French acronym, 'COREPER', was set up to prepare the work of the Council.⁴⁴ The Permanent Representatives are the ambassadors of the Member States to the Community and the Committee represents the Member States at a lower level than the ministers. COREPER itself meets on two levels: deputy Permanent Representatives (COREPER I) for more technical questions; and the Permanent Representatives themselves (COREPER II) for the more important political questions. At a lower level still, there are many committees and Council working groups, staffed by national officials based in Brussels or in their home countries.

COREPER plays an important role in the Council mechanism. Matters to be decided by the Council come to it first. If unanimous agreement is reached in COREPER, the item will be listed under Part A of the Council agenda; it will then be adopted without

³⁹ For further details on the various Council 'formations', see the Communication from the Council of 23 June 2000, OJ 2000 C174.

⁴⁰ Arts 203 [146] EC and 116 Euratom.

⁴¹ These bodies include the European Council, COREPER, committees and working groups of COREPER, and meetings of the Representatives of the Governments of the Member States.

⁴² Art. 18 [J.5] TEU.

⁴³ Arts 207(2) [151(2)] EC and 121(2) Euratom.

⁴⁴ Arts 207(1) [151(1)] EC, and 121(1) Euratom.

discussion. Negotiations with the Commission take place in COREPER: if a Commission proposal is unacceptable, attempts will be made to induce the Commission to amend it in order to secure agreement. The result of this is that in fact, though not in law, COREPER is an integral part of the Council decision-making process and could be regarded as an extension of the Council itself.⁴⁵

VOTING

Since the most important decisions are taken by the Council, the question of voting is crucial. At first sight, the Treaties⁴⁶ give the impression that the supranational element is strong. Thus Article 205(1) [148(1)] EC states:

Save as otherwise provided in this Treaty, the Council shall act by a majority of its members.⁴⁷

In fact, however, the specific provisions dealing with almost every matter of importance *do* provide otherwise: only matters of minor significance are decided by this system.⁴⁸ There are some matters (for example, the admission of new members)⁴⁹ which must be decided unanimously.⁵⁰ Most matters, however, are decided by what is called a 'qualified majority'.

The qualified-majority voting system is an attempt to solve one of the most intractable problems facing supranational organizations. Once you get away from the idea that nothing can be done without unanimity, it is necessary to decide how voting is to be conducted. If each state were given equal voting power, it would mean that Luxembourg would be on the same footing as the United States or China. This would be absurd. However, to base voting power solely on population would be unacceptable to most states. In the UN Security Council, the problem is solved by giving each state one vote, but, in addition, giving a veto to what were originally regarded as the most important states.

In the EU, a different solution has been adopted. When qualified-majority voting takes place in the Council, the votes of the Member States are weighted. The votes given to each state are in essence a compromise between the principle of equality and the principle that votes should reflect population.

Certain additional factors also play a role, in particular, the idea of grouping states together. This latter idea produces anomalies. In the past, Germany, France, Italy, and

⁴⁵ In *Commission v. Council* (FAO case), Case C-25/94, [1996] ECR I-1469, the European Court held that, not being an institution of the Community, COREPER has no power to take decisions in its own name. However, an amendment to Arts 207(1) [151(1)] EC and 121(1) Euratom brought about by the Treaty of Amsterdam allows it to adopt procedural decisions in cases provided for in the Council's Rules of Procedure.

⁴⁶ The position is the same under the Euratom Treaty (see Art. 118).

⁴⁷ Note that this is a majority of members (absolute majority), not a majority of votes: abstentions count as votes against the proposal.

⁴⁸ For example, Art. 209 [153] EC.

⁴⁹ Art. 49 [O] TEU.

⁵⁰ However, an abstention by one or more members of the Council does not prevent such a decision from being adopted, provided that the members in question were 'present in person or represented' at the meeting: Art. 205(3) [148(3)] EC. Such decisions can be blocked if one member boycotts the meetings, as France did during the crisis of 1965–6.

the United Kingdom were all approximately the same size; so it made sense to give them the same voting power. This changed with German reunification. However, France was unwilling to allow Germany to have more votes than it had; so Germany remains grouped with the other members of the 'Big Four'.

The allocation of votes has been subject to frequent changes. At present, it is as follows:⁵¹

Germany, France, Italy, United Kingdom	29 votes each
Spain, Poland	27 votes each
Romania	14 votes
Netherlands	13 votes
Belgium, Czech Republic, Greece, Hungary, Portugal	12 votes each
Bulgaria, Austria, Sweden	10 votes each
Denmark, Ireland, Lithuania, Slovakia, Finland	7 votes each
Estonia, Cyprus, Latvia, Luxembourg, Malta, Slovenia	4 votes each

The total number of votes is 346. A qualified majority is 255. This is approximately 74 per cent of the total number of votes.

In addition, there is a second rule that a majority of Member States must vote in favour of the act when it is adopted on a proposal from the Commission; when it is not adopted on a proposal from the Commission, a two-thirds majority of Member States must vote for it.⁵² This second rule benefits the smaller states. However, there is a third rule, which benefits the larger states. This is the rule that when a decision is adopted by a qualified majority, any Member State may request verification that the states making up the qualified majority represent at least 62 per cent of the total population of the Community. This will prevent a coalition of small states outvoting the larger states.⁵³

In every constitution, the provisions of strict law are supplemented, and sometimes modified, by convention. Constitutional conventions are rules of political practice based on the realities of political life. They reflect political power and do not normally endure for long, once the assumptions on which they are based have disappeared. Conventions operate in the Community as they do in national constitutions.

International bodies usually work on a system of give and take. States try to achieve what they want by influencing other Member States, either by offering something in return – 'We will vote for you on issue X if you support us on issue Y' – or by threatening to cause trouble. In the latter category, three tactics (in order of increasing stringency) are: threatening to block progress on other, unrelated issues; threatening to boycott future meetings; and threatening to withdraw. Negative tactics of this kind can, if the threats are credible, be very effective, but there is a price to be paid. Bad feeling is created and other states will be less co-operative. Moreover, boycott or withdrawal will

⁵¹ Act of Accession (Bulgaria and Romania) 2005, Art. 10(1), OJ 2000 L157, p. 203 (replacing Arts 205(2) EC and 118(2) Euratom). For decision-making under the Common Foreign and Security Policy and under Police and Judicial Co-operation in Criminal Matters, see Arts 10(2) and 10(3) of the Act of Accession (replacing Art. 23(2), third paragraph, TEU and Art. 34(3) TEU). ⁵² *Ibid.*

⁵³ Arts 205(4) EC and 118 Euratom (inserted by Art. 3(1)(a)(ii) of the Protocol to the Treaty of Nice on the Enlargement of the European Union).

hurt the state concerned more than the others. For these reasons manoeuvres of this kind will be used only if a country feels that its vital interests are at stake (though a relatively powerful country will feel able to take tougher measures than a weaker one).

In view of this, it would be surprising if a 'constitutional convention' had not sprung up in the Community to the effect that majority voting should not be used to push through a measure regarded by one Member State as harming its vital interests. Such a convention did indeed come into existence, though today it has to some extent withered away. Its history is instructive. The EC Treaty envisaged the establishment of the Common Market in three stages. In many instances, it provided that the Council would take decisions unanimously during the first two stages and by a qualified majority thereafter. The third stage began on 1 January 1966 and should have marked the transition to qualified majority voting. However, General de Gaulle was not prepared to accept this. From the middle of 1965 France boycotted the Community institutions (the so-called 'empty chair' policy) in protest against various developments, including the imminent onset of qualified-majority voting.⁵⁴ This precipitated a crisis in the Community which was settled only when France agreed to a meeting with the other five Member States. It was held in Luxembourg in January 1966 and resulted in a press release containing the famous 'Luxembourg Accords'.

The main provisions of the Luxembourg Accords dealing with majority voting are as follows:

- I. Where, in the case of decisions which may be taken by majority vote on a proposal of the Commission, very important interests of one or more partners are at stake, the Members of the Council will endeavour, within a reasonable time, to reach solutions which can be adopted by all the Members of the Council while respecting their mutual interests and those of the Community, in accordance with Article 2 [2] of the Treaty.
- II. With regard to the preceding paragraph, the French delegation considers that where very important interests are at stake the discussion must be continued until unanimous agreement is reached.
- III. The six delegations note that there is a divergence of views on what should be done in the event of a failure to reach complete agreement.

There is also a fourth paragraph under which the Six agreed that five specified matters, all concerned with agriculture, should be decided by common consent.

It should be noted that this is in part an agreement between the Member States (of which the legal effect is uncertain) and in part an agreement to disagree; nevertheless, for a long time afterwards the French view prevailed in practice, and when the United Kingdom joined the Community it was confidently asserted by the British Government that each Member State enjoyed a veto.⁵⁵ Even at that time, however, qualified-majority voting was practised in one special case, the Community budget.⁵⁶ The next development

⁵⁴ Initially the French were more concerned with agricultural markets, Community financing, and the budgetary powers of the European Parliament, but they subsequently broadened their demands to include the suppression of qualified majority voting.

⁵⁵ See *The UK and the European Communities*, Cmnd. 4715 (1971), para. 29 and *Membership of the European Community – Report on Renegotiation*, Cmnd. 6003 (1975), para. 124.

⁵⁶ It was also used for staff matters.

occurred in 1982 when the Council adopted an agricultural price increase despite an attempted British veto. In what appears to have been a pre-planned move, the Belgian President of the Council called for a vote, ignoring the British representative's claim that very important interests of the United Kingdom were at stake. The United Kingdom, Denmark, and Greece refused to vote;⁵⁷ the others voted in favour, thus ensuring the qualified majority required by the relevant Treaty provision. The United Kingdom was outraged, but a month later, after a meeting of the General Council called specially to discuss the matter, Mr Francis Pym, the British Foreign Secretary at the time, expressed the view that the veto remained intact.

How is one to explain this? It is not known what was said in that meeting, but one explanation is that the events of the previous month did not constitute a violation of the convention, because the United Kingdom's attempt to use the veto was improper. Britain admitted that the price increases were not unacceptable in themselves: they were being blocked in order to force the other Member States to make concessions on Britain's budgetary contribution. Therefore, if one takes the view that the right to veto a measure exists only when *that* measure is contrary to the vital interest of the state concerned, the other Member States were fully entitled to press the matter to a vote.⁵⁸

However this may be, the principle of unanimity had obviously been weakened.⁵⁹ Moreover, in the years that followed, it became increasingly clear that greater use of majority voting would be essential if reasonable progress was to be made towards the attainment of the objectives of the Community. How this might be brought about was considered in the discussions leading up to the Single European Act and, though the latter did not directly refer to it, there was an understanding that more votes would take place, at least with regard to the completion of the single European market.⁶⁰ Since then, voting has become increasingly common⁶¹ and now takes place quite often; nevertheless, one cannot say that the convention is dead, since many decisions are still taken without a vote and considerable efforts are made to reach a consensus.⁶²

⁵⁷ Denmark and Greece both supported the measure but regarded the principle of the veto as sacrosanct.

⁵⁸ See the statement in the House of Commons by Sir Geoffrey Howe (Foreign Secretary at the time), on 23 April 1986, H C Deb., 96, cols 320–1.

⁵⁹ See Nicoll, 'The Luxembourg Compromise' (1984) 23 JCMS 35 at 40–1, where it is said that further votes took place in 1984.

⁶⁰ However, in his statement in the House of Commons on 23 April 1986, the British Foreign Secretary said that the Luxembourg Accords were 'in no way affected one way or the other by the Single European Act'. See H C Deb., 96, cols 320–1.

⁶¹ It is interesting to note that on 20 July 1987 the Council amended its Rules of Procedure so that a vote can now be taken not only on the initiative of the President, but also on the initiative of any member of the Council (or on the initiative of the Commission), provided that a (simple) majority of the members of the Council is in favour. This means there are two votes: a procedural vote (on whether the substantive question should be put to the vote) and, if the procedural motion is supported by a majority of Member States, a substantive vote. Previously a vote on a substantive question would be taken only if the President so decided. See OJ 1987, L291/27. For the current Rules, see Decision 2006/683/EC, OJ 2006 L285/47, Art. 11(1).

⁶² According to one study, only one decision in four is contested; a negative vote (as distinct from an abstention) is cast against only one in seven; and there is more than marginal opposition to only one in sixteen. The topics are usually highly technical. The most frequent 'no-sayers' are (in order) Denmark, the Netherlands, Germany, and the United Kingdom. See Fiona Hayes-Renshaw and Helen Wallace, *The Council of Ministers* (1997), p.53.

THE EUROPEAN COUNCIL

In 1974 it was agreed that the Heads of State or of Government⁶³ of the Member States, together with their foreign ministers, would hold summit conferences at regular intervals. In time these meetings became formalized and were known as 'the European Council', a term now used in the Treaties. (This must not to be confused with the regular Council, referred to simply as 'the Council', nor with the Council of Europe, which is an entirely different organization.) In 1986 the European Council was given legal recognition by Article 2 SEA.⁶⁴

Today the governing provision is Article 4 [D] TEU, which states that the European Council will provide the European Union with the necessary impetus for its development and will define its general political guidelines. Article 4 [D] also confirms the right of the President of the Commission and one other Commissioner to attend. The meetings, which take place at least twice a year, are chaired by the representative of the Member State holding the Presidency. Discussions cover both Community matters and matters outside the jurisdiction of the Community (but within that of the Union).⁶⁵ When it discusses Community matters it could act as the Council of the European Communities: there is nothing in Community law preventing Member States from being represented at Council meetings by their Heads of State or of Government.⁶⁶ In practice, however, the European Council usually takes only general political decisions; these are then translated into legal form at meetings of the Council held at ministerial level. The appointment of members of the Commission is an exception. As we saw above, the Treaty of Nice provides that this will be done by the Council, meeting in the composition of Heads of State or Government.

COMMON FOREIGN AND SECURITY POLICY

As far back as the early 1950s, attempts were made to promote European integration in the fields of defence and foreign policy, but these collapsed in 1954 when the French National Assembly rejected the European Defence Treaty. It was another fifteen years before a new effort was made.⁶⁷ This deliberately avoided any element of supranationalism and concentrated instead on establishing an inter-governmental framework for political co-operation, mainly in the field of foreign policy. The Member States agreed to regular consultations and exchanges of information in the hope that this would lead to common positions and joint action in international affairs.

⁶³ This means the British Prime Minister, the German Chancellor, the French President, etc.

⁶⁴ Now repealed.

⁶⁵ The Common Foreign and Security Policy, and Police and Judicial Co-operation in Criminal Matters (explained below). See Art. 1 [A] TEU.

⁶⁶ Solemn Declaration on European Union 1983, Point 2.1.3, EC Bull. 6 – 1983, p. 5.

⁶⁷ The origin of European Political Co-operation is usually traced to the Hague Summit of December 1969 and the Luxembourg Report of October 1970.

A striking feature of the system in its initial stage was that it operated almost entirely outside the institutional structure of the Community. There was a rigid division between the European Community and European Political Co-operation (EPC), as it was then called: the Commission was largely excluded from EPC meetings, which took place in the capital of the Member State holding the Presidency, rather than in Brussels. The argument was that the subject matter of EPC was outside the scope of the Treaties; therefore, it was outside the jurisdiction of the Community institutions. It soon became apparent, however, that this distinction could not be fully maintained. For example, if it were wished to adopt economic sanctions against a third country, would this be a matter for EPC (because it concerned foreign policy) or a matter for the Community (because it concerned commercial policy, a subject covered by Articles 131–135 [110–116] of the EC Treaty)? In fact, when the Falklands War broke out, sanctions against Argentina were adopted by the Community after ‘discussions in the context of European political co-operation’, but ‘in accordance with the relevant provisions of the Community Treaties’.⁶⁸ Thus both systems came together to produce the desired result.

As time went on, therefore, the dividing line between the Community and EPC became blurred and Title III of the Single European Act, which gave legal recognition to EPC, provided that the Commission would be ‘fully associated with the proceedings of Political Co-operation’⁶⁹ and that the European Parliament would be ‘closely associated’ with it.⁷⁰ Title III SEA also made provision for the establishment of a political and administrative structure for EPC.

Title III SEA was replaced by Title V of the Treaty on European Union, which was amended and restructured by the Treaty of Amsterdam. These provisions establish a common foreign and security policy (CFSP), which Member States are obliged to support ‘actively and unreservedly in a spirit of loyalty and mutual solidarity’.⁷¹ The Treaty provides that the CFSP includes all questions relating to the security of the Union, including the progressive framing of a common defence policy. This may lead to a common defence, should the European Council so decide, though such a decision must be adopted by each Member State in accordance with its constitutional requirements.⁷²

The European Union pursues the CFSP by various means: defining the principles and general guidelines on which it is to be based; deciding on common strategies; adopting joint actions; adopting common positions; and strengthening co-operation between the Member States.⁷³ The European Council decides on principles and general guidelines; it also decides on common strategies.⁷⁴ The Council takes decisions on joint actions and common positions. Joint actions address specific situations where operational action by the Union is required; they commit the Member States in their foreign-policy activities.⁷⁵ Common positions lay down the approach of the Union to problems relating to a particular geographical area or theme.⁷⁶

⁶⁸ See the preamble to Council Regulation 877/82, OJ 1982, L102/1.

⁶⁹ Art. 30(3)(b) SEA. See now Art. 27 [J.17] TEU. ⁷⁰ Art. 30(4) SEA. See now Art. 21 [J.11] TEU.

⁷¹ Art. 11(2) [J.1(2)] TEU. ⁷² Art. 17(1) [J.7(1)] TEU, as amended by the Treaty of Nice.

⁷³ Art. 12 [J.2] TEU. ⁷⁴ Art. 13(1) and (2) [J.3(1) and (2)] TEU. ⁷⁵ Art. 14 [J.4] TEU.

⁷⁶ Art. 15 [J.5] TEU.

When operating within the scope of the CFSP, the Council must normally be unanimous; nevertheless, abstentions by members present in person (or represented) do not prevent the adoption of decisions.⁷⁷ If, when abstaining, a member makes a formal declaration invoking Article 23 TEU, it is not obliged to apply the decision, though it must accept that it commits to the Union. In these circumstances, the Member State in question must refrain from any action likely to conflict with action taken by the Union. If, however, the number of members making such a declaration command more than a third of the total votes in the Council (as weighted under the qualified-majority voting system), the decision cannot be adopted.⁷⁸

The unanimity rule does not apply in all cases: the Council acts by a qualified majority when adopting joint actions, common positions, or other decisions on the basis of a common strategy, or when adopting a decision implementing a joint action or common position. In such cases, however, any Member State may declare that, for important and stated reasons of national policy, it intends to oppose the decision. If it does this, no vote may be taken; the Council may, however, vote (by a qualified majority) to refer the matter to the European Council for decision by unanimity.⁷⁹

The Presidency (Member State holding the Presidency of the Council) represents the Union in matters coming within the CFSP; it is also responsible for the implementation of decisions and for speaking on behalf of the Union in international organizations and conferences.⁸⁰ The Presidency is assisted by the Secretary General of the Council, clearly destined to be a key figure. With regard to the CFSP, he has the title 'High Representative'.⁸¹

The most striking feature about the CFSP is that the supranational element is almost entirely lacking. All power is concentrated in the hands of the Council, which does not have to act on a proposal from the Commission, though the Commission has the power to make proposals;⁸² no Member State can be forced to accept a decision against its will; and the jurisdiction of the Court is largely excluded.⁸³

POLICE AND JUDICIAL CO-OPERATION IN CRIMINAL MATTERS

A similar system has been set up by Title VI of the Treaty on European Union (as amended and restructured by the Treaty of Amsterdam) for police and judicial co-operation in criminal matters.⁸⁴ This system is intended to combat crime in general, though particular attention is paid to terrorism, trafficking in persons, offences against children, drug trafficking, arms trafficking, corruption, and fraud.

To achieve these objectives, the Council, acting unanimously on the initiative of a Member State or of the Commission, may adopt common positions defining the approach of the Union to a particular matter; adopt framework decisions to harmonize

⁷⁷ Art. 23(1) [J.13(1)] TEU. ⁷⁸ *Ibid.*

⁷⁹ Art. 23(2) [J.13(2)] TEU. The provisions of this paragraph do not apply to decisions having military or defence implications: Art. 23(1) [J.13(1)] TEU. For procedural questions, the Council acts by a majority of its members: Art. 23(3) [J.13(3)] TEU. ⁸⁰ Art. 18 [J.8] TEU.

⁸¹ *Ibid.*, para. 3. The Secretary General also assists the Council: Art. 26 [J.16] TEU.

⁸² Art. 22 [J.12] TEU. Member States may also make proposals.

⁸³ Art. 46 [L] TEU, as amended by the Treaty of Nice.

⁸⁴ The discussion that follows is based on Title VI as amended by the Treaty of Amsterdam.

national legislation;⁸⁵ adopt decisions for other purposes;⁸⁶ and establish conventions.⁸⁷ Conventions must be adopted by the Member States in accordance with their constitutional requirements; measures to implement them may be adopted within the Council by a majority of two-thirds of the Contracting Parties.⁸⁸

As in the case of the CFSP, supranational elements are largely lacking; nevertheless, the European Court has jurisdiction to give preliminary rulings on the validity and interpretation of framework decisions and other decisions; on the interpretation of conventions; and on the validity and interpretation of measures implementing conventions.⁸⁹ However, the European Court's jurisdiction in this regard applies only to those Member States which declare that they are willing to accept it.⁹⁰ The Court also has jurisdiction to review the legality of framework decisions and other decisions in actions brought by Member States or the Commission.⁹¹

THE EUROPEAN PARLIAMENT

COMPOSITION

The European Parliament⁹² is intended to represent the peoples of the Community. This is made clear by Article 189 [137] EC,⁹³ which states that it consists of 'representatives of the peoples of the States brought together in the Community'. In spite of this, however, the Members of the European Parliament were for a long time selected by the national legislatures and it was only in 1976 that agreement was reached on direct elections.⁹⁴ The Treaties provided that the Parliament would draw up proposals for direct elections and that the Council, acting unanimously, would 'lay down the appropriate provisions', which it would recommend to Member States for adoption in accordance with their

⁸⁵ Framework decisions are similar to directives but are expressly stated to have no direct effect: Art. 34(2)(b) [K.6(2)(b)] TEU. On the concept of direct effect, see Chap. 7.

⁸⁶ These also have no direct effect: Art. 34(2)(c) [K.6(2)(c)] TEU. The Council may adopt measures to implement these decisions; when doing so, it acts by a qualified majority: *ibid.*

⁸⁷ These powers are all conferred on the Council by Art. 34(2) TEU.

⁸⁸ Art. 34(2)(d) [K.6(2)(d)] TEU. ⁸⁹ Art. 35(1) [K.7(1)] TEU.

⁹⁰ Art. 35(2) [K.7(2)] TEU. However, the Court may in no circumstances review police action in the Member States, nor may it review the actions of Member States regarding the maintenance of law and order and the safeguarding of national security: Art. 35(5) [K.7(5)] TEU.

⁹¹ Art. 35(6) [K.7(6)] TEU. For a general discussion of proceedings of this kind, see Chaps 11, 12, 15, and 16. The Court also has jurisdiction to rule on disputes between Member States on the interpretation or application of acts adopted under Art. 34(2) [K.6(2)] TEU and on disputes between Member States and the Commission regarding the interpretation or application of conventions established under Art. 34(2)(d) [K.6(2)(d)] TEU: see Art. 36(7) [K.8(7)] TEU.

⁹² Referred to in the original Treaties as the 'Assembly', the European Parliament adopted its present name in 1962 (EP Resolution of 30 March 1962, JO 1962, p.1045). This was recognized by the Member States in the Single European Act: see Art. 3(1) SEA. See now Art. 7 [4] EC. ⁹³ See also Art. 107 Euratom.

⁹⁴ Council Decision 76/787, and the annexed Act concerning the election of the representatives of the Assembly by direct universal suffrage, OJ 1976, L278/1. See, further, Forman, (1977) 2 ELRev. 35.

respective constitutional requirements.⁹⁵ The Parliament first drew up proposals as long ago as 1960, but it took the intervening sixteen years for the Council to reach a decision. Thereafter, the provisions had to be adopted at national level and this involved further difficulties and delays, not least in the United Kingdom; so the first elections were not held until 1979. Thereafter they have been, and will be, held every five years.⁹⁶

The instrument providing for elections took an unusual form, since all its substantive provisions are in an Act annexed to the Council Decision. The legal nature of this Act is controversial. Does it take effect as an international agreement between the Member States based on a draft recommended by the Council? Or does it take effect as a decision of the Council to which the Member States have agreed? Perhaps the best view is that Articles 190(4) [138(3)] EC and 108(3) Euratom lay down a special procedure for amending these Treaties which derogates from the normal procedure.⁹⁷ If this view is correct, the Act takes effect as an agreement between the Member States but forms part of the three Treaties.⁹⁸ The importance of this question is that the jurisdiction of the European Court to annul,⁹⁹ interpret,¹⁰⁰ or enforce¹⁰¹ the Act depends on the Act's legal status.¹⁰²

Prior to 1994, the four largest Member States (Germany, France, Italy, and the United Kingdom) all had the same number of seats (eighty-one). After the unification of Germany, however, the German electorate became so much greater that parity with the other three could no longer be maintained; so Germany was given ninety-nine seats. When further states joined, there was a danger of the Parliament getting too large. The Treaty of Nice therefore made provision for a reduction in the number of seats allocated to all the existing Member States except Germany (the largest) and Luxembourg (then the smallest).

At present, the total number of seats is 736. They are allocated as follows:¹⁰³

Germany	99
France, Italy, United Kingdom	72 (each)
Spain, Poland	50 (each)
Romania	33
Netherlands	25
Belgium, Czech Republic, Greece, Hungary, Portugal	22 (each)
Sweden	18
Bulgaria, Austria	17 (each)

⁹⁵ Arts 190(4) [138(3)] EC and 108(3) Euratom. Amendments brought in by the Treaty on European Union provide that the Council must obtain the consent of the European Parliament (which acts by a majority of its members) before adopting the provisions to be recommended to the Member States.

⁹⁶ See Art. 3 of the Act providing for direct elections (above).

⁹⁷ This was previously set out in Arts 236 EC and 204 Euratom; see now Art. 48 [N] TEU.

⁹⁸ See Joliet, *Institutions*, pp. 75–7, where the problem is fully discussed.

⁹⁹ See Arts 230 [173] EC and 146 Euratom (direct actions); and 234 [177] EC and 150 Euratom (preliminary rulings on validity).

¹⁰¹ See Arts 226–228 [169–171] EC and 141–143 Euratom.

¹⁰² If the third view is correct, the European Court cannot annul the Act, even if it infringes the Treaties, but it can interpret or enforce it where the Treaties so provide.

¹⁰³ Act of Accession (Bulgaria and Romania) 2005, Art. 9, replacing Art. 189(2) EC and Art. 107(2) Euratom.

Denmark, Slovakia, Finland	13 (each)
Ireland, Lithuania	12 (each)
Latvia	8
Slovenia	7
Estonia, Cyprus, Luxembourg	6 (each)
Malta	5
TOTAL	736

It will be noticed that these allocations are not proportional to population: the smaller Member States are over-represented compared with the larger ones. For example, the population of the United Kingdom is more than 130 times that of Luxembourg. If it is right for Luxembourg to have six seats, the United Kingdom should have something like 780 seats, instead of seventy-two. To put it another way: the vote of one Luxembourger is worth more than those of ten British citizens. This is not exactly consistent with the principle of 'one person – one vote – one value', which shows that democratic principles must give way before the national interests of the smaller states.¹⁰⁴

The Act providing for direct elections states that, until a uniform electoral procedure has been adopted, each Member State is free to choose its own electoral system.¹⁰⁵ So far no agreement has been reached on a fully uniform system; therefore, the question still depends on national law¹⁰⁶ and the electoral system differs from country to country. For many years, the United Kingdom used its normal 'first past the post' system (except in Northern Ireland).¹⁰⁷ When Labour came to power, however, there was a change of policy, and the 1999 elections were held on the basis of proportional representation in all parts of the United Kingdom.¹⁰⁸ Now, some form of proportional representation is used in every Member State.¹⁰⁹

¹⁰⁴ It is sometimes said that this unequal allocation of seats is necessary in order to ensure that all parties in the smaller countries can gain representation. Such an argument cannot, however, justify a departure from the basic principle of equality of voting rights, nor can it explain why Northern Ireland, with its distinctive and diverse political scene, should have only half as many seats as Luxembourg, even though it has more than four times as many voters. The fact that Northern Ireland is not an independent state is irrelevant, since the European Parliament is not intended to provide a forum to represent states, a function fulfilled by the Council. Similar arguments may be made with regard to Scotland and Wales, as well as with regard to culturally distinct regions in other Member States.

¹⁰⁵ Art. 7(2). This is subject to the other provisions of the Act; as to these, see Joliet, *Institutions*, pp. 77–82. It might originally have been argued that Art. 7(2) was invalid, since the Treaty provisions (Arts 190(3) [138(3)] EC, 21(3) ECSC, and 108(3) Euratom) required the procedure to be uniform in all Member States. The counter-argument was that this requirement applied only to the Parliament's proposals, not to the final measure: see Joliet, *Institutions*, p. 77. In any event, the Treaty of Amsterdam amended these provisions to state that the Parliament's proposal must be for elections according to a uniform procedure in all Member States *or in accordance with principles common to all Member States*.

¹⁰⁶ For this reason, a grant by the European Parliament to the political parties to cover election expenses was held invalid by the European Court: *Parti Ecologiste – 'Les Verts' v. European Parliament*, Case 294/83, [1986] ECR 1339. (The Ecologist Party (the Greens) had challenged the grant on the ground that it was distributed in a way that was unfair to the newer parties.) See, further, Joliet and Keeling, 'The Reimbursement of Election Expenses: A Forgotten Dispute' (1994) 19 ELRev. 243.

¹⁰⁷ European Parliamentary Elections Act 1978, s. 3.

¹⁰⁸ European Parliamentary Elections Act 1999.

¹⁰⁹ On the citizenship requirement for voting, and the right of persons in Gibraltar to vote, see *Spain v. United Kingdom*, Case C-145/04, 12 September 2006.

Members of the European Parliament (MEPs) are permitted also to be members of their national parliaments,¹¹⁰ but Article 6(1) of the Act annexed to Council Decision 76/787 specifies a number of offices with which the office of MEP is incompatible. The most important are: member of the Government of a Member State; member of the Commission; Judge, Advocate General, or Registrar of the European Court; or active official of a Community institution. Article 6(2) permits Member States to lay down additional incompatibilities at national level, and in the United Kingdom most of the disqualifications for membership of the House of Commons apply also to membership of the European Parliament.¹¹¹

PAY OF MEPS

At present, MEPs are paid the same salaries as their national counterparts, which means there are large differences between the pay of MEPs from different countries. These salaries are subject to income tax in the MEP's home country. They also receive substantial allowances (often greater than their salaries), which are not (at least in principle) subject to national tax.¹¹²

There have been persistent allegations in the past that some MEPs have obtained allowances fraudulently – for example, by claiming expenses for travel not actually undertaken. It has also been said that the Parliament shows little inclination to investigate.¹¹³ After much discussion, a reformed system was finally adopted. In exchange for a uniform level of basic pay that would constitute an increase for most MEPs, it was agreed to clean up the allowance system. However, the new regime will only come fully into force in 2009.¹¹⁴

PRIVILEGES AND IMMUNITIES

MEPs are entitled to various privileges and immunities¹¹⁵ of which the most important are, first, freedom of movement to and from the meeting place of the Parliament; secondly, immunity from legal proceedings in respect of opinions expressed, or votes cast, in the performance of their duties; and thirdly, in their own Member State, the same immunities as are enjoyed by members of their national parliament and, in other Member States, freedom from detention and immunity from legal proceedings. Immunities in the third category apply only during parliamentary sessions but, as these last virtually all the year,¹¹⁶ this

¹¹⁰ Art. 5 of the Act annexed to Council Decision 76/787.

¹¹¹ European Parliamentary Elections Act 1978, Sched. 1, para. 5.

¹¹² *Lord Bruce v. Aspden*, Case 208/80, [1981] ECR 2205.

¹¹³ See, for example, Special Report 10/98 of the Court of Auditors, OJ 1998 C243/1.

¹¹⁴ See OJ 2005 L262/1; OJ 2006 C133/48.

¹¹⁵ See the Protocol on the Privileges and Immunities of the European Communities, Arts 8–10.

¹¹⁶ The length of the sessions is a matter for the Parliament itself to decide. Although it does not actually sit throughout the year, it holds various ancillary activities, such as committee meetings, during most of the year and for the purpose of Parliamentary immunity is regarded as in session until the formal closing of the session, which takes place immediately before the opening of the new session. See *Wybot v. Faure*, Case 149/85, [1986] ECR 2391.

limitation is of little importance.¹¹⁷ Immunities in this category may be waived by the Parliament itself.

POLITICAL PARTIES¹¹⁸

Members of the European Parliament sit according to their party, not their country. The Rules of Procedure provide for the official recognition of 'political groups'¹¹⁹ and there are various advantages, both procedural and administrative, in being so recognized. To gain recognition, a group must have a certain minimum number of MEPs. Most of the groups are coalitions of national parties, though in some cases one national party is dominant. Thus, for example, the European Socialists include Labour MEPs from Britain and social democrats from other Member States; and the Green Group is made up of environmentalists from various countries. As might be expected, the cohesiveness of these groups varies, and on some issues national allegiances are more important than loyalty to one's political group.¹²⁰

COMMITTEES

A characteristic feature of the European Parliament is the role of committees. There are a number of standing committees, and much of the work of the Parliament is done in these committees. When matters come before the Parliament for discussion, they are usually considered first in the appropriate committee and the subsequent debate on the floor of the House is based on the Committee's report.

PARLIAMENTARY QUESTIONS

Parliamentary questions have become an important part of the Parliament's proceedings. Article 197 [140] EC¹²¹ requires the Commission to reply orally or in writing to questions put to it by the Parliament or by its members. The Council replies to questions on a voluntary basis. Article 21 [J.7] TEU requires the Member State holding the Presidency to keep the Parliament informed of developments regarding the common foreign and security policy; it also states that the Parliament may ask questions of the Council. Similar provisions concerning co-operation in the fields of justice and home affairs are to be found in Article 39 [K.6] TEU.

¹¹⁷ As to whether a former MEP may be prosecuted in England for dishonestly obtaining money for expenses from the European Parliament, see *R v. Manchester Crown Court, ex parte DPP* [1993] 1 WLR 693, QBD, reversed on other grounds [1993] 1 WLR 1524, HL. According to the House of Lords (*ibid.* at 1530-1), the decision of the Divisional Court in this case, having been made without jurisdiction, will not be binding on any other court.

¹¹⁸ Art. 191 [138a] EC, a provision inserted by the Treaty on European Union, declares that political parties at European level are important as a factor for integration within the Union. They are also stated to contribute to forming a 'European awareness' and to expressing the political will of the citizens of the Union.

¹¹⁹ These are not political parties in the normal sense. They exist simply for the purpose of the internal functioning of the Parliament, not for fighting elections.

¹²⁰ For litigation on the formation of political groups, see *Front national v. Parliament*, Case C-486/01 P, [2004] ECR I-6289.

¹²¹ See also Art. 110 Euratom.

The answers to Parliamentary questions are published in the Official Journal and are an important means of gaining information on Community affairs. It is sometimes noticeable, however, that the replies are uninformative to a degree that would hardly be acceptable in the House of Commons.

PROPOSALS, INQUIRIES, AND PETITIONS

Three amendments to the Community Treaties brought into force by the Treaty on European Union may conveniently be mentioned at this point: the right of the Parliament to request proposals, its right to set up inquiries, and the right of citizens (and others) to petition the Parliament.

The second paragraph of Article 192 [138b] EC¹²² gives the Parliament the right, acting by a majority of its members, to request the Commission to submit any 'appropriate proposal' on matters on which it considers that a Community act is required for the purpose of implementing the Treaty. There is no obligation on the Commission to comply.

Article 193 [138c] EC¹²³ gives the Parliament the right to set up (temporary) committees of inquiry, at the request of a quarter of its members, to investigate alleged contraventions or maladministration in the implementation of Community law (except where the matter is pending before a court).

Article 194 [138d] EC¹²⁴ gives any citizen of the European Union, acting individually or in association with others, the right to petition the European Parliament on a matter within the Community's fields of activity which affects him directly.¹²⁵ This gave legal recognition to a practice which had existed for some time and can be a valuable means of putting pressure on the Community.¹²⁶

THE OMBUDSMAN

Article 195 [138e] EC¹²⁷ gives the Parliament the power to appoint an Ombudsman,¹²⁸ who can receive complaints from any citizen of the Union¹²⁹ concerning maladministration in the activities of any Community institution or body except the Court of Justice and the Court of First Instance acting in their judicial roles. The appointment is made after each Parliamentary election and the Ombudsman holds office until the next election. He is eligible for reappointment. His status is in some ways similar to that of a member

¹²² See also Art. 107a Euratom.

¹²³ See also Art. 107b Euratom.

¹²⁴ See also Art. 107c Euratom.

¹²⁵ The right also extends to non-citizens residing in a Member State (as well as to companies having their registered office there).

¹²⁶ For further details, see Marias, 'The Right to Petition the European Parliament after Maastricht' (1994) 19 *ELRev.* 169; Pliakos, 'Les conditions d'exercice du droit de pétition' [1993] *CDE* 317.

¹²⁷ See also Art. 107d Euratom.

¹²⁸ The office of Ombudsman originated in Scandinavia (the Parliamentary Commissioner for Administration in Britain is based on the Scandinavian model). The first Ombudsman was a Finn, Jacob Soderman, appointed in 1995.

¹²⁹ This right, too, extends to non-citizens residing in a Member State, and to companies having their registered office there.

of the Commission: he is completely independent in the performance of his duties and can be dismissed only if the European Court, at the request of the Parliament, finds that he no longer fulfils the conditions required for the performance of his duties or is guilty of serious misconduct.

Where the Ombudsman establishes an instance of maladministration, he must refer the matter to the institution concerned, which has three months to inform him of its views. The Ombudsman then forwards a report to the Parliament and the institution concerned. The person lodging the complaint must be informed of the outcome. The Parliament does not, however, have power to provide redress in the event that the complaint is upheld. Perhaps it is hoped that the institution or body concerned will do this.¹³⁰

CONSULTATION

The legislative procedure in the Community, and the Parliament's role in it, are discussed below. It will be seen from this that the Parliament's rights vary, depending on the provision under which the measure is being adopted: in some cases the Parliament has fairly extensive rights; in others it has the right merely to be consulted.¹³¹ Here the procedure will be discussed where the latter is the case.

Under this procedure, the Commission sends a proposal to the Council, which in turn forwards it to the Parliament for its opinion. The proposal is first considered by one of the Parliament's committees, which produces a report and a draft resolution. These go to the full Parliament, which will give its opinion (either positive or negative) and may suggest amendments to the proposal. The Commission may modify its proposal on the basis of the Parliament's opinion but there is no obligation on either it or the Council to follow the opinion or even to give reasons for rejecting it.

Although this procedure gives the Parliament no power to affect the content of legislation, its right to be consulted must be respected. If it is not, the European Court will declare the measure invalid. This happened in *Roquette v. Council*,¹³² where the Council sent a proposal for legislation to the Parliament in March 1979. As the measure was to enter into force on 1 July of that year, the Council asked that the opinion be given during the April session. This proved impossible because the draft resolution proposed by the Parliamentary Committee on Agriculture, to which the proposal had been sent, was rejected by the Parliament in plenary session. This meant that the matter had to go back to the Committee for reconsideration and the resulting delay made it impossible to complete the procedure during the April session. The Parliament was willing to convene an extraordinary session should the Council or Commission so desire, but the Council made no such request. Instead it adopted the measure on 25 June 1979, referring in the

¹³⁰ For further details, see Pliakos, 'Le Médiateur de l'Union européenne' [1994] CDE 563; Magliveras, 'Best Intentions but Empty Words: The European Ombudsman' (1995) 20 ELRev. 401.

¹³¹ Where the relevant Treaty provision does not give the Parliament the right to be consulted, it is consulted by virtue of an inter-institutional agreement between the Parliament and the Council: see EP Resolution 65 of 27 November 1959, JO 1959, p.1267. It is uncertain what the legal effect of failure to consult in such a case would be.

¹³² Case 138/79, [1980] ECR 3333. See also *Maizena v. Council*, Case 139/79, [1980] ECR 3393.

preamble to the fact that the Parliament had been 'consulted', rather than (as is normal) referring to its opinion.

Is it sufficient that the Parliament has been *asked* for its opinion or must it actually *give* its opinion? If the latter were the case, the Parliament could delay legislation indefinitely by the simple expedient of not giving an opinion. If such stonewalling were possible, the right to be consulted would turn into a veto power.

In its judgment, the Court said that observance of the requirement of consultation 'implies that the Parliament has expressed its opinion. It is impossible to take the view that the requirement is satisfied by the Council's simply asking for the opinion.'¹³³ The Council had argued that the Parliament, by its own conduct, had made observance of the requirement impossible. The Court, however, pointed out that the Council had not exhausted all the possibilities of obtaining an opinion; in particular it had not asked for an extraordinary session. The Council had not, therefore, proved its allegations; and the Court declared the measure void. It was, however, careful to leave open the questions of principle raised by the Council.

In 1995, the question again came before the Court. This time, however, the fault lay with the Parliament: it had not done everything possible to give an opinion in sufficient time; so the Court held that it could not complain that the Council had gone ahead and adopted the measure without waiting for its opinion. The measure was, therefore, valid.¹³⁴

What is the position where, after the Parliament has given its opinion, the proposal is amended? If it was always necessary to ask the Parliament for a new opinion on the amended proposal, the procedure would become very cumbersome, since amendments often have to be made in order to secure the assent of the Member States in the Council. In view of this, the Court has held that, if the provisions of the final text of the measure are 'substantially identical' to those in the version submitted to the Parliament, or if any amendment is substantially in accordance with the Parliament's own proposal, there is no need for a second consultation.¹³⁵ Where, however, the amended text differs in substance from the one on which the Parliament was consulted, the Parliament must be consulted again. If this is not done, the measure will be annulled.¹³⁶

International agreements between the Community and non-Member States are another area where the Parliament has the right to be consulted. The procedure for the

¹³³ Para. 34 of the judgment.

¹³⁴ *European Parliament v. Council*, Case C-65/93, [1995] ECR I-643. See also *European Parliament v. Council*, Case C-417/93, [1995] ECR I-1185, where the Court ruled that the Council is entitled to take a preliminary decision on the measure in question before obtaining the Parliament's opinion, provided that such a decision is not definitive. For a comment on both cases, see Boyron, 'The Consultation Procedure: Has the Court of Justice Turned against the European Parliament?' (1996) 21 ELRev. 145.

¹³⁵ *Chemiefarma v. Commission*, Case 41/69, [1970] ECR 661 (paras 68 and 69 of the judgment). *Buyl v. Commission*, Case 817/79, [1982] ECR 245 (paras 23 and 24 of the judgment). The Court has also held that where power to implement a measure is delegated by the Council either to the Commission or to itself, it is not necessary to consult the Parliament on the implementing measures, provided the Parliament was consulted on the original measure: *Einfuhr- und Vorratsstelle v. Köster*, Case 25/70, [1970] ECR 1161; *European Parliament v. Council*, Case C-417/93, [1995] ECR I-1185. For a discussion of delegation, see Chap. 4.

¹³⁶ *European Parliament v. Council*, Case C-65/90, [1992] ECR I-4593; *European Parliament v. Council*, Case C-388/92, [1994] ECR I-2067; *European Parliament v. Council*, Case C-21/94, [1995] ECR 1827; *European Parliament v. Council*, Case C-392/95, [1997] ECR I-3213.

conclusion of international agreements under the EC Treaty is laid down in Article 300 [228] EC. In some cases (discussed below) the Parliament has a right of veto; in all other cases under the EC Treaty, except tariff and trade agreements under Article 133(3) [113(3)], the Parliament has the right to be consulted.¹³⁷ It is expressly provided, however, that when it consults the Parliament, the Council can lay down a time-limit for the Parliament to deliver its opinion and, if no opinion is given by the due date, act without it.¹³⁸

Although not previously laid down in the Treaties, the right of the Parliament to be consulted with regard to international agreements was recognized as early as 1983 in the Solemn Declaration on European Union,¹³⁹ and in one respect the new provisions could be regarded as a setback for the Parliament since the Solemn Declaration appears to cover all 'significant agreements', including – apparently – tariff and trade agreements, which are now expressly excluded by Article 300(3) [228(3)].

It should finally be mentioned that Article 21 [J.7] TEU states that the Member State holding the Presidency must consult the Parliament on 'the main aspects and the basic choices of the common foreign and security policy' and must ensure that the views of the Parliament are 'duly taken into consideration'. However, since the jurisdiction of the European Court does not extend to this area,¹⁴⁰ there is no legal sanction if this is not done.

VETO RIGHTS

There are a number of circumstances in which the Parliament must give its assent to action taken by the Council. In such cases the Parliament has a right of veto. With regard to legislation and treaties, there are six instances.

The first concerns sanctions imposed on a Member State under Article 7 [4] TEU for a serious and persistent breach of fundamental rights. The second concerns international agreements and arises under the second paragraph of Article 300(3) [228(3)] EC, under which the assent of the Parliament must be obtained in the case of association agreements under Article 310 [238] EC, agreements which establish a specific institutional framework by organizing co-operation procedures, agreements having important budgetary implications for the Community, and agreements entailing amendment of an act adopted under the co-decision procedure.¹⁴¹ The third arises under Article 49 [O] TEU, which provides that the Parliament, acting by a majority of its members (absolute majority, not a majority of votes) must give its assent to the admission of new Member States to the Community. The procedure is discussed in Chapter 3. The fourth concerns Council measures under Article 161 [130d] EC regarding the structural and cohesion funds. The fifth relates to Council decisions on the procedure for elections to the European Parliament (discussed above). The sixth concerns amendments to the ECB Statute (Article 107(5) [106(5)] EC).

¹³⁷ See the first para. of Art. 300(3) [228(3)] EC.

¹³⁸ *Ibid.*

¹³⁹ See Point 2.3.7 of the Solemn Declaration, EC Bull. 6 – 1983, pp. 26–7.

¹⁴⁰ Art. 46 [L] TEU.

¹⁴¹ Discussed below.

APPROVAL OF THE COMMISSION

Here, the Parliament has two powers: first, it must approve the nomination of the President of the Commission; secondly, the President and the other members of the Commission nominated by the Member States are subject 'as a body' to a vote of approval by the Parliament.¹⁴² Before it grants its approval, the Parliament requires the President-elect and the would-be Commissioners to appear before it to answer questions. Some nominees are said to find these sessions gruelling.

The power to approve Commissioners other than the President is weakened by the fact that the Parliament must approve the nominations *en bloc*; so it cannot veto individual nominations. However, if it objects strongly enough to a particular appointment, it can threaten to reject the whole Commission unless the offending nominee is replaced.

CENSURE OF THE COMMISSION

The Parliament also has the power to obtain the resignation of the Commission by passing a vote of censure. This is laid down by Articles 201 [144] EC and 114 Euratom, which provide that the Commission must resign *en bloc* if such a motion is passed by a two-thirds majority of votes cast representing a majority of all members. However, these provisions also state that the resignation takes effect only after the new Commission has been appointed; so if the Parliament did not approve the new nominees put forward by the Council – who could in fact be the same individuals – the existing Commissioners would remain in office indefinitely.

The most important occasion on which resort was had to this procedure was in January 1999, when there was a motion of censure against the Commission headed by Mr Santer. This failed to achieve a two-thirds majority;¹⁴³ but the Commission had to accept the establishment of a committee of independent experts to investigate allegations against it of fraud, mismanagement, and nepotism. When the experts produced a damning report, the whole Commission resigned on 15 March 1999. However, the Member States failed to appoint a new Commission and, in accordance with the rule mentioned above, the existing Commissioners continued to carry out their duties – and draw their salaries – until their terms of office expired in January of the following year.¹⁴⁴

CONCLUSIONS

It will be clear from what has been said that the powers of the European Parliament fall short of those normally enjoyed by the legislature of a modern state. Nevertheless, they are gradually increasing and the days are long past when it could be dismissed as no more than a 'talking shop'. Moreover, its most important powers, those concerning legislation and the budget, have yet to be considered.

¹⁴² Arts 214 [158] EC and 127 Euratom.

¹⁴³ There were 292 votes in favour and 232 against.

¹⁴⁴ See Tomkins (1999) 62 MLR 744.

THE ECONOMIC AND SOCIAL COMMITTEE

Article 7(2) [4(2)] EC provides that the Council and Commission are to be assisted by an Economic and Social Committee (often called ECOSOC). This is an advisory body intended to represent various sectional interests. According to Article 257 [193] EC, it consists of representatives of, among others, producers, farmers, carriers, workers, dealers, craftsmen, the professions, and the general public. In practice it consists of three groups: employers, workers (largely represented by trade unionists), and others (the last group includes spokesmen for farmers, consumers, and the professions). Its members are appointed by the Council for renewable four-year terms on the basis of national allocations:¹⁴⁵ the largest (for the United Kingdom and the other large countries) is twenty-four; the smallest (Luxembourg) is six.¹⁴⁶ The members, though intended to represent particular groups, may not be bound by any 'mandatory instructions'.¹⁴⁷ In certain cases the Committee has the right to be consulted by the Council or Commission;¹⁴⁸ where this is done, however, the Council or Commission may set it a time-limit (of at least one month), and, if no opinion is given within this period, go ahead without it.

THE COMMITTEE OF THE REGIONS

The Committee of the Regions, which was established by the Treaty on European Union and operates only under the EC Treaty, represents regional and local bodies within the Community.¹⁴⁹ Like the Economic and Social Committee, its role is to advise the Council and Commission.¹⁵⁰ Its membership is divided among the Member States in the same way as that of the Economic and Social Committee.¹⁵¹

THE LEGISLATIVE PROCESS

The legislative process in the Community is complex. It depends both on the Treaty under which the measure is adopted and on the provision of that Treaty applicable to the case in question. Legislation on atomic energy comes under the Euratom Treaty and

¹⁴⁵ Prior to the Treaty of Nice, the Council acted unanimously: Art. 258 [194] EC. Under the Treaty of Nice, it acts by a qualified majority 'in accordance with the proposals made by each Member State': Art. 259(1) EC, as amended by the Treaty of Nice. This latter provision uses the same formula as that for the appointment of members of the Commission. It is ambiguous, but presumably means that the representatives of each Member State must be the persons nominated by that state.

¹⁴⁶ The number of persons from each Member State remains unaffected by the Treaty of Nice. For the proposed allocations for the new Member States, see Declaration 20 to the Treaty of Nice.

¹⁴⁷ Arts 258 [194] EC and 166 Euratom.

¹⁴⁸ Arts 262 [198] EC and 170 Euratom. The Committee may also be consulted by the Parliament, but there is no obligation to do so: *ibid.*

¹⁵⁰ Art. 7(2) [4(2)] EC.

¹⁴⁹ See Arts 263–265 [198a–c] EC.

¹⁵¹ For a discussion of the Committee's role and objectives, see Jones, 'The Committee of the Regions, Subsidiarity and a Warning' (1997) 22 ELRev. 312.

legislation on other matters under the EC Treaty. In this section, we will confine our attention to the latter.

Depending on the subject matter, legislation under the EC Treaty may be adopted by three authorities: the European Parliament acting jointly with the Council, the Council acting alone, and the Commission.¹⁵² The EC Treaty confers legislative power on the Commission only in very limited cases,¹⁵³ though the Council frequently delegates powers to it. The procedures adopted for the enactment of delegated legislation, as well as the general decision-making procedure in the Commission, have already been discussed. Here we will consider only legislation adopted jointly by the Parliament and Council or by the Council alone.

We will first consider the procedure where the Council, acting alone, adopts the measure and the Parliament has no role other than a consultative one.

THE BASIC PROCEDURE

Under the basic procedure (sometimes called the 'consultation procedure'), the Commission makes a proposal and, after the Parliament has been consulted, the Council takes the final decision. Here the Council is in the strongest position; but no decision can be taken unless the Commission initiates the process and, since the Commission can amend the proposal at any time until a final decision has been taken but the Council cannot do so unless it is unanimous,¹⁵⁴ the Commission is not without tactical advantages. In theory, complete deadlock could be reached if the Commission (supported by at least one Member State) insisted on a particular provision and the majority of Member States wanted something different. In practice, however, the Commission will usually amend its proposals in order to secure the agreement of the Council.

Diagram 1.1 represents the basic decision-making process.¹⁵⁵ The first stage is the formulation of the Commission proposal. A working group is established, made up of persons nominated by the national governments, who are usually civil servants but are sometimes academics or other independent experts. The powers of the group are only advisory: at this stage the final decision rests with the Commission; but the views of the national experts are listened to carefully, since the consent of the national governments will have to be obtained at a later stage. After the working group has held a number of meetings and consideration has been given to the opinions of the national governments and appropriate non-governmental interest groups (for example, the relevant trade associations), the Commission will draft its proposal.

The proposal is sent to the Council, which in turn sends it to the Parliament (and sometimes also the Economic and Social Committee or the Committee of the Regions or both) for their opinions. After these opinions have been received, the proposal (which may have been amended by the Commission in the light of these consultations) is sent to the Committee of Permanent Representatives (COREPER). A working group

¹⁵² Art. 249 [189] EC.

¹⁵³ See above.

¹⁵⁴ Art. 250 [189a] EC.

¹⁵⁵ Where the co-decision procedure applies, it comes into operation after Point 15 on the chart. In such a case, Diagram 1.2 may be regarded as beginning where Diagram 1.1 ends.

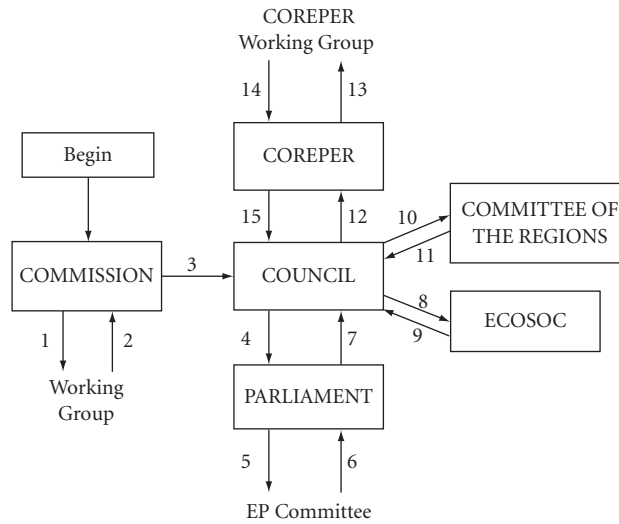


Diagram 1.1 The EC Decision-Making Process (Basic Procedure)

of national officials is set up within COREPER to prepare a report for the Council. Commission representatives attend the meetings of these groups. Amendments are usually put forward by the national representatives and these may, or may not, be accepted by the Commission.

Finally, the proposal, together with the report of the COREPER working group, goes to the Council. The Commission is also represented at the Council meetings in which it is considered. If full agreement was reached in COREPER, the proposal will be adopted by the Council without debate, unless a last-minute objection is made. If no agreement was reached in COREPER, the matter will be thrashed out in the Council. Sometimes this takes a long time, and in important matters hard bargaining may take place. In the end, agreement may be reached on the basis of a package deal in which several decisions are combined, so that concessions made by a state on one issue are balanced by gains on another. In such a situation the Commission plays a crucial role in suggesting possible compromises. If no agreement can be reached in the appropriate technical Council, the matter may go up to the general Council, or even to the European Council. This will almost always be necessary where a package deal contains elements from different policy areas.

THE CO-OPERATION PROCEDURE

The powers of the European Parliament in the legislative process were increased in 1986 by Articles 6 and 7 of the Single European Act, which provided for a 'co-operation procedure' applicable in certain instances under the EC Treaty. This procedure, which is now governed by Article 252 [189c] EC, has, however, been almost entirely eliminated under the Treaty of Amsterdam. For this reason, no attempt will be made to describe it in

detail.¹⁵⁶ Even when first established, the co-operation procedure was subject to criticism on the ground that it granted the Parliament very little.¹⁵⁷ Its main innovation was that, if the Parliament was opposed to a measure, it could be passed only if the members of the Council were unanimous. This was a real, though small, increase in the powers of the Parliament. With regard to amendments, on the other hand, the Parliament's powers were not significantly increased. If the Parliament's proposed amendment was adopted by the Commission, the Council could reject it only on a unanimous vote. This, however, has always been the case, since the Council has never been able to amend a Commission proposal except by unanimity, and the Commission has always had the power to amend its proposal so as to give effect to amendments proposed by the Parliament.¹⁵⁸

THE CO-DECISION PROCEDURE

The procedure for legislation adopted jointly by the Parliament and the Council, usually called the 'co-decision procedure' or 'joint legislative procedure', is laid down in Article 251 [189b] EC, a provision inserted into the EC Treaty by the Treaty on European Union and modified by the Treaty of Amsterdam. It is depicted in Diagram 1.2. When the co-decision procedure applies, the process described previously (the 'basic procedure'), including the consultation of the Parliament, goes ahead in the usual way until the point is reached at which the Council would normally be ready to adopt the act. At this point, if the Council (acting by a qualified majority) is able to adopt the act as amended by the Parliament (or if the Parliament has not proposed any amendments), it will adopt it.

If it is not able to adopt it – this will normally be because it cannot accept the Parliament's amendments – it will instead adopt what is called a 'common position'. A common position (which must be adopted by a qualified majority) is a statement by the Council of the version of the act that it favours. Under Article 250 [189a] EC, a Commission proposal can be amended only if the Council is unanimous; consequently, the common position will correspond to the Commission proposal (including any of the Parliament's amendments adopted by the Commission) unless the Council is unanimous.

The common position is then sent to the Parliament together with a statement of the reasons which led the Council to adopt it and a statement of the Commission's position. This will be the second occasion on which the Parliament has considered the matter, the first having been under the normal consultation (basic) procedure. At this point, the Parliament has three months in which to act. If it approves the common position, or if it has taken no decision within the three-month period, the act is deemed to have been adopted in accordance with the common position. If, on the other hand, the

¹⁵⁶ A full description, together with a chart, may be found in the third edition of this book, at pp. 41–4.

¹⁵⁷ Nevertheless, the European Court went to some lengths to ensure that what rights the Parliament did have were protected: *Commission v. Council*, Case C-300/89, [1991] ECR I-2867.

¹⁵⁸ See the second para. of Art. [149] EEC, as it existed before the Single European Act.

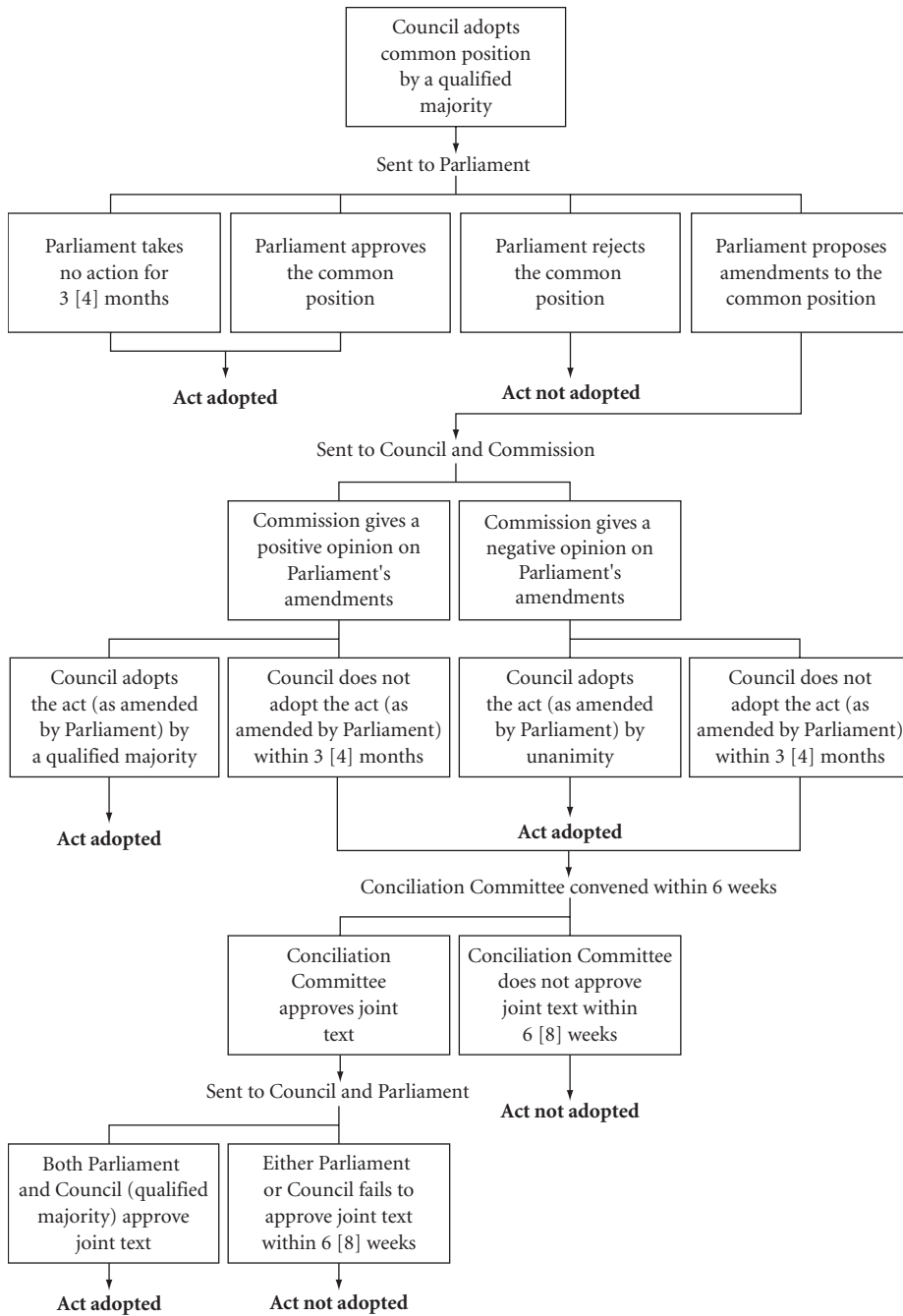


Diagram 1.2 The Co-Decision Procedure

Parliament, acting by an absolute majority of its members, rejects the common position, the proposed act is deemed not to have been adopted: there is no way in which the Council can override the rejection.

The Parliament can also propose amendments to the common position. These must be adopted by an absolute majority of members. If this occurs, the amended text is forwarded to the Council and Commission, and the latter delivers an opinion on the amendments. The Council then has three months to act. If it approves all the amendments, the act is deemed to have been adopted in the form of the common position thus amended. (In doing this, it acts by a qualified majority, unless the Commission gave a negative opinion on the amendments, in which case the Council must be unanimous.) If, on the other hand, the Council does not approve the act as amended, a meeting of the Conciliation Committee must be convened within six weeks by the President of the Council in agreement with the President of the Parliament.¹⁵⁹

The Conciliation Committee has an equal number of members from the Council and the Parliament. On the Council's side, it may consist of all the members of the Council or their representatives. The two sides of the Committee vote separately and it cannot take a decision unless both sides agree. Consequently, there must be both a qualified majority of the representatives of the Council, on the one side, and a majority of the representatives of the Parliament, on the other. The Commission takes part in the proceedings and attempts to reconcile the positions of the two sides.¹⁶⁰ The Conciliation Committee has six weeks to act. If it approves a joint text, the Parliament, acting by a majority of votes, and the Council, acting by a qualified majority, have a further six weeks in which to adopt the act in accordance with the joint text.¹⁶¹ If one of the two institutions fails to adopt it, the act is deemed not to have been adopted. If the Conciliation Committee fails to agree on a joint text, the act is also deemed not to have been adopted.¹⁶²

It is interesting to analyse the voting majorities needed under the co-decision procedure. The Council votes by a qualified majority¹⁶³ (except where it wishes to approve an amendment to which the Commission objects). The Parliament normally acts by an absolute majority of its members, but this does not apply where it approves the common position of the Council: in such a case no specified majority is mentioned, which means that it acts by an absolute majority of votes cast.¹⁶⁴ Moreover, no more than an absolute majority of votes is required for approving a joint text agreed by the Conciliation

¹⁵⁹ This will not occur if the Parliament and the Council are able to settle their differences without it.

¹⁶⁰ The last sentence of Art. 251(4) [189b(4)] EC, which was added by the Treaty of Amsterdam, reads, 'In fulfilling this task, the Conciliation Committee shall address the common position on the basis of the amendments proposed by the European Parliament.' This appears to exclude the possibility of any new amendments being put forward by the representatives of the Parliament, though no doubt it would permit a compromise between the amendments proposed by the Parliament and the common position.

¹⁶¹ The period of six weeks begins from the date of the approval of the joint text.

¹⁶² The periods of three months and six weeks which apply at various points in the co-decision procedure may be extended by a maximum of one month and two weeks respectively at the initiative of the Parliament or the Council: Art. 251(7) [189b(7)] EC. However, a Declaration (No. 34) adopted by the Conference at which the Treaty of Amsterdam was agreed, the Declaration on Respect for Time Limits under the Co-Decision Procedure, states that such extensions should be considered only when strictly necessary.

¹⁶³ In a Conciliation Committee this may be a qualified majority of the representatives of the Council.

¹⁶⁴ Art. 198 [141] EC.

Committee. In other words, a majority of members is required where the Parliament wishes to block the Council's proposals, but a majority of votes is sufficient if it approves the Council's proposals.

It is a truism that the Community is not really democratic. Rectifying this, however, is not easy. There are two difficulties, one well known and the other less so. The well-known difficulty is that any increase in the powers of the European Parliament must entail a diminution in the powers of the Member States, something which many national governments are reluctant to approve. The less well-known difficulty is that any increase in the powers of the Parliament must probably also entail a diminution in the powers of the Commission.

How do the Commission's powers apply under the co-decision procedure? In general, the foundation of the Commission's power is its right to make proposals. It retains this right under the co-decision procedure. However, the right to make proposals is of little value if those proposals can be easily amended. Consequently, the Commission gains considerable bargaining power from the rule that the Council must be unanimous in order to amend the Commission's proposals.¹⁶⁵ It is true that the Council can refuse to adopt a measure unless the Commission agrees to amend it, but if the Commission is determined, it may well be able to force the Council to accept a compromise.

Under the co-operation procedure, the Commission's prerogatives were fully respected: amendments proposed by the Parliament which were not accepted by the Commission could be adopted by the Council only if it was unanimous. Prior to the convening of the Conciliation Committee, the same is true under the co-decision procedure. Once the Conciliation Committee has been convened, however, the position is different: a text accepted by the Conciliation Committee may be adopted by the Council by a qualified majority even if the Commission objects.¹⁶⁶ Once the conciliation procedure comes into operation, therefore, it is possible for the Commission's proposal to be amended by a qualified majority in the Council even if the Commission objects. This is a significant weakening of the Commission's power: the Commission's loss is the Parliament's gain.

The Conciliation Committee is convened whenever the Council does not approve the Parliament's amendments within three months. Consequently, if the Council wishes to approve an amendment proposed by the Parliament which the Commission rejects, but the Council cannot muster a unanimous vote, it merely has to wait for three months and convene the Conciliation Committee, which may adopt the amendment by a qualified majority on the Council side. The amendment may then be approved by the Council, acting by a qualified majority. In other words, the only effect of a Commission veto is to delay adoption of the measure. The result is that, while the Council still cannot itself amend the Commission's proposals unless it is unanimous, it may adopt the Parliament's amendments by a qualified majority even if the Commission objects.

¹⁶⁵ Art. 250 [189a] EC.

¹⁶⁶ The rule that the Council must be unanimous to amend a Commission proposal does not apply in this case (or in the Conciliation Committee itself): Art. 250(1) [189a(1)] EC, read with Art. 251(4) and (5) [189b(4) and (5)] EC.

THE BUDGETARY PROCEDURE¹⁶⁷

The budgetary procedure is illustrated in Diagram 1.3.¹⁶⁸ The first step is for each institution to draw up its estimates of expenditure. These are sent to the Commission, which consolidates them into a 'preliminary draft budget' (there is a common budget for the three Communities). This preliminary draft budget, which must also contain an estimate of revenue, is then sent to the Council. The next step is the establishment of the 'draft budget' by the Council. In doing this, the Council acts by a qualified majority.¹⁶⁹ It is not bound by the proposals of the Commission: the normal rules which prevent the Council from making amendments to Commission proposals except by unanimity do not apply here, though the Council is obliged to consult the Commission when it intends to depart from the Commission's proposals. In all cases the Council will also consider the views of the Parliament.

The third stage takes place in the Parliament. The Parliament has the power to accept the budget, to amend it, or to reject it. If it accepts it, the budget is thereby adopted; in addition, if the Parliament takes no action at all during the following forty-five days, it is deemed to have adopted it.

The Parliament's right to make changes in the budget depends on the distinction between expenditure necessarily resulting from Treaty provisions or Community legislation (known as compulsory expenditure) and other expenditure (non-compulsory expenditure).¹⁷⁰ In the case of non-compulsory expenditure the Parliament may make amendments; in the case of compulsory expenditure, on the other hand, it may only propose 'modifications'. The significance of this distinction is that the Parliament has the last word in the case of amendments to provisions regarding non-compulsory expenditure; but the Council has the last word as regards proposed modifications to compulsory expenditure. Since amendments carry more weight, it is not surprising that they have to be passed by a majority of *Members* of Parliament (absolute majority); in the case of proposed modifications, on the other hand, only a majority of *votes cast* is required.

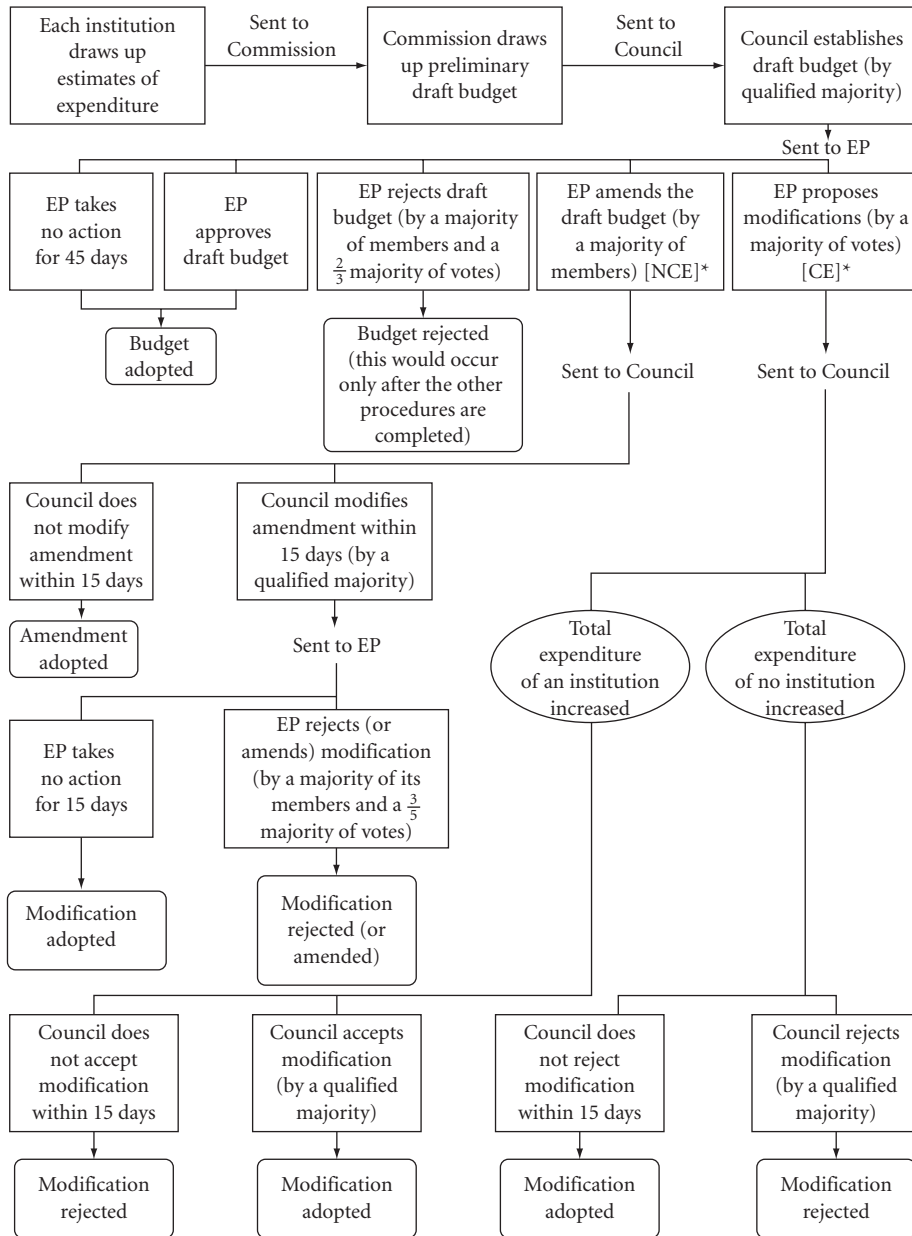
If amendments are made, or modifications proposed, the draft budget is sent back to the Council. The procedure in the Council depends on whether an amendment or modification is involved and, in the case of a modification, on whether or not the effect of the proposed modification is to increase the total expenditure of the institution in

¹⁶⁷ The main provisions on Community finance are Arts 268–280 [199–209a] EC and 171–183a Euratom. The main provisions on budgetary procedure are Arts 272 [203] EC and 177 Euratom. For litigation between the institutions on the budget, see *Council v. European Parliament*, Case 34/86, [1986] ECR 2155; *European Parliament v. Council (Draft Budget)*, Case 377/87, [1988] ECR 4017; *Commission v. Council*, Case 383/87, [1988] ECR 4051; *Council v. European Parliament*, Case C-284/90, [1992] ECR I-2277; *European Parliament v. Council*, Cases C-181, 248/91, [1993] ECR I-3685; *Council v. European Parliament*, Case C-41/95, [1995] ECR I-4411.

¹⁶⁸ The main sources of Community revenue ('own resources') are agricultural levies, customs duties on imports from outside the Community, a slice of the proceeds of the value added tax (VAT) imposed by the Member States on the basis of EC rules, and revenue based on the GNP of the Member States.

¹⁶⁹ As previously mentioned, this is one occasion on which majority voting has always been practised in the Council.

¹⁷⁰ See Arts 272(4) [203(4)] EC and 177(4) Euratom.



* NCE = non-compulsory expenditure
 CE = compulsory expenditure

Diagram 1.3 The Budgetary Procedure

question. (This, in turn, depends on whether increases in particular items of expenditure are balanced by cuts in other items for the same institution.)

The procedure is as follows:

1. *Amendments*: amendments passed by the Parliament may be modified by the Council provided there is a qualified majority in favour.¹⁷¹ If no such motion is passed within fifteen days, the amendment is deemed to have been accepted.
2. *Modifications which do not increase total expenditure of an institution*: these modifications may be rejected by the Council if a motion to this effect is passed by a qualified majority; if no such motion is passed, the modifications are deemed to have been accepted.
3. *Modifications increasing total expenditure of an institution*: in this case the modification is deemed to have been rejected unless it is accepted. A motion accepting it must be passed by a qualified majority.

If, within fifteen days, the Council has not modified any of the Parliament's amendments, and has accepted its modifications, the budget is deemed to have been finally adopted. If this is not the case, it goes back again to the Parliament.

When the budget comes back to it, the Parliament no longer has power to change provisions dealing with compulsory expenditure: if its modifications to these provisions have not been accepted by the Council, there is nothing it can do unless it decides to reject the budget as a whole. In the case of non-compulsory expenditure, on the other hand, the Parliament has the right to reject the Council's modifications to its amendments and such a rejection is definitive. A motion to this effect must, however, be passed by a majority of the *Members* of the Parliament; in addition, three-fifths of the *votes* must be in favour. If, however, no such action is taken within fifteen days, the budget is deemed to have been adopted.

The Parliament also has the power to reject the budget *in toto* if there are 'important reasons' for doing so.¹⁷² Such a motion must be passed by a majority of all the members of the Parliament and also by two-thirds of the votes cast. This happened for the first time in December 1979. When this occurs, a new budget must be drawn up by the Council and put before the Parliament. If no budget has been passed at the beginning of a financial year, a sum equal to one-twelfth of the previous year's budget may be spent each month, provided that the Commission may not be granted more than one-twelfth of the appropriation in the draft budget under consideration.¹⁷³ The monthly sums available may be increased by the Council, provided the consent of the Parliament is obtained with regard to non-compulsory expenditure.

It will be seen from this that the Parliament has substantial powers with regard to non-compulsory expenditure. These are, however, restricted by a rule that the annual growth of expenditure of this kind is subject to a limit (known as a 'maximum rate'),

¹⁷¹ It should be noted that, since such a decision is not taken on the basis of a Commission proposal, there must be at least eight Member States in favour: see Arts 205(2) [148(2)] EC and 118(2) Euratom.

¹⁷² Arts 272(8) [203(8)] EC and 177(8) Euratom.

¹⁷³ Arts 273 [204] EC and 178 Euratom.

based on the increase in GNP, national budgets, and inflation within the Community.¹⁷⁴ This limit may, however, be increased by agreement between the Council (acting by a qualified majority) and the Parliament (acting by a majority of members and a three-fifths majority of votes cast).¹⁷⁵ The greatest weakness of the system from the point of view of the Parliament is that the latter has only limited powers over compulsory expenditure. This deficiency has been somewhat alleviated, however, by a Joint Declaration of 4 March 1975 and an Interinstitutional Agreement of 6 May 1999.

The Joint Declaration of the Parliament, the Council, and the Commission of 4 March 1975¹⁷⁶ establishes a conciliation procedure intended to reconcile the views of the Parliament and the Council regarding Community legislation with 'appreciable financial implications', the adoption of which is not required by pre-existing legislation. This is intended to give the Parliament a say in the enactment of legislation giving rise to compulsory expenditure. The procedure is initiated, at the request of either the Parliament or the Council, when the Council does not intend to follow the Parliament's opinion on the legislation. A Conciliation Committee is convened, consisting of the Council and representatives of the Parliament, with the participation of the Commission. Its object is to seek agreement on the legislation between the Parliament and the Council. The procedure does not normally continue for more than three months and, where necessary, the Council may set a deadline. The Joint Declaration concludes by saying, 'When the positions of the two institutions are sufficiently close, the European Parliament may give a new Opinion, after which the Council shall take definitive action.' In such a case, the Council will presumably be able to follow the Parliament's opinion. The Joint Declaration is, however, silent as to what will occur where this is not possible. The Council apparently takes the view that it can then go ahead and adopt the measure without following the Parliament's opinion, but the Parliament is reluctant to accept this.¹⁷⁷

The Interinstitutional Agreement of 6 May 1999 between the European Parliament, the Council, and the Commission on Budgetary Discipline and the Improvement of Budgetary Procedure¹⁷⁸ provides that all budgetary items must be initially classified by the Commission as compulsory or non-compulsory. If either the Council or the Parliament cannot accept the classification of any item, the matter is referred to a meeting of the Presidents of the Parliament, the Council, and the Commission (under the chairmanship of the Commission), where an attempt is made to reach agreement.¹⁷⁹

¹⁷⁴ It is fixed by the Commission. When the Parliament refused to abide by this limit in 1985, the European Court declared the budget invalid: *Council v. European Parliament*, Case 34/86, [1986] ECR 2155.

¹⁷⁵ Art. 272(9) [203(9)] EC. For litigation on this, see *Council v. European Parliament*, Case C-41/95, [1995] ECR I-4411. There is also a rule that, if the draft budget established by the Council provides for increases in non-compulsory expenditure which are greater than half the maximum rate laid down by the Commission, the Parliament is nevertheless entitled to make further increases amounting to not more than half the maximum rate, even though the end result will be that the total increases will then be over the maximum: *ibid.* The idea of this rule is to prevent the Council from pre-empting the Parliament's right to make increases by taking up the whole of the permitted amount. The amount by which the Parliament is entitled to increase the non-compulsory expenditure is known as its 'margin of manoeuvre'.¹⁷⁶ OJ 1975, C89/1.

¹⁷⁷ See Joliet, *Institutions*, p. 107, where it is said that the Parliament takes the view that, in such a case, the Council may adopt the measure only by unanimity.¹⁷⁸ OJ 1999 C172/1.

¹⁷⁹ See *Greece v. Council*, Case 204/86, [1988] ECR 5323.

The budget is implemented by the Commission.¹⁸⁰ At the end of the financial year, the Parliament, acting on a recommendation from the Council (which itself acts by a qualified majority), gives a discharge to the Commission after considering the accounts and financial statement submitted by the Commission and the annual report of the Court of Auditors.¹⁸¹

CONCLUSIONS

Two facts will by now have become apparent: first, the supranational element in the Community, though real, is limited; secondly, the democratic element, though also real, is even more restricted. It seems probable that a link exists between these two facts: the supranational element is unlikely to grow much stronger unless the democratic element is greatly strengthened. Significantly increased powers are not going to be given to a bureaucracy.

In the years since the beginning of the Community, various changes have taken place in the distribution of powers among the political institutions. The European Parliament, being directly elected for the first time in 1979, has significantly increased its powers, mainly in the field of the budget¹⁸² but also in other fields, especially legislation.¹⁸³ The balance of power between the Commission and the Council has shifted in various ways. The power of the Commission relative to the other institutions was at its height in the days when only the ECSC existed, since under that Treaty it was intended to be the dominant authority. (It is interesting that the original draft of the ECSC Treaty contained no mention of the Council: it was included only to allay the fears of the smaller countries that the Commission would be dominated by the big countries.) The EC and Euratom Treaties show a diminution in the Commission's role and an enhanced position for the Council. Perhaps this was only to be expected in view of the fact that, unlike the ECSC Treaty, the EC Treaty sets out only the basic, initial policies to be pursued; beyond this, everything is left to the discretion of the institutions. In such circumstances, it is hardly surprising that the Member States insisted that the Council should have the dominant position.

A further shift in power, probably not intended by the authors of the EC Treaty, took place after that Treaty entered into force. The refusal for many years to apply majority voting meant that the adoption of legislation depended on negotiations carried on in COREPER and the Council, a development which lessened the importance of the Commission's power to make proposals; the increased prestige and effectiveness of the Presidency diluted the role of the Commission as mediator, and the establishment of the European Council (itself in part a response to the paralysis of the Council under the unanimity system) involved a move back to traditional inter-governmental procedures.

¹⁸⁰ Arts 274 [205] EC and 179 Euratom.

¹⁸¹ Arts 276 [206] EC and 180b Euratom.

¹⁸² Budgetary Treaties of 1970 and 1975.

¹⁸³ This took place under the Single European Act 1986 and the Treaty on European Union 1992.

In the 1980s, however, the Commission began to strengthen its position, and, since the coming into force of the Single European Act, majority voting has begun to take place regularly in the Council. Important changes have also taken place in the legal sphere: in a series of key judgments, the European Court has enhanced the status of Community law to the point where, as far as its legal system is concerned, the Community now possesses most of the characteristics of a federation.¹⁸⁴ The most noticeable feature of this process has been the development, beginning in 1963 with the *Van Gend en Loos* case,¹⁸⁵ of the doctrine of direct effect (the principle that Community law must be applied by national courts as the law of the land) and the establishment of the supremacy of Community law over national law.¹⁸⁶ Another feature has been the widening of Community jurisdiction, especially in the international sphere.¹⁸⁷ As a consequence, the Community has become more supranational in the legal sphere than in the political.¹⁸⁸

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¹⁸⁴ See Hartley, 'Federalism, Courts and Legal Systems: The Emerging Constitution of the European Community' (1986) 34 Am. Jo. Comp. L. 229.

¹⁸⁶ See Chap. 7, below.

¹⁸⁷ See Chap. 6, below.

¹⁸⁸ For a full discussion, see Weiler, 'The Community System: The Dual Character of Supranationalism' (1981) 1 YEL 267.

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