European Union, Historical Evolution

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A. Historical Background

1 The idea of a European Union is not an invention of the 20th century. The earliest proposals for cooperation at the European level of the 17th and 18th centuries by William Penn, Charles-Irénée Castel de Saint-Pierre, and Immanuel Kant were strictly confederal in nature, and intended European institutions to serve as forums for peaceful conflict resolution between States. One of the first to propose institutional structures that would have materially altered the prevailing nation-State system was Henri de Saint-Simon in 1814. A fledgling system of international cooperation in Europe with informal institutional traits was initiated at the Congress of Vienna in 1815 (→ Vienna Congress [1815]). However, it was only after the horrors of World War I that proposals of a European Union received greater public attention and that associations were founded in an attempt to gather enough support to implement them. Of more than 10 such associations, the Pan-European Union, founded by Count Coudenhove-Kalergi in 1923, was the most successful, lobbying for the establishment of a ‘United States of Europe’. The first serious attempts of institutional cooperation in Europe were made after World War II with the Organisation for European Economic Cooperation (‘OEEC’) in 1948 and the first comprehensive political institution established in post-war Europe, the → Council of Europe (COE) of 1949. Neither the OEEC nor the COE was a supranational institution with a certain degree of independence from its Member States, however. Both were intergovernmental in nature and did not lead to closer cooperation.

B. Towards a Political Union

1. The Founding of the European Communities: ECSC, EDC, EEC, EURATOM

2 A simple and yet ingenious proposal by Jean Monnet, head of France’s General Planning Commission, formed the basis for the → European Coal and Steel Community (ECSC), established in 1952. Publicized by French Foreign Minister Robert Schuman on 9 May 1950, it suggested transferring control of coal and steel resources, ingredients of war, to a supranational entity. The ECSC was characterized by a degree of supranationality unmatched by later European organizations (→ Supranational Law). Another proposal by Jean Monnet concerned the establishment of a common European army under the command of a European Defence Minister, complemented by an overarching political union. Based on the ensuing plan by French Defence Minister Pléven, the Traité instituant la Communauté européenne de défense (Treaty instituting a European Defence Community; ‘EDC’) was signed on 27 May 1952, but its ratification failed in the French National Assembly in 1954 ([1954] 24 Mémorial du Grand-Duché de Luxembourg 644–75). After this setback, the protagonists of → European integration reverted back to the technocratic-sectoral approach, which had been successful in 1952 with the establishment of the ECSC. Apparently, diverging national interests preventing the establishment of a comprehensive political union could best be overcome by initially limiting cooperation to specific sectors and successively extending it to other policy areas. It was once again a proposal by Jean Monnet, this time adopted by the Belgian Foreign Minister Paul-Henri Spaak in 1955, which was the starting point for the next round of negotiations on how to further European integration. Spaak suggested an extension of the reach of the ECSC to the nuclear energy and transport sectors. On the initiative of Dutch Foreign Minister Johan Willem Beyen, the proposal was soon modified to include general economic integration by establishing a common market. After a lengthy process of negotiations, initially at the conference of Messina in 1955, then by the Spaak Committee, and finally at the intergovernmental conference at Val Duchesse in 1956, the Rome Treaties establishing the → European (Economic) Community (‘EEC’) and the → European Atomic Energy Community (Euratom) were signed on 25 March 1957. The German contribution to the project initiated by France
is often associated with the name of Walter Hallstein, law professor and diplomat, who represented Germany in the negotiations concerning the establishment of the European Communities from 1950 onwards. His concept of the European Community as a community of law, in which law rules power, not power the law, shapes the European Union (‘EU’) until today. Hallstein’s devotion to the idea of European integration and his decisive contribution in establishing the European Communities were recognized by the six founding States through his appointment as the first Commission (EEC) President in 1958.

2. Beyond Sectoral Integration

3 Until the 1980s, there were comparatively few efforts to establish a political union. One of them was the Fouchet Plans of the early 1960s, which remained unsuccessful. Named after French politician Christian Fouchet, they originally emanated from French President Charles de Gaulle, whose vision of Europe was that of a Europe of States, not of a Europe above the States. Though technically plans for a political union, they in fact aimed at weakening the existing institutional structures by reducing the level of integration to intergovernmental cooperation between nation-States.

4 During the 1960s and 1970s, economic integration proceeded at a slow pace. De Gaulle, angered by the failure of the Fouchet Plans, blocked British accession to the European Communities in 1963. He was, moreover, apprehensive of the pending change of the Council’s voting system from unanimity to majority, due to be implemented by January 1966, which would have meant that many Council decisions could have been taken against French national interests. Using disagreements on how the common agricultural policy would be financed in the future as a pretext, the French cabinet withdrew its representatives from the organs of the Communities in June 1965. Until the Luxembourg Accords of January 1966, the Communities’ organs were unable to effectively conduct their affairs. The Luxembourg Accords were an informal agreement to disagree. They stipulated that decisions of the Council would generally be taken consensually, and that discussions would be continued until an agreement was reached where vital national interests were concerned. At the same time, the powers of the Commission were decreased. It was obliged to present all proposals to the Council before their publication, and to coordinate its activities within international organizations with the Council. While the Luxembourg Accords ended the ‘empty chair crisis’, they also caused the power balance within the Communities to tilt in favour of the Council. The resulting weakening of the principle of supranationality, which had inspired the entire integration process and which had distinguished the Communities from all other international organizations, was a heavy setback.

5 During the following years, the European Communities suffered from what has been termed ‘eurosclerosis’—slow and ineffective legislative processes, a primary concern of Member States with their national interests, and decisions which more often than not represented the smallest common denominator. It was during this time of ‘eurosclerosis’, however, that some of the most important judgments of Community law were handed down by the European Court of Justice (‘ECJ’; → European Union, Court of Justice and General Court), which seemed intent upon filling the gap left by the incapacitated Community organs. The ECJ, through a series of judgments including the → Van Gend & Loos Case and the → Costa v ENEL Case gradually brought about the constitutionalization of the legal and political order of the European Communities. It developed the doctrines of direct effect, primacy, effet utile, implied powers, etc, which proved to be immensely powerful tools for
the advancement and deepening of European integration. To a certain degree, therefore, the ECJ took over from the Commission as the ‘motor’ of integration.

6 After the failure of the Fouchet Plans and a decade of uncoordinated foreign policies of the Member States, a first tentative step was taken in the direction of political cooperation in October 1970, when the foreign ministers agreed to cooperate more closely in foreign policy matters. Until 1986, this European Political Cooperation (‘EPC’) remained a voluntary system with no legally binding basis, detached from Community institutions.


8 As a result of subsequent negotiations on a reform treaty, the Single European Act (‘SEA’) was adopted in 1986 and entered into force in 1987. It was not a treaty establishing a European Union, as the Genscher–Colombo Plan and the Solemn Declaration had suggested, but it was the first major revision of the Founding Treaties and a decisive step towards the establishment of the European Union. Though limited in quantitative respects, the SEA brought about a number of noteworthy changes. Most significantly, it introduced majority voting in the Council in most important areas concerning the internal market, leading to an unprecedented legislative activity within the Communities. The introduction of a comprehensive deregulation and harmonization programme in order to complete the establishment of a common market by 1992 helped kick-start the attainment of the economic goals of the Rome Treaties. The SEA also introduced the cooperation procedure, which gave the European Parliament a visible role in the Communities’ legislative process for the first time. The reach of the Communities was extended, whose competences now included environmental protection, health and safety at work, research and development, as well as economic and social cohesion. Furthermore, the summits of the → heads of State and government were formalized under the name of ‘European Council’. Finally, the SEA codified the EPC, which subsequently evolved to become the → European Common Foreign and Security Policy (‘CFSP’).

9 The SEA appeared to be a limited reform treaty. Soon, however, its true potential became apparent. The Commission took on a far more active role, continuously proposing the measures necessary for the realization of the internal market, as stipulated by the SEA’s harmonization and deregulation programme. This legislative activity by the Commission was no longer thwarted by a Council immobilized by the Luxembourg Accords. The Luxembourg Accords had lost much of their clout with the introduction of majority voting, as well as the Council’s subsequent decision to allow a vote on whether to vote on a particular issue. Thus, by 1992 about 77% of the SEA’s harmonization and deregulation measures had entered into force in the Member States. The Communities’ ‘eurosclerosis’ had been cured.
3. The Founding of the European Union with the Treaty of Maastricht (1992)

10 The legislative activity of the Communities soon revealed that the goal set by the SEA—the completion of a barrier-free internal market—could not be realized effectively without some form of closer economic and monetary union, for the volatility of currency exchange rates created an intolerable degree of economic uncertainty (see also → Monetary Law, European). A committee of central bank governors, chaired by Commission President Jacques Delors, was mandated by the European Council in 1988 to examine possibilities of setting up an economic and monetary union in Europe. The committee’s report of 1989 suggested the establishment of a monetary union in three stages.

11 On the basis of this report, the Member States agreed to convene an intergovernmental conference on treaty reform with respect to economic and monetary union. At the same time, Germany and France pressed for negotiations on the establishment of a closer political union, which was to sustain and complement the economic and monetary union. Both negotiation processes, which were conducted independently from each other, were completed at Maastricht on 7 February 1992, when the heads of State and government signed the Treaty of Maastricht. This treaty added to the existing three European Communities two new areas of cooperation, concerning foreign and security policy as well as justice and home affairs, and established the European Union as an overarching entity. The establishment of the European Union was not merely the institutionalization of political cooperation in addition to the existing Communities, but rather a change in character of the entire integration project. With the ratification of the Treaty of Maastricht, European integration moved beyond the primarily economic project it had been, towards the political venture it had always intended to be.

12 The European Union as established by the Maastricht Treaty has often been described as a three-pillar structure. The first pillar consisted of EEC, ECSC, and Euratom. The EEC was officially renamed European Community (‘EC’), as the Maastricht Treaty allocated to it new competences reaching beyond entirely economic affairs. These new competences included industrial policy, education, youth, culture, public health, consumer protection, trans-European networks, as well as development cooperation. Significant modifications were made to the EC’s competences in the area of environmental protection. One of the most important substantive changes concerning the first pillar were the provisions on Economic and Monetary Union (‘EMU’), which regulated the introduction of the euro as common currency by 1999. Institutional changes included the introduction of the co-decision procedure, allowing the European Parliament to block legislative acts, as well as the establishment of a Committee of Regions.

13 The second pillar consisted of the CFSP, which essentially was a somewhat revised EPC with a new name. The characteristically intergovernmental form of cooperation of the EPC was preserved. The third pillar consisted of the provisions on cooperation in Justice and Home Affairs (‘JHA’), later renamed Policing and Judicial Cooperation in Criminal Matters (‘PJCC’). In order to achieve free movement of persons within the EU, the third pillar was to allow for cooperation in matters of crime, asylum, and → migration policy as well as customs investigation.

14 Overarching changes of considerable importance were the introduction of the principle of → subsidiarity and of → European citizenship. Subsidiarity was to delineate the spheres of action of the Community and Member States, ensuring that Community measures in areas not within its exclusive competence would only be taken where the aims of these measures could not be achieved satisfactorily at the national level. Union citizenship, still attached to the citizenship of the Member States, entails active and passive suffrage in EP and local
elections, → diplomatic protection by any of the Member States’ representations in third countries, as well as the right to petition the EP.

15 Ratification of the Maastricht Treaty proved to be more difficult than expected. In Denmark, the Treaty was initially rejected in a → referendum in June 1992. Ratification only succeeded after several concessions had been made, including an opt-out of the common currency provisions. In France, a referendum was held, which produced only a narrow 51% majority for the Treaty. In Germany, ratification could only proceed after the Constitutional Court had affirmed the Treaty’s constitutionality in its Maastricht judgment (→ Federal Constitutional Court of Germany [Bundesverfassungsgericht]). The Treaty subsequently entered into force on 1 November 1993.


16 After the entry into force of the Maastricht Treaty, three incentives for further reform persisted. One was the desire to complete the establishment of a barrier-free internal market, which even after the period of intensive deregulation and harmonization following the SEA had not yet been fully achieved. The second incentive was the ongoing challenge of dealing with the effects of a common market with open frontiers. The third incentive was to prepare the EU for the enlargement that was to be expected after the end of the → Cold War (1947–91). It was clear that the existing EU institutions and processes would be unable to cope with a membership of 27 or more States. Already at Maastricht, therefore, the Member States agreed that further reform was necessary, providing for another round of negotiations to commence in 1996.

17 Keeping to the time frame set at Maastricht, negotiations on the next Treaty revision began in March 1996 in Turin, Italy, which soon proved to be a rather lengthy process. Thirteen foreign ministers’ conferences later, the Treaty of Amsterdam was signed on 2 October 1997 and entered into force on 1 May 1999. Despite their length, negotiations did not achieve one of their most central aims: a comprehensive institutional reform ensuring that the Union remained functional even with a potential membership of 27 or more States. The Treaty of Amsterdam consolidated and streamlined existing primary law, renumbering all Treaty provisions and eliminating obsolete ones, as well as introducing a series of smaller changes, which increased efficiency to a certain extent.

18 Given that the institutional reform necessary for enlargement had not been agreed upon at Amsterdam, yet another intergovernmental conference was initiated a mere two months after the entry into force of the Treaty of Amsterdam. The conference essentially dealt with the ‘leftovers’ of Amsterdam, that is, the institutional adjustments necessary in order to make existing decision-making processes efficient in an ever larger EU. Despite this limited agenda, the negotiation process was difficult and the European Council summit of Nice in December 2000 was the longest ever. Its outcome, the Treaty of Nice, was signed in March 2001. The Nice Treaty did solve some of the most pressing problems, but there was also considerable dissatisfaction with the reform process and its outcome. The intergovernmental conference system was non-transparent and seemed to be at odds with efforts to increase the democratic legitimacy of the EU. Moreover, the European Council summit at Nice had been dominated by attempts to preserve national interests to the greatest possible extent, which explains why agreement was reached only after four days and one night of heated negotiations. The Nice Treaty did not help reduce the complexity of
the primary law. A plethora of competences, legal instruments, and legislative procedures characterized the treaties, while the EU lacked a clear political mission.

19 Public discontent became apparent with the Irish ‘No’ in a June 2001 referendum, which only changed into a ‘Yes’ in September 2002 after Ireland had received assurances that its military neutrality would not be affected by the treaty. The governments, however, realized that there was still need for improvement. Together with the Nice Treaty, they adopted a Declaration on the Future of the Union ([2001] OJ C80/85), which called for an open and public debate on the aims and identity of the EU. This, they held, required a discussion of possibilities to simplify the treaties, of the role of national parliaments in the EU, of the delimitation of powers between the Union and its Member States, as well as of the legal status of the → Chart of Fundamental Rights of the European Union (2000), which had been proclaimed as a political statement in Nice.

5. The Treaty Establishing a Constitution for Europe and the Treaty of Lisbon

20 Given the broad nature of the questions to be addressed, as well as the growing dissatisfaction with the intergovernmental conference system, a → consensus emerged that the next treaty revision should be prepared in a process conveying more legitimacy to its results. The Laeken European Council of December 2001 therefore established a Convention on the Future of Europe, composed of representatives of national parliaments, the European Parliament, the Commission, and national governments, as well as accession candidates, which was to propose the reforms that were to be discussed at the subsequent intergovernmental conference.

21 In June 2003, a Draft Treaty Establishing a Constitution for Europe (‘Constitutional Treaty’) was published as the result of lengthy convention debates. Failing to reach an agreement at the European Council in December 2003, the Member States signed the Treaty in October 2004. The Constitutional Treaty differed from previous reform treaties as it was not merely a collection of instructions on how the treaties were to be amended, but rather a complete document intended to replace the existing primary law. The Constitutional Treaty would have abolished the three-pillar structure of the European Union, combining the Community, CFSP and PJCC to form a single Union. The previous community decision-making processes would have been applied to what was formerly the third pillar, while the CFSP would have retained much of its intergovernmental nature. Although the label ‘constitution’ suggested a renewed foundation of the EU, the substantive changes to the existing treaties would have been limited, aiming mainly at consolidation and simplification.

22 The French and Dutch electorates rejected the Constitutional Treaty in May and June 2005. Ratification of the Constitutional Treaty was halted, and the following year of stunned perplexity was officially declared a ‘phase of reflection’, which eventually led to the understanding that the Treaty was to be saved, while the constitution was to be abandoned.

23 Under German Council presidency in the first half of 2007, a process of consultations was conducted, which resulted in the adoption of a detailed agenda for an intergovernmental conference that was to begin before the end of July 2007. Effectively, the agenda already contained the gist of the new treaty text, reflecting that most of the contentious questions had already been agreed upon before the conference had even begun. This essentially reversed the usual order of events during a treaty revision process, where politically contentious points are left open until the very end, when the heads of State ultimately decide during notorious night-time negotiation sessions. When the Treaty was signed in Lisbon on 13 December 2007, hopes were high that the ratification process would be completed by the first half of 2009, so that the next elections to the European
Parliament could be conducted according to the new primary law. This, however, was not the case. Even though a majority of Member States had already ratified the Treaty, the Irish rejected it in a referendum held in June 2008. Proceedings at the German Constitutional Court delayed German ratification by more than one year, until September 2009, when the court not only declared the → Lisbon Treaty to be constitutional but also domestic legislation protecting the German parliament’s powers to be sufficient (→ Lissaboner Vertrag Case [Ger]). Similarly, proceedings at the Czech Constitutional Court as well as the refusal of President Klaus to sign the Treaty delayed Czech ratification. After the Irish had consented to the treaty in a second referendum, the Lisbon Treaty eventually entered into force on 1 December 2009.

The Lisbon Treaty preserves the majority of substantive changes the Constitutional Treaty would have introduced. These include the legally binding status of the Charter of Fundamental Rights, the extension of the co-decision procedure strengthening the EP and of qualified majority voting in the Council at the expense of unanimity, especially to measures concerning asylum, immigration, and judicial cooperation in criminal matters. Weighted voting in the Council is replaced with a double majority system. The changes to the composition of the EP and Commission, as well as the institutional changes concerning the European Council, especially the introduction of a full-time presidency, and the CFSP are also preserved.

However, there are a number of aspects which distinguish the two treaties. All references to constitution, including the etatist terminology of ‘laws’ or ‘foreign minister’, as well as the symbols of flag and anthem were removed from the text. What was previously one document has been split into two treaties, the Treaty on European Union (‘TEU’) and the Treaty on the Functioning of the European Union (‘TFEU’). Thus, the Treaty of Lisbon is yet again merely a collection of instructions on how the existing treaties are to be amended and does not replace the existing primary law as the Constitutional Treaty would have done. The three-pillar structure remains abolished. The Charter of Fundamental Rights of the European Union is now once again a separate document and not, as foreseen by the Constitutional Treaty, part of the treaties. This, however, does not affect the legal status of the charter, which is declared legally binding by Art. 6 (1) TEU.

C. Legal Status and Nature of the European Union

Initially, the European Union did not have legal personality. While the EC had been given legal personality from its inception, there was no express provision to this effect in the EU Treaty. The Lisbon Treaty repeals the dual status of EU and EC, endowing the EU—which replaced and succeeded the EC—with legal personality.

The legal nature of the European Union is still a controversial subject. It is neither a State nor an intergovernmental organization in the traditional sense (→ International Organizations or Institutions, General Aspects), and for want of a suitable name is often termed an inter- and supranational institution sui generis with federal structures. Union citizenship, the primacy of EU law, the breadth of EU competences, and the EU’s legislative powers have often been enumerated as arguments for classifying the EU as a State. However, while the European Union clearly has some State-like traits, it lacks its own territory and people, for the geographical reach of EU law and Union citizenship are defined by reference to Member State boundaries and nationality. Moreover, the EU does not have the power to extend its own competences and remains bound by the principle of conferred power. On the other hand, it has never been merely an intergovernmental organization, and has in fact veered farther away from intergovernmental structures with every treaty revision. Especially since the mid-1980s, the supranational elements of the EC—the Commission’s powers, qualified majority voting in the Council, the co-decision
procedure strengthening the EP, and the obligatory jurisdiction of the ECJ—have been strengthened continuously. These elements clearly set the EU apart from international organizations, which normally cannot force their will on recalcitrant Member States. The highly complex institutional structure of the EU, including the ECJ with its obligatory jurisdiction and the European Parliament as the world’s only directly elected multi-State parliament, as well as the constitutional law dimension of European law in a multilevel constitutional law system, clearly distinguish the EU from traditional intergovernmental organizations.

D. Member States, Accession Process, and Accession Candidates

Initially, the European Communities were composed of the six founding States: France, Germany, Italy, Belgium, Luxembourg, and the Netherlands. Subsequently, until 2007, four rounds of enlargement increased membership to 27 States. The United Kingdom, Denmark, and Ireland were the first three countries to join in 1973, after French President de Gaulle had vetoed UK accession twice in 1963 and in 1967. Norway had signed an accession agreement in January 1972, but did not ratify it after a negative referendum. Having shaken off their respective dictatorial regimes, Greece, Spain, and Portugal joined in 1981 and 1986. Accession of these three countries was particularly challenging, given their comparatively low per capita income and their large agricultural sectors, which heavily strained the EC common agricultural policy budget and increased pressure on the French agricultural sector. A membership application from Morocco was rejected in 1987, due to its geographical location outside the European continent. In 1995, Finland, Austria, and Sweden became members of the EU. Norway, having signed a second accession agreement in June 1994, was yet again barred from becoming a Member State by the negative outcome of another referendum held in November 1994. The fourth round of enlargement, which took place in 2004 and 2007, almost doubled EU membership from 15 to 27 Member States. → Cyprus, Malta, the Czech Republic, Hungary, Lithuania, Latvia, Estonia, Poland, → Slovenia, and Slovakia acceded in 2004, when negotiations with Romania and Bulgaria were still ongoing. These two States joined in 2007. On 1 July 2013 the EU had again, due to the accession of → Croatia, increased in size, to then 28 Member States. On 31 January 2020, however, the United Kingdom became the first country to formally withdraw from the European Union, leaving the current number of Member States at 27. Albania, Turkey, → North Macedonia, → Serbia, and → Montenegro, on the other hand, hold the status of accession candidates. → Bosnia and Herzegovina and → Kosovo have been recognized as potential candidates. Iceland revoked its application, dating from the year 2009, in 2015. In 2016, Switzerland formally revoked its membership application from 1992.

E. Structural Evolution: Overcoming the Pillar Architecture

The initial European Union as established by the 1992 Maastricht Treaty was characterized by a three-pillar structure. The first pillar—the supranational Community pillar—originally comprised the three European Communities: EEC, Euratom, and (until the expiration of the ECSC Treaty in 2002) the ECSC. The second and third intergovernmental pillars consisted of the CFSP and the EU’s PJCC respectively.

The Lisbon Treaty abolished the three-pillar structure of the European Union, combining the Community, the CFSP, and the PJCC to form a single Union. It applies the supranational Community decision-making processes to third-pillar matters, while the CFSP retains much of its intergovernmental nature. Unlike the PJCC provisions, which are
transferred to the TFEU, the CFSP provisions become part of the TEU, which indicates that the CFSP retains its special status.

**F. Institutions**

31 When the Rome Treaties were concluded in 1952, eight institutions existed: one high authority, two commissions, three councils, one court of justice, and one parliament. Each of the three communities had its own commission or high authority and council, while the Convention on Certain Institutions Common to the European Communities Annexed to the Treaty Establishing the European Economic Community (European Communities [ed] European Union: Selected Instruments Taken from the Treaties vol 1 [Office for Official Publications of the European Communities Luxembourg 1995] 683–96) stipulated that the Communities were to share the ECSC Court of Justice and Parliamentary Assembly. This plethora of institutions was rationalized by the Treaty Establishing a Single Council and a Single Commission of the European Communities (‘Merger Treaty’ [done 8 April 1965, entered into force 1 July 1967] [1965] OJ L152/1), which established one commission and one council that the Communities were to share.

32 Initially, the European Union itself did not have any organs. It reverted to the EC institutions. The European Council, an entity that had developed from informal conferences of the heads of State and government, did not have the status of a Community institution. The Treaty of Lisbon clarifies the institutional set-up and lists as the EU’s institutions the European Parliament, the European Council, the Council, the European Commission, the Court of Justice of the European Union, the European Central Bank (ECB), and the Court of Auditors. An Economic and Social Committee and a Committee of the Regions act in an advisory capacity in the legislative process.

**G. Activities of the European Union**

33 The EU can only act where the treaties expressly confer upon it a competence to do so. Lack of competence may lead to the annulment of the act by the ECJ in accordance with Arts 263 and 264 TFEU. This principle of conferred power, enshrined in Art. 5 TEU, ensures that the EU does not encroach upon the sovereignty of the Member States. The same applies to the principle of subsidiarity, which was introduced by the Treaty of Maastricht. In policy areas in which Member States and the EC share powers, the subsidiarity principle delimits the spheres of competence. The EU may only act if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Union. The rather restrictive effect of these two principles is alleviated somewhat by the theory of implied powers, which was developed by the ECJ in order to ensure that the EC could perform its duties effectively, as well as by Art. 352 TFEU, which accords legislative power to the EU within the scope of EU objectives.

34 The range of EU policy responsibilities has experienced a gradual extension throughout the integration process. Generally, the transfer of economic policies has preceded that of political policies, though naturally there has always been some overlap. This is due to the fact that economic integration has often been perceived as less politically sensitive than the integration of political policies. Moreover, the need for political cooperation often became apparent only after the EC/EU had begun its work on economic policies. It is also possible to discern a movement from informal and intergovernmental cooperation in newly integrated policy areas towards formalized supranational cooperation as time progresses. Thus, JHA cooperation, which had begun informally in the mid-1970s as a loose form of intergovernmental coordination, received official treaty recognition as the third Maastricht pillar in 1993, was partially transferred to the first pillar by the Treaty of Amsterdam, and
was then ‘communitarized’, ie subjected to the supranational decision-making and judicial review processes in its entirety, by the Lisbon Treaty.

35 Initially, Community policies were limited to matters pertaining directly to the common market, such as commercial policy, customs cooperation, subsidies, or competition, which were complemented by a basic social policy. The SEA added to this portfolio new policy areas, including environment, research and development, as well as economic and social cohesion. Simultaneously, foreign policy cooperation was formalized. The Maastricht Treaty not only expanded the list of Community policies by adding development, public health, and consumer protection, as well as economic and monetary union, but also introduced the CFSP and cooperation in JHA. The Treaty of Amsterdam introduced the policy areas of anti-discrimination and employment and consumer protection, and transferred much of the JHA provisions to the Community pillar. The Nice Treaty only brought about minor changes to already existing policy areas. The Lisbon Treaty again added a number of new competences, though in many instances the EC/EU already had capacity to adopt certain measures in these areas. The new competences concerned, inter alia, the establishment of a European Defence Agency, permanent structured cooperation, energy, space, humanitarian aid, intellectual property, civil protection, sport, as well as climate change.

H. Challenges and Future Prospects

36 Until the Lisbon Treaty entered into force on 1 December 2009, the—at the time—27 EU Member States appeared to be on a slow descent towards complete inability to act. The Lisbon Treaty streamlined the decision-making process and institutions and was, at the time, considered by many to be likely to be the last major treaty reform for many years. However, new challenges to the institutional system and the conceptual framework emerged just months after the treaty went into force. Since May 2010, the crisis of the euro and ensuing treaty modification have led to recurring reflections on a future reform of the treaties.

37 However, the Lisbon Treaty’s extremely long and difficult negotiation process, as well as the recurring ratification problems, makes another treaty reform difficult, arguably even unlikely. This may indicate that the traditional treaty amendment procedure, requiring ratification by all Member States, is no longer adequate. One answer to this problem could be to stress that if the EU is to remain capable of adapting to changing circumstances, the current treaty amendment procedure may need to be replaced by a more flexible mechanism, departing from unanimous consent, moving towards the type of majority consensus amendment scheme frequently used to amend multilateral conventions.

38 One of the challenges underlining the need for more flexibility and responsiveness is the crisis of the euro, better understood as a European sovereign debt crisis, which emerged in 2010 in Greece. While a Greek withdrawal from the euro area was prevented at the time, structural problems of the euro area continue to exist. And different economic policy approaches are not the only sources of controversy within the European Union. Moreover, the ECB’s monetary policy of temporarily purchasing government bonds on the secondary market has not only been a subject of discussion, but also of a 2018 decision of the ECJ, which eventually approved this method (Case C-493/17 Heinrich Weiss and Others). On the political level, responses to the European sovereign debt crisis include the European Stability Mechanism (‘ESM’), established in 2012, replacing the European Financial Stability Facility (‘EFSF’) and the European Financial Stabilisation Mechanism (‘EFSM’). Furthermore, the banking union at the EU level, tackling one of the core
problems of the euro area, was set up in 2014, consisting of the Single Supervisory Mechanism (‘SSM’) and the Single Resolution Mechanism (‘SRM’).

39 Since 2015, the European Union has been confronted with a crisis of a different character, the so-called European migrant or refugee crisis, with hundreds of thousands of people crossing the EU’s external borders. An attempt to partially relieve the Member States primarily responsible under the Dublin III regulation by resettling migrants within the European Union was boycotted by the Czech Republic, Hungary, and Poland, following infringement procedures launched by the European Commission. Actions challenging the Council’s majority decision to initiate the relocation of migrants were later dismissed by the ECJ (Joined Cases C–643/15 and C–647/15 Slovak Republic and Hungary v Council of the European Union). Even this judgment, however, did not lead to a change in policy of the Member States concerned. Far beyond the disputes over the, practically negligible, relocation programme, the crisis has manifested fundamental political differences between the Member States of the European Union (see → Common European Asylum System).

40 Other post-Lisbon developments have raised concerns over the situation of the → rule of law in certain Member States. After the European Commission had triggered the Art. 7 TEU mechanism over a heavily criticized judiciary reform in Poland in December 2017, the European Parliament also initiated proceedings based on Art. 7 TEU against Hungary in September 2018. In May 2019, the European Commission issued a warning against Romania regarding a substantial weakening of its corruption law. Besides the still-pending Art. 7 proceedings, the ECJ declared the Polish legislation concerning the lowering of the retirement age of judges of the Polish Supreme Court contrary to EU law on 24 June 2019 (Case C–619/18 European Commission v Republic of Poland).

41 In the midst of these unsolved crises, on 29 March 2017, the United Kingdom invoked Art. 50 TEU in order to leave the European Union, after a majority of 51.9 percent had voted for a ‘Brexit’ in a non-binding referendum held on 23 June 2016. Before the United Kingdom eventually withdrew from the European Union on 31 January 2020, the Brexit date was repeatedly postponed because of serious disagreements between the different British governments and the British parliament over the proposed withdrawal agreement, initially negotiated under former Prime Minister Theresa May and modified by newly appointed Prime Minister Boris Johnson. After this extended period of uncertainty for both the UK and the EU, in the end, a ‘no-deal Brexit’ was prevented by the mutual ratification in January 2020 of a modified version of the original withdrawal agreement (the ‘Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community’), establishing a transition period until 31 December 2020, with the possibility of extending it further; together with a protocol on Ireland and Northern Ireland. Previously, in October 2019, both Parties had already adopted the non-binding ‘Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom’. During the transition period, the Parties are expected to reach a long-term agreement based on the political declaration, formally establishing their future relationship. However, the United Kingdom’s withdrawal from the European Union was considered by some to be a major setback in European integration and led to questions as to the EU’s ability to function as a unifying force on the European continent. Others stressed the fact that contrary to initial expectations no other States had thus far followed the United Kingdom’s lead and that Brexit had proved once and for all the peculiar nature of the European polity, allowing members to unilaterally and freely decide to leave the union.
In the face of the post-Lisbon crises and challenges to the European Union, different scenarios and reform proposals have been presented. One of the more comprehensive contributions to the debate was issued by the European Commission as a White Paper on 1 March 2017, consisting of five scenarios for the further development of the European Union. The options brought forward are (1) a continuation of the status quo, (2) the EU’s reduction to the single market, (3) a multi-speed Europe, (4) the EU’s reduction to its core competences, and (5) a significant extension of cooperation on the European level. Reform proposals by French President Emmanuel Macron, introduced in his Sorbonne speech (‘Initiative pour l’Europe’) on 26 September 2017, aim to realize the fifth scenario and include, among other aspects, a more comprehensive approach on migration, security, and digitalization, and a more coherent economic and social system within the euro area. While some of the agenda has been partially implemented, its overall message seems to have faded away among the turmoil accompanying the various crises. The European Union’s future remains uncertain, but it is also important to note that crises have been part of the history of European integration since the very beginning.

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