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1. Constitutional History

From Paris to Lisbon

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Abstract

This chapter surveys the historical evolution of the European Union in four sections. Section 1 starts with the humble origins of the Union: the European Coal and Steel Community (ECSC), which was set up by the 1951 Treaty of Paris. While limited in its scope, the ECSC introduced a supranational idea that was to become the trademark of the European Economic Community (EEC). Section 2 focuses the EEC, while Section 3 investigates the development of the (old) European Union founded through the Treaty of Maastricht. Finally, Section 4 reviews the reform efforts leading to the Lisbon Treaty, and analyses the structure of the—substantively—new European Union as it exists today. Concentrating on the constitutional evolution of the European Union, the chapter does not present its geographic development.

Keywords: European Union, European Coal and Steel Community, 1951 Treaty of Paris, European Economic Community, Treaty of Maastricht, Lisbon Treaty

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Introduction

The idea of European integration is as old as the European idea of the sovereign State.[1] Yet the spectacular rise of the latter overshadowed the idea of European union for centuries. In the twentieth century, two ruinous world wars and the social forces of globalization have, however, increasingly discredited the idea of the *sovereign* State. The decline of the nation State has found expression in the spread of interstate cooperation.[2]

The various efforts at European cooperation after the Second World War originally formed part of a general transition from an international law of coexistence to an international law of cooperation.[3] 'Europe was beginning to get organised.'[4] This development began with three international organizations. First, the Organisation for European Economic Cooperation (1948), which had been created after the Second World War by 16 European States to administer the international aid offered by the United States for European reconstruction.[5] Second, the Western European Union (1948, 1954) that established a security alliance to prevent another war in Europe.[6] Third, the Council of Europe (1949), which had inter alia been founded to protect human rights and fundamental freedoms in Europe.[7] None of these grand international organizations was to lead to the European Union. The birth of the latter was to take place in a much humbler sector: coal and steel.

The 1951 Treaty of Paris set up the European Coal and Steel Community (ECSC).[8] Its original members were six European States: Belgium, France, Germany, Italy, Luxembourg, and the Netherlands. This first
p. 5 Community had been created to *integrate* one ↵ industrial sector; and the very concept of *integration* indicated the wish of the contracting States 'to break with the ordinary forms of international treaties and organisations'.[9]

The Treaty of Paris led to the 1957 Treaties of Rome, which created two additional Communities: the European Atomic Energy Community and the European (Economic) Community. The 'three Communities' were partly merged in 1967,[10] but continued to exist in relative independence. A major organizational leap was taken in 1993, when the three Communities were themselves integrated into the European Union. For a decade, this European Union was, however, under constant reconstruction. Finally, and in an attempt to prepare the Union for the twenty-first century, a European Convention was charged to draft a Constitutional Treaty in 2001. The latter, unexpectedly, failed in 2005; and it took a few more years to rescue the reform through the Reform (Lisbon) Treaty that came into force in 2009. This Lisbon Treaty has replaced the 'old' European Union with the 'new' European Union.

This chapter surveys the historical evolution of the European Union in four sections. Section 1 starts with the humble origins of the Union: the European Coal and Steel Community (ECSC). While limited in its scope, the ECSC introduced a supranational idea that was to become the trademark of the European Economic Community (EEC). The EEC will be analysed in Section 2. Section 3 investigates the development of the (old) European Union founded through the Treaty of Maastricht. Finally, Section 4 reviews the reform efforts leading to the Lisbon Treaty, and analyses the structure of the—substantively—new European Union as it exists today. Concentrating on the constitutional evolution of the European Union (see Figure 1.1),[11] this chapter will *not* present its geographic development.[12]

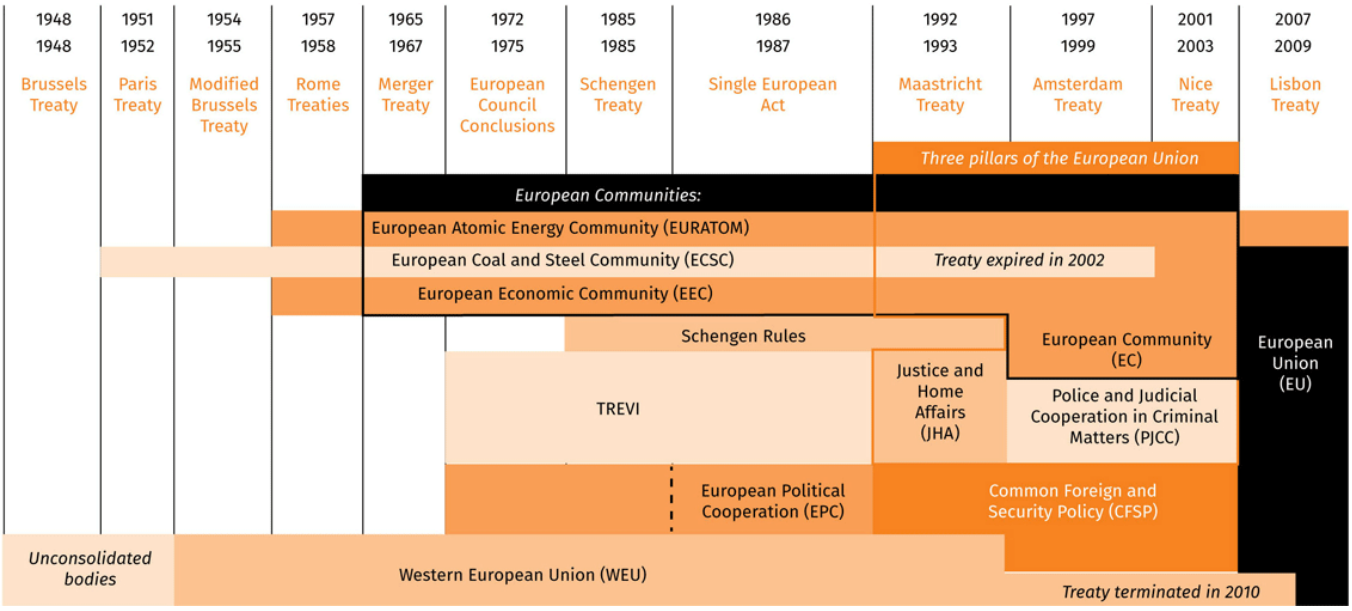

Figure 1.1 Historical evolution of the Union

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1. From Paris to Rome: The European Coal and Steel Community

The initiative to integrate the coal and steel sector came—after an American suggestion—from France.[13]
p. 6 The French Foreign Minister, Robert Schuman, revealed the plan to build a European Community for Coal and Steel on 9 May 1950:

> Europe will not be made all at once, nor according to a single, general plan. It will be formed by taking measures which work primarily to bring about real solidarity. The gathering of the European nations requires the elimination of the age-old opposition of France and Germany. The action to be taken must first of all concern these two countries. With this aim in view, the French Government proposes to take immediate action on one limited but decisive point. The French Government proposes that Franco-German production of coal and steel be placed under a common [Commission], within an organisation open to the participation of the other European nations. *The pooling of coal and steel production will immediately ensure the establishment of common bases for economic development as a first step in the federation of Europe, and will change the destinies of those regions which have long been devoted to the manufacture of arms, to which they themselves were the constant victims.*[14]

The 'Schuman Plan' was behind the Treaty of Paris (1951) establishing the European Coal and Steel Community. Six European States would create this Community for a period of 50 years.[15] The Treaty of Paris was no grand international peace treaty. It was designed to 'remove the main obstacle to an economic partnership'.[16] This small but decisive first step towards a federal or *supranational* Europe will be discussed first. The 'supranational' idea would soon be exported into wider fields.[17] However, the attempt to establish a federal European Defence Community, and with it a European Political Community, did fail. Until the 1957 Rome Treaties, the European Coal and Steel Community would thus remain the sole supranational Community in Europe.

a. The Supranational Structure of the ECSC

The structure of the ECSC differed from that of ordinary intergovernmental organizations. It was endowed
p. 8 with a 'Commission',[18] a Parliament,[19] a 'Council', and a 'Court'.[20] The ECSC Treaty had placed the Commission at its centre. It was its duty to ensure that the objectives of the Community would be attained.[21] To carry out this task, the Commission would adopt decisions, recommendations, and opinions.[22] The Commission would thereby be composed in the following way:

> The [Commission] shall consist of nine members appointed for six years and chosen on the grounds of their general competence … The members of the [Commission] shall, in the general interest of the Community, be completely independent in the performance of these duties, they shall neither seek nor take instructions from any Government or from any other body. They shall refrain from any action incompatible with the *supranational character of their duties*. Each Member State undertakes to respect this *supranational character* and not to seek to influence the members of the [Commission] in the performance of their tasks.[23]

The Commission constituted the supranational heart of the new Community. The three remaining institutions were indeed peripheral to its functioning. The Parliament, consisting of delegates who would 'be designated by the respective Parliaments from among their members',[24] had purely advisory functions.[25] The Council,[26] composed of representatives of the national governments,[27] was charged to 'harmonise the action of the [Commission] and that of the Governments, which are responsible for the general economic policies of their countries'.[28] Finally, a Court—formed by seven independent judges—was to 'ensure that in the interpretation and application of this Treaty, and of rules laid down for the implementation thereof, the law is observed'.[29]

In what ways was the European Coal and Steel Community a *supranational* organization? The Community could carry out its tasks through the adoption of 'decisions', which would be 'binding in their entirety'.[30]
p. 9 And the directly applicable ↵ nature of ECSC law quickly led early commentators to presume an 'inherent supremacy of Community law'.[31] The novel character of the Community—its 'break' with ordinary international organizations—thus lay in the normative quality of its secondary law. The transfer of decision-making powers to the Community indeed represented a transfer of 'sovereign' powers.[32]

However, this was only one dimension of the ECSC's 'supranationalism'. Under the Treaty of Paris, the organ endowed with supranational powers was itself 'supranational'; that is, it was independent of the will of the Member States. The Commission was composed of independent 'bureaucrats', and it could act by a majority of its members.[33] This ability of the Community to bind Member States against their will radically departed from the international law ideal of the sovereign equality of States; and, it was especially *this* decisional dimension that had inspired the very notion of supranationalism.[34]

But the legal formula behind the European Coal and Steel Community was dual: the absence of a normative veto in the national legal orders was complemented by the absence of a decisional veto in the Community legal order.[35] This dual nature of supranationalism was to become the trademark of the European Union and attempts were soon made to export it into wider fields.

b. The (Failed) European Defence Community

The European Coal and Steel Community had only been 'a first step in the federation of Europe';[36] and the six Member States soon tried to expand the supranational idea to the area of defence. The initiative came from the (then) French Prime Minister, René Pleven. The 'Pleven Plan' suggested 'the creation, for our common defence, of a European army under the political institutions of a united Europe'.[37] For that, '[a]
p. 10 minister of defence would be nominated by the participating governments and ↵ would be responsible, under conditions to be determined, to those appointing him and to a European [Parliament]'.[38] The plan was translated into a second Treaty signed in Paris that was to establish a second European Community: the European Defence Community (EDC).

The core aim of the 1952 Paris Treaty was to 'ensure the security of the Member States against aggression' through 'the *integration* of the defence forces of the Member States'.[39] The Treaty thus envisaged the creation of a European army under the command of a supranational institution.[40] Due to disagreement between the Member States, however, the exact nature of the supranational *political* institution to

command the European army had been deliberately left open. The Treaty postponed the problem until six months *after* its coming into force by charging the future Parliament of the EDC with the task of finding an institutional solution. In the words of the EDC Treaty:

> Within the period provided for in Section 2 of this Article, the [Parliament] shall study:
>
> (a) the creation of a [Parliament] of the European Defence Community elected on a democratic basis;
>
> (b) the powers which might be granted to such [a Parliament]; and
>
> (c) the modifications which should be made in the provisions of the present Treaty relating to other institutions of the Community, particularly with a view to safeguarding an appropriate representation of the States.
>
> In its work, the [Parliament] will particularly bear in mind the following principles:
>
> The definitive organisation which will take the place of the present transitional organisation should be conceived so as to be capable of constituting one of the elements of an ultimately federal or confederal structure, based upon the principle of the separation of powers and including, particularly, a bicameral representative system.
>
> The [Parliament] shall also study the problems to which the coexistence of different organisations for European cooperation, now in being or to be created in the future, give rise, in order to ensure that these organisations are coordinated within the framework of the federal or confederal structure.[41]

The problem with this postponement strategy was, sadly, that it did not work. The exact nature of the political authority behind a European army soon came to be seen as part and parcel of the EDC. And, in order to obtain French ratification ↵ of the EDC Treaty, an ad hoc Parliament was created so as to anticipate the work of the future Parliament of the EDC.[42]

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The fruit of this anticipatory effort was a proposal for a European Political Community.[43] The Draft Treaty establishing the European Political Community suggested the establishment of a 'European Community of a supranational character', which was to be '*founded upon a union of peoples and States*'.[44] The European Political Community aimed at merging the European Coal and Steel Community and the EDC into a new overall institutional structure.[45] Its central institution was a 'Parliament' that would have consisted of two Houses—the House of the Peoples and the Senate. This bicameral parliament would have been the principal lawmaking organ of the European (Political) Community.[46] The novel constitutional structure thus promised to establish a democratic and responsible political authority behind the EDC. Yet despite all efforts and assurances, the EDC—and with it the European Political Community—was a failure. The French Parliament rejected the ratification of the second Paris Treaty in 1954.

The failure of the EDC discredited the idea of *political* integration for decades. European integration consequently returned to the philosophy of *economic* integration.[47] A first suggestion for a 'European revival' concerned the integration of an economic sector adjacent to coal: nuclear energy. This French

proposal for further sectoral integration met the criticism of those Member States favouring the creation of a common market for *all* economic sectors.[48] In the end, a compromise solution was chosen that proposed the creation of *two* additional European ↵ Communities: the European Atomic Energy Community and the European Economic Community. Each Community was based on a separate international treaty signed in Rome in 1957.

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Thanks to its non-sectoral approach, the second Rome Treaty would become the foundation and yardstick for all future European integration projects.[49] By establishing a common market, the European Economic Community was to 'lay the foundations of *an ever closer union* among the peoples of Europe'.[50]

2. From Rome to Maastricht: The European (Economic) Community

The idea of a European Economic Community had first been discussed in 1955 in the Italian city of Messina. The Messina Conference had charged Paul-Henry Spaak with producing a report on the advantages of a common market. On the basis of the 'Spaak Report', the 1957 Rome Treaty establishing the European Economic Community decided to create a common market—both in industrial and agricultural products.

The inner core of the European common market was the creation of a customs union. A customs union is an economic union with *no* internal customs duties and *one* external customs tariff.[51] But the idea behind the EEC Treaty went beyond a customs union. It aimed at the establishment of a common market in goods as well as 'the abolition, as between Member States, of obstacles to freedom of movement for persons, services and capital'.[52] The European Economic Community was equally charged with, inter alia, the adoption of a common transport policy and 'the institution of a system ensuring that competition in the common market is not distorted'.[53] An overview of the original structure and content of the 1957 EEC Treaty can be found in Table 1.1.

Table 1.1 Original EEC Treaty: content

Preamble	
Part I: Principles	
Part II. Foundations of the Community	Part III. Policy of the Community
Title I. Free Movement of Goods	Title I. Common Rules
Title II. Agriculture	Title II. Economic Policy
Title III. Free Movement of Persons, Services and Capital	Title III. Social Policy
Title IV. Transport	Title IV. The European Investment Bank
Part IV. Association of Overseas Countries	
Part V. Institutions of the Community	
Part VI. General and Final Provisions	

The Rome Treaty was—much more than the Treaty of Paris—a framework treaty. It provided a basic legal framework and charged the European institutions with adopting legislation to fulfil the objectives of the Treaty. What would this mean for the character of the European Economic Community?

a. Normative Supranationalism: The Nature of European Law

Like the ECSC, the European Economic Community would enjoy autonomous powers. The EEC Treaty indeed acknowledged two 'supranational' instruments. p. 13 ↵ The Community could directly act upon individuals through legislative 'regulations' or executive 'decisions'. These acts were designed to be directly applicable within the national legal orders. But the EEC Court soon showed its eagerness to go beyond the drafter's design by declaring that, since 'the Community constitutes a new legal order of international law', individuals' rights 'arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States'.[54] The direct effect of Community law—its ability to be applied by national courts—would indeed become the 'ordinary' state of European law.[55]

This normative quality of European law indeed contrasted with the 'ordinary' state of international law:

> By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply ... The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty[.][56]

This famous passage announced the supremacy (or primacy) of Community law over national law. Where two equally applicable norms of European and national law came into conflict, the former would prevail over the latter. The law stemming p. 14 ↵ from the EEC Treaty was 'an independent source of law' that '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'.[57] European law could therefore not only enjoy direct effect, it would also be supreme in the Member States. The Court thus confirmed and developed the supranational quality of European law anticipated by the European Coal and Steel Community.

b. Decisional Supranationalism: The Governmental Structure

The Rome Treaty had established a number of institutions, which were modelled on those of the Paris Treaty.[58] Yet underneath formal similarities, the institutional balance within the European Economic Community differed significantly from that of the European Coal and Steel Community. Indeed, the EEC Treaty even carefully avoided all references to the concept of 'supranationalism'.[59]

These doubts about the supranational nature of the EEC were not confined to semantics. For the enormously enlarged scope for European integration had required a price: the return to a more international format of decision-making. Emblematically, the EEC Treaty now charged the Council—not the Commission—with the task '[t]o ensure that the objectives set out in this Treaty are attained'.[60] Instead of the 'supranational' Commission, it was the 'international' Council that operated as the central decision-maker.[61] The Council was composed of 'representatives of the Member States';[62] and it would, when deciding by unanimous agreement, follow traditional international law logic.[63] However, the Rome Treaty avoided a purely international solution by insisting on the prerogative of the (supranational) Commission to initiate Community bills.

Decisional supranationalism could also still be seen at work once the Council acted by (qualified) majority. Following a transitional period,[64] the Rome Treaty ↵ had indeed envisaged a range of legal bases allowing for qualified majority voting in the Council. Yet, famously, the supranational machinery received —once more—an intergovernmental spanner from France. But this time it was not the French Parliament which rocked the European boat. Behind the first constitutional crisis of the young EEC stood the (then) French President, General Charles de Gaulle.

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What was the General's problem? The Community was about to start using qualified majority voting when it passed into the third transitional phase on 1 January 1966.[65] In March 1965, the Commission had made a —daring—proposal for the financing of the Community budget. The Council stormily discussed the proposal in June of that year; and after an inconclusive debate, the French Foreign Minister declared the discussions to have failed. The Commission made a new proposal, but the French government decided to simply boycott the Council. This boycott became famous as France's 'empty chair' policy. France would not take its chair within the Council unless a 'compromise' was found that balanced the (imminent) move to majority voting with France's national interests. To solve this constitutional conflict, the Community organized two extraordinary Council sessions in Luxembourg (as Brussels was the place of the— supranational—devil). The compromise between the supranational interests of the Community and the national interests of its Member States became known as the 'Luxembourg Compromise'.[66] The latter declared:

> Where, in the case of decisions which may be taken by majority vote on a proposal of the Commission, very important interests of one or more partners are at stake, the Members of the Council will endeavour, within a reasonable time, to reach solutions which can be adopted by all the Members of the Council while respecting their mutual interests and those of the Community, in accordance with Article 2 of the Treaty. With regard to the preceding paragraph, the French delegation considers that where very important interests are at stake, the discussion must be continued until unanimous agreement is reached. The six delegations note that there is a divergence of views on what should be done in the event of a failure to reach complete agreement. The six delegations nevertheless consider that this divergence does not prevent the Community's work being resumed in accordance with the normal procedure.[67]

The formal status of the Luxembourg Compromise, as well as its substantive content, was ambiguous. Textually, its wording did not grant each Member State a constitutional right to veto Community decisions.
p. 16 Nonetheless, decision-making ↵ in the Council would henceforth take place under the 'shadow of the veto'.[68] The Damoclean sword of the Luxembourg Compromise led to consensual decision-making within the Council even for legal bases that allowed for (qualified) majority voting. This 'constitutional convention' would influence the decisional practice of the Community for almost two decades.[69]

But the young European Economic Community (partly) balanced this decline of supranationalism *in the Council* by a rise of supranationalism in two other Community institutions. A small but significant step towards supranationalism was achieved in the European Parliament, when the Community chose to replace the financial contributions of the Member States with its own resources.[70] To compensate for this decline of *national* parliamentary control over State contributions, it was felt necessary to increase the *supranational* controlling powers of the European Parliament.[71] And to increase the democratic credentials of that Parliament, the latter was finally transformed from an 'assembly' of national parliamentarians into a directly elected Parliament.[72] Sadly, this rise in the Parliament's democratic credentials was not immediately matched by a rise in its powers beyond the budgetary process. Parliamentary involvement in the exercise of the Community's legislative powers would have to wait until the Single European Act.[73]

Until this time, it was a third institution that came to rescue the 'deficient Community legislator'—the
p. 17 Court of Justice.[74] In the late 1970s, the Court decided to ↵ take decision-making into its own hands. Instead of waiting for *positive* integration through European legislation, the Court chose to integrate the common market *negatively*. This strategy of 'negative integration' would not depend on political agreement within the Council. It pressed for market integration by judicial means.[75]

The famous illustration of this shift *within* decisional supranationalism from positive integration to negative integration is *Cassis de Dijon*.[76] The case concerned a sales prohibition of a French fruit liqueur in Germany. The importer had applied for a marketing authorization, which had been refused by the German authorities on the grounds that, in the absence of European harmonization, the national rules on consumer protection applied. The lack of European harmonization had been a result of the Luxembourg Compromise. This would originally have been the end of the story. But after a decade of judicial patience, the European Court was having none of it. It declared that—even in the absence of European harmonization—the Member States could not impose their national legislation on foreign goods, *unless this was considered to be justified by the European Court of Justice*.[77] The judgment elevated the principle of mutual recognition to a general constitutional principle of the common market.[78] It means that, in the absence of European harmonization, it is the Court that ultimately decides which national law regulates a particular situation. The constitutional message behind *Cassis de Dijon* was thus that the decline of decisional supranationalism in the Council would, if need be, be compensated for by the Court.

c. Intergovernmental Developments Outside the EEC

The analysis of the second period in the evolution of the European Union would be incomplete if we concentrated solely on the supranational developments *within* the European Economic Community. There were indeed important developments *outside* the Community, which would—with time—shape the

structure and content of the future European Union. These intergovernmental developments began when the foundational period of the EEC came to a close by the end of the 1960s. Far from constituting the 'dark ages' of the Community, this period saw '[t]he revival of ambition'.[79]

The search for a 'Europe of the second generation' began in 1969 with the Hague Summit.[80] Its Final
p. 18 Communiqué called inter alia for the promotion of 'economic ↵ and monetary union' and 'progress in the matter of political unification'.[81] The possibility of economic and monetary union was further explored in the Werner Report.[82] The report called for the realization of monetary union 'to ensure growth and stability within the Community and reinforce the contribution it can make to economic and monetary equilibrium in the world and make it a pillar of stability'.[83] However, disagreement existed on how to achieve this aim. Should economic union precede monetary union; or should monetary union precede and precipitate economic union?[84] The dispute was never resolved; but a compromise would—after years of debate and delay—lead to the establishment of the European Monetary System in 1979.

The possibility of political union was explored in the Davignon Report, which laid the foundations for a 'European Political Cooperation'. The report linked political unification with cooperation in the field of foreign policy. This cooperation was to 'ensure greater mutual understanding with respect to the major issues of international politics, by exchanging information and consulting regularly' and to 'increase their solidarity by working for a harmonisation of views, concertation of attitudes and joint action when it appears feasible and desirable'.[85] To achieve these objectives, the Member States decided to have their foreign Ministers regularly meet at the initiative of the President-in-office of the Council. But, importantly, this was not the creation of a supranational foreign policy: European Political Cooperation was a strictly international mechanism *outside* the European Communities. In this way, old French wounds from the (failed) European Defence and Political Communities would not be reopened.[86]

A third international development concerned the area of justice and home affairs. Following discussions on European Political Cooperation, the Member States had decided to set up the 'TREVI' mechanism.[87] Originally designed as a political instrument to fight international terrorism, its scope was subsequently enlarged to the coordination of police and judicial efforts to combat organized crime. In the light of this development, some Member States were increasingly willing to abolish border controls; and an
p. 19 international treaty between five Member States was signed ↵ in 1985 near Schengen.[88] The Schengen Agreement and its implementing convention aimed at establishing an area without border controls, with common rules on visas, and police and judicial cooperation.[89] This 'Schengen Area' would constitute an independent intergovernmental regime outside the European Communities until it was integrated into the European Union structure a decade later.

Finally, there is a fourth intergovernmental development that emerges in this period of European integration: the birth of the 'European Council'. The 1969 Hague Summit had shown the potential for impulse that the heads of State or government could give to the evolution of the European Communities. And when the Community traversed the global recession in the 1970s, the heads of State or government decided to realize this potential and began to meet regularly. The Final Communiqué of the 1974 Paris Summit thus 'institutionalized' these summit meetings in the following terms:

> Recognizing the need for an overall approach to the internal problems involved in achieving European unity and the external problems facing Europe, the Heads of Government consider it essential to ensure progress and overall consistency in the activities of the Communities and in the work on political cooperation. The Heads of Government have therefore decided to meet, accompanied by the Ministers of Foreign Affairs, three times a year and whenever necessary, in the Council of the Communities in the context of political cooperation. The administrative secretariat will be provided for in an appropriate manner with due regard to existing practices and procedures. In order to ensure consistency in Community activities and continuity of work, the Ministers of Foreign Affairs, meeting in the Council of the Community, will act as initiators and coordinators. They may hold political cooperation meetings at the same time.[90]

The establishment of the European Council as a semi-permanent 'government' of the European
p. 20 Communities was a momentous development.[91] While formally ↵ created 'outside' the Rome Treaty, it would evolve into a powerful political motor of European integration and thereby complement the task of the supranational engine of the Commission.

d. Supranational and Intergovernmental Reforms through the Single European Act

Despite important supranational and intergovernmental developments within and without the European Communities over 30 years, the first major Treaty reform would only take place in 1986 through the Single European Act (SEA). The Act received its name from the fact that it combined two reforms in a *single* document. On the one hand, the SEA represented a constitutional reform of the European Economic Community.[92] On the other hand, it reformed the European Political Cooperation as an intergovernmental mechanism outside the formal structure of the European Communities.[93]

The core of the constitutional reform within the European Communities lay in the idea of completing the common market by '1992'.[94] The project had been devised in the 1985 White Paper 'Completing the Internal Market'.[95] Leaving the Luxembourg Compromise behind, it sought to revamp the idea of positive integration. A fresh term—the internal market—reflected the desire to break with the past and to realize this fundamental aim of the original Rome Treaty.

In order to achieve this aim, the SEA not only expanded the Community's competences significantly, but it also reformed its institutional structure in three ways. First, the Single European Act expanded supranational decision-making in the Council by adding legal bases allowing for (qualified) majority voting.[96] Second, the legislative powers of the European Parliament were significantly enhanced by
p. 21 ↵ means of a new lawmaking procedure: the cooperation procedure.[97] Third, the Court of Justice would be assisted by another court. Due to its jurisdiction 'to hear and determine at first instance', the Court would become known as the 'Court of First Instance'.[98]

The constitutional reforms of the Single European Act, however, still left important aspects outside the supranational structure of the European Communities. Indeed, all four intergovernmental developments discussed in the previous section continued to be outside the European Treaties. The SEA did *not* bring the

'European Monetary System' under a supranational roof.[99] The SEA did *not* integrate foreign affairs—even if it placed the EPC on a more formal legal footing. The SEA did *not* bring justice and home affairs within the scope of the European Treaties. And, while formally recognizing the European Council,[100] the SEA had *not* elevated it to the status of a Community institution. It would take two more decades before all four issues were finally resolved.

These future developments took place in a third historical period. They will be discussed in the next section.

3. From Maastricht to Nice: The (Old) European Union

Thanks to its thematic proximity to the internal market, economic and monetary union soon came to be seen as the next stage in the process of European integration. Following the Delors Report,[101] the 1989 European Council decided to push the matter by calling for an Intergovernmental Conference.[102] The decision provoked an inspired response from the European Parliament, which argued that it was 'increasingly necessary rapidly to transform the European Community into a European Union of [the] federal type'.[103] Pointing to the Single European Act,[104] Parliament insisted: 'the agenda of the Intergovernmental Conference must ↵ be enlarged beyond economic and monetary union'.[105] Having received eminent support,[106] this request for a link between *monetary* and *political* union was heard by the European Council.[107] The European Council thus called for *two* parallel intergovernmental conferences. They would result in the Treaty on European Union signed in Maastricht in 1992, which entered into force a year later.[108]

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The Treaty on European Union represented 'a new stage in the process of European integration'.[109] Yet it was a constitutional compromise: the Member States had been unable to agree on placing all new policies into the supranational structure of the European Communities. From the four Single European Act 'leftovers', solely economic and monetary union would become a supranational policy—and that at the price of differential integration.[110] By contrast, the European Council as well as the two remaining intergovernmental policies—Foreign and Security Policy and Justice and Home Affairs—would retain their international character. However, it was agreed to strengthen their institutional links with the Community system. This was achieved by placing the European Council, the two intergovernmental policies, *as well as the European Communities* under a common legal roof: the European Union. The overall constitutional structure of the Union was thereby defined by the first article of the (old) Treaty on European Union:

> By this Treaty, the High Contracting Parties establish among themselves a European Union, hereinafter called 'the Union'. This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizens. The Union shall be founded on the European ↵ Communities, supplemented by the policies and forms of cooperation established by this Treaty. Its task shall be to organise, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples.[111]

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The provision established a separate international organization—the European Union—that was different from the European Communities. What was the relationship between the two organizations? Due to the textual structure of the Maastricht Treaty, the relationship came to be compared—somewhat misleadingly—to a Greek temple. This temple architecture became the defining characteristic of the 'old' (Maastricht) European Union and will be discussed first. Subsequent Treaty amendments within this third period kept the Union's pillar structure intact, but strengthened and widened the supranational elements of the First Pillar significantly.

a. The Temple Structure: The Three Pillars of the (Maastricht) Union

The legal structure of the Maastricht Treaty led the European Union to be identified with a Greek temple (see Figure 1.2). The 'common provisions' would form the roof ↵ of the Union 'temple'. They laid down common objectives,[112] and established that the Union was to 'be served by a single institutional framework'.[113] Underneath this common roof were the three pillars of the Union: the European Communities (First Pillar), the Common Foreign and Security Policy (Second Pillar), and Justice and Home Affairs (Third Pillar). The base of the temple was formed by a second set of provisions common to all three pillars: the 'final provisions' of the Maastricht Treaty. These final provisions not only determined the relationship between the pillars,[114] but also contained common rules for their amendment.[115] Importantly, apart from the common and final provisions, each of the three pillars was subject to its own rules. The constitutional fragmentation caused by the Maastricht Treaty was consequently criticized as having created a 'Europe of bits and pieces'.[116]

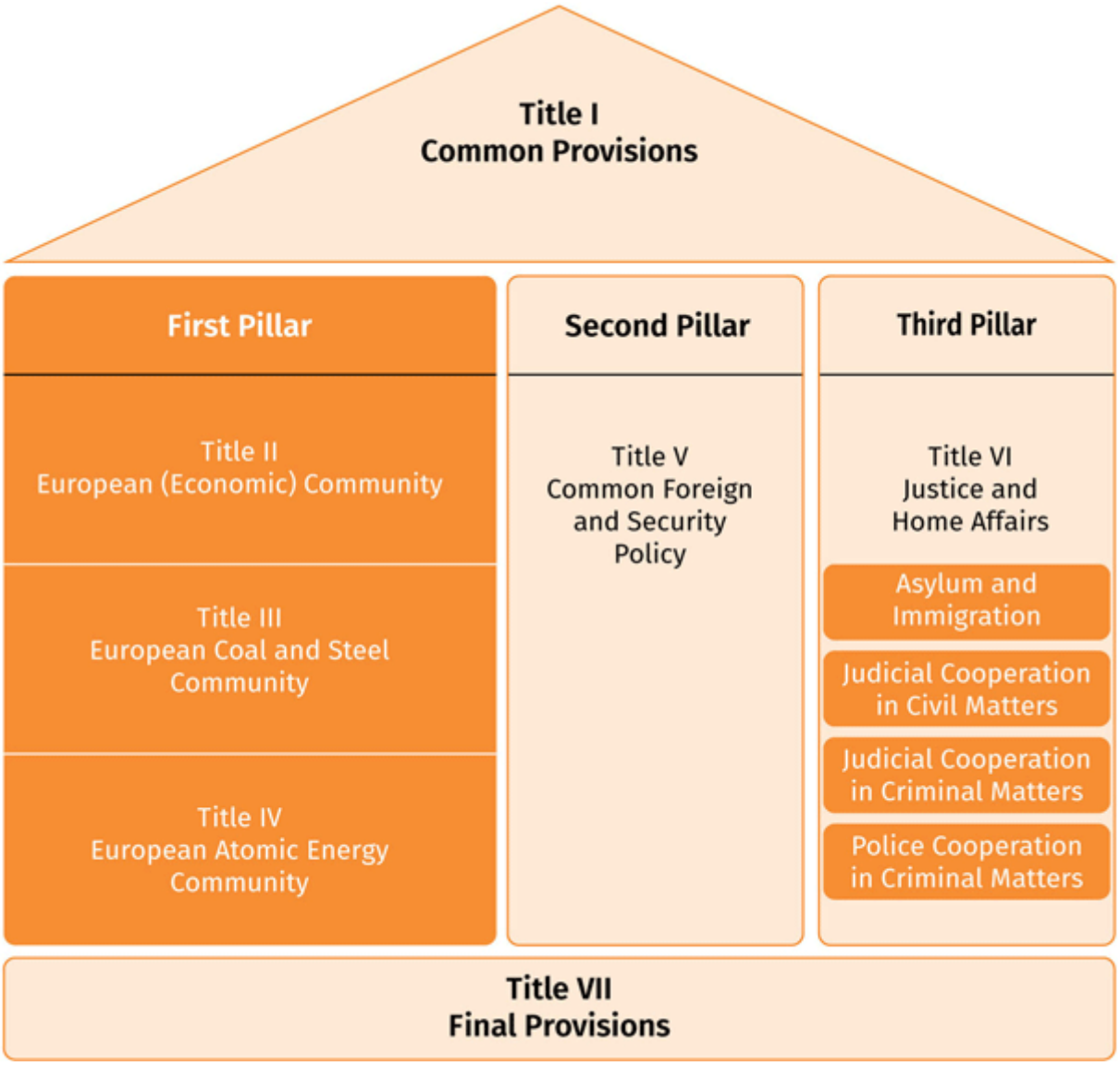

Figure 1.2 Pillar structure of the 'old' (Maastricht) Union

aa. The First Pillar: The European Communities

At the heart of the Maastricht Treaty lay a fundamental reform of the European Communities and, in particular, the European Economic Community. And due to its substantially enlarged scope, the latter would henceforth be renamed the European Community.[117]

The Maastricht Treaty significantly enlarged the competences of the European Community. Most importantly, it introduced a supranational *monetary policy* and thereby established the European System of Central Banks (ESCB) and the European Central Bank (ECB).[118] The ECB would eventually have the exclusive right to authorize the issue of bank notes ('euros') within the Community.[119] For two Member States, this was too much supranationalism and they decided to 'opt out' of any European monetary union.[120]

What institutional changes were brought by the Maastricht reform? With regard to political union, the
p. 25 Maastricht Treaty created a number of important innovations. ↵ First, it introduced the political status of a '*citizenship* of the Union'.[121] Apart from free movement rights, Union citizens would henceforth enjoy a number of political rights. These would include 'the right to vote and to stand as a candidate at municipal elections' in another Member State, 'the right to vote and to stand as a candidate in elections to the European Parliament' in another Member State, as well as the right to protection by the diplomatic or consular authorities of any Member State.[122] Second, the constitutional prerogatives of the European Parliament were significantly expanded.[123] The most striking aspect of the rising *democratic* supranationalism within the Union was the introduction of a new legislative procedure: the *co-decision* procedure. Going beyond the cooperation procedure of the Single European Act, the co-decision procedure would allow the European Parliament to 'co-decide' European legislation on a par with the Council.[124] Finally, the Maastricht Treaty continued the expansion of qualified majority voting in the Council.

bb. The Second Pillar: Common Foreign and Security Policy

Under the Single European Act, the cooperation of national foreign affairs within the 'European Political Cooperation' had still been conducted *outside* the European Treaties. This changed with the Maastricht Treaty which brought foreign and security affairs *inside* the European Union. A Common Foreign and Security Policy (CFSP) would henceforth constitute the Union's Second Pillar.[125] The latter could potentially cover the area of defence;[126] yet the exact legal relationship between a future Common Security and Defence Policy (CSDP) and the 'Western European Union' was left for another day.[127]

p. 26 ↵ Importantly, the integration of foreign and security policy into the Union did *not* mean that it had become a supranational policy. On the contrary, the Maastricht compromise determined that the CFSP could retain its international character. The dominant Union actors were thus the European Council and the Council—two intergovernmental institutions. The role of the supranational institutions was, by contrast, minimalist. The Parliament only enjoyed the right to be consulted and to make recommendations,[128] while the Commission was only entitled to be 'fully associated' with the CFSP.[129] The decisional intergovernmentalism within the CFSP was matched by its normative internationalism. Indeed, the objectives of the CFSP were not to be pursued by the Community's ordinary legal acts—such as regulations and decisions. On the contrary, the Second Pillar had established a number of specific instruments such as 'common positions' and 'joint actions'.[130] And since the Court of Justice was not to have any jurisdiction within this area,[131] the direct effect and supremacy of these instruments was in serious doubt.

cc. The Third Pillar: Justice and Home Affairs

The Third Pillar expanded the competences of the European Union into the field of 'Justice and Home Affairs' so as to better achieve the free movement of persons. For this purpose, it was given the power to act, inter alia, in the areas of asylum, immigration, judicial cooperation in civil and criminal matters, and police cooperation.[132] The 'Justice and Home Affairs' pillar would thus incorporate and replace the TREVI mechanism. However, the Union would not (yet) integrate the 'Schengen Area' and its *acquis*.

The nature of the Third Pillar was as international as that of the Second Pillar. Its decision-making processes as well as the normative quality of its law lacked a supranational character.[133]

b. A Decade of 'Constitutional Bricolage': Amsterdam and Nice

The decade following the Maastricht Treaty was an accelerated decade: Treaty amendment followed Treaty amendment. The increased demand for constitutional change was partly caused by a changed geopolitical context. With the fall of the Berlin Wall in 1989, Eastern Europe wished to join Western Europe under the legal roof of the European Union. Eastern enlargement, however, posed formidable ↵ constitutional problems. How could an institutional system that worked for 12 States be made to work for twice that number? But *widening* was only one aspect of the demand for constitutional change. The Union equally wished to *deepen* its evolution towards political union by establishing more democratic and transparent institutions.

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The search for institutional solutions to these questions began with the 1997 Treaty of Amsterdam and continued with the 2001 Treaty of Nice. Both treaties introduced *minor* changes, yet none succeeded in offering the much-needed *major* constitutional reform of the Union. Both reforms indeed represented a constitutional 'bricolage' of pragmatic and temporary political compromises.[134]

aa. The Amsterdam Treaty: Dividing the Third Pillar

What will the Treaty of Amsterdam be remembered for? In addition to minor changes within the First and Second Pillars,[135] its central reform lay in the changes brought to the Third Pillar—that is: Justice and Home Affairs.

The Amsterdam Treaty 'split asunder' what the Maastricht Treaty had joined together.[136] Indeed, from the subject areas originally falling within the Third Pillar, only those dealing with criminal law survived into the 'new' Third Pillar. The remainder, dealing essentially with asylum and immigration as well as judicial cooperation in civil matters, was transferred to the First Pillar, as a more supranational approach for these matters had become favourable. The breaking up of the (old) 'Justice and Home Affairs' pillar left the new Third Pillar with a radically limited scope. The latter now only covered 'common actions among the Member States in the field of police and judicial cooperation in criminal matters and preventing and combating racism and xenophobia'.[137] After the Amsterdam amputation, the 'new' Third Pillar therefore came to be known as the Police and Judicial Cooperation in ↵ Criminal Matters (PJCC) pillar. This shortened pillar remained an intergovernmental pillar—even if there were some minor supranational additions.[138]

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What happened to the 'amputated' part of the (old) Third Pillar? The Amsterdam Treaty inserted it into the First Pillar, and thus transformed this *Union* policy into a *Community* policy. A new title introduced into the EC Treaty thus granted the Community powers in the area of 'visa, asylum, immigration and other policies related to free movement of persons'.[139] This was a supranational policy, albeit with intergovernmental traits.[140]

But this was not all. The Member States finally agreed to 'incorporate' the Schengen Agreement and its legal offspring into the European Union.[141] The incorporation of the Schengen *acquis* under the roof of the European Union was legally complex for three reasons. First, not all Member States were parties to the international agreements and a legal solution had to be found for the non-participants.[142] Second, some *non*-Member States of the Union had been associated with the Schengen Agreement and would thus wish to be associated with the incorporation and future development of the Schengen *acquis*.[143] Third, since the old Third Pillar had been split into two parts—one supranational and one intergovernmental—the Schengen *acquis* could not be incorporated in one piece. It would also need to be divided according to whether the subject matter fell into the (new) First or the (new) Third Pillar. For that reason, the Schengen Protocol left it to the Council to determine 'in conformity with the relevant provisions of the Treaties, the legal basis for each of the provisions or decisions which constitute the Schengen acquis'.[144] But as long as the Council had not taken any implementing measures, 'the provisions or ↵ decisions which constitute the Schengen acquis [would] be regarded as acts based on Title VI of the Treaty on European Union'; that is, acts of the Third Pillar.[145]

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bb. The Nice Treaty: Limited Institutional Reform

Despite the political prospect of Eastern enlargement, the Amsterdam Treaty had postponed a 'comprehensive review of the provisions of the Treaties on the composition and functioning of the institutions'.[146] In the light of these 'Amsterdam leftovers', the principal aim of the Nice Treaty was the—overdue—institutional reform of the European Union. Past amendments had not changed the *structural* composition of its institutions. Each enlargement had simply increased their membership. This 'policy of pulling up chairs' would reach a limit with Eastern enlargement.[147]

High expectations were therefore brought to the next amending Treaty. These heightened expectations the Nice Treaty did *not* fulfil. The aim of a 'comprehensive review' of the institutional structure and decision-making system was not met. This substantial failure was soon seen as the result of the formal method of negotiation. The Nice Treaty had shown the procedural shortcomings of intergovernmental conferences for *major* Treaty reforms.[148]

What were the institutional changes nonetheless effected by the Nice Treaty? The Nice Treaty chiefly addressed the Amsterdam leftovers in a Protocol on the Enlargement of the European Union. This contained provisions for the composition of the European Parliament,[149] the Council,[150] and the Commission.[151] With regard to the Court of Justice, the Nice Treaty also effected some changes in the EC Treaty ↵ as well as in the Protocol on the Statute of the European Court of Justice. But, importantly, the Court's jurisdiction would not be widened significantly. Finally, while a 'Charter of Fundamental Rights of the European Union' had been proclaimed at Nice,[152] its status would remain that of a *non*-binding instrument *outside* the European Union.

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The Nice Treaty was self-conscious about its only minor achievements. While they opened the way for Eastern enlargement, the 'comprehensive review' mandate had not been fulfilled. For that reason, the Member States added the Nice 'Declaration on the Future of the Union' that called for 'a deeper and wider

debate about the future of the European Union'. Setting itself the deadline of its 2001 Laeken meeting, the European Council committed itself to 'a declaration containing appropriate initiatives for the continuation of this process'.[153] The process should thereby address the following questions:

> - how to establish and monitor a more precise delimitation of powers between the European Union and the Member States, reflecting the principle of subsidiarity;
> - the status of the Charter of Fundamental Rights of the European Union, proclaimed in Nice, in accordance with the conclusions of the European Council in Cologne;
> - a simplification of the Treaties with a view to making them clearer and better understood without changing their meaning;
> - the role of national parliaments in the European architecture.[154]

The Nice Treaty envisaged yet another intergovernmental conference to amend the Treaties, reflecting 'the need to improve and to monitor the democratic legitimacy and transparency of the Union and its institutions, in order to bring them closer to the citizens of the Member States'.[155] The Lisbon Treaty—eventually—fulfilled the mandate for comprehensive reform.

4. From Nice to Lisbon: The (New) European Union

Whereas the 1957 Rome Treaty was praised for 'its sober and precise legal wording',[156] every Treaty amendment since the Single European Act has been criticized for the 'pragmatic' distortions introduced into the constitutional order of ↵ the European Community.[157] And while each political compromise admittedly advanced European integration, two decades of legal pragmatism had turned Europe's constitution into an 'accumulation of texts, breeding ever deepening intransparency'.[158] The European Treaties had become constitutional law full of historical experience—but without much legal logic.

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This gloomy background provided the impulse for a major constitutional reform of the Union in the first decade of the twenty-first century. In the wake of the Nice Treaty's Declaration on the Future of the Union, the European Council convened in Laeken (Belgium) to issue a declaration on the Future of the European Union.[159] Among the four desirable aims, the Laeken Declaration identified the need for '[a] better division and definition of competence in the European Union', a '[s]implification of the Union's instruments', '[m]ore democracy, transparency and efficiency in the European Union', and a move '[t]owards a Constitution for European citizens'.[160]

How was this to be achieved? To pave the way for a *major* Treaty reform, the European Council decided to convene a Convention on the Future of Europe. The Convention was tasked 'to consider the key issues arising for the Union's future development and try to identify the various possible responses'. For that purpose, it was asked to 'draw up a final document', which would evolve into the 2004 Constitutional Treaty. Yet the Constitutional Treaty would never enter into force. It failed to win the ratification battles in France and the Netherlands. Despite this failure, many of its provisions have nonetheless survived into the Reform Treaty concluded at Lisbon.

The Lisbon Treaty, while formally an ordinary amending Treaty, differs significantly from all its predecessors. In substance, it is the—mildly moderated—2004 Constitutional Treaty. Its opening
p. 32 provisions already announced a dramatic ↵ constitutional decision: 'The Union shall replace and succeed the European Community.'[161] Was this the end of the pillar structure? Did the establishment of the 'new' European Union dissolve the 'old' European Union? And what were the institutional and constitutional changes brought about by the Lisbon Treaty? Before answering these questions, we need first to look at the (failed) Constitutional Treaty.

a. The (Failed) Constitutional Treaty: Formal 'Total Revision'

The Laeken European Council had charged a 'European Convention' with the task of identifying reform avenues for the future development of the Union.[162] The Convention would be chaired by a former French President, Valéry Giscard d'Estaing. It was to be composed of representatives from the Member States and the European institutions,[163] and led by a 'Praesidium'.[164] To facilitate its task, the Convention organized a number of 'Working Groups',[165] which would prepare the intellectual ground for the plenary debate. The Convention eventually produced a *Draft* Constitutional Treaty, which was presented to the European Council in 2003. The subsequent Intergovernmental Conference made significant changes to the Draft Treaty,[166] and agreed on a final version in 2004.

What was the constitutional structure of the (new) European Union supposed to be? The 2004
p. 33 Constitutional Treaty (CT) repealed all previous treaties,[167] and ↵ merged the pillar structure of the 'old' European Union to form a 'new' European Union.[168] The CT thus aimed to create *one* Union, with *one* legal personality, on the basis of *one* Treaty. The CT was thereby divided into four parts. Part I defined the values and objectives, competences, and institutions, as well as instruments and procedures of the Union. Part II incorporated the Charter of Fundamental Rights into the Treaty. Part III spelled out the details of the various internal and external policies of the Union; and this included the former Second and Third Pillar policies of the 'old' Union. Finally, Part IV contained some general and final provisions.

The CT would, as an international treaty, need to be ratified by the Member States. Many of these States decided—in the light of the 'constitutional' nature of the new Treaty—to submit their ratification to a referendum. This (national) constitutional choice was to provide direct democratic legitimacy to the European Union.[169] Yet, the strategy led to failure. The peoples of France and the Netherlands rejected the Constitutional Treaty in 2005. After the negative referenda, the Constitutional Treaty was put into a coma from which it was not to reawaken. Yet after a reflection period, the European Council agreed that 'after two years of uncertainty over the Union's treaty reform process, the time ha[d] come to resolve the issue and for the Union to move on'.[170] To this end, it called for an Intergovernmental Conference with the following mandate:

> The IGC is asked to draw up a Treaty (hereinafter called the 'Reform Treaty') amending the existing Treaties with a view to enhancing the efficiency and democratic legitimacy of the enlarged Union, as well as the coherence of its external action. The constitutional concept, which consisted in repealing all existing Treaties and replacing them by a single text called 'Constitution', is abandoned. The Reform Treaty will introduce into the existing Treaties, which remain in force, the innovations resulting from the 2004 IGC, as set out below in a detailed fashion.
>
> The Reform Treaty will contain two substantive clauses amending respectively the Treaty on the European Union (TEU) and the Treaty establishing the European Community (TEC). The TEU will keep its present name and the TEC will be called Treaty on the Functioning of the Union, the Union having a single legal personality. The word 'Community' will throughout be replaced by the word 'Union'; it will be stated that the two Treaties constitute the Treaties on which the Union is founded and that the Union replaces and succeeds the Community.[171]

p. 34 ↵ The idea behind the mandate was simple. It consisted of abandoning the *form* of the CT,[172] while rescuing its *substance*. The idea of a formal refounding of the European Union on the basis of a new Treaty was thus replaced with the idea of a substantive amendment of the existing Treaties. The CT had to drop its constitutional garb. In political terms, this window (un)dressing was necessary to justify a second attempt at Treaty reform. In legal terms, by contrast, 'none of the changes identified by the European Council were significant'.[173] Indeed, apart from some hasty and amateurish repackaging, the final 'Reform Treaty' would be 'the same in most important respects as the Constitutional Treaty'.[174]

The Reform Treaty was signed in December 2007 in Lisbon and was consequently baptized the 'Lisbon Treaty'. After ratification problems in Ireland,[175] Germany,[176] and the Czech Republic,[177] the Lisbon Treaty entered into force in December 2009.

b. The Lisbon Treaty: Substantive 'Total Revision'

It had been 'a long road from Nice to Lisbon'.[178] After four years lost on the Constitutional Treaty and four more years of suspension, the Lisbon Treaty embodied the strong desire 'to complete the process started by the Treaty of Amsterdam and by the Treaty of Nice with a view to enhancing the efficiency and democratic legitimacy of the Union and to improving the coherence of its action'.[179]

p. 35 ↵ The Lisbon Treaty had reverted to the amendment technique. Instead of a formal 'total revision', it chose to build on the *acquis constitutionnel* created by the Rome Treaty establishing the European Community and the (Maastricht) Treaty establishing the European Union. But while the Lisbon Treaty merged both into a 'new' European Union, it retained a *dual* treaty base (Figure 1.3). This was—presumably—to underline its (formal) difference from the 2004 Constitutional Treaty. But, importantly, the dual treaty base no longer distinguished between a *Community* Treaty and a *Union* Treaty, as the new Union would be a single organization. Substantively, *both* Treaties concern the European Union.

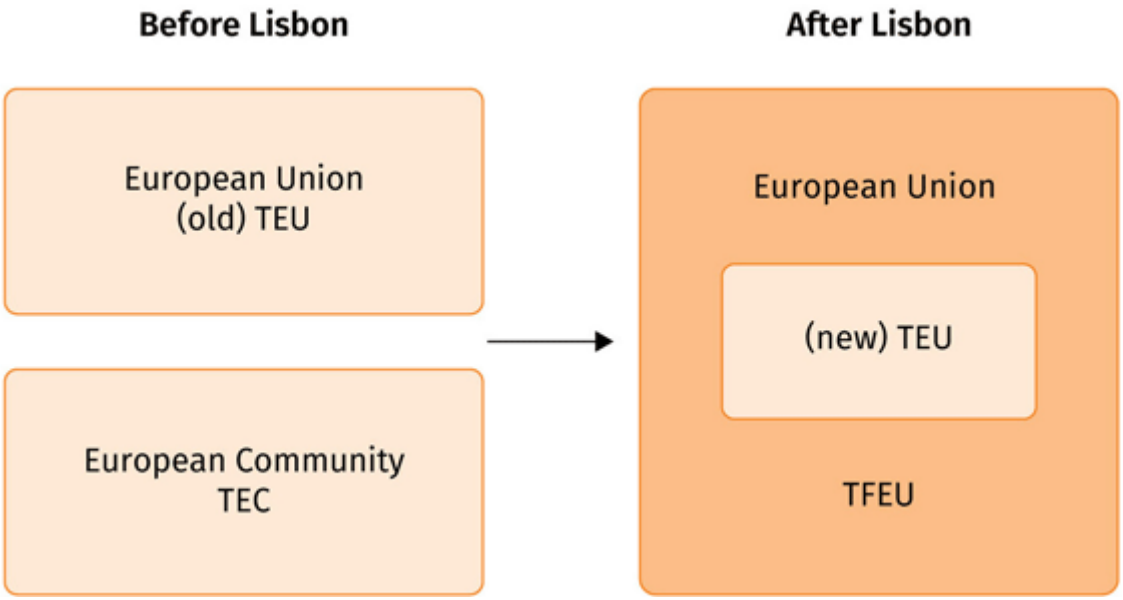

Figure 1.3 Dual Treaty basis before and after Lisbon

The division into two European Treaties follows a functional criterion. While the (new) Treaty on European Union contains the *general* provisions defining the Union, the Treaty on the Functioning of the European Union (TFEU) spells out specific provisions with regard to the Union institutions and policies. The structure of the Treaties is shown in Table 1.2.

Table 1.2 Structure of the TEU and TFEU

European Union			
EU Treaty		**FEU Treaty**	
Title I	Common Provisions	Part I	Principles
Title II	Democratic Principles	Part II	Citizenship (Non-discrimination)
Title III	Institutions	Part III	Union (Internal) Policies
Title IV	Enhanced Cooperation	Part IV	Overseas Associations
Title V	External Action, and CFSP	Part V	External Action
Title VI	Final Provisions	Part VI	Institutions & Finances
		Part VII	General & Final Provisions
Charter of Fundamental Rights			
Protocols (37)*			
Declarations (65)**			

* According to Art 51 (new) TEU: 'The Protocols and Annexes to the Treaties shall form an integral part thereof.' The best way to make sense of a Protocol is to see it as a legally binding 'footnote' to a particular provision of the Treaties.

** Declarations are *not* an integral part of the Treaties, and are *not* legally binding. They only clarify the 'context' of a particular provision and, as such, may offer an interpretative aid.

This dual structure was shaped by the attempt of the Member States formally to 'repackage' the substance of the Constitutional Treaty. This 'restructuring' has led to a number of systemic inconsistencies. First, the institutional provisions are split over the two Treaties. Thus, Parts I and II as well as sections of Parts VI and VII of the TFEU should have been placed in the TEU. Second, because the Member States wished to underline the special status of the CFSP, this policy was not placed in Part V of the TFEU but instead inserted, as a separate title, into the TEU. This constitutional splitting of the Union's external relations provisions is unfortunate, and—oddity of oddities—places a single policy outside the TFEU. Third, instead of being an integral part of the TEU, the Charter of Fundamental Rights remains 'external' to the Treaties, while being recognized to 'have the same legal value as the Treaties'.[180]

p. 36 ↵ Nonetheless, and despite its choice for a dual treaty base, the Union also contains elements that underline the 'unity' of its Treaty structure. First, both Treaties expressly confirm that they have the *same* legal value.[181] Second, the Protocols are attached to *both* Treaties—a break with a traditional constitutional technique. But, most importantly, the new European Union, while having two Treaties, has one single legal personality.[182]

What are the principal institutional and substantive changes brought about by the Lisbon Treaty? In line with the Laeken Declaration, the 2004 Constitutional Treaty and the 2007 Lisbon Treaty aimed at a better division and definition of Union competences. For that purpose, the TFEU contains a new title on 'categories and areas of Union competence'.[183] However, as a critical review of the title shows,[184] this reform objective has not been achieved. This negative outcome is, however, partly compensated for by
p. 37 positive results with regard to the remaining three reform ↵ objectives. The Lisbon Treaty has indeed satisfactorily simplified the Union instruments and lawmaking procedures. It has abolished the 'old' Union instruments, such as 'common positions', and it eliminated the 'cooperation' procedure that had existed since the Single European Act.

What about the third Laeken mandate, that is: '[m]ore democracy, transparency and efficiency in the European Union'? The Lisbon Treaty here represents a dramatic step towards political union. The (new) Treaty on European Union now contains a separate title on 'democratic principles'.[185] The central provision thereby is Article 10 TEU, according to which '[t]he functioning of the Union shall be founded on representative democracy'.[186] Democratic representation is offered directly and indirectly. European citizens are 'directly represented at Union level in the European Parliament';[187] whereas they are indirectly represented through their Member States in the (European) Council.[188] This *dual* democratic legitimacy of the Union corresponds to its *federal* nature.[189] The Lisbon Treaty thereby enhances the direct representation of European citizens by significantly widening the powers of the European Parliament. Not only has 'co-decision' become the 'ordinary legislative procedure',[190] Parliament's decision-making powers with regard to executive, external, and budgetary powers have also been significantly increased.[191]

Finally, what about the move '[t]owards a Constitution for European citizens'? The (Maastricht) European Union and the (Rome) European Community have now been merged into the (Lisbon) European Union. And, while the Union is still not formally based on a single Treaty, the Lisbon Treaty has successfully abolished the pillars of the (Maastricht) Union. The former 'Second Pillar' of the CFSP has been integrated into the (new) TEU. And, in its substance, the CFSP has been strengthened with regard to the Union's defence policy, which induced the WEU to dissolve.[192] With regard to the Third Pillar, the Lisbon Treaty

transferred PJCC to the former First Pillar. The (Amsterdam) Third Pillar is thus 'reunited' with the rest of the original (Maastricht) pillar on Justice and Home Affairs, and both are now under the supranational roof of Title V of Part Three of the TFEU.[193]

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Conclusion

In the first 70 years of its history, the European Union has evolved from a humble Community on coal and steel to a mature Union that is involved in almost all areas of modern life. The Union has, however, not only widened its jurisdictional and geographic scope, it has considerably deepened its supranational character—in relation to *both* normative *and* decisional supranationalism.[194]

This chapter has looked at four historical periods in the Union's evolution. The first two periods alone covered 40 years, and this is no accident, since the next 20 years were a period of accelerated constitutional change: Treaty amendment followed Treaty amendment! The Lisbon Treaty is the last chapter in this constitutional chain novel. However, as Section 4 has shown, it is a decisive chapter that has —if not in form, then in substance—reconstituted the European Union. This 'new' European Union differs in significant respects from the 'old' European Union founded by the Maastricht Treaty. Not only has the pillar structure disappeared, the Union's institutions as well as its powers and procedures have considerably changed. The European Union of today constitutes a fairly 'compact' constitutional object. The sole satellite that still orbits around it is the European Atomic Energy Community;[195] and it is hoped that the Member States will—sooner rather than later—integrate that Community into the European Union.

The Lisbon Treaty will not be the last chapter of the European Union. The evolution of the European Union will, of course, continue. Constitutional change will need to follow social change. The Union must recognize this; or else it will be punished by life. What is remarkable, however, is that the method of constitutional change has itself changed over time. While at first organized by means of the Union's general competences,[196] formal Treaty amendment has become the preferred route after the Single European Act. The procedural hurdles for this are comparatively high, but the Lisbon Treaty has tried to make that task a little easier. The Union legal order now recognizes in Article 48 TEU two 'simplified revision ↵ procedures' in addition to the 'ordinary revision procedure'.[197] The ordinary revision here continues to require, after a complex preparatory stage,[198] the ratification of Treaty amendments 'by all the Member States in accordance with their respective constitutional requirements'.[199] The insistence on the express consent of all national parliaments or—where a referendum is nationally required—the national peoples will make this a steep route towards constitutional change.[200]

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The two simplified revision procedures try to provide for an easier passage. But the first simplified procedure under Article 48(6) TEU hardly makes matters much simpler.[201] Although it leaves the decision to amend Part III of the TFEU to the European Council, the amendment will only enter into force when approved by all the Member States 'in accordance with their respective constitutional requirements'. By contrast, the second simplified procedure allows the European Union—for a very small part of primary law[202]—to change its constitutional Treaties if backed up by the *tacit* consent of national *parliaments*.[203]

This route allows for constitutional change through parliamentary *inaction*; and it textually appears to expressly exclude national referenda. This will make future constitutional change a little easier but more is needed to facilitate the constitutional capacity of the Union to adapt to social change.

p. 40

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Case 26/62, *Van Gend en Loos*; Case 6/64, *Costa v ENEL*; Case 120/78, *Cassis de Dijon*

Notes

[1] R. H. Foerster, *Die Idee Europa 1300–1946, Quellen zur Geschichte der politischen Einigung* (Deutscher Taschenbuchverlag, 1963).

[2] G. Schwarzenberger, *The Frontiers of International Law* (Stevens, 1962).

[3] W. G. Friedmann, *The Changing Structure of International Law* (Stevens, 1964).

[4] A. H. Robertson, *European Institutions: Co-operation, Integration, Unification* (Stevens & Sons, 1973), 17.

[5] The ‘European Recovery Programme’, also known as the ‘Marshall Plan’, was named after the (then) Secretary of State of the United States, George C. Marshall. In 1960, the Organisation for European Economic Co-operation (OEEC) was transformed into the thematically broader Organisation for Economic Co-operation and Development (OECD) with the United States and Canada becoming full members of that organization.

[6] Art. IV of the 1948 Brussels Treaty stated: ‘If any of the High Contracting Parties should be the object of an armed attack in Europe, the other High Contracting Parties will, in accordance with the provisions of Article 51 of the Charter of the United Nations, afford the party so attacked all the military and other aid and assistance in their power.’

[7] The most important achievement of the Council of Europe was the development of a common standard of human rights in the form of the European Convention on Human Rights (ECHR). The Convention was signed in 1950 and entered into force in 1953. The Convention established the European Court of Human Rights (ECtHR) in Strasbourg (1959).

[8] For a detailed discussion of the negotiations leading up to the signature of the ECSC Treaty, see H. Mosler, ‘Der Vertrag über die Europäische Gemeinschaft für Kohle und Stahl’ (1951–2) 14 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1.

[9] Ibid., 24 (trans. R. Schütze).

[10] This was achieved through the 1965 ‘Merger Treaty’ (see Treaty establishing a Single Council and a Single Commission of the European Communities).

[11] For an overview of the Union’s constitutional amendments, see also Appendix, Section 1.

[12] For an overview of the Union’s geographic development, see the book’s inside cover.

[13] This is how the (then) US Secretary of State, Dean Acheson, wrote to the French Foreign Minister, Robert Schuman: 'Whether Germany will in the future be a benefit or a curse to the free world will be determined, not only by Germany, but by the occupying powers. No country has a greater stake than France in the answer. Our own stake and responsibility is also great. Now is the time for French initiative and leadership of the type required to integrate the German Federal Republic promptly and decisively into Western Europe … We here in America, with all the will in the world to help and support, cannot give the lead. That, if we are to succeed in this joint endeavour, must come from France' (US Department of State, *Foreign Relations of the United States*, III (1949) (Government Printing Office, 1974), 623 and 625).

[14] Schuman Declaration (Paris, 9 May 1950), reproduced in A. G. Harryvan and J. van der Harst (eds), *Documents on European Union* (St Martin's Press, 1997), 61 (emphasis added).

[15] Art. 97 ECSC: 'This Treaty is concluded for a period of fifty years from its entry into force.' The Paris Treaty entered into force on 23 July 1952 and expired 50 years later.

[16] J. Gillingham, *Coal, Steel, and the Rebirth of Europe, 1945–1955: The Germans and French from Ruhr Conflict to Economic Community* (Cambridge University Press, 1991), 298.

[17] On the birth of the term 'supranational', see in particular: P. Reuter, 'Le Plan Schuman' (1952) 81 *Recueil des Cours de l'Académie de la Haye* 519.

[18] The original name in the ECSC Treaty was 'High Authority'. In the wake of the 1965 Merger Treaty this name was changed to 'Commission' (ibid., Art. 9).

[19] Originally, the ECSC Treaty used the name 'Assembly'. However, in order to simplify the terminology and to allow for horizontal comparisons between the various Communities, I have chosen to refer to the 'Assembly' throughout as 'Parliament'. Early on, the Assembly indeed renamed itself 'Parliament', a change that was formally recognized by the 1986 SEA.

[20] Art. 7 ECSC.

[21] Ibid., Art. 8.

[22] Ibid., Art. 14. Community acts were thus considered to be acts of the Commission, even if other Community organs had been involved in the decision-making process.

[23] Ibid., Art. 9 (emphasis added).

[24] Ibid., Art. 21.

[25] Ibid., Art. 22. The Parliament's powers were defined in Art. 24 ECSC and consisted of discussing the general report submitted by the Commission, and a motion of censure on the activities of the Commission.

[26] During the drafting of the ECSC Treaty, the Council had been—reluctantly—added by Jean Monnet to please the Netherlands. The Netherlands had argued that coal and steel issues could not be separated from broader economic issues (see D. Dinan, *Europe Recast: A History of European Union* (Palgrave, 2004), 51). Under the Paris Treaty, the Council's task was primarily that of 'harmonising the action of the [Commission] and that of the governments, which are responsible for the general economic policy of their countries' (Art. 26 ECSC). It was seen as a 'political safeguard' to coordinate activities that fell within the scope of the ECSC with those economic sectors that had not been brought into the Community sphere, see Mosler, 'Der Vertrag über die Europäische Gemeinschaft für Kohle und Stahl' (n. 8), 41.

[27] Art. 27 ECSC.

[28] Ibid., Art. 26.

[29] Ibid., Art. 31.

[30] Art. 14(2) ECSC.

[31] See G. Bebr, 'The Relation of the European Coal and Steel Community Law to the Law of the Member States: A Peculiar Legal Symbiosis' (1958) 58 *Columbia Law Review* 767, 788 (emphasis added): '*The fact that Community law can be enforced directly demonstrates the inherent supremacy of the Community law better than any analogy to traditional international treaties which do not penetrate so deeply into national legal systems*.'

[32] Reuter, 'Le Plan Schuman' (n. 17), 543.

[33] Art. 13 ECSC (repealed by the Merger Treaty and replaced by Art. 17 ECSC).

[34] G. Bebr, 'The European Coal and Steel Community: A Political and Legal Innovation' (1953–4) 63 *Yale LJ* 1 at 20–4 defining 'supranational powers' as those 'exercised by the [Commission]' alone, and 'limited supranational powers' as those acts for which 'the [Commission] needs the concurrence of the Council of Ministers'—qualified or unanimous.

[35] See H. L. Mason, *The European Coal and Steel Community: Experiment in Supranationalism* (Martinus Nijhoff, 1955), 34–5.

[36] See 'Schuman Declaration' (n. 14).

[37] For the 'Pleven Plan', see Harryvan and van der Harst (eds), *Documents on European Union* (n. 14), 67.

[38] Ibid.

[39] Art. 2(2) EDC.

[40] Ibid., Art. 9 stated: 'The Armed Forces of the Community, hereinafter called "European Defence Forces" shall be composed of contingents placed at the disposal of the Community by the Member States with a view to their fusion under the conditions provided for in the present Treaty. No Member State shall recruit or maintain national armed forces aside from those provided for in Article 10 below.' On the history and structure of the European Defence Community, see G. Bebr, 'The European Defence Community and the Western European Union: An Agonizing Dilemma' (1954–5) 7 *Stanford Law Review* 169.

[41] Art. 38 EDC.

[42] G. Clemens et al., *Geschichte der europäischen Integration* (UTB, 2008), 114.

[43] Draft Treaty embodying the Statute of the European Community (Secretariat of the Constitutional Committee, 1953).

[44] Art. 1 Draft Treaty (emphasis added).

[45] Ibid., Art. 5: 'The Community, together with the European Coal and Steel Community, and the European Defence Community, shall constitute a single legal entity, within which certain organs may retain such administrative and financial autonomy as is necessary to the accomplishment of the tasks assigned by the treaties instituting the European Coal and Steel Community and the European Defence Community.'

[46] Ibid., Art. 10: 'Parliament shall enact legislation and make recommendations and proposals. It shall also approve the budget and pass a bill approving the accounts of the Community. It shall exercise such powers of supervision as are conferred upon it by the present Statute.' For an analysis of the European Political Community, see A. H. Robertson, 'The European Political Community' (1952) 29 *BYIL* 383.

[47] In the words of Paul H. Spaak: 'After the [EDC] venture it was not reasonable to repeat exactly the same experiment a few months later. A means must be found of reaching the same goal—that distant goal of an integrated Europe—by other methods and through other channels. We then considered that, having failed on the political plane, we should take up the question on the economic plane and use the so-called functional method, availing ourselves to some extent—although, of course, without drawing any strict parallels—of the admittedly successful experiment already made with the European Coal and Steel Community.' See Address to the Parliament, 21 October 1955—quoted in Robertson, *European Institutions* (n. 4), at 26.

[48] Clemens et al., *Geschichte der europäischen Integration* (n. 42), 126.

[49] According to Dinan, *Europe Recast* (n. 26), 76: 'most member states regarded Euratom as irrelevant'.

[50] Art. 2 EEC (emphasis added).

[51] The existence of a single external custom distinguishes a customs union from a free trade area. For a discussion of the EU customs union, see R. Schütze, European Union Law (12), ch. 19, section 4b.

[52] Art. 3(c) EEC.

[53] Ibid., Art. 3(e) and (f).

[54] Case 26/62, *Van Gend en Loos* [1963] ECR 1 at 12.

[55] On this point, see Chapter 5.

[56] Case 6/64, *Costa v ENEL* [1964] ECR 585 at 593–4.

[57] Ibid., at 594.

[58] Art. 4 EEC. The Rome Treaty had been drafted on the understanding that the Parliament and the Court of the European Coal and Steel Community would be the same for the European Economic Community. However, the executive organs of both Communities still differed. This institutional 'separatism' changed with the 1965 Merger Treaty that 'merged' the executive organs of all three Communities.

[59] R. Efron and A. S. Nanes, 'The Common Market and Euratom Treaties: Supranationality and the Integration of Europe' (1957) 6 *ICLQ* 670 at 682.

[60] Art. 145 EEC.

[61] See A. H. Robertson, 'Legal Problems of European Integration' (1957) 91 *Recueil des Cours de l'Académie de la Haye* 105 at 159–60: 'Indeed, it was the reluctance of governments in subsequent years to accept anything in the nature of the supranational which produced the result that the powers of the Commission of the EEC were less extensive than those of the [ECSC Commission].'

[62] Art. 146 EEC.

[63] Efron and Nanes, 'The Common Market and Euratom Treaties' (n. 59), 675.

[64] The Rome Treaty had established a transitional period of 12 years, divided into three stages of four years. The procedure for this transitional period was set out in Art. 8 EEC. During the first two stages of the transitional period, unanimous decisions would remain the rule.

[65] While Art. 8 EEC had envisaged a political decision to pass from the first to the second stage (para. 3), the passage from the second to the third stage was to be automatic. France would thus not have been able to block the transition by 'legal' means established in the EEC Treaty.

[66] 'Final Communiqué of the Extraordinary Session of the Council' [1966] 3 *Bulletin of the European Communities* 5.

[67] Ibid.

[68] For this nice metaphor, see J. Weiler, 'The Transformation of Europe' (1990–1) 100 *Yale LJ* 2403 at 2450.

[69] On the gradual decline of the Luxembourg Compromise, see L. Van Middelaar, 'Spanning the River: The Constitutional Crisis of 1965–1966 as the Genesis of Europe's Political Order' (2008) 4 *European Constitutional Law Review* 98 at 119–23.

[70] See 'First Budget Treaty' ('Treaty amending Certain Budgetary Provisions', 1970) [1971] OJ L2/1 and 'Second Budget Treaty' ('Treaty amending Certain Financial Provisions', 1975) [1977] OJ L359/1.

[71] The First Budget Treaty distinguished between compulsory and non-compulsory expenditure and gave Parliament the power to control the latter (see Art. 4 of the 1970 Budget Treaty). The 1975 Treaty increased the budgetary power of Parliament to reject the Community budget as a whole (see Art. 12 of the 1975 Budget Treaty), and would create the Court of Auditors (see Art. 15 of the 1975 Budget Treaty).

[72] This transformation had been envisaged, from the very beginning, by Art. 138(3) EEC: 'The [Parliament] shall draw up proposals for elections by direct universal suffrage in accordance with a uniform procedure in all Member States. The Council shall, acting unanimously, lay down the appropriate provisions, which it shall recommend to Member States for adoption in accordance with their respective constitutional requirements.' The Council decision was taken on 20 September 1976 and the Member States ratified it in 1977. On 8 April 1978, the Council decided to hold the Parliament's first elections on 7–10 June 1979.

[73] Beyond its budgetary powers, Parliament remained primarily an 'advisory' institution—even if its advice was to be a compulsory procedural requirement. See Case 138/79, *Roquette Frères v Council* (*Isoglucose*) [1980] ECR 3333.

[74] P. Pescatore, 'La Carence du législateur communautaire et le devoir du juge' in G. Lüke, G. Ress, and M. R. Will (eds), *Rechtsvergleichung, Europarecht und Staatenintegration: Gedächtnisschrift für Léontin-Jean Constantinesco* (Heymanns, 1983), 559.

[75] The distinction between 'positive' and 'negative' integration is extensively discussed in R. Schütze, European Union Law (Oxford University Press, 2021), Chapters 13 and 14.

[76] Case 120/78, *Rewe-Zentral v Bundesmonopolverwaltung für Branntwein* (*Cassis de Dijon*) [1979] ECR 649.

[77] Ibid.

[78] This constitutional principle is extensively discussed in Schütze, European Union Law (n.75).

[79] This is the title of ch. 11 of D. Urwin, *The Community of Europe: A History of European Integration since 1945* (Longman, 1994).

[80] See R. Bieber (ed.), *Das Europa der Zweiten Generation: Gedächtnisschrift für Christoph Sasse* (Engel, 1981).

[81] 'Final Communiqué of the Meeting of the Heads of State or Government of the EEC (The Hague, 1969)', in Harryvan and van der Harst (eds), *Documents on European Union* (n. 14), 168–9, paras 8 and 15.

[82] For the Werner Report, see also ibid., 169.

[83] Ibid., 170.

[84] The former option was advocated by Germany and is known as the 'coronation theory', and its advocates were referred to as the 'economists'. The second option was argued by France and is known as the 'locomotive theory', and its advocates were known as the 'monetarists'.

[85] Harryvan and van der Harst (eds), *Documents on European Union* (n. 14), 173 at 174.

[86] Urwin, *Community of Europe* (n. 79), 147.

[87] The mechanism was established following the Rome European Council of 1 December 1975. In French, the acronym 'TREVI' came to stand for 'terrorism', 'radicalism', 'extremism', and 'international violence'. However, 'Trevi' is also the name of a famous fountain in Rome.

[88] Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders ('Schengen Agreement') [2000] OJ L239/13–18. The original 'Schengen States' were: Belgium, France, Germany, Luxembourg, and the Netherlands. These Member States signed the 1990 Convention implementing the Schengen Agreements [2000] OJ L239/19–62.

[89] The Schengen Agreement and the Schengen Convention contained provisions dealing with police cooperation, see Arts 39–47 of the Schengen Convention. For an early analysis of 'Schengen', see J. Schutte, 'Schengen: Its Meaning for the Free Movement of Persons in Europe' (1991) 28 *CML Rev.* 549.

[90] Communiqué of the Meeting of the Heads of State or Government (Paris, 1974) reproduced in Harryvan and van der Harst (eds), *Documents on European Union* (n. 14), 181.

[91] This was confirmed in the Solemn Declaration on European Union (Stuttgart, 1983), reproduced in Harryvan and van der Harst (eds), *Documents on European Union* (n. 14), 214 at 215 (para. 2.1.2): 'In the perspective of the European Union, the European Council provides a general political impetus to the construction of Europe; defines approaches to further the construction of Europe and issues general political guidelines for the European Communities and European Political Cooperation; deliberates upon matters concerning European Union in its different aspects with due regard to consistency among them; initiates cooperation in new areas of activity; solemnly expresses the common position in questions of external relations.'

[92] Title II of the SEA deals with 'Provisions amending the Treaties establishing the European Communities'.

[93] Ibid., Art. 1: 'Political Cooperation shall be governed by Title III. The provisions of that Title shall confirm and supplement the procedures agreed in the reports of Luxembourg (1970), Copenhagen (1973), London (1981), the Solemn Declaration on European Union (1983) and the practices gradually established among the Member States.'

[94] Ibid., Art. 13 was to introduce the following provision into the EEC Treaty: 'The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992 … The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.'

[95] 'Completing the Internal Market: White Paper from the Commission to the European Council', COM(85) 310.

[96] The most famous additional legal basis to put this constitutional mandate into effect was—what is today—Art. 114 TFEU allowing the Community to adopt harmonization measures by qualified majority.

[97] See Arts 6 and 7 SEA.

[98] Ibid., Art. 11.

[99] However, in order to ensure the convergence of economic and monetary policies, Art. 20 SEA imposed a duty on the Member States to 'take account of the experience acquired in cooperation within the framework of the European Monetary System (EMS) and in developing the ECU'.

[100] Art. 2 SEA.

[101] European Communities, 'Report of the Committee for the Study of Economic and Monetary Union' [1989] 4 *Bulletin of the European Communities* 8.

[102] European Council (Madrid, 26 and 27 June 1989), 'Conclusions of the Presidency' (1989) 6 *Bulletin of the European Communities* 8 at 11.

[103] European Parliament, Resolution of 14 March 1990 on the Intergovernmental Conference in the context of Parliament's strategy for European Union ([1990] OJ C96/114), preamble B.

[104] The commitment to review the procedures on European Political Cooperation had been made in Art. 30(12) SEA: 'Five years after the entry into force of this Act the High Contracting Parties shall examine whether any revision of Title III is required.'

[105] European Parliament (n. 103), para. 1.

[106] See the letter by the German Chancellor Kohl and the French President Mitterrand to the Irish Presidency (19 April 1990), in Harryvan and van der Harst (eds), *Documents on European Union* (n. 14), 252: 'In the light of far-reaching changes in Europe and in view of the completion of the single market and the realisation of economic and monetary union, we consider it necessary to accelerate the political construction of the Europe of the Twelve.'

[107] European Council (Rome, 14 and 15 December 1990), 'Presidency Conclusions' (1990) 12 *Bulletin of the European Communities* 7.

[108] The Treaty on European Union was, at first, rejected by Denmark. It was eventually ratified after concessions made to Denmark by the Edinburgh European Council (see 'Denmark and the Treaty on European Union' [1992] OJ C348/1). The German Constitutional Court posed a second ratification challenge. On the famous 'Maastricht Decision' of the German Constitutional Court, see Chapter 2, Section 4b.

[109] Preamble to the TEU.

[110] 'Differential integration' means that not all Member States take part in the integration project. The decision to establish a differential constitutional regime for economic and monetary union had been taken early on in the negotiations of the Maastricht Treaty. Only those States fulfilling the 'convergence criteria' would be allowed to participate. In addition, the Member States agreed to allow for opt-outs for those Member States that, while entitled to participate, did not wish to do so. For a closer analysis of differential integration within EMU, see R. Schütze, European Union Law (12), ch. 18, section 1b.

[111] Art. A EU (old).

[112] Art. B EU (old).

[113] Art. C EU (old). Remarkably, no common legal personality was established for the Union.

[114] Art. M EU (old).

[115] Art. N EU (old).

[116] D. Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces' (1993) 30 *CML Rev.* 17.

[117] Art. G(A)(1) EU (old): 'The term "European Economic Community" shall be replaced by the term "European Community".'

[118] Art. G(B)(7) EU (old). This will be discussed in Chapter 4, Section 3.

[119] Ibid. The timetable was set by what was to become the future Art. 100j EC. The Council was called to decide 'not later than 31 December 1996 whether it is appropriate for the Community to enter the third stage; and if so, set the date for the beginning of the third stage' (ibid., para. 3). And, if that had not been done by the end of 1997, it was provided that 'the third stage shall start on 1 January 1999' (ibid., para. 4).

[120] See Protocol on Certain Provisions relating to the United Kingdom, which recognized 'that the United Kingdom shall not be obliged or committed to move to the third stage of Economic and Monetary Union without a separate decision to do so by its government and Parliament' (recital 1). For the similar position of Denmark, see Protocol on Certain Provisions relating to Denmark.

[121] Art. G(C) EU (old)—introducing Art. 8(1) EC: 'Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union.'

[122] Art. G(C) EU (old)—introducing Arts 8a to 8c EC.

[123] Art. G(D)(53) EU (old)—amending Art. 173 EC that now allowed for actions by the European Parliament for the purpose of protecting its prerogatives.

[124] For a discussion of this procedure, see Chapter 7, Section 3a.

[125] Art. J EU (old): 'A common foreign and security policy is hereby established[.]'

[126] Art. J.4(1) EU (old): 'The common foreign and security policy shall include all questions relating to the security of the Union, including the eventual framing of a common defence policy, which might in time lead to a common defence.'

[127] Art. J.4(6) EU (old): 'With a view to furthering the objective of this Treaty and having in view the date of 1998 in the context of Article XII of the Brussels Treaty, the provisions of this Article may be revised as provided for in Article N(2) on the basis of a report to be presented in 1996 by the Council to the European Council, which shall include an evaluation of the progress made and the experience gained until then.' The relationship between the EU and the Western European Union was further clarified by a Declaration relating to the Western European Union. This declared that the 'WEU will be developed as the defence component of the European Union and as a means to strengthen the European pillar of the Atlantic Alliance' (para. 2). And according to para. 3: 'The objective is to build up WEU in stages as the defence component of the European Union. To this end, WEU is prepared, at the request of the European Union, to elaborate and implement decisions and actions of the Union which have defence implications.'

[128] Art. J.7 EU (old).

[129] Art. J.9 EU (old).

[130] Arts J.1(3) as well as J.2 and J.3 EU (old).

[131] Art. L EU (old).

[132] Art. K.1 EU (old).

[133] This was—partly—qualified by the Court of Justice in Case C-105/03, *Pupino* [2005] ECR I-5285. For a discussion of this case, see S. Peers, 'Salvation Outside the Church: Judicial Protection in the Third Pillar after the "*Pupino*" and "*Segi*" Judgments' (2007) 44 *CML Rev.* 883.

[134] P. Pescatore, 'Nice: Aftermath' (2001) 38 *CML Rev.* 265.

[135] Within the First Pillar, the Amsterdam Treaty extended and reformed the co-decision procedure (L. Gormley, 'Reflections on the Architecture of the European Union after the Treaty of Amsterdam' in P. Twomey and D. O'Keeffe (eds), *Legal Issues of the Amsterdam Treaty* (Hart, 1999), 57). The notable change in the Second Pillar was the creation of the new post of 'High Representative for the Common Foreign and Security Policy' (see Art. 1(10) TA—inserting new Art. J.16 EU (old)). Moreover, the Amsterdam Treaty brought the WEU closer to the EU in Part I, Art. 1(10) TA—inserting new Art. J.7 EU (old): 'The Western European Union (WEU) is an integral part of the development of the Union providing the Union with access to an operational capability notably in the context of paragraph 2. It supports the Union in framing the defence aspects of the common foreign and security policy as set out in this Article. The Union shall accordingly foster closer institutional relations with the WEU with a view to the possibility of the integration of the WEU into the Union, should the European Council so decide. It shall in that case recommend to the Member States the adoption of such a decision in accordance with their respective constitutional requirements.'

[136] S. Peers, 'Justice and Home Affairs: Decision-Making after Amsterdam' (2000) 25 *EL Rev.* 183.

[137] Art. 1(11) TA—Art. K.1 EU (old).

[138] On this point, see the excellent analysis by J. Monar, 'Justice and Home Affairs in the Treaty of Amsterdam: Reform at the Price of Fragmentation' (1998) 23 *EL Rev.* 320.

[139] See Art. 1(15) TA—introducing the (new) Title III(a) into Part III of the EC Treaty. The price for this 'supranationalization' was differential integration. Indeed, the United Kingdom and Ireland opted out of this new title (see Protocol on the Position of the United Kingdom and Ireland). And according to the Protocol on the Application of certain aspects of Art. 7a establishing the European Community to the United Kingdom and to Ireland, border controls for persons travelling into these two States would continue to be legal (ibid., Art. 1), and this would also hold true with regard to border controls for persons coming from these two States (ibid., Art. 3). On the complex position of Denmark, see Protocol on the Position of Denmark.

[140] On this point, see K. Hailbronner, 'European Immigration and Asylum Law under the Amsterdam Treaty' (1998) 35 *CML Rev.* 1047 at 1053ff.

[141] See Protocol Integrating the Schengen acquis into the framework of the European Union, preamble 2. The Annex to the Protocol identifies the 'Schengen Acquis' with the Schengen Agreement, the Schengen Convention, the Accession Protocols and Agreements, and the decisions and declarations adopted by the (Schengen) Executive Committee or bodies established under it.

[142] Arts 3 and 4 of the Schengen Protocol.

[143] The two non-Member States are the Republic of Iceland and the Kingdom of Norway, whose legal status is determined by Art. 6 of the Schengen Protocol.

[144] Ibid., Art. 2(1)—second indent; and see also ibid., Art. 5.

[145] Ibid., Art. 2(1)—fourth indent.

[146] See Art. 2 of the Protocol on the Institutions with the Prospect of Enlargement of the European Union. The provision reads as follows: 'At least one year before the membership of the European Union exceeds twenty, a conference of representatives of the governments of the Member States shall be convened in order to carry out a comprehensive review of the provisions of the Treaties on the composition and functioning of the institutions.' The Protocol thereby envisaged that 'the Commission shall comprise one national of each of the Member States, provided that, by that date, the weighting of the votes in the Council has been modified, whether by re-weighting of the votes or by dual majority, in a manner acceptable to all Member States, taking into account all relevant elements, notably compensating those Member States which give up the possibility of nominating a second member of the Commission' (ibid., Art. 1).

[147] R. Barents, 'Some Observations on the Treaty of Nice' (2001) 8 *MJ* 121 at 122.

[148] Famously, after the prolonged and aggravated Nice Treaty negotiations, Tony Blair (former UK Prime Minister) is reported to have exclaimed: 'We cannot go on working like this!'

[149] Art. 2 Enlargement Protocol.

[150] Ibid., Art. 3. The heart of this provision was the definition of what constitutes a qualified majority in the Council, and involved a reweighing of the votes of the Member States.

[151] Ibid., Art. 4. The core of the provision was formed by two rules. Para. 1 reduced the number of Commissioners to 'one national of each of the Member States'. However, para. 2 qualified this, when the Union reached 27 Member States: 'The number of Members of the Commission shall be less than the number of Member States. The Members of the Commission shall be chosen according to a rotation system based on the principle of equality, the implementing arrangements for which shall be adopted by the Council, acting unanimously.'

[152] The Charter had been drafted by a special 'Convention' *outside* the Nice Intergovernmental Conference. On the drafting process, see G. de Búrca, 'The Drafting of the European Union Charter of Fundamental Rights' (2001) 26 *EL Rev.* 126.

[153] See Declaration No. 23 on the Future of the Union, para. 3.

[154] Ibid., para. 5.

[155] Ibid., para. 6.

[156] P. Pescatore, 'Some Critical Remarks on the "Single European Act"' (1987) 24 *CML Rev.* 9 at 15.

[157] The Single European Act was famously criticized by Pescatore (ibid., at 15). The eminent former judge confessed: 'I am among those who think that forgetting about the Single Act would be a lesser evil for our common future than ratification of this diplomatic document.' The document was described as 'a flood of verbose vagueness'. The Treaty on European Union found a memorable criticism in D. Curtin's phrase of the 'Europe of bits and pieces'. The Maastricht Treaty amendments were said to have 'no overriding and consistent constitutional philosophy behind the proposed reforms'. On the contrary, the European legal order was 'tinkered with in an arbitrary and *ad hoc* fashion by the inter-governmental negotiators in a manner which defied, in many respects, its underlying *constitutional* character' (see 'The Constitutional Structure of the Union: A Europe of Bits and Pieces' (1993) 30 *CML Rev.* 17 at 17–18). For the Amsterdam Treaty it was said that 'the devil is not in the detail': 'The problem lies in the accumulation of texts, breeding ever deepening intransparency. Change which is not intelligible is likely to cause alienation' (see S.

Weatherill, 'Flexibility or Fragmentation: Trends in European Integration' in J. Usher (ed.), *The State of the European Union* (Longman, 2000), 18). Finally, the Nice Treaty again encountered the strong voice of P. Pescatore, who raised the 'criticism of amateurishness' of the 'legal *bricolage* in the Nice documents' which constitute 'a patchwork of incoherent additions to the provisions of the EU and EC Treaties' (Guest Editorial, 'Nice—The Aftermath' (2001) 38 *CML Rev.* 265).

[158] Weatherill, 'Flexibility or Fragmentation' (n. 157), 8.

[159] Laeken Declaration of 15 December 2001 on the Future of the European Union.

[160] Ibid.

[161] Art. 1(2)(b) Lisbon Treaty.

[162] On the work of the Convention and the 'accidental' creation of the Constitutional Treaty, see P. Norman, *The Accidental Constitution: The Making of Europe's Constitutional Treaty* (EuroComment, 2003).

[163] In addition to the Chairman (V. Giscard d'Estaing) and two Vice-Chairmen (G. Amato and J. L. Dehaene), the Convention was composed of 15 representatives from the national governments (one per State), 30 delegates from national parliaments (two per State), 16 members of the European Parliament, and two Commission representatives. The (future) accession countries were represented in the same way as the Member States 'without, however, being able to prevent any consensus which may emerge among the Member States' (see Laeken Declaration, n. 159).

[164] The Praesidium was composed of the Chairman and the Vice-Chairmen, three government representatives, two national parliament representatives, two European Parliament representatives, and two Commission representatives.

[165] The Convention established 11 'Working Groups': (I) 'Subsidiarity', (II) 'Charter/ECHR', (III) 'Legal Personality', (IV) 'National Parliaments', (V) 'Complementary Competences', (VI) 'Economic Governance', (VII) 'External Action', (VIII) 'Defence', (IX) 'Simplification', (X) 'Freedom, Security and Justice', and (XI) 'Social Europe'. For the working documents and final reports of the Convention Working Groups, see http://european-convention.eu.int/doc_wg.asp?lang=EN <*http://european-convention.eu.int/doc_wg.asp?lang=EN*>.

[166] On these changes, see P. Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform* (Oxford University Press, 2010), 16–20.

[167] Art. IV-437 CT. This would have simplified matters significantly. In the words of J.-C. Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge University Press, 2010), 20: 'Up until 2004, the original 1957 Treaties had been amended and complemented fifteen times. As a result, there were about 2,800 pages of primary law contained in seventeen Treaties or Acts[.]'

[168] Art. IV-438(1) CT: 'The European Union established by this Treaty shall be the successor to the European Union established by the Treaty on European Union and to the European Community.'

[169] Apart from two Member States that were constitutionally compelled to organize referenda (Denmark and Ireland), seven additional Member States decided to go down the direct constitutional democracy road (ie France, Luxembourg, Poland, Portugal, Spain, the Netherlands, the United Kingdom).

[170] European Council (Brussels, 21–22 June 2007), 'Presidency Conclusions' (2007) 3 *EU Bulletin* 1 at 8.

[171] CT, Annex I, paras 1–2.

[172] This idea was spelled out in ibid., para. 3: 'The TEU and the Treaty on the Functioning of the Union will not have a constitutional character. The terminology used throughout the Treaties will reflect this change: the term "Constitution" will not be used, the "Union Minister for Foreign Affairs" will be called High Representative of the Union for Foreign Affairs and Security Policy and the denominations "law" and "framework law" will be abandoned, the existing denominations "regulations", "directives" and "decisions" being retained. Likewise, there will be no article in the amended Treaties mentioning the symbols of the EU such as the flag, the anthem or the motto. Concerning the primacy of EU law, the IGC will adopt a Declaration recalling the existing case law of the EU Court of Justice.'

[173] Craig, *Lisbon Treaty* (n. 166), 23.

[174] Ibid., 24. According to Craig, the Reform Treaty 'replicated 90 per cent of what had been in the Constitutional Treaty' (ibid., 31). The repacking was a result of the (political) compromise of keeping the 2004 Constitutional Treaty substantially intact, while producing a new treaty that formally looked different.

[175] After a first referendum had failed, the European Council promised Ireland a number of concessions (see European Council (Brussels, 11–12 December 2008), 'Presidency Conclusions' (2008) 12 *EU Bulletin* 8). The most significant of these was the promise that 'a decision will be taken, in accordance with the necessary legal procedures, to the effect that the Commission shall continue to include one national of each Member State' (ibid., para. 2).

[176] On the Lisbon Decision of the German Constitutional Court, see Chapter 6, Section 2c.

[177] In order to remove the last hurdle to ratification, the European Council had to promise the Czech Republic an amendment to Protocol No. 30 on the Application of the Charter of Fundamental Rights (see European Council (Brussels, 29–30 October 2009), 'Presidency Conclusions' (http://european-council.europa.eu/council-meetings/conclusions.aspx <*http://european-council.europa.eu/council-meetings/conclusions.aspx*>)). However, the current Czech government has opted out of this opt-out option.

[178] Craig, *Lisbon Treaty* (n. 166), 1.

[179] Lisbon Treaty, preamble 1.

[180] Art. 6(1) (new) TEU.

[181] See Art. 1 TEU and Art. 1 TFEU.

[182] Art. 47 (new) TEU.

[183] Title I of Part I (Arts 2–6) TFEU.

[184] R. Schütze, 'Lisbon and the Federal Order of Competences: A Prospective Analysis' (2008) 33 *EL Rev.* 709.

[185] See Title II of the (new) TEU.

[186] Ibid., Art. 10(1).

[187] Ibid., Art. 10(2).

[188] Ibid., Art. 10(3).

[189] On this federal understanding, see Chapter 2, Section 3.

[190] Art. 289 TFEU.

[191] For an analysis of these various powers, see Chapter 3, Section 2d.

[192] Statement of the Presidency of the Permanent Council of the WEU on behalf of the High Contracting Parties to the Modified Brussels Treaty—Belgium, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom (Brussels, 31 March 2010): 'The WEU has therefore accomplished its historical role. In this light we the States Parties to the Modified Brussels Treaty have collectively decided to terminate the Treaty, thereby effectively closing the organization, and in line with its article XII will notify the Treaty's depositary in accordance with national procedures.'

[193] On the—complex—status of this policy area, see S. Peers, 'Mission Accomplished? EU Justice and Home Affairs Law after the Treaty of Lisbon' (2011) 48 *CML Rev.* 661.

[194] Contra J. Weiler, 'The Community System: The Dual Character of Supranationalism' (1981) 1 *YEL* 267. The Weiler thesis was already hard to defend before the Single European Act, but thereafter—and especially after the Maastricht Treaty—it became untenable.

[195] The Convention Working Group on 'Legal Personality' had generally argued in favour of merging Euratom with the new European Union (Final Report, CONV 305/02, 5); yet a minority in the Working Group felt that the integration of Euratom was 'not absolutely essential given the specific nature of that Treaty' (ibid., 3), while noting that the treaty-making powers of the Commission within the sectoral Community may justify institutional separation. This minority view was sadly followed.

[196] See R. Schütze, 'Organized Change towards an "Ever Closer Union": Art. 308 EC and the Limits to the Community's Legislative Competence' (2003) 22 *YEL* 79.

[197] Art. 48 (new) TEU. For an excellent overview of the new Treaty amendment rules, see S. Peers, 'Amending the EU Treaties' in R. Schütze and T. Tridimas (eds), *Oxford Principles of European Law, Vol. I: The European Union Legal Order* (Oxford University Press, 2018), ch. 13.

[198] This process may, or may not, involve a 'Convention'—depending on the extent of the proposed Treaty amendments, see Art. 48(3) (new) TEU, and will be followed by an intergovernmental conference.

[199] Art. 48(4) (new) TEU.

[200] The Lisbon Treaty did not replace the unanimity requirement by a qualified majority requirement. It only committed itself to a procedural obligation to 'rethink' a Treaty amendment, where 'four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification' (ibid., para. 5).

[201] Ibid., para. 6. The paragraph was used by the European Council for the first time in 2011 (see European Council Decision 2011/199 amending Art. 136 TFEU with regard to a stability mechanism for Member States whose currency is the euro [2011] OJ L91/1).

[202] Art. 48(7) (new) TEU. The paragraph only applies in two situations. First, '[w]here the Treaty on the Functioning of the European Union or Title V of this Treaty provides for the Council to act by unanimity in a given area or case, the European Council may adopt a decision authorising the Council to act by a qualified majority in that area or in that case.' (This, however, excludes decisions with military or defence implications.) Second, '[w]here the Treaty on the Functioning of the European Union provides for legislative acts to be adopted by the Council in accordance with a special legislative procedure, the European Council may adopt a decision allowing for the adoption of such acts in accordance with the ordinary legislative procedure.' However, it is important to note that Art. 353 TFEU sets external limits to Art. 48(7) (new) TEU.

[203] Art. 48(7) (new) TEU third indent.