

## Introduction

The idea of European union is as old as the European idea of the sovereign State.<sup>1</sup> Yet the spectacular rise of the latter overshadowed the idea of a European Union for centuries. Within 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 – isolationist – State found expression in the spread of inter-state cooperation. The various efforts at European cooperation after the Second World War formed part of that transition from an international law of coexistence to an international law of cooperation.<sup>2</sup> Yet European “integration” would go far beyond the traditional forms of international “cooperation”.

The European Union was born in 1952 with the coming into being of the European Coal and Steel Community (ECSC). Its original members were six European States: Belgium, France, Germany, Italy, Luxembourg, and the Netherlands. The 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 organizations”.<sup>3</sup> The 1957 Treaties of Rome created two additional Communities: the European Atomic Energy Community and the European (Economic) Community. The “three Communities” were partly “merged” in 1967,<sup>4</sup> but continued to exist in relative independence. A first major treaty reform was effected in 1987 through the Single European Act, but an even bigger organizational leap was taken by the 1992

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

<sup>2</sup> W. G. Friedmann, *The Changing Structure of International Law* (Stevens, 1964).

<sup>3</sup> 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”, 14 (1951/2) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 24 (translation – RS).

<sup>4</sup> This was achieved through the 1965 “Merger Treaty” (see Treaty establishing a Single Council and a Single Commission of the European Communities).

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Table 0.1 European Treaties – Chronology

Signed	Name	Published	Entry
1951	Treaty establishing the European Coal and Steel Community	Founding Treaty <sup>5</sup>	1952
1957	Treaty establishing the European (Economic) Community	Founding Treaty <sup>6</sup>	1958
1957	Treaty establishing the European Atomic Energy Community	Founding Treaty	1958
1965	Treaty establishing a Single Council and a Single Commission	[1967] OJ 152	1967
1986	Single European Act	[1987] OJ L169	1987
1992	Treaty on European Union	[1992] OJ C191 <sup>7</sup>	1993
1997	Treaty of Amsterdam	[1997] OJ C340	1999
2001	Treaty of Nice	[2001] OJ C80	2003
2004	Treaty establishing a Constitution for Europe	[2004] OJ C310	Failed
2007	Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community	[2007] OJ C306	2009

Maastricht Treaty. The latter integrated the three Communities into the (Maastricht) European Union.

But for a decade, this European Union was under constant constitutional construction (Table 0.1). Treaty amendment followed treaty amendment! And in an attempt to get away from the ever-repeating minor treaty amendments, a European Convention was charged to prepare a major reform that would result in the “Constitutional Treaty”. The 2004 Constitutional Treaty would have effected the biggest structural change in the history of the European Union. Yet the Treaty failed when Dutch and French referenda were lost; and it took almost another decade to rescue the reform effort into the 2007 Reform (Lisbon) Treaty. The Lisbon Treaty replicates nearly 90 per cent of the (failed) Constitutional Treaty and came into force on 1 December 2009. Despite its modest name, the Lisbon Treaty constitutes a radical new chapter in the history of the European Union. For while it formally builds on one of the original “Founding Treaties”

<sup>5</sup> The Treaty expired in 2002.

<sup>6</sup> For a consolidated version of the Treaty establishing the European Community, see: [2002] OJ C325.

<sup>7</sup> For a consolidated version of the Treaty on European Union, see: *ibid.*

Table 0.2 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
Protocols (37)			
Charter of Fundamental Rights			

and the 1992 Treaty on European Union, it has nonetheless “merged” the old “Community” legal order with the old “Union” legal order. The textual foundations of the “new” European Union are indeed dramatically different from anything that existed before the 2007 Reform Treaty.

What is the structure of the present European Union? The Union is based on two treaties: the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). The division into two EU Treaties follows a functional criterion. The Treaty on European Union contains the *general* provisions defining the Union, while the Treaty on the Functioning of the European Union contains the specific provisions with regard to the Union institutions and policies. Depending on their length, the Treaties are divided into “Parts”, “Titles”, “Chapters”, “Sections” and “Articles”. Numerous Protocols and the “Charter of Fundamental Rights” moreover join the Treaties. According to Article 51 TEU, Protocols to the Treaties “shall form an integral part thereof”; and the best way to make sense of them is to see them as legally binding “footnotes” to a particular article or section of the Treaties. By contrast, the Charter is “external” to the Treaties; yet it also has “the same legal value as the Treaties”.<sup>8</sup> The structure of the Treaties is shown in Table 0.2.

Despite their impressive wordiness, the EU Treaties are designed to be “framework treaties”. They are treaties whose substance is mainly made up from institutional provisions that are to provide the “framework” for

<sup>8</sup> Article 6 (1) (new) TEU.

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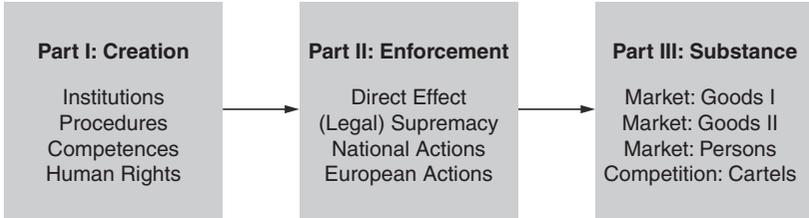


Figure 0.1 Structure of the Book

subsequent secondary law. The policy areas in which the Union can act are thereby set out in Parts III and V of the TFEU. The former sets out twenty-four “internal” policies, while the latter lists a much smaller number of external areas of Union action. In order to legislate within one of these policy areas, the Union must have a legislative competence. These competences will generally be found in the specific policy title within Parts III or V of the TFEU; and they will constitute the principal legislative fountain for a particular part of European Union law.

What is the structure of this book on European Union law? The book is divided into three parts, which correspond to the three themes of “creation”, “enforcement”, and “substance” of European law.

Part I analyses the Union as an institutional “creature”, and considers the creation of European (secondary) law. It starts with an overview of the four major Union institutions: the European Parliament, the Council, the Commission, and the European Court in Chapter 1. Chapter 2 investigates how these institutions cooperate in the creation of European legislation. The Union cannot legislate in all areas of social life; and Chapters 3 and 4 look at two constitutional limits to Union legislation. Based on the principle of conferral, the Union must act within the scope of competences conferred upon it by the Member States. The scope of these competences – and their nature – will be discussed in Chapter 3. The final Chapter within this part analyses a second constitutional limit to the exercise of Union competences: European fundamental rights. These rights first emerged as general principles of Union law, but have now been codified in the Union’s Charter of Fundamental Rights.

Part II concentrates on the “enforcement” of European law in the courts. We shall see that European law establishes rights and obligations that directly affect individuals. The direct effect of European law in the national legal orders will be discussed in Chapter 5. Where a

European norm is directly effective, it will also be “supreme” over national law. The “supremacy” of European law is the subject of Chapter 6. But how will individuals enforce their “supreme” European rights? Chapters 7 and 8 look at the dual enforcement machinery within the Union legal order. Individuals will typically enforce their European rights in national courts. The Union legal order has thereby required national courts to provide effective remedies for the enforcement of European rights; and in order to assist national courts in the interpretation and application of European law, the Union envisages a preliminary reference procedure. The indirect enforcement of European law through the national courts is discussed in Chapter 7. It is complemented by the direct enforcement of European law in the European Courts, and Chapter 8 explores these direct actions.

Part III analyses the substantive heart of European law, that is: the law governing the internal market and European competition law. From the very beginning, *the* central economic task of the European Union was the creation of a “common market”. The Rome Treaty had thereby not solely provided for a common market in goods. It equally required the abolition of obstacles to the free movement of persons, services, and capital. Europe’s “internal market” was thus to comprise four fundamental freedoms. Two of these freedoms will be discussed in turn. The free movement of goods is the “classic” freedom of the Union, and Chapters 9 and 10 explore two strategies of market integration in this context. Chapter 11 subsequently examines the free movement of persons. The final Chapter provides a brief overview of EU competition law through the lens of Article 101 TFEU. European competition law is thereby traditionally seen as a functional complement to the internal market. It would – primarily – protect the internal market from *private* power.

This book is (relatively) short for a book on European law. But brevity is the spice of language; and in order to keep this book as spicy as possible, many selective choices had to be made. Inevitably, some aspects will not be covered, others only marginally. Nevertheless, this “Introduction to European Law” will deal with all essential aspects of this complex area. And by concentrating on the “essence” of the subject, the book aims to help seeing the proverbial “wood” instead of the trees. For these European trees are ever growing and multiplying, and it is no wonder that many a student might get lost in the legal undergrowth! But if there is a second wish which this “Introduction to European Law” has, it is also to make

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the reader “thirsty” for more. Yet this thirst will have to be quenched by one of the larger generalist textbooks,<sup>9</sup> or one of the major textbooks dedicated to a specialized branch of European law.<sup>10</sup>

<sup>9</sup> The three traditional textbooks in English are: D. Chalmers *et al.*, *European Union Law* (Cambridge University Press, 2014), P. Craig and G. de Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press, 2011), and A. Dashwood *et al.*, *European Union Law* (Hart, 2011). These have now been joined by my own *European Union Law* (Cambridge University Press, 2015).

<sup>10</sup> European law is traditionally divided into three major branches: European *constitutional* law (see T. Hartley, *The Foundations of European Union Law* (Oxford University Press, 2014); and: R. Schütze, *European Constitutional Law* (Cambridge University Press, 2012)), European *internal market* law (see C. Barnard, *The Substantive Law of the EU* (Oxford University Press, 2013); and: F. Weiss and C. Kaupa, *European Union Internal Market Law* (Cambridge University Press, 2014)), and European *competition* law (see J. Goyder and A. Albers-Llorens, *EC Competition Law* (Oxford University Press, 2009), and: A. Jones and B. Sufrin, *EU Competition Law* (Oxford University Press, 2014)). In addition to these three principal branches, the last two decades have seen the emergence of many smaller branches, such as European *external relations* law (see P. Eeckhout, *EU External Relations Law* (Oxford University Press, 2011), and: P. Koutrakos, *EU International Relations Law* (Hart, 2006)), and European *environmental* law (see J. H. Jans and H. Vedder, *European Environmental Law* (Europa Law Publishing, 2011), and: L. Krämer, *EC Environmental Law* (Sweet & Maxwell, 2012)).

## Part I

# European Law: Creation

This Part analyses the Union as an institutional “creature”, and it equally considers the creation of European (secondary) law. It starts in Chapter 1 with an overview of the four major Union institutions: the European Parliament, the Council, the Commission, and the European Court. Chapter 2 investigates how these institutions cooperate in the creation of European legislation. The Union cannot legislate in all areas of social life; and Chapters 3 and 4 look at two constitutional limits to Union legislation. Based on the principle of conferral, the Union must act within the scope of competences conferred upon it by the Member States. The scope of these competences – and their nature – will be discussed in Chapter 3. Chapter 4 analyses a second constitutional limit to the exercise of Union competences: European fundamental rights. These rights first emerged as general principles of Union law, but have now been codified in the Union’s Charter of Fundamental Rights.

**Chapter 1 Union Institutions**

**Chapter 2 Union Legislation**

**Chapter 3 Union Competences**

**Chapter 4 Fundamental Rights**

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## Introduction

The creation of governmental institutions is *the* central task of all constitutions. Each political community needs institutions to govern its society; as each society needs common rules and a method for their making, execution, and adjudication. The European Treaties establish a number of European institutions to make, execute, and adjudicate European law. The Union’s institutions and their core tasks are defined in Title III of the

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Treaty on European Union (TEU). The central provision here is Article 13 TEU:

The Union shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions.

The Union's institutions shall be:

- the European Parliament,
- the European Council,
- the Council,
- the European Commission (hereinafter referred to as 'the Commission'),
- the Court of Justice of the European Union,
- the European Central Bank,
- the Court of Auditors.<sup>1</sup>

The provision lists seven governmental institutions of the European Union. They constitute the core “players” in the Union legal order.<sup>2</sup> What strikes the attentive eye first is the number of institutions: unlike a tripartite institutional structure, the Union offers more than twice that number. The two institutions that do not – at first sight – seem to directly correspond to “national” institutions are the (European) Council and the Commission. The name “Council” represents a reminder of the “international” origins of the European Union, but the institution can equally be found in the governmental structure of Federal States. It will be harder to find the name “Commission” among the public institutions of States, where the executive is typically referred to as the “government”. By contrast, central banks and courts of auditors exist in many national legal orders.

<sup>1</sup> Article 13(1) TEU. Paragraph 2 adds: “Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practise mutual sincere cooperation”.

<sup>2</sup> While the Treaties set up seven “institutions”, they do acknowledge the existence of other “bodies”. First, according to Article 13(4) TEU, the Parliament, the Council and the Commission “shall be assisted by an Economic and Social Committee and a Committee of the Regions acting in an advisory capacity”. The composition and powers of the “Economic and Social Committee” are set out in Articles 301–4 TFEU. The composition and powers of the “Committee of the Regions” are defined by Articles 305–7 TFEU. In addition to the Union’s “Advisory Bodies”, the Treaties also acknowledge the existence of a “European Investment Bank” (Articles 308–9 TFEU; as well as Protocol No. 5 on the Statute of the European Investment Bank).