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The Origins, Institutions and Development of the Communities, the Legislative Process and Budgetary Process

Introduction

Questions on the topics in this chapter cover a number of related subjects and can consequently give rise to a very wide range of questions, the exact form or content of which will be determined by the emphasis given the topics in your courses. Given that this topic might be covered by introductory lectures rather than tutorials or seminars, it is most likely that most of the questions posed will be of the essay type rather than problem questions. Therefore, a range of questions and framework answers to cover these areas has been included. However, because the coverage of this topic can vary significantly between courses, it is consequently more difficult to predict with accuracy the range and type of questions which may be encountered. Direct questions on the history and development of the Communities would be rare because the answers could only be very descriptive and not therefore particularly suitable for the level of examination you are taking. Questions therefore tend to be concentrated on the institutions and in particular on the inter-relationship of these institutions in the legislative and other processes of the Community.

Other exam questions may concern the role and legality of the Management Committees and procedures, the budget or legislative procedures in further detail or questions may focus on the powers and rights of the European Parliament (EP), the Council or the Commission separately.

The first questions will, however, concern the more general aspects of Community law courses.

Question 1

'The United Kingdom has been described as a reluctant partner as far as its attitude to the European Union is concerned.'

Discuss this statement in the light of the development of the European Union.



Commentary

This question is looking for a historical analysis, not just of Britain's attitude but also of the general developments of the Communities. This is because Britain's attitude was originally a direct response to the setting up of the European Economic Community and as further developments took place in the EEC and the other two Communities, so further reactions from Britain were prompted.

The answer could be divided into time periods to help in the presentation, however such divisions are often artificial and the facts may not always fit comfortably. The answer should thus include a brief outline of the setting up of the Communities and in particular, the reasons for this. Periods could, however, include the 1950s and the setting up of the Community, the attempts of the UK to enter in the 1960s and the reasons for this, the 1970s when Britain entered, but had second thoughts, and the 1980s to date. The latter period includes the at times hostile relations of the UK with the rest of Europe and also seeming change in attitude as a result of the landslide Labour Party victory in the May 1997 General Election, although subsequent developments have cast doubt on this change of attitude.

Much of the explanation for Britain's attitude lies in the realm of politics rather than law, in a strict sense. The degree to which this is then covered in your course will determine whether such questions will be set in an examination and the amount of discussion expected in your answer.

Finally, you could provide a paragraph summarising Britain's attitude to the EC.



Answer plan

- The reasons for the establishment of the Communities
- The UK's original reasons not to participate and change of mind in early 1960s
- Two failed and one successful entry attempt
- Membership, budget renegotiations and the opt-outs at Maastricht
- A change of heart from 1997 under Labour?
- The **2007 Lisbon Reform Treaty**

Suggested answer

Although there had been ideas to unify Europe before the Second World War, it was only afterwards that they found peaceful fruition. This was prompted by the horrific events and the devastation of Europe in the Second World War which left much of Europe in economic and political ruins. Political and economic co-operation and development between nations were regarded as crucial to replace the economic competition which was viewed as a major factor in the outbreak of wars between European nation states. Thus, plans were put forward to eliminate harmful national jealousies and to promote economic and political stability, especially in the face of the rising soviet threat. The first forms of cooperation concentrated on these aspects and led to the setting up of the United Nations in 1945, the Organisation for European Economic Cooperation (OEEC) in 1948 and the North Atlantic Treaty Organisation (NATO) and the Council of Europe in 1949.

The direct impetus for the Communities came in the plan proposed in 1950 by the French Foreign Minister Robert Schuman, based on the research and plans of Jean Monnet, to link the French and German coal and steel industries. The Schuman Plan would not only help economic recovery but also remove the disastrous competition between the two states. It was aimed to make future war not only unthinkable but also materially impossible. It was left open for other European countries to join in the discussions and Italy and the Benelux nations (Belgium, the Netherlands and Luxembourg) took full part. The establishment of the Communities was not intended to exclude Britain which was invited to participate in negotiations but took no further role than that of observer, despite the seeming enthusiasm of Churchill and many in the UK about the unification of Europe and the apparent leading role that Britain might play. Britain, however, did not envisage a role as a key participant and was reluctant to involve itself further in the negotiations.

To try to explain some of the reasons for this attitude it must be pointed out that Britain had at the time a historical legacy which involved quite different economic and social ties, including the Empire and Commonwealth and the Atlantic alliance, which were the result of both historical colonisation and the alliances which had found victory in the war. These ties of security and common language are often overlooked but played no small part in the attitude of Britain to Europe in the immediate post-war years. Britain also regarded its status as remaining a world power whose sovereignty and independence could not be compromised by membership of such an organisation.

Hence, six nations went on without the UK to sign the **European Coal and Steel Community Treaty (ECSC)** in 1951. As a result of the success of this first Community, the six Member States decided to extend the scope of their cooperation. The Spaak Report was prepared to consider the establishment of an Economic

Community and an Atomic Energy Community for energy and the peaceful use of nuclear power. Britain was again invited to participate fully but again declined. On 25 March 1957 the two [Treaties of Rome](#) were signed establishing the European Economic Community and the European Atomic Community. Britain instead embarked on what might have seemed the potentially wrecking path of establishing in 1958, with other non-EC States, a European free trade area (EFTA); a free trade area but with no further political aims and no desire to create a supra-national organisation capable of superseding the Member States in any way.

Following this initial reluctance, a change of mind by the UK occurred in 1961 when the Conservative Government, under Prime Minister Harold Macmillan, applied for membership. The previous reasons for not joining included the view that because Britain retained its world power status and direct links with most of the world, membership was neither desirable nor necessary. However, these had been weakened by the economic demise of the UK, the Suez débâcle and continuing conversion of the Empire into the Commonwealth of independent states. Trade patterns were shifting towards Europe, the Atlantic alliance was less prominent and the Commonwealth started to appear as not such a promising long-term trading relationship. Britain had also observed the much faster economic improvements taking place in the EEC of six and was envious of this. It was clear that this certainly provoked the main interest in membership. Whether the UK had now become fully supportive of the entire package and aims of the Community is less clear. However, Britain had now to bargain from the outside and the application was in any case vetoed by President De Gaulle of France. The second attempt, the 1967 application by the Labour Government, under Prime Minister Harold Wilson, was also vetoed by De Gaulle.

The third attempt in 1970, under the Conservative Government of Edward Heath, was successful and in 1973 the UK joined the Communities with Ireland and Denmark, mainly because of their trade dependence on the UK. This was regarded by some as a panic measure spurred on by the view that if the UK was unable to get in at this stage Europe would leave the UK behind.

The timing of this entry was in fact unfortunate. Instead of the UK being able to participate equally in the post-war boom and recovery, the economy of Europe had received a setback and Britain along with the rest of the western world became the hostage of oil price increases. Instead of a period of economic prosperity, the 1970s witnessed high inflation and economic stagnation. To aggravate matters still further, the high and arguably inequitable level of the British budget contribution became the focus of attention. It did not take long before disquiet with the terms of entry arose. It seems that we paid too high a price to join the club and that the budget wrangles that polarised opinion both in Europe and the UK were inevitable, given the pattern of trade in the UK which initially favoured imports from Commonwealth non-EEC countries, and having to pay the higher CAP regulated food prices, all of which added to the economic problems.

In 1974, a new government was elected in the UK and a renegotiation of the terms of entry was started. This was climaxed by the approval of the British public in the then unprecedented 1975 referendum which not only approved membership but also the renegotiated terms regarding budget contributions. However, it was only a partial cure for the level of contributions, and this dispute was later reopened by Margaret Thatcher. Its effect was, however, to cast the UK firmly in the role of the reluctant partner and as a troublemaker in Europe.

Viewed politically, the UK had decided to cast its lot with the EC, aware that some loss of sovereignty was involved and that a potentially high monetary contribution was required. One side of the bargain was not, as with other Member States, the security of nationhood or the stamp of approval and stability of the democratic political system that membership gave. The fact that the UK had won the war and had centuries of stability meant that these were so well secured in the UK that the EC could never seriously be considered for these advantages, or to keep the peace, which Britain had secured with its allies by victory in the last war. The other side of the bargain was to share in the spoils of European economic progress. Given the changing circumstances, this proved to be a dubious economic gain. No wonder that there was a feeling by some, which still remains, that membership had sold Britain short.

In the 1980s, the first part of the decade was occupied with further wrangles over the British budget contribution and reluctance to reform the Communities which hindered progress on other matters in the Community and did not engender relaxed relations with Britain's partners in the Community. The budget contributions were settled in 1984, only to be questioned again in the 1990s and again in 2002 and 2004.

Furthermore, the discussions and agreements made in Maastricht in 1991 to 1992 demonstrate how Britain continued to be out of line with its other partners by its reluctance to fully participate. Part of the agreement reached in Maastricht was that the UK opted out of the Social Policy but all other Member States went ahead with this. Maastricht also agreed to a process and timetable for moving towards economic and monetary union. The UK negotiated another opt-out here in respect of the decision of whether to join the final stage in which a single currency would be established.

The change of government in the United Kingdom on 1 May 1997 saw a change in the relationship with Europe with the new Labour Government announcing soon afterwards the intention to sign up to the social chapter, which was carried through shortly afterwards, and generally to take a more participatory role in Europe. The UK opposition to monetary union seems to have been removed although uncertainty as to when and even if the UK might join continues to this day.

The Treaty negotiations for the [Amsterdam and Nice Treaties](#), the [Convention and IGC for the Constitution for Europe](#), the expansion to 27 States in 2007 and the changing political relationships between the leading EU States (notably

France, Germany and the UK) have led to a far more complex Union now than a few years ago. The UK's attitude remains somewhat ambivalent, expressing on the one hand to be at the heart of Europe and on the other, showing a reluctance to commit as deeply as other Member States, notably to the Euro. The proposed UK referendum on the Constitution, abandoned as a result of the Dutch and French rejection of the CT and the **2007 Lisbon Reform Treaty** was though ratified but without a referendum in the UK. The **2007 Lisbon Reform Treaty** witnessed, though, a return to reluctance to fully commit by the UK by securing an opt-out from the binding application of the **European Charter on Fundamental Rights** in domestic matters.

Trying to summarise Britain's attitude over the five decades is no easy matter, as it is a complex of many concerns and influences. Whether Britain is a reluctant or just hesitant partner is itself still unclear. The fact that the UK up to the end of 2008 has still not committed itself to adopting the Euro must still leave room for doubt. There is, however, certainly no serious talk of withdrawal these days by any of the political parties likely to be members of a UK Government.

Question 2

'European integration is initially a wholly political concept whose implementation proceeds by the formulation of economic policies and decisions.'

Comment on this statement by the European Commission from the 1960s.



Commentary

This question basically addresses the questions of why the Communities and now Union were set up and how they were designed to achieve their aims. This question focuses initially on the original reason or reasons for setting up the European Communities, ie the initial impetus which prompted moves to pursue European integration. Hence, the answer must commence with a review of these reasons. The fact that these reasons find their base in politics is stressed and must be addressed in the answer in contrast to suggesting that the reasons were based purely or merely on economic grounds, although it is very difficult to distinguish the two terms completely.

This in turns leads you on to considering the form of integration envisaged, ie the process by which the implementation of the political concept was to be achieved. This brings in considerations of initial theories of European integration including federalism and functional integration.

Next, you should look at how the implementation was to be achieved. This will involve you in considering the overall objectives of the **EC Treaty** and the way in which further laws and decisions could be reached to assist integration.

Since you are informed that the quotation arises from the 1960s you will be aware that it pre-dates the discussions for the various treaty revisions including the **Treaty on European Union** and the attempted recent reforms by the **Constitutional Treaty** and the **2007 Lisbon Reform Treaty** about where the Union is heading and how it should be reformed to assist it in getting there (wherever that is). However, don't limit your answer to an intention as viewed in the 1950s and 1960s. You should also include in your answer a discussion on developments since that time including the **Single European Act (SEA)**, the **Treaty on European Union**, the **Amsterdam Treaty**, the **Nice Treaty**, the **Constitution for Europe** and the **2007 Lisbon Reform Treaty**. You could consider the further question of whether the arguable eventual goal of the Communities, that of political union to be achieved by progressive economic integration, will ever be reached.



Answer plan

- Reasons for establishing the European Communities
- Ultimate goal of integration?
- Objectives of the **Treaty of Rome**
- Developments since the 1950s
- No longer just economic but also social policies
- The significance of recent reform attempts

Suggested answer

The term 'European integration' is taken to refer to the European Communities which were set up in the 1950s. What were the reasons for setting up these Communities by Treaties between nation states? The Communities were a political response to the Second World War and the massive destruction that had taken place in Europe as a consequence. They represented both an attempt to ensure that such a war could not occur in Europe again and to provide a better and hopefully more stable means by which the reconstruction of Europe could take place. They aimed to remove the rivalries between nation states by legally binding them together in economic communities. So, the reason for setting up the Communities was the result of entirely political motives to eliminate war and provide a new basis for economic reconstruction of Europe. Thus the primary motivations were political but economic reasons were also inevitably involved.

What was then the political concept of European integration? At the time the Communities were being contemplated and even after the establishment of the Treaties, different views were adopted on the form of integration. These ranged from the view that a European Federal State was envisaged to the view that the Member States were only participating in the erection of a common market concerned only with economic cooperation.

It was, however, originally widely considered that because there was success in certain policies this would automatically lead to a spillover from one area to another to lead to increasing integration and that the whole process of integration was a dynamic and not a static process. This process is termed functional integration. In fact, it was considered that in order for the original policies to work properly there must be continuing integration. Thus sector by sector integration and the process of European integration was regarded as inexorable. For example, common tariffs and the establishment of the Common Market would lead to exchange rates being stabilised to ensure that production factors and costs in the Member States were broadly equal. This in turn requires monetary union to be established to ensure exchange rates do not drift apart and this requires full economic union to be achieved so that the value of different components of the common currency is not changed by different policies in different countries. This economic integration would also mean that the political integration would eventually follow. Whilst the above is a rather simplistic account of the theories of integration, it also helps understand the suggestion that any decision on the part of the Community to go no further in terms of integration would in fact not maintain a stable position but would ultimately be regressive as it would start to undermine or undo the previous successes and integration achieved.

Federalism or some form of federal state may therefore be the argued goal of the Communities if the aims are not limited to the distinct policies thus far agreed. In order to make the goal of the Communities more acceptable the term 'a closer union' has been used in both the **EC and EU Treaties**. Its exact meaning is unclear as to whether it refers to federalism or something short of that. The UK's view on this during the negotiations for the **Treaty of European Union** was that it falls somewhat short and whilst the Community does operate on the supra-national level, the UK maintained that it does not signify an inevitable move to federalism.

Secondly, the way in which these fundamental political objectives were to be converted into economic and social integration must be considered. This was initially by the agreement to establish a Treaty providing the legal basis for economic and further integration. The aims and objectives of the Community are clearly set out in the **EC Treaty**. The **preamble** and **Arts 2 and 3** set out in general terms the type and range of policies the Community will pursue to achieve the general objective of European integration.

Article 2, for example, set the general goals as the establishment of a common market and an economic and monetary union. This was to be achieved by the implementation of the common policies or activities referred to in **Articles 3 and 4**. **Article 3** notably includes policies on customs duties, a common commercial policy, free movement of goods, persons, services and capital, agriculture and fisheries, transport, competition. Newer developments include activities and policies in the social sphere, economic and social cohesion, the environment,

research and technological development, trans-European networks, health protection, education and training, culture, development cooperation, overseas policies, consumer protection and energy, and civil protection and tourism.

Those objectives and policies outlined in [Arts 2 and 3](#) are expanded upon in specific parts of the Treaty, for example, free movement of workers in [Art 39](#) and competition law in [Arts 81–82](#). The [Treaty Articles](#) were not to be the only source of legal provisions formulating the economic policies and decisions. The Community institutions, notably the Council, Commission and to an at first very limited extent, the European Parliament, were also empowered by the Member States with their own law-making powers to establish further laws to achieve European integration and the objectives of the Treaties. These powers are summarised in [Arts 250–252 EC](#). Furthermore, a European Court of Justice was established for the Community to adjudicate on Community law and provide rulings binding on the Member States. These further help to implement the concept of European integration.

Thus, whilst it would be true to agree that the original concept was a political one, which has and is being implemented by economic policies, the debate continues and it is clear from the intense discussions surrounding the [Single European Act](#), the [Treaty on European Union](#) and the further changes in the 1990s to date that the eventual goal of the Community is far from clearly or definitively determined. European integration is still dependent on further political impulses. Implementation of European integration can only proceed by further political policy and not just by economic decisions. Indeed it can be observed from the very modest scope of social policy in the original [EEC Treaty, Art 119 \(now 141\)](#), that considerable advances or inroads have been made into other non-purely political or economic areas of the Member States' economies. See the policies noted above from [Art 3 of the Treaty](#). The underlying political nature of the EU was clearly seen during the negotiations at the Nice 2000 IGC where only after very hard political bargaining was sufficient agreement reached to open up the way for further European expansion and integration. The political impetus for new policies to assist integration and indeed the wide-ranging political debate as to the future of the EU continues with the abandoned [Constitutional Treaty for Europe](#) and its replacement the [2007 Lisbon Reform Treaty](#) which, following the rejection by the Irish electorate in June 2008, has thrown that debate once more into sharp focus and further progress has once again been halted for the present. These recent events show quite clearly that European integration is indeed a wholly political concept because without the political agreement, there will be no further economic integration.

Question 3

'The Council of Ministers is by its very nature the federal institution of the Community.' (Walter Hallstein).

Discuss.



Commentary

This question appears to be quite simple but in order to get a respectable mark, it would involve you in more work than meets the eye. In order to answer this fully, a little lateral thought is required rather than just simply describing or analysing the position and the work of the Council. However, it clearly involves the Council as the central element in any answer. The term 'federal' is also a decisive element of the question. In order to provide a meaningful answer there should be a definition of what is meant by federal, both generally and in particular respect to the European Community. If your answer only included those aspects it would be adequate but only just and probably not attract more than a 2(ii) mark. To get more you would have to place these central elements of your answer in context. The context relevant here would be in relation to other institutions of the Community as the question implicitly requires an answer to this point, ie that the Council is 'the' federal institution as opposed to, or in contrast to, the others. You would need therefore to consider the position and role of the Commission and the European Parliament and compare these with the Council. Whilst this is a historical quote, it should now be discussed in view of the fact that the Communities have now evolved into the European Union.

First of all you should describe the pertinent features of the Council and its main tasks.



Answer plan

- The Council of Ministers and its main tasks
- The meaning of 'federal', generally and in respect of the institutions
- The European Parliament and federalism
- The European Commission and federalism
- Final comparison

Suggested answer

The Council of Ministers (now simply termed the Council) is governed by [Treaty Arts 202–210 EC](#) and is the principal legislative organ of the Communities. Its composition is outlined in [Art 203](#) and consists of representative government Ministers of the Member States depending on the subject matter under discussion.

Foreign Ministers attend the General Council and the agriculture or finance ministers, for example, attend the specialist Councils. In total, there are nine different configurations of the Council.

Article 202 EC imposes on the Council the duty of ensuring the coordination of the general economic policies of the Member States and confers upon it the power to take decisions and to delegate decision making powers to the Commission.

The Council has the final power of decision for the adoption of legislative proposals made by the Commission. Depending on the Treaty requirements it may have to consult the EP, the Economic and Social Committee or the Committee of the Regions and, by numerous later amendments to the Treaties, share the law-making process with the EP. Formally, it reaches its decisions by voting, but whether this must be by unanimity or the majority required, differs according to which **Treaty Article**, the legislative proposal is based on. **Article 205** provides three different proceedings consisting of a simple majority, qualified majority or unanimity voting. The qualified majority provides a means whereby decisions can be made without having to get the agreement of every Member State. The expansions in 2004 and 2007 have meant that finding the appropriate balance in terms of voting rights of each country has been difficult but the underlying principle remains that it provides a way for the Council to function by majority voting, but that this has to represent a certain proportion of the Union in terms of both the number of countries and a majority of the population of the Union.

Next, the term 'Federal' needs to be analysed. Whether the Council can be considered to be the Federal institution first requires a consideration of what is meant by federal. Federalism is defined as a form of government in which two or more states constitute a political unity while remaining independent in respect of their internal affairs. It involves the construction of political institutions which oversee integration on many fronts as agreed by the constituent states. A federal state is usually achieved by democratic means and can be otherwise referred to as a confederate state. Examples of federal nations are the USA, Nigeria, Switzerland, Germany, Australia and Canada. These consist of federal and state governments with appropriate spheres of power.

Is this applicable to the Council of Ministers? The Council is federal in that it consists of representatives of the Member States who meet together to act in a legislative capacity, creating rules binding on the constituent Member States. However, it is more often the case that national interests are pursued by the individual members rather than the Council acting collectively first and foremost in the interest of the Community. Furthermore, it is not the equivalent of a federal government as other institutions in the Community play a part in the legislative and executive processes, namely the European Parliament and the Commission. Thus, to describe it as federal was perhaps too optimistic. By its method of action, it is more intergovernmental and was described so by the Italian member of the European Parliament, Spinelli, largely responsible for the Parliament's **Draft Treaty on European Union** published first in 1984.

However, before you can conclude that it is not the only federal institution, you need to look at the other institutions.

The Commission, the executive of the Community, was given the sole right as the proposer of legislation under [Art 155 \(now 211\)](#) of the original [EEC Treaty](#), although this has been in effect partially circumvented by the Council and European Council. It has its own powers of decision and is able to exercise powers delegated to it by the Council. This is now subject to the measures under [Art 202](#), regulating the management committee structure.

The tasks and composition of the Commission are now determined by [Arts 211–219 EC](#). It consists of members appointed by common accord of the Member States. Commissioners are required to act independently ([Arts 213–214](#)). The Commissioners are required under oath to act in the interest of the Community rather than in the interest of their host Member States. The Commission is, however, described as multinational or supranational, and not federal, because the Commissioners are not representing or acting for the constituent states but for the Community.

The European Parliament, originally called the Assembly and consisting of members nominated from the Member State governments, is now directly elected. It is arguably more aptly named an Assembly, consisting only of one chamber, whereas a Parliament usually consists of two chambers and a Head of State.

Before the SEA, the Parliament had largely advisory and consultative powers, which under [Art 137 EEC \(now 189 EC\)](#) provided that the Assembly shall ‘exercise the advisory and supervisory powers which are conferred on it by this Treaty’. The Treaty specified only 17 instances where the EP had to be consulted. Under its advisory role, certain provision of the Treaty required that the EP be consulted before a decision could be adopted by the Council, see [old Arts 54 and 235](#). The participation in the legislative process was increased by the Conciliation procedure of 1977 and the introduction of the cooperation procedure by the SEA. [The Maastricht Treaty](#) introduced a co-decision procedure by which the EP enjoys an ultimate power of veto over proposed legislation, which was extended into more areas by the [Treaty of Amsterdam](#) and the [Treaty of Nice](#) and will be further increased if and when the [2007 Lisbon Reform Treaty](#) enters into force.

However, despite these improvements, the legislative role of the EP is still limited, to such an extent that the term ‘democratic deficit’ is used to describe this state of affairs. Parliament at the moment thus lacks the power to really be described as federal. It is federal in as much as, in limited circumstances it participates in the legislative process to create binding legislation on the constituent Member States, but this is very limited. It does consist of representative members from each of the constituent states but they are elected to represent regional constituencies and political parties and not state governments.

Thus, of the three political institutions, leaving the Court of Justice to one side, it may be true to say that the Council by its nature should be the federal institution. However, because the Council does not act in that manner and the other two have at present little capacity to do so, it cannot therefore be truly described as such.

Question 4

'As far as its legislative procedures are concerned, the EC is neither efficient nor democratic.'

- (a) Discuss this statement in the light of the powers and the decision-making procedures of the Council, Commission and European Parliament.
- (b) What reforms would you advocate which would overcome these criticisms?



Commentary

This question is quite complex because it is in three parts. The first part can be broken down to determine what issues must be considered. You must consider the legislative procedures, ie they must be described as concisely as possible because there is a lot more of the question to answer and because specific features of these procedures will be considered in the answer to (a), thus they need only briefly be outlined at the outset. Having basically described the two types of procedure, you must then address the issues that, in respect of the two procedures, the EC is neither efficient nor democratic in respect of the powers and activities of the three political institutions in the second sentence of the question.

This final section is probably the hardest to prepare for in that it really requires you to have read particular advocated reforms during your course such as those formulated for the **Constitutional Treaty for Europe** but when that was abandoned, carried forward to the **2007 Lisbon Reform Treaty**, rather than try to consider reforms in the exam. Although good original suggestions will pick up a few extra marks it is not the major part of the answer and is not worth spending an excessive amount of time trying to think up reforms, if you have not previously prepared such suggestions. In other words, in order to do well in this question, you must have at least prepared for the possibility of a question on institutional reforms in your revision. If you have not, it would probably be better to find another question to answer.



Answer plan

- Legislative procedures
- Roles of the Council, Commission and European Parliament
- Efficiency and democratic deficit
- Reforms undertaken
- Possible future reforms

Suggested answer

At present all the legislative procedures commence with a proposal from the Commission and consist of those in the following list:

- the original consultation procedure;
- the cooperation procedure;
- the conciliation and veto procedure, entitled the co-decision procedure;
- the assent of the EP.

In addition, the Commission and the Council have limited go-it-alone powers. Under its initial advisory role a limited number of **Treaty Articles** (17) provided that the Council was required to consult the EP as to its opinion before coming to a decision on Community secondary law; see, for example, **old Arts 54 or 56**. The **Isoglucose cases (Roquette Frères) (Cases 138–9/79)** confirmed that the EP had to be consulted. However, on receipt of that opinion the Council could proceed to ignore it and override any view given by the EP. In two cases, **EP v Council (C-65/91)** and **Parliament v Council (C-392/95)**, the Court annulled two Regulations which had been substantially amended by the Council without a further consultation of Parliament taking place when the Council had amended its draft legislation.

The two readings cooperation procedure (**Art 252 EC**) was introduced to establish a form of first and second reading in areas largely affecting the internal market. In brief, it works as follows:

The Council and the EP receive a proposal from the Commission.

The EP sends its opinion to the Council.

The Council adopts a common position on the basis of a qualified majority vote.

Then, rather than proceed immediately to decide on the matter as it would have done under the old consultation procedure, this common position is sent to the EP, which has three months in which to act.

The EP can approve the proposal, do nothing, or reject the common position.

The Council can nevertheless adopt the proposal but only if it does so within three months and by a unanimous vote. Finally, if the EP makes amendments, the Commission must re-examine the proposal and resubmit it to the Council within one month.

The Council then has three months to act. It can adopt by a qualified majority, amend by unanimity or do nothing, in which case the proposed measure will lapse.

Under [Art 251](#) a co-decision procedure was introduced whereby ultimately the EP can reject a legislative proposal as follows:

The EP gives its opinion on a legislative proposal. The Council can adopt this by a qualified majority if it agrees or if the EP has made no amendments to the Commission proposal. If not, the Council can adopt a common position which the EP can, within three months, either approve or take no decision, in which case the Council can adopt the measure. Alternatively, the EP can reject or amend the proposal by an absolute majority, in which case the Council can, within three months, approve those amendments by a qualified majority. However, if the Commission has issued a negative opinion on the amendments, the Council can only approve by unanimity. If the Council does not accept the amended proposal, the matter is referred to a new Conciliation Committee to attempt to achieve a compromise within six weeks. If a joint text is approved, the Council and EP may adopt the provision together within six weeks. If there is no agreement the Council must confirm its position within six weeks and the EP may finally reject it within six weeks by an absolute majority.

The efficiency and democracy of these procedures must be considered in the light of powers of the institutions which support or contradict the view expressed in the question.

The powers of the Council are basically set out in [Art 202 EC](#). The Council disposes of Community legislation which must be initiated by the Commission. The power of the EP is set out in [Art 192 EC](#) which provides that the EP shall participate in the adoption of Community Acts by exercising its powers under [Arts 251 and 252 EC](#) and by giving assent.

The Commission's powers are to initiate the legislative procedure by making proposals and to act under powers delegated to it by the Council. The Commission's right to act under delegated powers is extremely restricted by the management committee structure by which the Council retains overall much of its original powers.

Features that support the first statement are the limited role played by the EP in the legislative procedure, the fact that at present three main procedures exist and the slowness of these procedures. In particular, the cooperation procedure only applies to a limited number of Treaty Articles. Finally the most fundamental feature is that with the exception of the co-decision procedure, the EP can be overruled at the end of the day. Even in the latter procedure the EP's ultimate power is only that of a negative veto.

Addressing the criticism concerning the lack of efficiency, the delays that were often and still are experienced in the legislative procedure can be cited and that there are a number of different procedures according to the Treaty. The procedures are also becoming more complex and, as evidence, the stagnation of the legislative process in the 1970s and 1980s could be highlighted. Further evidence is that the Council could not cope with the amount of work necessary and has

had to devise ways in which decision-making power could be delegated but that control could nevertheless be retained by setting up a number of complex management committees. The Council by its nature acts in the interests of the Member States and not the Community, hence compromises must be reached which has delayed some legislation by very many years.

The question of democracy is easier to address and clearly points to the role of the EP as the only directly elected body but only having a minor role in the legislative process and the question of delegation to Committees controlled by the Council and not the EP. This whole argument is described as the democratic deficit in the Community, ie because the EP is the only directly democratically elected element, in order to maintain the democratic right or justification of Community laws, the legislative process must be more in the hands of elected bodies. If this democratic deficit is real then something needs to be done.

Finally to move on to reforms. To help you in this part, the reforms already put into effect under the [Maastricht, Amsterdam and Nice Treaties](#) should be considered to determine whether these have answered the criticisms before suggestions for further reform are made.

The criticisms of the Maastricht reforms are that the power of co-decision still does not go very far and only gives the EP a negative power of veto and [Art 251](#) still only applies to limited specific areas. The ability under [Art 192](#) to request the Commission to make legislative proposals in areas of Community policy is also unclear as to whether it can insist that a proposal is made. The changes introduced by the [Treaty of Amsterdam](#), whilst welcome and beneficial to the EP, are also limited. They increase the use and streamline the co-decision procedure. The Treaty also extends the areas in which the assent of the Parliament is to be required to incorporate the structural and cohesion funds. However, these do not actually increase the level of participation of the EP and its ability to insist on particular measures and thus do little to reduce the democratic deficit and make the Union more democratic. Also, the amendments of the [Nice Treaty](#) were more limited in scope than hoped and planned for; however, qualified majority voting (QMV) was extended into 39 new areas and the co-decision procedure was also extended to more Treaty Articles.

Clearly now in respect of this answer, the changes proposed originally for the Constitution for Europe but carried forward into the [2007 Lisbon Reform Treaty](#) are the most important. Essentially, the cooperation procedure which was used less and less would be scrapped in favour of the co-decision procedure ([Art 251 EC](#)) which becomes the 'ordinary' procedure under [Arts 289 and 294 TFEU](#) (the amended [EC Treaty](#)). And, whilst this procedure is extended again into new areas, some 30 more provisions, certain areas such as Tax and Social Security will retain the use of unanimous voting, indeed, as will over 50 other legal bases. Whether this addresses the concerns about democracy and efficiency will only be measurable after the passage of time. The CT also proposed a role for the

national Parliaments in the legislative process which is now referred to in [Art 12 of the amended EU Treaty](#) and is contained in a Protocol on the role of National Parliaments. This requires that draft legislative acts of the Union are forwarded to National Parliaments for their opinion. Whilst this could be argued to increase democracy, it might be at the expense of efficiency as another body (or collection of bodies) is introduced into the law-making process and apart from the in-built extra time required may simply slow or prevent the Council from reaching a consensus on a particular issue if hindered by an unfavourable National Parliament or Parliaments' opinion.

Whatever other reforms you suggest will depend on your views as to whether the Community is inefficient or undemocratic or, whether previous reforms have improved the situation, ie does it answer the democratic deficit? Your suggested reforms might be to increase the EP's powers to give equal power of decision-making and equal say in the approving of the budget, and generally to speed up the procedures, but it would not do simply to state this. You must say how this is to be done and the consequences for the other institutions. Any increase the powers of the EP have is to be at the expense of some other organisation, not the national Parliaments but the Councils of Ministers and/or the Commission.

Question 5

'The choice of legal base of a Community legislative provision can become a matter of dispute.'
Discuss.



Commentary

First of all you need to consider exactly what a legal base is, so a definition must be provided and the relevance of its choice must be explained, as must the consequences for the various parties involved in the legislative processes. The use of different legal bases in the Treaty determines which particular legislative procedure is employed in enacting the provision. This in turn determines the extent of the role played by the various institutions. You should determine which institutions are concerned and why. The choice of a certain legal base is important to the Member States, the Council, the Commission and the EP. Each of these could be considered briefly in turn. Then the reasons why it can and does give rise to legal disputes must be provided. Better candidates will be able to refer to decided cases to help them and to demonstrate how the Court of Justice has resolved these disputes.



Answer plan

- Definition and choice of 'legal base'
- How it affects the Commission
- How it affects the EP
- How it affects the Council and Member States
- Decisions of the ECJ
- Consequences of Treaty Reform

Suggested answer

The legal base or authority for the enactment of Community secondary legislation is initially determined by the subject matter of the legislative proposal. This can be seen in the area of free movement of persons which provides a legal base for the Council and European Parliament to enact further secondary legislation for the free movement of workers. [Article 39](#) provides the basic policy and [Art 40](#) provides the legal base to enact secondary legislation in support of the policy. [Article 40](#) requires that the co-decision procedure under [Art 251](#) be used. Hence, the legal base of each particular proposal for a Regulation, Directive or Decision determines the procedure to be used. This in turn then determines which participants (eg Council plus European Parliament or Economic and Social Committee or the Committee of the Regions) take part in the legislative process and also the level of their participation. The choice of legal base therefore is fundamental to the relative powers and ability of the institutions to affect the content of Community law.

The Member States and each of the major institutions is affected in the following ways. (It should be noted here that this might be less of an issue if the [2007 Lisbon Reform Treaty](#) for Europe comes into force because of the revision of the legislative acts which will reduce the number of law-making procedures.)

The Commission

The Commission is concerned because the use of qualified majority voting in the Council of Ministers is extremely important to the Commission which stands a greater chance of having proposals accepted by a majority rather than by all Member States. The extreme views can thus be ignored rather than taken into account at the draft stages and in the legislative proposal put forward by the Commission.

The Commission may wish to see a proposal go through on a majority vote if it was of the opinion that one or two Member States may object. Thus, the treaty base may affect the precise content or formulation of the proposals, in that, if they know a qualified majority vote applies, then they can ignore the objections of the

extreme views in Council as these will be outvoted. Hence, they need not water down proposals to take into account all views. See *Commission v Council* in the *Erasmus decision* (Case 242/87).

The European Parliament

The EP is clearly concerned as the legal base is also vital to the level of participation of the EP in the legislative process, ie whether it can participate in the consultation process or the cooperation process, which gives the final say to the Council or whether it can participate in the co-decision process in which case the EP has marginally more say in the process. Its opinion in the consultation procedure can be ignored by the Council whereas, for example, under [Art 95 \(ex 100a\)](#), measures for the single market, the co-decision procedure is more likely to reflect the views of the EP.

The Member States and the Council of Ministers

The Member States are represented in Council by the relevant ministers of the national governments. As such they are subject to whatever political pressures are present in the Member States and the degree to which this is important depends on the strength of the government concerned and the strength of the pressure groups and lobbies who might object to certain legislative proposals. In some Member States the farming lobbies are very influential and the governments in these Member States may therefore wish to take into account their protests. If these states are a minority in Council, the consequence for the Member States is that if a legal base is used which does not require unanimity to enact legislation, they would not be able to veto the measure or at least water down the requirements significantly. An example of where a Member State has taken an action to try to protect such an interest is the *UK v Council (the Hormones case 68/86)*.

The Council might therefore continue to prefer to use a base requiring unanimity because as a body it retains full unshared power in the legislative process, other bases weaken its position as a Community institution.

Hence, differences of opinion can arise as to the correct legal bases and the institutions and Member States have often fought over legal base, because it is possible to base measures on more than one Treaty Article due to the fact that the subject matter can straddle more than one Treaty Article. Measures in support of the single market require majority voting rather than unanimity in the Council and because this makes life easier for the Commission, it tries to exploit this by introducing as much legislation as possible under [Art 95 \(old 100a\)](#), whereas one or more Member States and/or the Council have argued the proposals should have as their legal base other Articles requiring unanimity. Looking at it from the other side, a single Member State which objects to a particular measure would wish to veto it and would want unanimity in Council to have that chance. It would object to the Council deciding to adopt the measure under a legal base requiring QMV. The subject matter may simply lend itself to both and thus give rise to a genuine

dispute. The EP has not refrained from challenging the Council for the use of the incorrect legal base and regularly brings cases before the ECJ (see, eg, [case 22/96 EP v Council \(data exchange\)](#)) claiming that by using a legal base which gives it less participation, its prerogatives are being eroded. An early example of the many cases which have reached the ECJ on legal base is the case of [UK v Council \(the Hormones case \(68/86\)\)](#) concerned with a ban on growth producing hormones. It was argued that [old Art 100](#), an internal market measure, which required unanimity was more suitable than [old Art 43](#) (the Common Agriculture Policy measure) under which the measure was actually adopted and required only a qualified majority. The adoption by qualified majority was objected to by the UK. The Court of Justice was required to consider whether the subject matter more concerned the free movement of goods and thus a single market measure or really agricultural policy and thus the CAP. The use of the qualified majority procedure under the CAP was held to be appropriate by the Court of Justice.

In the 1992 case of [European Parliament v Council \(Students residence C-295/90\)](#), Parliament successfully challenged the adoption of [Directive 90/366](#) on the free movement of students which the Council adopted under [old Art 235](#) requiring only consultation rather than under [old Art 7](#), which would require the cooperation procedure to be used, thus giving the EP a greater role in the legislative process. The Directive was annulled and was re-enacted.

A further case to focus on the issues raised above is [Commission v Council \(Re: Titanium Dioxide Directive C-300/89\)](#). The Council adopted a Directive on the basis of [old Art 130s](#) as an environmental measure which then required unanimity and only consultation of the EP, despite the protests of the EP at the time. The Commission argued it should have been adopted using [Art 100a](#) as a single market measure, which then required QMV and the cooperation procedure instead. Whilst the Court acknowledged that both could be a valid base, the use of [Art 130s](#) instead of [Art 100a](#) deprived the EP of its greater role in the legislative process. Even if both were used, as suggested by the Council, it would still have to decide unanimously and thus overrule any opinion objections of the EP.

In a similar challenge, in case [C-155/91 Commission v Council \(Waste Directive\)](#), to a [Directive \(91/156\) on waste disposal](#), adopted under [old Art 130s](#) by the Council, the Commission challenged it on the basis that [old Art 100a](#) in respect of the internal market should have been used as the legal base. On this occasion, the Court disagreed and held that the protection of the environment stated in the Directive was the real reason and not the free movement of waste. Therefore the challenge by the Commission was rejected. The view of the ECJ was that it was not so much the right to move waste around but the promotion of the most efficient way of dealing with waste to protect the environment, ie by not preventing its movement to the most efficient waste disposal operators.

A further case concerned the adoption by the Council in June 1993 of a Directive specifying a minimum working week, albeit with the ability of workers to

work longer voluntarily. The UK which was opposed to this was unable to veto the proposal as it was introduced under the Health and Safety of workers provision under the **old Art 118a of EEC Treaty** (social policy) which requires only a qualified majority in the Council. The UK requested the annulment of the Directive in **Case C-84/94 UK v Council**, arguing that it would have been more appropriate to base the measure on **Art 308 (old 235) or 94 (old 100)**, either of which would have required unanimity on the part of the Council thus allowing the UK the chance to veto the measure. The Court of Justice was, however, satisfied with the choice of **Art 118a**.

The view of the Court of Justice is essentially that the democratic process which now involves the EP demands that where two legal bases are available requiring differing procedures, the one allowing the EP the greater role must be used so as not to deprive the EP and the Community of its democratic right, unless it can be shown the matter is primarily more concerned with a particular Treaty base. In contrast, in **Case C-376/98 Germany v Council (Tobacco Advertising)**, the ECJ held that the ban on tobacco advertising was mainly based on health grounds and not the internal market. It was, however, adopted under **Art 100a (now Art 95)**, the internal market harmonisation measure. It was held to have been outside the Community competence to enact it because the correct public health article did not allow for harmonisation of laws (**Art 129 (4)**), which was precisely what the Directive did.

Given the simplification of the legislative procedures by the Treaties of Amsterdam and Nice and the change of legal procedure for many provisions in favour of the EP, it will become less of an issue if the **2007 Lisbon Reform Treaty** comes into effect. This will reduce the types of legislative procedures in use by removing the cooperation procedure entirely and relying less on the consultation procedure. Qualified majority voting in the Council will be increased and unanimity on the part of the Council of Ministers will be restricted to taxation, social security and foreign policy. As a result there should be less scope for disputes about the legal base.

Question 6

In the light of the roles of the Advocate General and the European Court of Justice and with reference to the jurisprudence of the Court, consider whether the ECJ possesses law-making powers in the Community legal order.



Commentary

This is a relatively straightforward question dealing generally with the Court of Justice and the Advocates General and their impact in the Community legal order. The question can be broken into easier sections. First, you clearly need to outline the position and function of the Advocate General and the role and powers of the European Court of Justice. The place to start for both of these is with the [Treaty](#).

You have then to decide whether the role played by the ECJ in the decisions it reaches constitute a law-making power and thus whether it adds to the body of Community law, or whether it merely interprets and applies existing Community law. The reference to the jurisprudence of the ECJ is simply asking you to refer to the case law of the ECJ where necessary to support your arguments and answer.

The amount of detail you include for the first part of the answer will depend on the coverage in your course and whether, for example, you have considered in detail the [Protocol on the Statute of the Court of Justice](#) or the [Rules of the Court of Justice](#). If not, then supply as much detail as you can.



Answer plan

- [Treaty Articles](#) concerning the European Court of Justice
- The role and powers of the ECJ
- The role and function of the Advocates General
- Temporal effect of judgments
- Development of Community principles of law

Suggested answer

As an introduction, it would be useful to state that the Court of Justice presently consists of 27 judges and eight Advocates General, nominated and appointed by unanimous agreement by the governments of the Member States. They must be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial office in their own countries ([Arts 221–223](#)).

The position of the Advocates General is established under [Art 222 of the EC Treaty](#). The role of an Advocate General is to assist the Court by giving an opinion, in complete independence and impartiality, on the issues of a case.

In doing so the Advocate General will examine the legal issues in depth and critically review the jurisprudence of the Court on the subject. The reasoned submissions of the Advocates General are to be made in open court. It is a general requirement that the opinion of the Advocate General be heard before judgment is given unless the case raises no new point of law ([Art 20 of the Statute of the Court of Justice](#)). The Advocate General can therefore take the public view of things

and consider the submissions of all the parties but cannot be bound to present or represent any particular view. Additionally, the opinion of the Advocate General is not binding on the Court but it acts like a sort of persuasive precedent. Alternatively, it can be considered that the opinion of the Advocate General acts like a first instance decision subject to an automatic and instant appeal. The Advocate General plays no part in the actual decision of the Court and once the Advocate General has delivered an opinion it brings to an end his or her role in the case.

Whilst not having the formal impact on Community law that the Court has, the Advocates General have nevertheless also helped in the development of Community law. This arises indirectly from their detailed research for cases often involving comparative research of the laws of Member States. At times this has led to a direct influence by the introduction of national legal principles into the Community legal order, eg in the case of *Transocean Marine Paint Association v Commission* (17/74), the principle of *audi et alteram partem* (the right of the other party to be heard) was introduced by the Advocate General and adopted later by the Court. An opinion of an Advocate General may be referred to in later cases as a sort of persuasive precedent as in the case of *Prodifarma v Commission* (T-3/90) when the Advocate General's opinion in a previous case was taken up by the Court of First Instance (CFI).

Article 220 EC outlines the general function of the Court of Justice. It states 'The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed.' Originally it had exclusive jurisdiction over Community law but it has now been joined by the Court of First Instance and judicial panels (**Art 225a**). The Court has been divided into chambers to help expedite the business of the Court. The jurisdiction and tasks of the Court are laid down in **Arts 226–245**.

As a result of the fact that the European Treaties and some of the secondary legislation are framework measures, they often require considerable amplification and interpretation. This, coupled with the style of interpretation which has been adopted by the Court to give effect to the aims of the Treaty, has given a wide scope to the Court of Justice to engage in judicial activism.

A primary form of interpretation is described as teleological in that the Court tries to determine in the light of the aims and objective of the Treaties and legislation what was intended and what result would assist those goals. These methods are applied in addition to the usual array of methods of interpretation found in the Member States, legal systems. The Court often refers to the spirit of the Treaty and Community to come to a particular conclusion. See in particular the leading case of *Van Gend en Loos* (Case 26/62) at para 71 and the case of *CILFIT Srl v Ministro della Sanita* (283/81), concerned with the necessity of national courts to refer a question under **Art 234 (ex 177)**. This form of interpretation allows the Court to be more adventurous in its decision-making than could be assumed from a literal reading of the legal provisions. For example, in certain circumstances

it has been held that persons who are unemployed or studying can be classified as workers under Community law, see the case of *Lair v Universität Hannover* (39/86).

Past decisions are often cited in Court, however, they are only persuasive rather than have any formal authority. For example, the *CILFIT* case can also be observed to give rise to a form of precedent in that the ECJ stated that it was possible for national courts to refer to previous judgments of the ECJ in identical cases to achieve a solution without the need for reference to the ECJ. However, it must be stated there is no formal system of precedent but the Court, as do courts in civil law jurisdictions, tries to maintain consistency in its judgments. An example of a reversal of the Court's decisions is in the case of *EP v Council* in the *Comitology case* (302/87) in which the EC was denied the right to take action under *Art 230 (ex 173)*, but it was later allowed in the case of *EP v Council* (C-70/88) concerned with a Euratom decision Treaty base by Council to protect Parliament's prerogatives.

One aspect which may hinder a law-making role is the requirement to give a single judgment of the Court. This is because a single judgment is at times difficult to interpret later because it does not reveal whether the decision was reached on a unanimous or majority verdict. Hence it can be confusing and terse and thus difficult to apply in future cases as 'established' law.

It can be observed that the Court has played a crucial role in the establishment and development of the Community legal order by the establishment and development of leading principles of Community law. Notable judgments are those concerned with what are now fundamental decisions of the Court including direct effects and supremacy and case rulings in actions concerning the rights of the Community institutions, notably the EP. In the case of *Les Verts v EP* (294/83), an action against the EP under *Art 230 (ex 173)* was admitted despite the lack of any mention in the Article that the EP could be a defendant and in *EP v Council* (C-295/90) concerned with the Treaty base, the extension of the rights of the EP to take action under *Art 230 (ex 173)* was confirmed despite not being given the right under the provision of the Article itself.

A number of cases could then be cited to provide evidence that the ECJ enjoys some form of law-making role but it would be best to rely on leading cases in which the ECJ has established the fundamental principles of Community law of direct effects and supremacy of Community law; *Van Gend en Loos* (26/62) and *Costa v ENEL* (6/64). Quotations from these cases could be employed to great effect.

In *Van Gend en Loos* the ECJ held:

... the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit in limited fields, and the subjects of which comprise not only Member States but also their nationals.

From *Da Costa* it was held:

By contrast with ordinary international treaties the EEC Treaty has created its own legal system which became an integral part of the legal systems of the Member States and which their courts are bound to apply. By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and more particularly real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the Community the Member States have limited their sovereign rights and have created a body of law to bind their nationals and themselves.

Also:

It follows . . . that the law stemming from the treaty, an independent source of law, could not because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.

These cases must demonstrate more than the simple interpretation and application of law as there is nothing in the Treaty to expressly establish these two fundamental principles of Community law. Furthermore, the introduction of new principles to the Community legal order also establishes new principles and rules of Community law.

Inevitably, in reaching conclusion an answer to such a question depends on how you define 'law making'. I consider it to be at least arguable that given the width of the scope that the ECJ enjoys it would not be incorrect to describe it as having law-making powers. Indeed, during the Intergovernmental Conference in 1996–1997, some of the Member States had expressed their dissatisfaction with the high degree of judicial activism exercised by the ECJ in cases such as *Barber (C-262/88)*. No changes resulted from this but it may be regarded as evidence that the Member States consider the ECJ to be doing more than just interpreting law.

Finally, in view of the severe difficulties the EU is experiencing in reforming itself, I have decided to include a new question on this reform process which could now be examined in your course.

Question 7

The **2007 Lisbon Reform Treaty** is a much poorer substitute for the **2004 Constitutional Treaty** whilst essentially making the same institutional and other changes to the European Union. Neither, however, are destined to enter into force, despite the desires of the majority of Member States.

Discuss.



Commentary

This question is a topical one which is designed to highlight not only the changes which have been proposed but also the difficulties the Member States have been experiencing for the last few years in trying to reform the European Union.

You must consider not only what the **2004 Constitutional Treaty** and its substitute, the **2007 Lisbon Reform Treaty** contain and make a comparison of these contents but also in order to make sense of the latter part of the question, you must outline why these Treaties were considered desirable or necessary in the first place. So you need to go back to the previous decisions of the Member States in the European Council which launched the Union on this tortuous and still unsuccessful reform path. Finally, you need to address the last slightly cryptic part which suggests that both attempts might end in failure but that a majority of states did not or do not desire this. This, I hope is clear to you, is referring to the fact that both attempts to reform the EU have been undermined by rejection in one or more states. The **CT** was rejected by the Dutch and French electorates in May and June 2005 and although 18 states eventually ratified the **CT**, it was abandoned in June 2007. Its replacement, the **2007 Lisbon Reform Treaty** was rejected by the Irish in June 2008, but again a clear majority of the states had already or subsequently ratified it. You must try to sum up the latest position on the consequences of these developments for the future of the reform of the EU.



Answer plan

- Outline the decisions of the Member States which provided for a reform process
- Sketch out the main steps of this process
- Consider and compare the main changes proposed under both the **CT** and the **2007 Lisbon Reform Treaty**
- Discuss the consequences of the rejections in 2005 and 2008
- Revisit and re-evaluate the need for and possible chances of a major reform

Suggested answer

In order to consider why significant changes were proposed in both the **Constitutional Treaty** and the **2007 Lisbon Reform Treaty**, it is necessary to review the period immediately preceding these Treaties.

In preparation for the planned future expansion of the EU, in 1999, the then 15 Member States convened an intergovernmental conference to discuss institutional change and which concluded with the signing and eventual ratification of the **Nice Treaty**. The key provisions of this Treaty included amendments to the organisation and operation of the European Courts, temporary changes to the composition of institutions for future enlargement and re-weighting of the votes in Council. These changes were contained in a protocol rather than as amendments to the Treaty. The Nice Council Summit also saw the agreement of the Member

States as to how to move on to the next stage of Treaty amendment and further integration. It was further agreed to do this in a different way to make Treaty reform more inclusive and transparent. The Nice Council Summit provided, a 'Declaration on the Future of the Union' which was to address a number of issues for the next IGC, planned for 2003. The details were finalised at a later summit of the Member States in Laeken in December 2001, which saw the start of an ultimately unsuccessful attempt to put the EU on a new constitutional footing. The Laeken Summit formally set up and prepared the agenda for a 'Convention on the Future of Europe' which was headed by a Praesidium of 12 members, led by Valéry Giscard d'Estaing, a former French President. It further consisted of representatives of the heads of state and government of the 15 Member States and the 13 candidate countries, 30 representatives of the national parliaments and 26 from the candidate countries, 16 members of the EP, and two members from the Commission. It laid out in a declaration the goals for making the European Union more democratic, transparent and efficient. In particular, attention would be paid to the governance of the Union, institutional preparations for the forthcoming expansion, the division of competences and democratic participation in decision-making processes of the Union. The Convention worked until June 2003 when it wrote up its report and a draft **Constitutional Treaty (CT)** was finalised and presented to the European Council in Greece on 18 July 2003. This was subsequently considered by the IGC which commenced in October 2003 and the draft **Constitutional Treaty** was presented to the Heads of State and Government Summit in Rome in December 2003.

The main features of the **Constitutional Treaty** included a new longer 2½ year term for the President of the European Council, a Foreign Minister, a smaller Commission, the formal inclusion of the **Charter of Human Rights** into the Treaty, new simplified legislative tools and more involvement for national Parliaments in law-making. After some very hard bargaining on voting numbers in Council and the number of Commissioners in 2003–2004, the **CT** was signed in October 2004 by all the Member States in Rome and handed over to each of the Member States to ratify it by parliamentary approval or referendum or both according to the constitutional or legal requirements of each state. However, in referenda, the **Constitutional Treaty** was rejected by the electorates of France and the Netherlands in 2005. After an agreed period of reflection during which some states continued the ratification process, taking the total to eighteen, the process was abandoned. After a period of so-called reflection, in June 2007, a further summit was held to see if the **CT** could be rescued or replaced. The German Presidency had the task of either making the **CT** more palatable or coming up with something in its place which nevertheless addressed the institutional challenges of enlargement. However, after another late night of Summit discussions, it was agreed to abandon the **CT** entirely and replace it. Even though the **CT** was abandoned, it is worthwhile listing the agreements reached because most of these matters ended up in the new **Reform Treaty** although in slightly altered or different form.

1. the transfer of a number of Article bases from unanimity to qualified majority
2. making the **Charter of Fundamental Rights** a legally binding part of the Treaty
3. providing the EU with the status of a legal person
4. establishment of a longer serving President for the Council (2 ½ years)
5. a smaller Commission comprising two-thirds of the number of Member States
6. creation of a common EU foreign minister to lead a joint foreign ministry with ambassadors
7. an express statement that Union Law shall have primacy over the national law
8. procedures for adopting and reviewing the Constitution, some without the need for another IGC
9. an exit clause for Member States

The **2007 Reform Treaty**, which will not replace the existing Treaties but amend them, has retained the following features of the **CT**. The Union will get its legal personality, the proposed Union Minister for Foreign Affairs will be called the High Representative of the Union for Foreign Affairs and Security Policy. The new Council form will be established as envisaged by the CT. The Commission size will also be reduced as planned. The names and types of secondary law 'Regulations, Directives and Decisions' will be kept but new definitions for them will be introduced, taken from the **CT**.

The **Charter on Fundamental Rights** will become legally binding but only through a Declaration attached to the Treaties and with an opt-out for the UK and Poland. Primacy of Union law was removed as an express statement in the Treaty and instead placed in a declaration which merely affirmed the settled case law establishing primacy. The transfer of a number of articles to QMV and the co-decision procedure will proceed largely as planned.

The aspects of the **CT** which were not retained in the **Lisbon Reform Treaty** were those more of a symbolic nature which were perceived by the Member States to be a large part of the reason for the rejection by the French and Dutch electorates although studies have failed to establish this with any authority. The items completely abandoned were the references to a European flag, anthem, a motto and reference to a Europe day celebration which were argued to suggest too strongly of statehood.

The **Reform Treaty** was supposed, by stripping away the offensive parts of the **CT** and retaining most of the institutional changes, to make the changes more palatable to the Member States and their electorates. However, as the question suggests, the end result is less than satisfying despite making most of the changes considered necessary to allow the union to operate effectively in the future. This is because of the way the changes will now be made. Rather than contained in a

single document, as was with the **CT**, the **Reform Treaty** does this by complicated and extensive amendments to the **EC and EU Treaties**. The **TEU** will be turned more into an overview Treaty with the **EC Treaty** being converted into a treaty dealing with substantive issues, called the **Treaty on the Functioning of the European Union** and the term 'Community' will be replaced throughout by 'Union'. Both Treaties, however, will concern the institutions and a number of articles in both Treaties are concerned with the same subject matter. In addition, rather than tidying up and reducing the protocols and declarations attached to the Treaties, more have been added.

At this stage it is clear that the **Union Treaty** architecture will be even more complicated than it was, but if ratified by all Member States, it is progress of a sort. As the questions suggests, this could have been done better perhaps in a single document and still have removed those elements considered offensive and which did not contain the word Constitutional or similar, by just calling it, for example, the **Consolidated EU and EC Treaty**.

The final part of the question would appear simply to focus on the fact that not only was the **CT** rejected by the electorates in two Member States, but its supposed much more palatable replacement, the **Reform Treaty** was rejected by the Irish electorate in June 2008. Indeed, all but one state considered that the changes were insignificant enough not to have to subject the Treaty to a referendum and at the time of writing, 24 states had ratified. It was generally assumed it would be ratified with less difficulty than the **CT**. The Treaty was signed in Lisbon on 13 December 2007 by all 27 Member States and was planned to enter into force on 1 January 2009. At the time of answering this question, the future of the European Union integration project hangs in the balance. If the Irish are unable to overcome their rejection, then the **Reform Treaty** cannot come into force. What happens then, is uncharted territory, but it is hard to see 27 Member States negotiating a new Treaty more acceptable to one Member State but equally hard to see how the question can be put again to the Irish without evoking the same result. In the event of both remaining true, perhaps the only way forward presently is for minor and piecemeal Treaty amendments taking care of the most pressing institutional requirements.

In conclusion, I would suggest that with only, for the most part, the symbolic aspects having been removed and because most substantive changes remained, the **Reform Treaty** is a poorer substitute, especially because of the way that the changes will be made. Further, despite the fact that a majority of states ratified both the **CT** and the **2007 Lisbon Reform Treaty**, under the present circumstances, neither will enter into force.

Further reading

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