

# Part I Constitutional Foundations

The European Union has existed for over half a century. It originates in the will of six European States to cooperate closer in the area of coal and steel. Since 1952, the European Union has significantly grown – both geographically and thematically. It has today 28 Member States and acts in almost all areas of modern life. Its constitutional and institutional structures have also dramatically changed in the past six decades.

The Union’s remarkable constitutional evolution is discussed in Chapter 1. What type of legal ‘animal’ is the European Union? Chapter 2 analyses this question from a comparative constitutional perspective. We shall see that the Union is not a State but constitutes a ‘Federation of *States*’. Standing in between international and national law, the Union’s federal character thereby expresses itself in a number of normative and institutional ways. Chapters 3 and 4 explore the two key normative qualities of European Union law, namely its ‘direct effect’ and its ‘supremacy’. Chapters 5 and 6 then look at the institutional structure of the European Union. Each Union institution will here be analysed as regards its composition, powers and procedures. The interplay between the various institutions in discharging the Union’s governmental *functions* will be discussed in Part II.

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Constitutional History  
From Paris to Lisbon

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Introduction

The idea of European unification 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 European union for centuries. Within the twentieth century, two ruinous world wars and the social forces of globalisation have increasingly discredited the idea of the

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

*sovereign* State. The decline of the monadic State found expression in the spread of inter-state cooperation.<sup>2</sup> And the rise of international cooperation caused a fundamental transformation in the substance and structure of international law. The changed reality of international relations necessitated a change in the theory of international law.<sup>3</sup>

The various efforts at European cooperation after the Second World War formed part of this general transition from an international law of coexistence to an international law of cooperation.<sup>4</sup> 'Europe was beginning to get organised.'<sup>5</sup> This development began with three international organisations. 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.<sup>6</sup> Secondly, the Western European Union (1948, 1954) that established a security alliance to prevent another war in Europe.<sup>7</sup> Thirdly, the Council of Europe (1949), which had *inter alia* been founded to protect human rights and fundamental freedoms in Europe.<sup>8</sup> None of

<sup>2</sup> G. Schwarzenberger, *The Frontiers of International Law* (Stevens, 1962).

<sup>3</sup> C. de Visscher, *Theory and Reality in Public International Law* (Princeton University Press, 1968).

<sup>4</sup> W. G. Friedmann, *The Changing Structure of International Law* (Stevens, 1964).

<sup>5</sup> A. H. Robertson, *European Institutions: Co-operation, Integration, Unification* (Stevens & Sons, 1973), 17.

<sup>6</sup> 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. Art. 1 of the OEEC Treaty stated: 'The Contracting Parties agree to work in close cooperation in their economic relations with one another. As their immediate task, they will undertake the elaboration and execution of a joint recovery programme.' In 1960, the 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 organisation.

<sup>7</sup> 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.'

<sup>8</sup> According to Art. 1 of the Statute of the Council of Europe, its aim 'is to achieve a greater unity between its Members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress' (*ibid.*, para. a). This aim was to be pursued through common organs 'by discussion of questions of common concern and by agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms' (*ibid.*, para. b). The most important expression of this second aim 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 a European Court of Human Rights in Strasbourg (1959).

these grand international organisations was to lead to the European Union. The birth of the latter was to take place in a much humbler sector.

The 1951 Treaty of Paris set up the European Coal and Steel Community (ECSC).<sup>9</sup> 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 organisations'.<sup>10</sup>

The Treaty of Paris led to the 1957 Treaties of Rome. The latter created two additional Communities: the European Atomic Energy Community and the European (Economic) Community. The 'three Communities' were partly 'merged' in 1967,<sup>11</sup> but continued to exist in relative independence. A major organisational leap was taken in 1993, when the Maastricht Treaty integrated the three Communities into the European Union. But for a decade, the Treaty on European Union was under constant constitutional construction. 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. Yet the latter failed; and it took almost another decade to rescue the reform as the 2007 Reform (Lisbon) Treaty. The latter 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 formula that was to become the trademark of the European Economic Community (EEC). The European Economic Community will be analysed in section 2, while section 3 investigates the development of the (old) European Union founded through the Treaty of Maastricht. Finally, section 4 reviews the reform efforts of the last decade, and analyses the structure of the – substantively – new European Union as established by the Treaty of Lisbon. Concentrating on the constitutional evolution of the European Union,<sup>12</sup> this chapter will *not* present its geographic development.

<sup>9</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' (1951–2) 14 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 1.

<sup>10</sup> *Ibid.*, 24 (translated: R. Schütze).

<sup>11</sup> This was achieved through the 1965 'Merger Treaty' (see Treaty establishing a Single Council and a Single Commission of the European Communities).

<sup>12</sup> For an overview of the Union's constitutional amendments, see Annex 1 of this book.

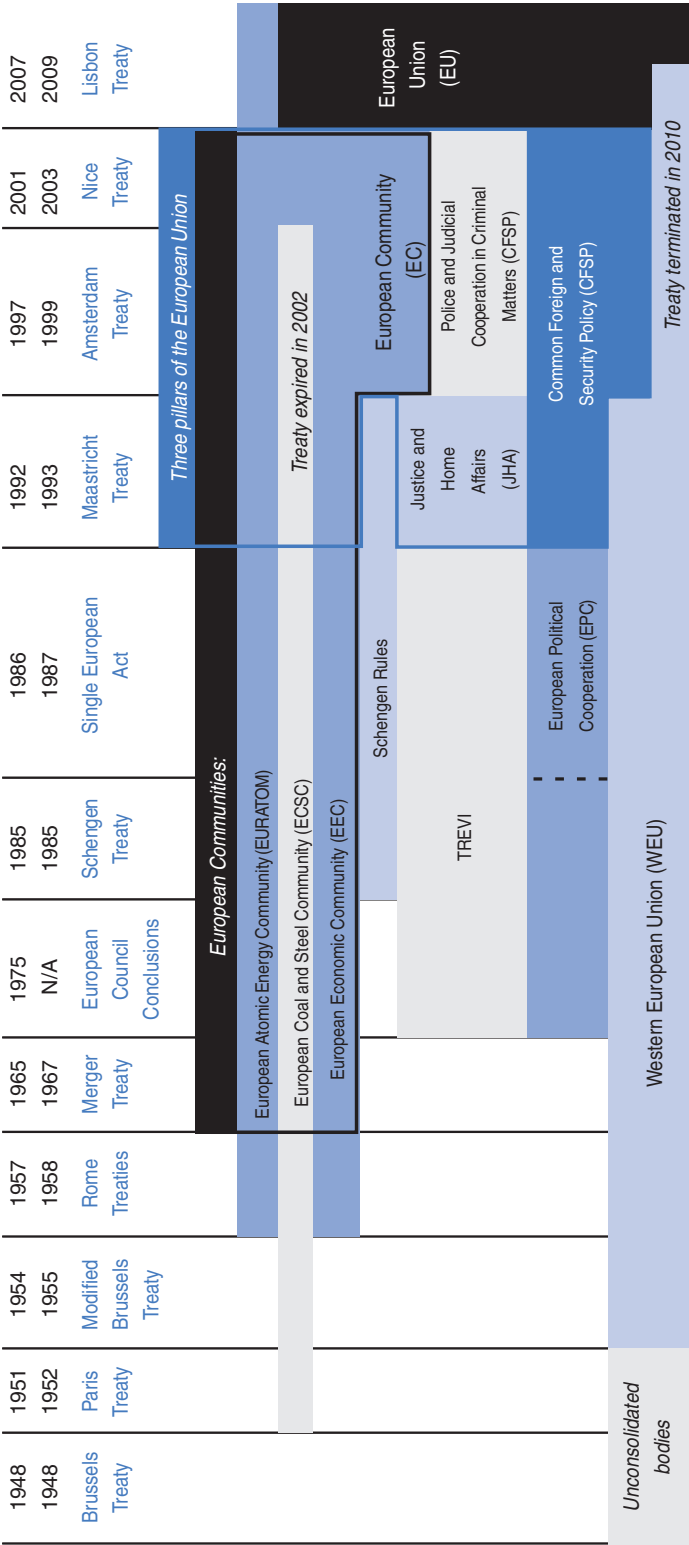


Figure 1.1 Historical Evolution of the Union

## 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.<sup>13</sup> 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.*<sup>14</sup>

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.<sup>15</sup> The Treaty of Paris was no grand international peace treaty. It was designed to ‘remove the main obstacle to an economic partnership’.<sup>16</sup> 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. However, the attempt to establish a supranational European Defence Community, and with it a European Political Community, would fail. Until the 1957 Rome Treaties, the European Coal and Steel Community would thus remain the sole supranational Community in Europe.

<sup>13</sup> 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.)

<sup>14</sup> 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).

<sup>15</sup> 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.

<sup>16</sup> 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.

### *a. The (Supranational) Structure of the ECSC*

The structure of the ECSC differed from that of ordinary intergovernmental organisations. It was endowed with a ‘Commission’,<sup>17</sup> a Parliament,<sup>18</sup> a ‘Council’, and a ‘Court’.<sup>19</sup> 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.<sup>20</sup> To carry out this task, the Commission would adopt decisions, recommendations and opinions.<sup>21</sup> 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 *supra-national 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.<sup>22</sup>

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’,<sup>23</sup> had purely advisory functions.<sup>24</sup> The Council,<sup>25</sup> composed of representatives

<sup>17</sup> 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).

<sup>18</sup> 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 renamed itself ‘Parliament’, a change that was only formally recognised by the 1986 SEA.

<sup>19</sup> Art. 7 ECSC. <sup>20</sup> Art. 8 ECSC.

<sup>21</sup> Art. 14 ECSC. Community acts were thus considered to be acts of the Commission, even if other Community organs had been involved in the decision-making process.

<sup>22</sup> Art. 9 ECSC (emphasis added). <sup>23</sup> Art. 21 ECSC.

<sup>24</sup> Art. 22 ECSC. The provision envisaged a single annual session for the second Tuesday of March. (Extraordinary sessions could only be held at the request of the Council or the Commission.) 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.

<sup>25</sup> 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 into the scope of the ECSC with those



of the national governments,<sup>26</sup> 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’.<sup>27</sup> 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’.<sup>28</sup>

In what ways was the European Coal and Steel Community a ‘supranational’ organisation?<sup>29</sup> The Community could carry out its tasks through the adoption of ‘decisions’, which would be ‘binding in their entirety’.<sup>30</sup> And the directly applicable nature of ECSC law led early commentators to presume an ‘inherent supremacy of Community law’.<sup>31</sup> The novel character of the Community – its ‘break’ with the ordinary forms of international organisations – thus lay in the normative quality of its secondary law. Piercing the dualist veil of classic international law, Community law did not require a ‘validating’ national act before it could become binding on individuals. The Member States were deprived of their ‘normative veto’ at the borders of their national legal orders. The transfer of decision-making powers to the Community thus represented a transfer of ‘sovereign’ powers.<sup>32</sup> While the Community still lacked *physical* powers,<sup>33</sup> it was its *normative* powers that would become identified with its ‘supranational’ character.<sup>34</sup>

However, this was only one dimension of the Community’s ‘supranationalism’. Under the Treaty of Paris, the organ endowed with supranational powers was itself ‘supranational’, that is: independent of the will of the Member States. For the Commission was composed of independent ‘bureaucrats’ and could act by a majority of its members.<sup>35</sup> (While the Commission was admittedly not the only organ of the European Coal and Steel Community, it was its *central* decision-maker.) This ability of the Community to bind Member States against their will here departed from the ‘international’ ideal of sovereign equality of

economic sectors that had not been brought into the Community sphere, see Mosler, ‘Der Vertrag über die Europäische Gemeinschaft für Kohle und Stahl’ (n. 9 above), 41.

<sup>26</sup> Art. 27 ECSC. <sup>27</sup> Art. 26 ECSC. <sup>28</sup> Art. 31 ECSC.

<sup>29</sup> 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.

<sup>30</sup> Art. 14(2) ECSC.

<sup>31</sup> 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.*’

<sup>32</sup> Reuter, ‘Le Plan Schuman’ (n. 29 above), 543.

<sup>33</sup> According to Art. 86 ECSC, it was the Member States ‘to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations resulting from decisions or recommendations of the institutions of the Community and to facilitate the performance of the Community’s tasks’.

<sup>34</sup> See A. H. Robertson, ‘Legal Problems of European Integration’ (1957) 91 *Recueil des Cours de l’Académie de la Haye* 105 at 143–5.

<sup>35</sup> Art. 13 ECSC (repealed by the Merger Treaty and replaced by Art. 17 ECSC).

States. And indeed, it was *this* decisional dimension that had inspired the very notion of supranationalism. Early analysis consequently linked the concept of supranationality to the decision-making mode of the Community.<sup>36</sup>

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.<sup>37</sup> 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’;<sup>38</sup> and the six Member States soon tried to expand the supranational sphere to the area of defence. The idea came from the (then) French Prime Minister, René Pléven. The ‘Pléven Plan’ suggested ‘the creation, for our common defence, of a European army under the political institutions of a united Europe’.<sup>39</sup> For that ‘[a] 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]’.<sup>40</sup> 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 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’.<sup>41</sup> The Treaty thus envisaged the creation of a European army under the command of a supranational institution.<sup>42</sup> Due to disagreement between the Member States, the exact nature of the supranational *political* institution to command the

<sup>36</sup> 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, ‘limited supranational powers’ as those acts for which ‘the [Commission] needs the concurrence of the Council of Ministers’ – qualified or unanimous. Powers reserved to the States were identified with the Council’s exclusive competences, that is, where the Treaty required a unanimous decision of the Council without any involvement of the Commission.

<sup>37</sup> See H. L. Mason, *The European Coal and Steel Community: Experiment in Supranationalism* (Martinus Nijhoff, 1955), 34–5.

<sup>38</sup> See ‘Schuman Declaration’ (n. 14 above).

<sup>39</sup> For the ‘Pléven Plan’, see Harryvan and van der Harst (eds.), *Documents on European Union* (n. 14 above), 67.

<sup>40</sup> *Ibid.* <sup>41</sup> Art. 2(2) EDC.

<sup>42</sup> Art. 9 EDC states: ‘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 (EDC), see G. Bebr, ‘The European Defence Community and the Western European Union: An Agonizing Dilemma’ (1954–5) 7 *Stanford Law Review* 169.