

EU Constitutional Law: V. The institutions

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V. The institutions

In this chapter we will look at:

1. The separation of powers in the EU, the principle of sincere cooperation between MS and the EU (introduction)
2. The institutions – step by step

1. Introduction

The Institutions of the EU are listed in Article 13 TEU as:

- European Parliament (EP) / Parlement européen (PE) / Europäisches Parlament (EP)
- European Council / Conseil européen / Europäischer Rat
- Council / Conseil / Rat
- European Commission / Commission européenne / Europäische Kommission
- Court of Justice of the European Union (ECJ) / Cour de justice de l'Union européenne (CJUE – ancienne CJCE) / Gerichtshof der Europäischen Union (EuGH)
- European Central Bank (ECB) / Banque centrale européenne (BCE) / Europäische Zentralbank (EZB)
- Court of Auditors / Cour des comptes / Rechnungshof

Introduction

Other bodies are established by and exercise their powers under the conditions laid down in the TEU and TFEU.

- The Treaty of Lisbon has established the new position of the: High Representative of the Union for Foreign Affairs and Security Policy (HRFASP) / Haut représentant de l'Union pour les affaires étrangères et la politique de sécurité (HRAEPS) / Hoher Vertreter der Union for Aussen und Sicherheitspolitik (HVAS).
- Further the Treaties establish:
 - Consulting bodies such as the Committee of the Regions, the Economic and Social Committee.
 - Agencies such as Europol and Eurojust (legislative acts have created many further agencies which support EU and the MS in the exercise of their administrative and executive obligations arising from EU law).

Seperation of powers

The 'horizontal' separation of powers:

- Legislative powers are exercised by the EP, the Council and the Commission.
- Executive powers are exercised by the Council and Commission.
- Judicative powers are exercised by the ECJ.

The 'vertical' separation of powers:

- EU is active only where it has explicitly been empowered to act (it has no 'Kompetenz-Kompetenz'),
- MS implement and administer EU policies (Art. 4.3 TEU).

Duty to Cooperate – Principle of Sincere Cooperation

Art. 4(3) TEU:

Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take **any appropriate measure, general or particular, to ensure fulfilment of the obligations** arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives.

2. Institutions

- Differentiate between (!):
 - European Council / Conseil européen / Europäischer Rat, Art. 15 TEU,
 - Council / Conseil / Rat, Art. 16 TFEU,
 - (and the Council of Europe as international organisation of its own right created by a different international Treaty, the Statute of London).

a) European Council

- Article 15 TEU:
 - Composition:
 - Heads of State or Government of MS,
 - President of the European Council,
 - President of the Commission,
 - The HRFASP may take part in its work.
 - Meets as a minimum twice every six months (=4x/year) to define the general political guidelines for EU development.
 - Unless provided otherwise, decisions in the European Council are taken by consensus.

European Council – President

- The European Council elects its President
 - Term of two and a half years, renewable once.
 - Procedure for election: qualified majority (explained in Art. 16.4 TEU and Art. 238 TFEU – see below)
- The President of the European Council under Art. 15 TEU *inter alia*
 - chairs the European Council and drives forward its work;
 - ensures the preparation and continuity of the works;
 - ensures the external representation of the Union on issues concerning its common foreign and security policy.

European Council – Duties

- Generally, for all policy areas covered by the TEU and TFEU, the European Council under (Art 15 TEU) provides
 - ‘the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof’.
- In certain policy areas, specific duties exist. The European Council e.g.
 - identifies the strategic interests and objectives of the Union in the area of the Common Foreign and Security Policy (Articles 21, 22 TEU),
 - together with the Council and acting unanimously, defines and implements the specific rules and procedures of the Common Foreign and Security Policy (Art. 24 TEU);
 - defines the strategic guidelines for legislative and operational planning within the ‘area of freedom, security and justice’ (Art. 68 TFEU – which comprises policies of external border controls, asylum and immigration policy, cooperation of police and justice institutions of the MS).

b) Council

- Council (Articles 16 TEU and 237 et seq. TFEU).
 - The Council is also known as the Council of Ministers / Conseil des ministres / Ministerrat
 - Composition: one Minister from each Member State (Art. 16(2) TEU).
 - Various constellations (e.g. Council of environmental affairs, agricultural Council ... unites the specific ministers)
 - meets on average more than 80 times a year
 - Presidency: rotating, 6 month term for each Member State (Article 16.9 TEU).
 - The Council is assisted by
 - COREPER (Committee of Permanent Representatives / Comité des représentants permanents / Ausschuss der Ständigen Vertreter (AStV)), Article 240(1) TFEU. This is supported by permanent or ad hoc working groups of national civil servants (no explicit reference in the TFEU).
 - a General Secretariat – Art. 235(4) TFEU (a body of civil servants working for the Council specifically).

COUNCIL

- Objectives, defined under Art 16(1) TEU: ‘The Council shall, jointly with the European Parliament, exercise legislative and budgetary functions. It shall carry out policy-making and coordinating functions as laid down in the Treaties.’
- It exercises:
 - Legislative powers
 - in accordance with the decision-making procedures laid down in the TFEU (e.g. Articles 293-299 TFEU), only on a proposal from the Commission (Article 293 TFEU).
 - Delegation of certain limited non-essential legislative powers is possible under the conditions of Art. 290 TFEU.
 - Budgetary powers
 - Under Art. 310-324 TFEU, specifically Art. 314 TFEU
 - by participation in establishing the budgets and the discharge of the budget.
 - Executive functions
 - in the context of the CFSP (Art. 24 and 26 TEU).
 - Also, exceptionally, the Council may retain executive powers in policies under the TFEU according to Art. 291(2) TFEU.

EXCURSUS: Voting in the European Council and Council

There are three different types of voting:

- **Consensus, Unanimity or Common Accord** (Every vote issued has to be in favour of a proposal. Absentions will not be counted - Art. 235(1) and 238(4) TFEU)
- **Simple majority** of the members of the Council (= each MS has one vote, 14 of 27 MS is the majority – Art. 238(1) TFEU).
- **Qualified majority voting (QMV)** is a weighted majority under Art. 16(4) TEU and 238(2), (3) TFEU).

Qualified majority voting

In various Articles of the TEU and TFEU, the European Council and the Council vote by 'qualified majority voting' (QMV). From November 2014, QMV is defined as follows:

- General rule: Art. 16(4) TEU defines QMV:
 - A proposal is adopted if three conditions are met:
 - a majority of 55% of Members of the Council
 - representing at least 15 MS
 - representing 65% of the population of the EUare issued in favour of the measure.
 - However, the blocking minority (= the minority blocking the 55% of votes of 15 MS) can only block a decision under QMV, if it at least consists of 4 MS.
 - This rule was introduced to limit the power of the big MS. The idea is to avoid that most populous MS - e.g. those with over 50 million citizens like Germany, France, UK, Italy - can easily create a blocking minority.
- Exceptions exist under Article 238(2), (3) TFEU:
 - Where the European Council or Council votes, exceptionally, on the proposal of a MS (and not of the Commission or the HRFASP) the majorities are 72% of the Members representing 65% of population respectively.
 - Special rules also exist in cases where not all MS may vote (e.g. in matters concerning the Euro currency, which is not the official currency in all MS).

QMV under the Treaty of Nice

- Interim QMV rules apply under Art. 16(5) TEU and Art. 3 Protocol (No. 36) on transitional provisions:
 - until November 1st 2014, QMV is applicable as defined in the Treaty of Nice and its relevant protocol.
 - Also, until 31 March 2017, any MS can request that the Nice rules are used for a particular vote.
- QMV under the Treaty of Nice was defined in the old Art. 205 EC and the Protocol on the enlargement of the European Union attached to the Treaty of Nice:
 - As of 1st January 2007 (the date of the last enlargement of the EU), under QMV, the 27 MS have 345 votes in the Council. The votes are allocated to the MS as follows:
 - 29: France, Germany, Italy, UK
 - 27: Poland, Spain
 - 14: Romania
 - 13: Netherlands
 - 12: Belgium, Czech Republic, Greece, Hungary, Portugal
 - 10: Austria, Bulgaria, Sweden
 - 7: Denmark, Finland, Ireland, Lithuania, Slovakia
 - 4: Cyprus, Estonia, Latvia, Luxembourg, Slovenia
 - 3: Malta
 - To pass a measure under QMV, a double majority required for a measure to be passed:
 - **Minimum of 255/345** (73.9%) votes in favour cast by a majority of Member States.
 - **62% of the total population of the Union represented** (39% blocking minority).

Main differences:

QMV Lisbon v QMV Nice

- Under the Treaty of Lisbon rules (applicable generally as of 2014 with exceptions until 2017), QMV:
 - no longer requires the weighing of MS votes. One MS then has one vote. The double majority of votes and percentage of population ensures that the acceptable balance of big and small MS agrees with a measure.
 - Explicitly, rules are established for qualified majority voting in matters in which not all MS are eligible to vote and in matters in which exceptionally, MS may make proposals (more details on the Commissions right of initiative will follow below).

c) European Parliament

The EP

‘represents the principal form of democratic, political accountability’ in the EU and ensures an ‘effective political democracy’ in the EU

(ECtHR of 18 February 1999, *Mathews v UK*, No. 24833/94, para. 52)

Rules on the EP are established in Art. 14 TEU and 223-234 TFEU

European Parliament

- Election of the Members (Art. 14(3) TEU):
 - for a term of five years
 - by direct universal suffrage in a free and secret ballot (these elections have taken place since 1979).
 - The MEPs are elected according to MS law.
 - All EU citizens have the right to vote at their place of residence (Art. 20(2b) TFEU), and can be elected at their place of residence (e.g. Daniel Cohn-Bendit as German citizen is MEP for France)

European Parliament

- Membership:
 - maximum 750 ‘representatives of the Union citizens’ plus the President
 - Representation distributed by ‘digressive proportionality’ i.e. each MS has a minimum of 6 and a maximum of 96 MEPs.
 - Small MS therefore have many more MEPs per capita than large MS.
 - On the other hand, large MS are stronger represented in the QMV voting system.

European Parliament

- Powers: Under Art. 14(1) TEU, the EP shall exercise legislative, budgetary and supervisory powers. In detail:
 - **Legislative** functions
 - Most importantly, it acts as **co-legislator** with the Council in the legislative procedure under Art. 294 TFEU (attention: EP has no right of initiative, only the Commission can propose acts, the EP may request such proposal under Art. 225 TFEU)
 - Has rights of supervision and control in case of delegation of legislative powers under Art. 290 TFEU.
 - **budgetary** functions
 - Establish and discharge the EU budget under Art. 310-324 TFEU.

European Parliament

– functions of **political control, (supervisory powers)**

e.g.:

- In the investiture procedure by election of the President of the Commission as proposed by the European Council under the procedure of Art. 17(7) TEU and holding a confirmation vote of the Commission 17(8) TEU.
- Holding the Commission and other administrative bodies to account through motions of censure (Art. 17(8) TEU and 234 TFEU), questioning under Art. 230 TFEU and the establishment of committees of inquiry (Art. 226 TFEU).
- Election and control of other important figures in various executive functions e.g. in agencies etc and the election of the European Ombudsman (Art. 24 TFEU and 43 CFR).
- Supervise implementing activities of EU bodies through establishing rules under Art. 291(3) TFEU (for so called *comitology* procedures).

European Parliament

MEPs organise themselves in political groups – spanning the different MS in each of these groups – according to political affiliation.

- Rules on these political groups can be established under Article 224 TFEU.
- Political Groups in the EP include e.g.:
 - Progressive Alliance of Socialists and Democrats (S&D)
 - European People's Party (EPP)
 - Group of the Alliance of Liberals and Democrats for Europe (ALDE)
 - The Greens/European Free Alliance

EP voting

The EP votes:

- Generally, the EP acts by a majority of the votes cast (Art. 231 TFEU).
- Exceptionally, Treaty provisions or the rules of procedure of the EP require specific majorities
 - e.g. a majority of the members of the EP (Art. 225 TFEU)

d) Commission

- The Commission is a body unique to the EU. Its legal basis is laid down in Articles 17 TEU and 244 and seq. TFEU.
- It has been referred to as the guardian of the Treaties. Most of its functions in MS would be exercised by the MS government.
- Objectives of the Commission are defined in Art. 17(1) TEU under which it shall:
 - promote the general interest of the Union and take appropriate initiatives to that end.
 - ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them.
 - oversee the application of Union law under the control of the Court of Justice of the European Union.
 - execute the budget and manage programmes.
 - exercise coordinating, executive and management functions, as laid down in the Treaties.
 - ensure the Union's external representation (with the exception of the CFSP, and other specific cases provided for in the Treaties)
 - initiate the Union's annual and multiannual programming.

Commission – Right of Initiative

One of the practically most important powers of the Commission is the right of initiative (defined in Art. 17(2) TEU). This right exists in legislative and non-legislative matters:

- ‘Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise.’ (These exceptions exist especially in the area of the CFSP, where the Council plays a strong role).
- ‘Other acts shall be adopted on the basis of a Commission proposal where the Treaties so provide.’

Commission – Composition

- Composition:
 - 27 Members (one per MS).
 - Please note: Art. 17(4) TEU actually provided for one member of the Commission per MS only until 2014. Then, under Art. 17(5) TEU, the Commission should be reduced in size. The European Council has however under Art. 17(5) TEU decided to maintain the one Commission member per MS rule. This was necessary to ensure ratification in some MS (notably Ireland).
 - Included in the 27 Members are the
 - Commission President
 - High Representative for Foreign Affairs and Security Policy (HRFASP) who is automatically a Vice President of the Commission.

Commission – Independence

- The Commission members have to be independent. This is an important notion in a Commission where there is one member per MS. Under Art. 17(3) TEU:
 - ‘In carrying out its responsibilities, the Commission shall be completely independent. Without prejudice to Article 18(2), **the members of the Commission shall neither seek nor take instructions from any Government or other institution, body, office or entity.**’
- Q: Why would, under these circumstances, a MS insist on permanently having a Commission member?

Commission – Establishment

The Commission President, the HRFASP and the other Commissioners are elected for a term of office of 5 years (Art. 17(3) TEU).

The establishment of a new Commission takes place in a two-step procedure:

1. The Commission President is elected
2. The Commission members are nominated and the Commission is confirmed in its entirety.

Step one: the President

- Nomination of the Commission President :
 - Proposition of a candidate for the President to the EP by the European Council acting by QMV.
 - The European Council must take ‘into account the elections to the European Parliament’ – which in reality means seek to find a candidate from political family of the majority in the EP.
- Election: by the EP ‘by a majority of its component members.’
 - If the candidate does not obtain the required majority, the European Council ‘shall within one month propose a new candidate’
 - This process will go on until a candidate has achieved the necessary majority in the EP.

Step two: the Commissioners

Under Art. 17(7) TEU:

- The Council (n.b. not the European Council)
 - adopts the list of persons whom it proposes to the EP for appointment as members of the Commission.
 - The Council acts by common accord with the President-elect on the basis of the suggestions made by the MS.
- The EP
 - Decides in a vote of consent by the EP (n.b. acting by simple majority of its votes) on the entire Commission including the President and the HRFASP.
 - Prior to the vote in the EP, the EP hears all Commissioners designate to test their integrity and capability for the office and for the subject matter the Commission President suggests they take on as responsibility.
- On the basis of this consent the Commission shall be appointed by the European Council (sic!), acting by QMV.

Commission President

The Commission President has special powers within the Commission. Under Art. 17(6) TEU, the President of the Commission shall:

- ‘lay down guidelines within which the Commission is to work’;
- ‘decide on the internal organisation of the Commission, ensuring that it acts consistently, efficiently and as a collegiate body’;
- ‘appoint Vice-Presidents, other than the HRFASP, from among the members of the Commission.’

The President also has important disciplinary powers vis-à-vis the members of the Commission:

- ‘A member of the Commission shall resign if the President so requests’.
- ‘The HRFASP shall resign, in accordance with the procedure set out in Article 18(1) TEU, if the President so requests.’
- The President may re-assign a Commissioner to a new portfolio (without asking him/her to resign. In that case, a new hearing will be held of that person in the EP)

Commission Members

Each Member of the Commission

- Has his/her specific portfolio as area of responsibility.
- is supported by a specific ‘directorate general’ (DG) of the Commission.
- The DGs are departments of the Commission responsible for specific policy areas (they can to a certain degree resemble single ministries in national governments).

The HRFASP has a specific service at their disposition including the foreign representations of the EU

Commission – Decision-Making

The Commission decides as a collegiate.

- That means, the Commission takes the collective responsibility for any decision even a decision taken in the subject area of a specific Commissioner.
- Decisions are normally adopted by consensus.
- However, a vote may be taken within the Commission, if any one Member so requests. In this case, decisions are adopted if a majority of the Members vote in favour.
- Delegation of decision-making powers to individual Commissioners is frequently undertaken for the adoption of management or administrative decisions.

Exkursus: the HRFASP

Under Art. 18(2), (3), the HRFASP shall:

- Conduct the Union's common foreign and security policy by
 - Making proposals to the development of that policy,
 - Carrying out the EU's common foreign and security as well as the EU's security and defence policy as mandated by the Council under the TEU.

The HRFASP has a double role. He/she:

- presides over the Foreign Affairs Council.
 - For this role the HRFASP is appointed for five years by the European Council with QMV with the agreement of the Commission President. The mandate may be terminated in the same procedure.
- Is vice-president of the Commission.
 - For this role, the HRFASP is subject, with the other Commission members to a vote of consent in the EP.
 - If a motion of censure in the EP terminates the mandate of the Commission, this does not touch the HRFASP's role in the Council (Art. 18(8) TEU). But, the President may request the European Council to terminate the mandate under Art. 18(1) TEU.

e) The Court of Justice of the EU

Art. 19 TEU provides for some important basics:

- ‘The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts.’

The structure of the ECJ and its sub-courts is as follows:

- Court of Justice / la Cour de Justice / der Gerichtshof
 - General Court / le Tribunal / das Gericht
 - Specialised courts / tribunaux spécialisés / Fachgerichte (so far, in this category, only the Civil Service Tribunal has been created).
- All are located in Luxembourg and have different responsibilities under the Treaties and the statute of the ECJ.

Jurisdiction

- Art. 19 TEU, states that the ECJ **‘shall ensure that in the interpretation and application of the Treaties the law is observed.’**
 - ‘law’ includes compliance with any written and unwritten sources of EU law: Treaties, general principles of law, international agreements of the EU, legislative and non-legislative acts by the institutions.
 - The jurisdiction of the courts applies to all matters of EU law with two exceptions:
 - The ECJ does not have jurisdiction in certain matters of the foreign, security and defence policy under Art. 275, 276 TFEU.
 - For a transitional period of 5 years the ECJ will have only limited jurisdiction in matters of police and justice cooperation in criminal matters (under Art. 10 Protocol 36 of the Treaty of Lisbon).
- Legal protection is also to be supplied by the MS: **‘Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.’**

Composition and Appointment

- Court of Justice:
 - Under Art. 19(2) TEU the CJ consists one Judge per MS.
 - It is assisted by 8 Advocates-General (Art. 252 TFEU). The numbers may be adjusted by a unanimous vote in the Council.
 - May sit as a Full Court, as a Grand Chamber (13 Judges) or in chambers of three or five Judges.
 - The Judges and AGs of the CJ shall under Art. 354 TFEU
 - ‘be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence;’
 - ‘be appointed by common accord of the governments of the Member States for a term of six years.’
 - The Council consults a panel of 7 members provided for in Article 255 TFEU for the nomination (one of whom is nominated by the EP).

Composition and Appointment

- GC
 - is composed of *at least* one judge per MS, the exact number is established by the Statute of the ECJ (which has the rank of a protocol to the Treaties, ie. Primary law)
 - The members need to have the same minimum requirements as CJ judges and are selected in the same procedure.
- Specialised Courts:
 - By legislative act the institutions may constitute specialised Courts attached to the General Court to hear and determine at first instance certain classes of actions brought in specific areas (Art. 257 TFEU).

Procedures

- The jurisdiction between the CJ and the GC is distributed according to the rules in Art. 19 TEU, 256 TFEU and the Statute of the ECJ.
- Articles 258-281 TFEU contains details as to the procedures before the ECJ.

f) Institutions – others

- Court of Auditors (Articles 285-287 TFEU)
- **Advisory bodies:**
 - Committee of the Regions (CoR) (Articles 305-307 TFEU, established by the Treaty on European Union).
 - European Economic and Social Committee (EESC) (Articles 301-304 TFEU).

The number of members in both the above Committees cannot exceed 350 members appointed by an unanimous Council decision on the proposal of Member State governments, upon advice from the Commission. Both are consulted on matters involving specific areas and have the right to deliver opinions.

- **Other specialised Community bodies:**
 - European Investment Bank (EIB) (Articles 308-309 TFEU),
- **Subsidiary bodies:**
 - European Agencies (with a limited role in external decision-making on the basis of the ‘Meroni Doctrine’),
 - Other decentralised bodies based on Treaty provisions e.g. Europol (European Police Office) (Article 85 TFEU).