

Cambridge University Press

978-0-521-88144-9 - European Union Law for International Business: An Introduction

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Excerpt

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EU institutions and law making

INTRODUCTION

THE EU HAS its origins in the European Coal and Steel community formed by France, Germany, Italy, Belgium, Luxembourg and the Netherlands by the Treaty of Paris in 1951. This treaty transferred the power over the coal and steel industries of those states signing it to a central authority. The objectives of the treaty are important because they signalled what were to become central aims of the EU. The primary objective was to have the coal and steel industry controlled centrally rather than at the individual nation state level for industry efficiency. Underlying this, however, was the view that such central control would contribute to peace within Europe by preventing any of the major powers from rearming and thereby avoiding the devastation that occurred in the previous decade in World War Two.

The formal beginnings of the EU occurred in 1957 when the same six nations to the Treaty of Paris signed the Treaty of Rome and created the European Economic Community, now the European Community (EC).¹ This treaty laid the foundations for the major institutions of the EU that exist today – the Council of Ministers, the European Parliament, the European Commission and the European Court of Justice. In addition, the EC Treaty moved beyond the aim of central regulation of a single industry to a much broader role of integration of the economies of the member countries. The treaty has been amended several times since 1957, most notably by the Single European Act of 1986; the Maastricht Treaty of 1992 that created an additional treaty to the original EC Treaty entitled the

¹ The resulting treaty is officially entitled the Treaty establishing the European Economic Community, Rome, 25 March 1957. It was later renamed the EC Treaty, when the EEC became the EC.

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Treaty on European Union ('EU Treaty')² and laid the groundwork for the introduction for a common European currency; the Treaty of Amsterdam in 1997 that reformed many of the institutional arrangements of the EU; the Treaty of Nice in 2000 that was necessary in view of the impending enlargement of EU membership; and finally the Treaty of Lisbon in 2007 that, if ratified by all member states, will streamline administrative and governance arrangements within the EU.

The embryonic EU took some time to persuade other European nations to join. However, since the early 1970s there has been a gradual expansion so that today, most European nations are either members, or if not members, have largely integrated their economies with the EU bloc. Great Britain, Denmark and Ireland joined in 1973 followed by Greece in 1981; Spain and Portugal in 1986; Austria, Finland and Sweden in 1995; Estonia, Latvia, Lithuania, the Czech Republic, Slovakia, Hungary, Poland, Slovenia, Malta and Cyprus in 2004; and finally Bulgaria and Romania in 2007, bringing total membership to 27 countries.

The increase in membership has been accompanied by a gradual increase in the areas of responsibility that have been transferred to central authorities by the member states. From the point of view of a businessperson from a country not part of the EU, the issues that are of most significance are those relating to freedom of movement of goods; freedom of movement of capital; freedom of establishment; and freedom of movement of persons. All of these central freedoms have the objective of creating a truly single market within the EU area. Thus, freedom of movement of goods aims to have no barriers when goods are moved across national boundaries within the EU. Freedom of movement of capital likewise refers to the absence of boundaries between members for the movement of capital. Freedom of establishment, accompanied by the freedom to provide services to citizens in another member state, aims to have minimal restrictions on any person anywhere in the EU establishing a business or providing a service in any part of the EU. Freedom of movement of persons is significant because a firm needs to have the flexibility to move managers between countries to oversee the operations of the firm in those countries. Of course, freedom of movement of persons also has importance in that workers should be free to move within Europe to take advantage of work opportunities in other states.

However, as will become apparent throughout this book, the attainment of the single market objective and the four freedoms is a work in progress. While the EU has the aim of freedom of movement of goods, this only

² Treaty on European Union, Maastricht, 7 February 1992.

applies to internal movement of goods. Businesspersons from outside of the EU must still negotiate initial customs barriers and regulations that apply to the type of good they are exporting to an EU member country. In addition, some barriers remain to the internal movement of goods. Chapter 3 discusses the various regulations that apply for internal transport of goods within the EU and details some of the difficulties in having a truly integrated transport system within the EU area. Some of these difficulties can be traced to the underlying legal conventions relating to the international transport of goods. Chapter 4 deals with customs procedures and formalities within the EU and makes it clear that while many goods are free to move, individual countries still have room to lay down their own conditions for the entry of some goods into their territories in some circumstances.

Similarly, the freedom to establish a business presence is confined to persons and entities from within the EU. However, as will be made clear, most European countries have extended the freedom to establish a new business to persons or firms from outside of the EU as well. Chapter 8 discusses the establishment of a business in an EU member country and notes that regulation over business establishment is still split between central European institutions and individual nation states, thereby making it necessary for the businessperson wanting to establish a business within an EU member country to take account not only of central EU regulations but also those of the member states where the business is to be set up.

Freedom of movement of persons is not dealt with in detail in this book. The reason here is that an external businessperson may face very different barriers in having a manager from their home country run a business within the EU to those that apply to managers moving between countries within the EU. This is because the EC Treaty specifically provides for freedom for persons to take up offers of employment in any member state subject to any legitimate limitations of the host state on public policy, public health or public security grounds.³ On the other hand, the outsider cannot take advantage of this freedom and accordingly more restrictions might apply to outsiders when attempting to obtain a visa and work permit.

Likewise freedom of movement of capital within the EU is not considered in any detail. Article 56 of the EC Treaty abolishes all restrictions on capital movements between member states and between member states and third countries. However, Article 57 of the EC Treaty allows for some restrictions to remain. These exist primarily in real estate investment, the

³ EC Treaty Article 39(3)(a).

financial services sector and the admission of securities to capital markets. However, for the outside businessperson who seeks to establish and operate a business in an EU member country, the associated capital flows between their home state and the EU member state will pose few problems provided that any requirements for establishment and operation of the business are met.

It is not only the attainment of the four freedoms and the single market that are a work in progress. The EU itself is evolving both in terms of its membership and its institutional arrangements. As at the end of 2008, both Turkey and Croatia are applicants for membership. In addition, free trade agreements between the EU and third countries have the effect of expanding the EU market beyond the current 27 member states. The EU has extensive free trade agreements with Switzerland and with Norway, Iceland and Liechtenstein. These are discussed in more detail in Chapter 4.

The way in which laws are made by the EU is also the subject of evolution. Thus, while this chapter details the roles of the various institutions of the EU and how law is made at the EU level, these processes will no doubt be subject to change over the coming decades. However, an understanding of EU institutions, their role in law making, the types of laws that exist and how the laws themselves are actually made is important for any person wishing to do business with a firm in any of the EU member countries. Each of these matters is now considered in turn.

EU INSTITUTIONS AND THEIR ROLE IN LAW MAKING

There are five main institutions involved in law making at the EU level. These are the European Council, the Council of the European Union, the European Commission, the European Parliament and the European Court of Justice. In addition, there are two consultative bodies – the Economic and Social Committee, and the Committee of the Regions. Many treaty articles require that these bodies be consulted before legislation is made. The role of each of these institutions will now be discussed with particular reference to law making as opposed to other supervisory and political functions that they may exercise.

THE EUROPEAN COUNCIL

The European Council consists of the heads of government of each of the member states. It is chaired by the head of state of one of the member states.

The position rotates among the member states every six months. While the European Council does not have a direct role in the EU's legislative process, it nonetheless exercises a significant role in EU law making by taking the lead role in treaty revisions and major changes in EU policy. As noted earlier, the two basic treaties of the EU are the Treaty Establishing the European Community that dates from 1957 and the Treaty on European Union that dates from 1992. Both of these are discussed in more detail below.

The European Council discusses major treaty changes at summit meetings. Because of the important role of both the European Commission and the European Parliament in developing legislation based on the EC Treaty, the heads of both the European Commission and the European Parliament frequently also attend summit meetings. Changes to the treaty discussed at a summit meeting are typically followed up by an intergovernmental committee that works on the detail of the changes and then finally the adoption of the changes by a further summit meeting. Because the EC Treaty is no more than an agreement between sovereign states, each member state must then adopt the treaty as the law of their own state. Each state has its own processes for doing this. Most changes to the EC Treaty have been able to have been adopted in most states by parliamentary processes alone without the need for a referendum.

There is some evidence that when states are obliged by their own constitutions to put treaty changes to a referendum in their own state, it is difficult to convince the public to support those changes. The most recent attempts to change the treaties in 2004 and again in 2007 are a case in point. Over the 2002–2004 period an ambitious attempt was made to upgrade the treaties into what was termed 'a constitution' for the EU. Voters in both France and Germany rejected this in referendums that were held in 2004. Following this, the original proposal for a constitution was abandoned and changes were made to make the revisions to the treaties more acceptable to the public. Thus, rather than a 'Constitution of Europe', the existing two treaties were retained but with significant amendments. The Council of Europe endorsed these changes at Lisbon in December 2007 with a view to having the revised treaties in force by the end of 2008 in time for the elections for the European Parliament in 2009.

The Lisbon Treaty⁴ provides for both an increase in the power of EU institutions and at the same time an increase in the checks and balances

⁴ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, Lisbon, 13 December 2007 ('Lisbon Treaty').

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mechanisms that member states have over the exercise of that power. In terms of increases in the power of EU institutions, the Lisbon Treaty creates an office of President of the European Union elected by the European Council for a two-and-a-half-year term renewable once and a new High Representative for Foreign Affairs and Security Policy who will represent the EU in an extended range of international matters that can be dealt with at the EU level rather than at the level of the individual nation state. However, individual nation states are given increased power to monitor EU actions; the individual rights and freedoms of citizens are enhanced; the division of legislative powers between the EU and member states is clarified and, for the first time, member states have the option of withdrawing from the EU.

As of the end of 2008, the Lisbon Treaty has been ratified by all member states except Germany, Czech Republic, Poland, and Ireland, whose constitution required a referendum to be held. That referendum was defeated in June 2008 and accordingly Ireland cannot yet ratify the Lisbon Treaty. The ratification process is well underway in the other three states. Because all nation states must ratify it for it to come into effect, it does not yet have the force of law. The European Council has taken a lead role in attempting to resolve this impasse.

The European Council exercises important functions other than revisions to the main treaties. These include the discussion of major differences between member states on key issues and the overall future direction of the EC.

THE COUNCIL OF THE EUROPEAN UNION

The Council of the European Union⁵ consists of one representative from each member state who is authorised to bind the member state. Accordingly the representative is usually a government minister. The composition of the Council is fluid depending upon the issue under discussion. Thus, for example, if immigration issues are under consideration the Council will consist of the immigration ministers from each of the member states. Because of this fluidity, the Council is supported by a committee of permanent representatives from each member state. While the ministers who formally make up the Council take the decisions, the permanent

⁵ When the term 'the Council' is used, it refers to the Council of the European Union and not the European Council.

representatives play an important role in arriving at an agreed position to facilitate Council decision making.

The Council plays an important role in EU law making because it is the body that has the final say in whether legislative proposals will become EU law. The exact role that the Council will play in approving laws and the process by which the Council makes a decision depends upon the type of legislation involved. The reason here is that the EC Treaty sets out different methods for making laws depending upon which article of the treaty the law is based upon and what type of law is proposed. A more detailed explanation of the Council's role in law making is provided in the next section which discusses the types of laws and how they are made.

Council meetings are chaired by the representative from the state that currently holds the EU presidency.

THE EUROPEAN PARLIAMENT

The European Parliament⁶ consists of 732 directly elected members, with a set number being allocated to each state depending upon the state's population.⁷ However, the electoral distribution system seeks not to disadvantage smaller states by giving smaller states more representatives than would apply if a strict one vote, one value system was applied uniformly across the EU.

The citizens of each state vote to elect their European Parliament representatives. However, the European parliamentarians tend to divide themselves into informal political groupings rather than according to their state of origin. Even though these informal political groupings are not yet 'political parties', the Parliament could be characterised as a truly supranational body rather than member state representatives who are simply there to represent the interests of their own constituents – as applies in many other international organisations. Of course, it would be naive to suggest that national interests do not have any bearing on decisions. Otherwise, European parliamentarians would have very short terms. Suffice it to say that on many issues pan-European interests are considered by the parliamentarians to be equally as important as national interests.

The role that the Parliament plays in legislation depends again on the provision of the EC Treaty upon which that legislation is based. The

⁶ When the term 'the Parliament' is used hereafter, it refers to the European Parliament.

⁷ This number will rise to 751 if the Lisbon Treaty is adopted.

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different roles that the Parliament plays in enacting legislation are detailed later in this chapter when the various types of EU legislation are discussed.

THE EUROPEAN COMMISSION

The European Commission consists of up to 27 Commissioners – one from each member state. Commissioners must take an independent role in furthering the goals of the EU. While they are nominated by each member state and approved by the European Parliament, they must take an oath swearing that they will not be influenced by representations from any member state. Each commissioner has overall responsibility for one or more areas of the EU's work – transport, energy, etc. Each of these areas is headed by a Director-General who is a full-time EU bureaucrat and who answers to the relevant commissioner for that area. Each directorate is supported by a number of full-time staff. In total, the European Commission has some 18,000 staff, most of whom are located in its headquarters in Brussels. While this seems large it is nowhere near as large as the bureaucracies in many of the member states.

The Commission is headed by a President appointed for a set term by the Council of the European Union after consultation with the European Parliament. The President has an important role in that they not only take overall responsibility for the work of the Commission but also attend meetings of the European Council and represent the EU in international negotiations. As noted, if the Lisbon Treaty is approved there will be a new High Representative for Foreign Affairs and Security who will also be a Vice-President of the Commission.

In terms of law making, the most significant role of the Commission is to draft laws that it then refers on to the Council of the European Union and the European Parliament for the relevant law making processes to take place. The Commission does not act alone in deciding what issues require legislative action. It is common for the Council, and increasingly the Parliament, to refer matters to the Commission for investigation for proposed legislative action. An example of a reference from the Parliament is the proposed European private company directive discussed in Chapter 8. In some areas, the Commission also enjoys delegated power from the Council to enact law. Examples here include the enactment of regulations relating to the customs tariff discussed in Chapter 4 and the block exemption regulation on vertical restraints discussed in Chapter 6.

The Commission also exercises considerable supervisory functions. First it is able to take member states to the European Court of Justice (ECJ) if a

member state is not following EU law. Examples of this include the references by the European Commission to the ECJ of a number of countries that have failed to recover monies from the beneficiaries of state aid given by the state in contravention of the conditions allowed for the provision of state aid. This is discussed further in Chapter 8. Second, the Commission has overall responsibility for competition policy and can take direct legal action in the ECJ against firms that are in breach of the EU's competition laws. EU competition laws are discussed in more detail in Chapters 6–8.

On the other hand, the Commission is also subject to oversight by the European Parliament. The Parliament can request the Commission to reply orally or in writing to questions put to it. As a measure of last resort, the Parliament can also by a two-thirds majority require the Commission to resign. While this power has never been used it provides a safeguard in the unlikely event that the Commission acts totally contrary to law and the interests of the EU.

CONSULTATIVE BODIES

The European Economic and Social Committee has been in existence since the commencement of the EC. It represents the various social and community interests throughout the EU. The Committee of the Regions came into being with the Treaty on European Union in 1992. Its role is to represent the interests of the various local governments in the member states. The Lisbon Treaty fixes the numbers at no more than 350 for each committee. Membership of both committees is decided by the Council after names are put forward by the member states.

Many treaty articles require that an opinion be provided by either or both of these committees at the commencement of the legislative process. The opinions are provided to either the Council or the Parliament. Consequently one finds in the preamble to many regulations and directives a statement that indicates that the legislation is being made having had regard to the opinion rendered by either or both of these committees.

THE EUROPEAN COURT OF JUSTICE

The ECJ consists of one judge appointed by each member state for a three-year term that is renewable once. As is the case with Commissioners, judges must act independently of their home state when making decisions. The pressure that might be brought to bear on individual judges is reduced by

the fact that the ECJ always delivers just one judgement as a whole rather than the individual judgement of each judge.

The process of the ECJ differs from the process used in common law countries such as the UK, the USA and Australia. Most of the submissions to the ECJ are written submissions by the parties that the ECJ itself communicates to all parties. This is followed by short oral argument at a hearing. The ECJ is assisted by an Advocate-General who also delivers an opinion on the case to the judges in addition to the various arguments put forward by the parties.

The primary role of the ECJ is to interpret treaty provisions. It does so not only in cases that are brought directly by the Commission against member states or pursuant to competition laws but also in cases where the courts of member states have referred a question to the ECJ for an opinion. An example of the latter is examined in Chapter 6 concerning choice of law in agency agreements. The ECJ can also hear cases brought directly by individuals or institutions seeking to question the validity of community legislation.

The ECJ is relieved of some of its workload by a court of first instance that is able to hear a limited range of matters. The court of first instance is appointed in a similar manner to the ECJ itself. Any decisions of the court of first instance can be appealed to the ECJ.

TYPES OF EU LAWS AFFECTING THE INTERNATIONAL BUSINESSPERSON

The EU is able to act on behalf of all its member states in implementing some international treaties. However, the bilateral and multilateral treaties that individual states themselves have entered into with third states often have more significance for the international businessperson. An overview of these will be provided below. From an internal point of view, there are five major types of EU legislation. These are the treaties themselves, regulations, directives, decisions and recommendations or opinions. In addition, the ECJ plays an important role not only in the legislative process but also in ensuring that legislation complies with the various treaty provisions and general principles of law.

INTERNATIONAL AGREEMENTS

A businessperson from a state outside of the EU doing business with a firm in an EU member state needs to be aware of the various treaties that have