

EUROPEAN UNION LAW FUNDAMENTALS

The D.C. Bar
Continuing Legal Education Program

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Presented By Nicholas G. Karambelas, Esq.

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FACULTY

Nicholas G. Karambelas, Esq.
Sfikas & Karambelas, LLP
1101 Pennsylvania Avenue, N.W.
7th Floor
Washington, D.C. 20004
Tel. (202) 661-4614
FAX (240) 465-0400
E-Mail nick@ngklaw.com
Website: www.ngklaw.com

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Nicholas G. Karambelas is a founding partner of Sfikas & Karambelas, LLP and practices in Washington, D.C., Baltimore, Maryland, New York City, New York with correspondent offices in Athens, Greece and Nicosia, Cyprus. He practices in the areas of business entity organization, international law and business transactions, e-commerce, securities, and franchising. He has written numerous articles on business organization, transactional law and international law. He has authored a three-volume treatise entitled “Limited Liability Companies: Law, Practice and Forms” which has been published in its second edition by Thomson Reuters West Company (*www.westlaw.com: database:llcplf*). He is writing electronic treatises on contract law, statutory interpretation and the law of international business transactions.

Mr. Karambelas holds a B.A. from Union College, a J. D. from Fordham University School of Law and a Master of International Affairs (M.I.A.) from Columbia University School of Public and International Affairs. Mr. Karambelas is a member of the Board of Directors of the American Hellenic Institute and the American Hellenic Institute Foundation. He chairs the American Hellenic Lawyers’ Society of Greater Washington, D.C. He is a Trustee on the Board of Trustees of the American Community Schools of Athens, Inc.

Mr. Karambelas participated in the drafting of the revised business organization laws of the District of Columbia. He is admitted to practice law in New York, the District of Columbia, Maryland, the federal courts and the Supreme Court of United States. He was elected as Secretary of the D.C. Bar and served for 2004-2005. He served on the Publications Committee of the D.C. Bar and the Federal Legislation Committee of the Association of the Bar of New York City. He served as Co-Chair of the Continuing Legal Education (CLE) Committee of the

D.C. Bar and teaches numerous CLE courses. Mr. Karambelas was named Attorney of the Year for 2015 by the Hellenic Lawyers Association of New York City.

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TAB 1

THE EUROPEAN UNION IN PERSPECTIVE

THE EUROPEAN UNION IN PERSPECTIVE

The dream of a united Europe dates back to medieval times. In the 20th century, the experience of two catastrophic world wars urgently impelled Europeans to transform the dream into a reality. In the wake of the devastation wrought by the Second World War, the European Coal and Steel Community (ECSC) was formed in 1951 by France and West Germany and later joined by Italy and the Benelux countries. The ECSC placed the production of coal and steel under the common authority of the community countries. The European Economic Community (EEC) was formed by these countries in 1957 and expanded the ECSC function to establishing common trade and commerce policies. Over more than 40 years, the EEC evolved into the European Union.¹ The EU is the most significant transnational political and economic organizations in history the world. The EU has 28 Member States which collectively occupy most of the land mass of Europe with a Gross Domestic Product (GDP) almost equal to the GDP of the United States and population of almost 500 million people.

A nation cannot simply join the EU. A nation must complete a long and complicated accession process before it can become a Member State. Ultimately, each Member State must agree to allow an applicant nation to become a Member State. Similarly, a Member State cannot simply withdraw from the EU. There is a two year negotiation process. Each Member State must approve the ultimate agreement on withdrawal. If the Member State and the EU cannot

¹ The European Union was originally called the European Coal and Steel Community, then the European Economic Community or Common Market, then the European Community and, after 1993, the European Union, although the previous names continued to be used for certain purposes. As of December 1, 2009, the European Union is the official name. For the purpose of these materials even when referring to the period before December 1, 2009, "EU" will be used.

reach an agreement, the Member State can unilaterally withdraw. Because no Member State has ever withdrawn from the EU, there is no consensus on the effect of withdrawal on the Member State and the EU. An unresolved issue is whether a portion of a Member State which may become independent, such as Catalan in Spain or Scotland, is a Member State or whether it must apply for membership.

When Americans think about a federal government, they conceive of a written constitution which allocates powers between the states and the federal government. The EU is a far more complex system than the American system and defies a simple description. The EU is less than a federal system but more than a confederal system. It is somewhere between the U.S. Constitution and the former Articles of Confederation. The fundamental difference is that Member States are sovereign nations and international actors *before* joining the EU and remain sovereign nations and international actors *after* joining the EU. Each Member State voluntarily concedes to the EU a measure of its national sovereignty and defers to the EU on internal policies which the government of the Member State would otherwise make. EU law prevails over the national law of a Member State which conflicts with the EU law, *Costa v. ENEL*, (1964) Case 6/64. The fundamental governance issue confronting the EU is and has been how and the extent to which sovereign power is allocated between the EU as a supranational entity and the Member States as national entities.

Although efforts have been made, the EU has never promulgated a written constitution which allocates power between Member States and the EU. Rather, the allocation of power is set forth in the Treaty Establishing the European Economic Community, the Treaty on the European Union, and the Treaty Establishing the European Atomic Energy Community (EURATOM),

which are the foundation treaties of the EU. The Treaties have evolved through a halting, fragmented and even contradictory process, a series of amendments to those Treaties and special purpose treaties to which not all of the Member States are parties. Not being able to agree on a written constitution, the EU took the next best step towards rationalizing and establishing the allocation of power. Effective December 1, 2009, the Member States enacted the Treaty of Lisbon which conforms, rearranges and unifies the Treaties.

I. Member States

As of May 1, 2016, the Member States are Ireland, United Kingdom, France, Netherlands, Belgium, Luxembourg, Denmark, Sweden, Finland, Germany, Spain, Portugal, Italy, Malta, Austria, Greece, Estonia, Latvia, Lithuania, Poland, Hungary, Czech Republic, Slovakia, Cyprus, Slovenia, Bulgaria, Croatia and Romania. There are 23 official languages of the EU. With certain limited exceptions, every document of any kind issued by the EU must be translated into each official language. The “capital” of the EU is in Brussels, Belgium.

The EU has an agreement on the free movement of persons, goods services and capital with the European Economic Area (EEA) of which Norway, Iceland and Liechtenstein are the members. The EU has a similar agreement with the European Free Trade Association (EFTA) of which the EEA countries and Switzerland are members. The EU has customs union agreement with Turkey which enables the free movement of goods between Turkey and the Member States.

The primary issue in the EU is the extent to which the citizens and national economies of the Member States are or should be subject to the decisions and regulations made by bureaucrats in Brussels. This issue is most obvious in the referendum in Great Britain on whether Great Britain should remain in the EU. The proponents of exiting the EU are essentially making an

argument which Americans would recognize as a “states’ rights” position. An interesting piece of pro-exit campaign literature sets forth the following:

Pythagoras's theorem - 24 words.

Lord's Prayer - 66 words.

Archimedes's Principle - 67 words.

10 Commandments - 179 words.

Gettysburg address - 286 words.

U.S. Declaration of Independence - 1,300 words.

U.S. Constitution with all 27 Amendments - 7,818 words.

EU regulations on the sale of cabbage - 26,911 words.

II. Other Transnational Organizations

The EU must be distinguished from other transnational organizations in which Member States participate but which have no organic connection to the EU.

A. Council of Europe (COE)

COE was established shortly after the Second World War as an intergovernmental cooperative organization to assure that the human rights abuses and ravages of the war were not repeated. The COE is composed of 47 European states. The COE promulgated the Convention for the Protection of Human Rights and Fundamental Freedoms and established the European Court of Human Rights (ECHR) as the judicial organ to hear cases of individuals who allege that a COE Member State has violated the Convention. The Convention has been referred to as an international bill of rights.

1. COE is governed through the Committee of Ministers which consists of

the foreign ministers of each COE Member State, the Parliamentary Assembly (PACE) composed of MPs from the Parliaments of each COE Member State, the Secretary General who performs the executive function and the Commissioner for Human Rights. The headquarters of the COE are in Strasbourg, France.

2. The acts and resolutions of PACE are persuasive and elements of international law but COE Member States are not obligated to enforce them.

B. Organization for Economic Cooperation and Development (OECD)

Composed of 31 nations, the purpose of the OECD is to identify and coordinate the analysis and resolution of issues involving economic, environmental, and social policies. The acts and resolution of the OECD are advisory and not binding on OECD Member States.

C. International Monetary Fund (IMF)

Composed of 187 nations, the IMF is an intergovernmental organization that promotes international economic cooperation particularly on policies affecting exchange rates and the balances of payments. The IMF lends to IMF Member States for the purpose of meeting balance of payments needs.

TAB 2

FOUNDATION TREATIES AND THE TREATY OF LISBON

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The Treaty of Lisbon took effect on December 1, 2009. The purpose of the Treaty of Lisbon was to conform and restate the foundation treaties of the EU. The foundation Treaties are the *Treaty Establishing the European Economic Community*, the *Treaty on the European Union* and the *Treaty Establishing the European Atomic Energy Community*. Over the years, special purpose treaties and modifications have amended each of these Treaties. With respect to the *Treaty Establishing the European Economic Community*, the Treaty of Lisbon merged and restated these amendments into a consolidated document and renamed it the *Treaty on the Functioning of the European Union (TFEU)*. With respect to the *Treaty on the European Union*, the Treaty of Lisbon conformed and restated the amendments and special treaties made since the Treaty was enacted in 1993 but kept its name. The *Treaty Establishing the European Atomic Energy Community* was also modified by the Treaty of Lisbon but kept its name.

I. Treaty on the Functioning of the European Union (TFEU)

Having taken effect in 1957, the original *Treaty Establishing the European Economic Community* (referred to as the EEC Treaty) established a common internal market among the Member States. The EEC Treaty eliminated customs duties and quotas among Member States, established a common external tariff and trade policy toward Member States, guaranteed free movement of persons, capital and services among the Member States, adopted common agricultural and transportation policies and common competition policies. In 1965, the Merger Treaty amended the EEC Treaty by eliminating parallel sets of institutions and created one Council and one European Commission. In 1987, the Single European Act (SEA) further amended and expanded the EEC Treaty by eliminating all physical, technical and fiscal

impediments to trade and integrating persons, goods, services and capital into one market by 1992. Under the Treaty of Lisbon, the EEC Treaty, the Merger Treaty, the SEA and other modifications were merged into a single document entitled the *Treaty on the Functioning of the European Union (TFEU)*.

II. Treaty on the European Union of 1993 (TEU)

Also referred to as the Maastricht Treaty, the TEU fundamentally amended and expanded the EEC Treaty. The TEU established the structure for the creation of the euro as a single currency and the basis for a full political and economic union of the Member States. The TEU sets forth the three pillars of the EU:

- A. Common trade and commerce measures,
- B. Common foreign and defense policy, and
- C. Common justice and police policy.

The Treaty of Amsterdam of 1999 and the Treaty of Nice of 2003 made further procedural and structural changes to the TEU with respect to the operation and structure of the EU institutions. Under the Treaty of Lisbon, these Treaties were consolidated into the TEU.

III. Treaty Establishing the European Atomic Energy Community (EURATOM)

The Treaty contributes to the formation and development of nuclear industries for the benefit of the Member States. It guarantees high safety standards for the public and prevents nuclear materials intended principally for civilian use from being diverted to military use. The Treaty regulates special fissile materials, source materials and the ores from which source materials are extracted.

IV. Charter of Fundamental Rights

The Charter sets forth certain political, social, and economic rights for EU citizens and residents. It is functionally similar to the U.S. Bill of Rights. Under the Treaty of Lisbon, the Charter has the force and legal effect as do the foundation Treaties but it does not expand the jurisdictions or competences of the Treaties. This means that an individual cannot take a Member State to court for failing to uphold the rights in the Charter unless the individual was aggrieved by the means or method by which the Member State implemented EU law. The EU must act consistent with the Charter. The Court of the EU is empowered to rule as invalid any law which contravenes the Charter.

V. Treaty of Lisbon

The Treaty of Lisbon is essentially an amending treaty. It does not nor is it intended to replace or repeal the three foundation treaties. The Treaty of Lisbon consolidates, rearranges and modifies the three foundation Treaties. The Treaty of Lisbon adds to the three foundation treaties in the area of foreign policy by creating the office of the High Representative of the European Union for Foreign Affairs and Security Policy. The foundation Treaties do not set forth any legal means or procedure by which a Member State can withdraw from the EU. Under the Treaty of Lisbon, the Member State and EU have a maximum of two years to negotiate and agree on terms for withdrawal. The agreement must be approved by all Member States. If the EU and the Member State cannot agree, then the Member State can withdraw after two years.

TAB 3

THE ALLOCATION OF SOVEREIGN POWER IN THE EU

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The EU has only the powers and authorities which the Member States have conferred on the EU. Such powers and authorities are referred to as competences.² In exercising these powers and authorities, the EU is circumscribed by the principles of subsidiarity and proportionality.

- A. The principle of subsidiarity holds that in areas outside of the exclusive competence of the EU, the EU shall act only insofar as the objective of the act cannot be accomplished by the Member States at the national or regional level because the scale and effects of the act are better accomplished at the EU level.
- B. The principle of proportionality holds that the form and content of the proposed act by the EU shall not exceed that which is strictly necessary to accomplish the objective within the limits set by the Treaties.

The Treaty of Lisbon sets forth the following categories of competences:³

I. Exclusive Competence⁴

The EU can enact laws which bind the Member States without the consent or approval of any Member State in the following policy areas:

- A. Customs union
- B. Anti-trust
- C. Monetary policies for the Euro Group
- D. Marine biological conservation, and
- E. Commercial policy

Any act of the EU in a policy area of exclusive competence is subject to the principle of

² The areas of foreign policy and defense are treated as competences which are separate from the other policy areas, TEU Art 21 *et seq.*

³ TFEU Art. 2a-2e and Protocol on exercise of shared competence.

⁴ TFEU Art. 3

proportionality.⁵

II. Competence Shared with Member States⁶

The Member States may act in the following policy areas. However, if the EU acts in any of these policy areas, then the Member States are precluded from acting unless the EU ceases to act in any area in which it was already acting:

- A. Internal market
- B. Social policy in the areas set forth in the TFEU
- C. Agriculture and fisheries
- D. Energy
- E. Health, safety security and justice
- F. Consumer protection
- G. Transportation

Any act of the EU in a policy area of shared competence is subject to the principle of subsidiarity.⁷

III. Complementary Competence⁸

The EU may act to support, coordinate and supplement the acts of the Member States in the following policy areas. However, the EU cannot preclude the Member States from acting or force the Member States to act in a particular way.

⁵ TEU Art. 5(4)

⁶ TFEU Art. 4

⁷ TEU Art. 5(3)

⁸ TFEU Art. 6

- A. Health
- B. Industry
- C. Culture and tourism
- D. Education and sports

IV. Flexibility Clause

Except foreign policy and defense, the EU may act in a policy area for which no Treaty provision confers a power or competence as long as such act is necessary to achieve an objective of the Treaties.⁹

⁹ TFEU Art. 308

TAB 4
THE EU INSTITUTIONS

THE EU INSTITUTIONS

The EU acts through the institutions which the Member States have established in the foundation Treaties.¹⁰ The EU institutions are the European Parliament, the Council, the European Council, European Commission, Court of Justice of the European Union, European Central Bank and the Court of Auditors.

I. European Parliament

The European Parliament (also referred to as the Parliament) performs a legislative function which is similar to the U.S. House of Representatives. The Parliament exercises legislative and budgetary functions jointly with the Council and represents the interests of the people of the EU.¹¹ The Parliament cannot initiate legislation. It can only consider legislation that the European Commission has proposed.

The Parliament is composed of a maximum of 750 members (referred to as MEPs) plus the President of the Parliament who is elected by the MEPs. Each Member State elects a number of MEPs which is proportional to the ratio that the population of each Member State bears to the EU population as a whole.

- A. No Member State has less than 6 representatives and no Member State has more than 96 representatives.
- B. Each member is elected on a popular basis by each Member State on the same day for a term of five years.¹²

¹⁰ TEU Art. 13

¹¹ TEU Art. 14(1)

¹² TEU Art. 14(2)

- C. Generally, the Parliament acts by a majority vote of the MEPs.¹³
- D. The Parliament conducts its business according to European Parliament Rules of Procedure (referred to as EP Rules) which the MEPs enact and periodically amend.

The Parliament is not an assembly of delegates from various nations like the United Nations. The MEPs do not caucus as delegates from a nation but rather they caucus according to their respective political affinities. The MEPs elected from Greece do not sit or act as representatives of Greece. The Greek socialists caucus with the socialists from Italy or France and the Greek conservatives caucus with the conservatives from Italy or France. The various caucuses are referred to as political groups.¹⁴ Each political group elects a chairperson. The chairperson of each political group and the President of the Parliament form the Conference of Presidents.¹⁵ The Conference organizes all of the work of the Parliament and parliamentary bodies. Decisions of the Conference are made by consensus. If no consensus is reached, the

¹³ TFEU Art. 225, 231

¹⁴ As of the most recent Parliamentary election in 2014, the political groups are:

1. Party of European Socialists
2. European People's Party
3. Alliance of Liberals and Democrats for Europe Party
4. European Green Party
5. Party of the European Left
6. European Democratic Party
7. Alliance of European Conservatives and Reformists
8. European Free Alliance
9. European Christian Political Movement
10. European Pirate Party
11. Non-Escrits (MEPs who are not part of a political group).

¹⁵ EP Rules 22-24

Conference decides by a weighted vote based on the number of MEPs in each political group.¹⁶

II. The Council or Council of Ministers or Consilium

The Council exercises legislative and budgetary functions jointly with the Parliament. It consists of a ministerial level representative from each Member State.¹⁷ Like the Parliament, the Council cannot initiate legislation but can only consider legislation proposed by the European Commission. Each Member State has one representative on the Council. The particular representative of a Member State varies according to the policy area at issue a particular time but he or she must be duly authorized to bind his or her Member State. Each such policy area is referred to as a configuration and each representative presides over each such configuration on a rotating basis. The configurations are specified by the European Council.¹⁸ The Council generally votes by a qualified majority although certain decisions such as taxation, foreign policy and treaty modification require a unanimous vote.¹⁹

The Council elects its President from a Member State on rotating basis for a six-month term according to a schedule that is set through 2020.²⁰ To increase efficiency, continuity and coordination between successive Presidencies, the immediate past, present and immediate future Presidents (referred to as presidency trios) cooperate on a common political program for an 18

¹⁶ *Ibid.*

¹⁷ TEU Art. 16(1)-(2)

¹⁸ TEU Art. 16(6); TFEU Art. 236; See this Part, this Section C., *infra*.

¹⁹ See this Part, IV. D., *infra*.

²⁰ TEU Art. 16(9); TFEU Art. 236

month period.²¹

The Committee of Permanent Representatives of the Governments of the Member States (COREPER) prepares the work of the Council and consists of each ambassador to the EU of each Member State. The Council is also served by a Secretary-General with a staff. Legislative meetings of the Council are open to the public.²²

III. European Council

The European Council defines the general political directions and priorities but does not perform a legislative function.²³ It consists of the heads of state or government of each Member State, the President of the European Council, the President of the European Commission and meets twice every 6 months.²⁴ The European Council elects a President by a qualified majority for a term of 18 months with one succession term. Decisions are made by consensus.²⁵ Although the European Council lacks any enumerated powers or specific authority, it exercises its influence by virtue of the fact that it is composed of the national leaders of the Member States.

IV. European Commission

The European Commission performs the executive function of the EU.²⁶ It consists of

²¹ *Draft 18 month programme of the Council*, Doc 16771/09 POLGEN 219

²² TEU Art. 16(8)

²³ TEU Art. 15(1)

²⁴ TEU Art. 15(2) - (3)

²⁵ TEU Art. 15(5), (4)

²⁶ TEU Art. 17(1)

one commissioner from each Member State. The commissioners are charged with pursuing the interests of the EU and not the interests of their respective Member States. Each commissioner is appointed by the European Council.²⁷ The Commission serves a term of five years. The President of the Commission is nominated by the European Council and approved by the Parliament.²⁸ The Commission functions through a series of directorates, each of which has a designated policy subject matter. The Commission exercises the following powers:

- A. Except for instances in which the national legislatures of the Member States may cause the European Commission to reconsider a legislative proposal and refer the issue to the Council and the European Parliament,²⁹ initiates legislation which is forwarded to the Council and the Parliament but does not vote on the legislation,³⁰
- B. Implements the budget of the EU,
- C. Enforces compliance with the Treaties by Member States, other EU institutions and represents the EU in legal proceedings,
- D. Represents the EU in negotiations with non-Member States, and
- E. Enacts laws which involve monopolies and concessions granted to companies by Member States and certain rights of workers.³¹

The Treaty of Lisbon created the position of High Representative of the Union for Foreign Affairs and Security Policy (HR). The HR coordinates the Common Foreign and Security Policy (CFSP) of the EU and represents the EU in trade negotiations with non-Member

²⁷ TFEU Art. 244

²⁸ TEU Art. 17(7), Art. 14(1)

²⁹ TEU Art. 12(b), TFEU Art. 88(2)

³⁰ TEU Art. 17(2)

³¹ TFEU Art. 106(3), Art. 45(3)(d)

States. The HR has been compared to the position of a foreign minister for the EU. The HR is assisted by the European External Action Service which is similar to a diplomatic service.

V. The European Central Bank

The European Central Bank (ECB) manages the euro and safeguards price stability in the Euro Area which means it is supposed to keep inflation under control. The ECB frames and implements the economic and monetary policy of the EU. The ECB is completely independent from the EU institutions, the national central banks of the Euro Group and the Member States. The ECB prepares and implements the decisions taken by the Euro Group decision-making bodies. The ECB is administered by a president and a board which consists of the heads of the central banks of each Euro Area Member State. The ECB has the authority to purchase the bonds of Euro Group Member States and to issue bonds.

In 2010, the EU formed the European Financial Stability Facility (EFSF). The purpose of the EFSF is to safeguard financial stability in Europe by providing financial assistance to those Member States which are in the Euro Group. The Euro Group Member States guarantee the commitment of the EFSF. The EFSF is authorized to:

- A. Lend to Member States in financial difficulties,
- B. Intervene in the primary and secondary debt markets. Intervention in the secondary debt market will be only on the basis of an ECB analysis recognizing the existence of exceptional financial market circumstances and risks to financial stability,
- C. Act on the basis of a precautionary program,
- D. Finance recapitalisations of financial institutions through loans to governments.

VI. Euro Area (Eurozone) and Euro Group

The Euro Area consists of those Member States who have adopted the Euro as their national currency and sole legal tender. The Member States are Austria, Belgium, Cyprus, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Malta, the Netherlands, Portugal, Slovakia, Slovenia, Croatia and Spain. There is no legal basis or procedure by which a Member State in the Euro Area can leave the Euro Area or be expelled from the Euro Area.

The Euro Group is governed by the finance ministers of each Member States in the Euro Area. In emergencies, the national leaders of each Member State form the Euro Group. The Euro Group provides the political control over decisions affecting the Euro Area and the Euro. Only Euro Area Member States vote on matters affecting the Euro Zone in the Council of the European Union. The chairperson rotates the same way that the presidency of the Council of European Union rotates.

The legal basis of the Euro Group was formalized under the Treaty of Lisbon Treaty.

The following 2 articles of the Treaty of Lisbon create and govern the Euro Group:

Article 1: The Ministers of the Member States whose currency is the euro shall meet informally. Such meetings shall take place, when necessary, to discuss questions related to the specific responsibilities they share with regard to the single currency. The Commission shall take part in the meetings. The European Central Bank shall be invited to take part in such meetings, which shall be prepared by the representatives of the Ministers with responsibility for finance of the Member States whose currency is the euro and of the Commission.

Article 2: The Ministers of the Member States whose currency is the euro shall elect a president for two and a half years, by a majority of those Member States.

VII. The Court of Auditors

The Court of Auditors consists of one national from each Member State. The Court of

Auditors acts through a qualified majority. Its duties are to examine all revenue and expense accounts of the EU and each EU institution, provide annual audited financial statements to the EU institutions and advise the EU on fiscal management issues.

TAB 5

COURTS OF THE EUROPEAN UNION

COURTS OF THE EUROPEAN UNION

I. The Court of Justice of the EU

The Court of Justice of EU (CJEU) is the judicial organ of the EU. It is composed of the European Court of Justice (ECJ), the European General Court and the EU Civil Service Tribunal. The CJEU interprets and applies the Treaties of the EU and the laws and regulations adopted by the EU Institutions.

II. The European General Court or General Court

The European General Court (EGC) is the court of original jurisdiction of the EU. Until the Treaty of Lisbon took effect on December 1, 2009, the EGC was called the Court of First Instance. The European Civil Service Tribunal hears actions involving the civil servants of the EU and its decisions are appealed to the EGC. The EGC has subject matter jurisdiction to hear and determine in the first instance all direct actions asserted by individuals/private parties or the Member States who allege damages as the result of an act or omission to act by an EU institution. The EGC does not hear cases between individuals/private parties or between individuals/private parties and a Member States. A direct action is similar to a complaint. Direct actions are categorized as follows:

- A. An action for annulment alleges that an act of the EU is unlawful.
- B. An action for failure to act alleges that the EU is obligated to act fails to act.
- C. An action for damages seeks compensation or recoupment for damages alleged to have been incurred by the unlawful conduct of an EU institution.
- D. An action based on an arbitration clause under a contract concluded by the EU which contains an arbitration clause.

- E. An action involving intellectual property against the trademark and copyright agencies of the EU.
- F. Appeals from the European Civil Service Tribunal.

The EGC is composed of 28 judges. At least one judge is from each Member State. The judges are appointed for a renewable term of six years by the Member States. The judges elect a President. The EGC is organized into chambers of three to five judges or under certain circumstances one judge. The judges elect a President of each chamber for a term of three years which can be renewed. EGC also has judicial panels of judges which hear cases in specialized areas of law. The judges appoint a registrar who performs the functions of a clerk of the court in the U.S. courts.

The EGC rules of procedure provide for a written phase and an oral phase. A case is initiated by an application (*i.e.* complaint) by the aggrieved party which is summarized in the official journal of the EU and served on the opposing EU institution by the court registrar. The opposing EU institution responds, the applicant replies and the opposing EU institution may file a rejoinder to the reply. At the oral phase, which is a public hearing, the judges pose questions to the attorneys of the parties. Witness testimony is rare. One of the judges is chosen to submit a draft report to the other judges. The judges deliberate in a common language and issue a decision in open court.

III. The European Court of Justice

The European Court of Justice (ECJ) assures that the TFEU and TEU are interpreted and applied in a consistent and systematic manner.³² The ECJ has exclusive original subject matter

³² TEU Art 19

jurisdiction over any case asserted by:

- A. The European Commission against any Member State that the European Commission alleges has failed to fulfill an obligation under the TFEU or TEU³³, and
- B. A Member State against another Member State for the failure of a Member State to fulfill an obligation under the TFEU or TEU. The case must first be brought before the Commission, which may render an opinion. If the Commission does not render an opinion within three months, the ECJ may hear the case without a Commission opinion.³⁴
- C. The ECJ may issue preliminary rulings on questions concerning EU law that arise in the domestic courts of the Member States.³⁵ A preliminary ruling is not advisory but rather mandatory. The domestic court which requests the preliminary ruling must comply with it. The lower courts of a Member State may, but are not obligated to, seek “authoritative guidance” in the form of a preliminary ruling. However, if the highest court of a Member State has before it a case involving a question of EU law, then that court must seek a preliminary ruling on the question.

The ECJ has exclusive appellate jurisdiction over cases appealed from the decisions of the EGC. The ECJ can only review matters of law and not matters of fact.³⁶ The ECJ has been described as a constitutional court, which performs a function similar to that of the U.S. Supreme Court. However, unlike the Supreme Court, the ECJ does not hear appeals from the decisions of the national courts of Member States.

³³ TFEU Art. 258

³⁴ TFEU Art. 259

³⁵ TFEU Art. 267

³⁶ TFEU Art 256(1)

IV. Other International Courts

The CJEU must be distinguished from other international courts. The term “*international courts*” refers to courts that are authorized and empowered by a treaty concluded by nations. The subject matter jurisdiction of international courts and the legal force and binding effect of the judgments of international courts on national courts and the nationals of the signatory nations are specified by the signatory nations in the treaty.

A. International Court of Justice (ICJ)

The ICJ was established by the United Nations (UN) in 1947. The UN Charter provides, *inter alia*, that the ICJ is the principal judicial organ of the UN and that all members of the UN are parties to the statute of the ICJ. The ICJ is a continuation of the Permanent Court of International Justice (also referred to as the World Court), which was established by the League of Nations in 1921. The ICJ has 15 judges, each of whom is elected by the General Assembly and the Security Council of the UN. Five judges are elected every three years so that the terms are staggered.

The court sits in the Hague, Netherlands. The ICJ hears only disputes between nation-states as a matter of original jurisdiction and does not hear appeals from national courts. Neither individuals nor legal entities have any recourse to the ICJ. The ICJ does not have compulsory jurisdiction. It can only hear cases that the nation-states have agreed to submit. Under certain circumstances the court may hear unilateral cases (*i.e.*, cases submitted by one nation-state in which the opposing nation-state does not consent to the submission of the case). It may also render advisory opinions when requested by an organ of the UN. The ICJ has no organic or procedural connection to any other international court. The ICJ has no enforcement

authority and relies on the parties to adhere to voluntarily adhere to ICJ judgments.

B. The International Criminal Court (ICC)

The ICC was established on the recommendation of the UN and is governed by the Rome Statute. The ICC has subject matter jurisdiction to hear cases which involve crimes of genocide, crimes against humanity, war crimes and crimes of aggression. It has personal jurisdiction only over persons from one of the 124 party states that have signed the Rome Statute. The ICC can only hear cases where the geographical area in which the crime is alleged to have occurred is within the territory of a party state, or the person alleged to have committed the crime is a national of a party state. The United States is not a party state.

The Prosecutor appointed under the Rome Statute decides which cases to prosecute and can prosecute only if the party state in question refuses or is unwilling to prosecute the alleged crimes.

C. The European Court of Human Rights (ECHR)

The ECHR is the judicial organ of the Council of Europe (COE). The ECHR is composed of a judge from each member nation of the COE and divided into sections for hearing specific cases. The court sits in Strasbourg, France. Unlike the ICJ, the ECHR has compulsory jurisdiction over its member states. Individuals and legal entities of any nationality as well as member states may assert cause of action in the ECHR. As a condition precedent to asserting a cause of action, an individual or entity must exhaust the available domestic remedies. The court can award only money judgments and has no equity jurisdiction. The ECHR has no organic or procedural connection to any other international court.

The ECHR has no enforcement authority. It relies on member states to comply with

their primary COE treaty obligation which is to implement the judgments of the ECHR. If a member state refuses to comply with a judgment of the ECHR, the matter is referred to the COE Council of Ministers. Ultimately, a member state can be expelled from the COE for refusing to comply with an ECHR judgment.

The Treaty of Lisbon mandates that the EU accede to the COE. As of May 1, 2016, the EU has not acceded due primarily to questions raised by the ECJ on whether the EU is legally able to accede. The EU has taken the position that it is bound by the Convention but not bound by the case law of the ECHR. However, the ECJ accords "special significance" as a "guiding principle" to the case law of the ECHR. The ECHR will hold an EU Member State liable for violations of the Convention even if the violation arises from a Member State complying with EU law.

TAB 6

LAW MAKING PROCEDURE IN THE EU

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I. Laws of the EU

The entire body of EU laws is referred to as the *acquis communautaire* which translates from French as “that which is obtained by the community”. The *acquis communautaire* consists of primary legislation, secondary legislation and the case law of the CJEU.³⁷ The primary legislation consists of the TEU, TFEU as each Treaty is amended by the Treaty of Lisbon and the Charter of Fundamental Rights. Secondary legislation consists of the following:³⁸

- A. Regulations - A regulation is binding on the EU and each Member State. No national legislation to implement the regulation is required.
- B. Directives - A directive is binding on the EU and each Member State but each Member State may choose the form and method of implementing a directive by or through its own national legislation.
- C. Decisions - A decision is binding on the party to whom it is addressed and no national legislation is required to implement a decision. That party can be one or more of the Member States, an entity or an individual.
- D. Recommendations, Interpretive Communications and Commission Comments - These items are not binding but are rules of conduct which have persuasive or practical effects.

II. Ordinary Legislative Procedure (formerly Co-Decision)

Under Treaty of Lisbon, the EU adopts most of its secondary legislation through the ordinary legislative procedure. Legislation in 73 policy areas including common commercial policy, internal market, economic governance, budget and immigration can be enacted only

³⁷ Delcourt, *The Acquis Communautaire: Has the Concept Had its Day?*, 38 Common Market Law Review 829 (2001); Ziller, *Integration of the Acquis Communautaire into the Legal Order of New and Future Member States*, COE Report CDL-UDT (2005)032.

³⁸ TFEU Art. 288

through this procedure. Under this procedure, an item of secondary legislation is law when both the European Parliament and the Council decide in favor of any such regulation, directive or decision.³⁹ The European Commission proposes a regulation, directive or decision which is then brought to vote in each of the European Parliament and the Council according to the following procedure:⁴⁰

Introduction of secondary legislation

The European Commission proposes an item of secondary legislation to each of the European Parliament and the Council.

Enactment after First Reading

The European Parliament takes a position on the proposal and communicates that position to the Council.

If the Council approves the position of the European Parliament, then the position of the European Parliament as reflected in the text communicated to the Council by the European Parliament is enacted.

Enactment after Second Reading

If the Council does not approve the position of the European Parliament, then the Council shall adopt its own position and communicates that position with reasons to the European Parliament.

If, within three months after it receives the non-approving Council position, the European Parliament approves the Council position, then the position of the Council as reflected in the text communicated to the European Parliament by the Council is enacted.

Rejection after Second Reading

If, within three months after it receives the non-approving Council position, the

³⁹ TFEU Art. 289(1)

⁴⁰ TFEU Art. 294 (1) - (14)

European Parliament rejects the Council position by a majority of its representatives, then the position of the Council as reflected in the text communicated to the European Parliament by the Council is not enacted.

Amendment after Second Reading

If, within three months after it receives the non-approving Council position, the European Parliament amends the Council position by a majority of its representatives, then the amended text is communicated to each of the Council and the European Commission, each of which render an opinion on the amended text.

Enactment of Amended Text after Second Reading

If, within three months after it receives the amended text of the European Parliament to the Council position, the Council approved the amended text by a qualified majority, then the proposal as reflected in the amended text is enacted except that, for any amendment on which the European Commission renders a negative opinion, the Council must approve by unanimous decision.

Rejection of Amended Text after Second Reading and Conciliation

If, within three months after it receives the amended text of the European Parliament to the Council position, the Council does not approve the amended text, then the President of the Council and the President of the European Parliament must each agree to convene the Conciliation Committee within six weeks.

Conciliation Committee and Procedure

The Conciliation Committee consists of each member of the Council and an equal number of representatives of the European Parliament. The purpose of the Conciliation Committee is to agree on a joint text based on the respective positions of the Council and the European Parliament after the Second Reading.

The Council decides on any joint text by a qualified majority of the Council. The European Parliament decides on any joint text by a majority of the representatives on the Conciliation Committee. The Conciliation Committee must decide on a joint text within six weeks of when it is convened unless extended.

The European Commission participates in the Conciliation Committee deliberations but does not decide.

Rejection by Conciliation Committee after Second Reading

If the Conciliation Committee does not approve a joint text, then the proposed item of secondary legislation is not enacted.

Approval by Conciliation Committee after Second Reading and Third Reading

If the Conciliation Committee timely approves a joint text, then, within six weeks from that approval, the joint text is law as long as the European Parliament approves the joint text by a majority of the votes cast and the Council approves the joint text by a qualified majority. If one or neither institution does not timely approve the joint text, the joint text is not enacted.

III. Special Legislative Procedure

Secondary legislation in certain policy areas specified in an article of either the TEU or the TFEU must be proposed and enacted according to the procedure specified in that particular article.⁴¹ Most of these articles enable the Council to enact secondary legislation proposed by the European Commission by a unanimous vote as long as the Council has obtained the consent of or consulted with the European Parliament. Also, in certain articles the Council may change the procedure from the procedure set forth in the article to the ordinary legislative procedure.⁴²

IV. Decision Making

The TEU and TFEU enable EU institutions to make decisions by unanimous vote, majority vote or qualified majority vote. The European Parliament acts by a majority vote of its representatives according to rules as to quorums set forth in the EP Rules. The Council generally acts by a qualified majority vote under the ordinary legislative procedure and by unanimous vote under most special legislative procedures. Until October 31, 2014, on the

⁴¹ See e.g. TFEU, Art.19, Art. 311-312

⁴² TFEU, Art. 81(3), Art.153(2)

qualified majority vote each Member State was accorded a weighted vote based on the relative populations of each Member State as set forth in the transition protocol.⁴³

As of November 1, 2014, the protocol expired and the weighted vote was abolished.

Each Member State has one vote. A qualified majority is at least 55% of the Member States as long as the 55% consists of at least 15 Member States which represent at least 65% of the total EU population.

- A. If at least 4 Member States vote negative, then there is no qualified majority under any circumstances, (referred to as a blocking minority).
- B. For legislation or a decision in policy areas not proposed by either the European Commission or the High Representative, a qualified majority is at least 72% of the Member States as long as the 72% represents at least 65% of the total EU population.⁴⁴
- C. For legislation or a decision in policy areas in which less than all of the Member States participate (*i.e.* Euro zone), a qualified majority is at least 55% of the participating Member States as long as the 55% represents at least 65% of the total population of the participating Member States. A blocking minority is at least 4 Member States as long as the 4 Member States represent more than 35% the total population of the participating Member States plus one more Member State whose population is not included to calculate the population percentage.⁴⁵

⁴³ TFEU, Art. 238(2); TFEU Protocol No. 36.

⁴⁴ TFEU, Art. 238(2)

⁴⁵ TFEU, Art. 238(3)