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LIST OF ABBREVIATIONS

CA	–	Court of Auditors
CFSP	–	common foreign and security policy
CJEU	–	Court of Justice of the European Union
CoR	–	Committee of Regions
COREPER	–	Committee of Permanent Representatives
Dz.U.	–	Dziennik Ustaw (Journal of Laws)
EC	–	European Community
ECB	–	European Central Bank
ECR	–	European Court Reports
EEAS	–	European External Action Service
EEC	–	European Economic Community
EGTC	–	European grouping of territorial cooperation
EP	–	European Parliament
ESCB	–	European System of Central Banks
EU	–	European Union
Euratom	–	European Atomic Energy Community
MEP	–	Member of European Parliament
OJ	–	Official Journal
SEA	–	Single European Act
TECSC	–	Treaty establishing the European Coal and Steel Community
TEC	–	Treaty establishing the European Community
TEEC	–	Treaty establishing the European Economic Community
TEU	–	Treaty on European Union
TFEU	–	Treaty on the functioning of the European Union
TL	–	Treaty of Lisbon

INTRODUCTION

The European Union (EU) is a construct which is unique in comparison with traditional international organisations. Its institutional structure, range of competences, its decision making processes and, especially, the nature of EU legislation make it unique. The above issues are likely to be of interest, and familiarity with them would be of use, given the influence the Union exerts over the functioning of the Member States and their citizens.

This book focuses on the issues concerning the EU's political system and institutions and – in accordance with editorial principles – omits issues concerning substantive law of the Union. Consequently, it encompasses the issues affecting the systemic nature of the contemporary Union, including: the legal nature of the Union, its institutional framework, sources of EU law, decision making processes in the EU, control over observance of EU law, and the relationship between Union law and domestic laws of the Member States. These areas are part of the "constitutional law (institutional law of the European Union)".

The presented book contains basic information regarding the above areas. It is based on the analysis of the European Union legislation – primary and secondary as well as on decisions of the Court of Justice of the European Union, and on opinions of researchers in the field, both from Polish and foreign scientific institutions.

This publication fully reflects the impact of the latest reform of the European Union and is based on the current provisions of the Treaty on the European Union and the Treaty on the Functioning of the European Union and on other legislative acts adopted on their basis. Naturally the book also contains provisions of the respective Treaties from the time before the Treaty of Lisbon entered into force by the way of comparison. Other legislative acts adopted before December 2009 are also quoted where these are still in force and govern important aspects of the functioning of the EU.

I would also like to offer thanks for all the help and support to the editor of the series, dr. Izabela Kraśnicka. I hope that the publication will prove a real help in examining the deceptively straightforward issues concerning the constitutional system of the European Union as it stands today. Any imperfections within this book are solely the author's responsibility.

Tomasz Dubowski

Part 1

THE EUROPEAN UNION – ITS EVOLUTION AND LEGAL NATURE

Any analysis of those aspects of European Union law concerning the constitutional issues requires a focus on the European Union's core as a particular form of cooperation between states. The widely disputed Treaty of Lisbon introduced a range of measures which allow the Union to be described in categories familiar to classic international law. Currently the Union can be portrayed as an international organisation. However, two observations need to be made.

First, the fact that the Union can be regarded as an international organisation is the result of the evolution which the Union underwent from the point of its establishment. The legal character of the Union has not always been obvious and therefore doubt was cast upon its international legal personality. This was due to contemporary co–existence of the European Communities together with supplementing them policies and the unique forms of cooperation between the Member States in the form of the common foreign and security policy (CFSP) of the EU, as well as police and judiciary cooperation in criminal matters. These three pillars combined to form the European Union, however, *de iure*, only the Communities, i.e. the First pillar, had the nature of international organisations. The three pillars were finally united in frames of the European Union after the introduction of the Treaty of Lisbon.

Secondly, placing the Union in the category of international organisations does not fully explain all the unique features which characterise the Union as the successor of the European Community. The nature of the Union institutions and decision making processes

as well as the specific nature of law made in the Union are the main characteristics which allow it to be classified as a supranational organisation.

This chapter will present the main stages of European integration within the Communities and the European Union. The legal character of the Union will also be examined, both before and after the introduction of the Treaty of Lisbon. Lastly, those features which define an international organisation as a subject of international law will be indicated. This chapter will also present arguments in favour of regarding the Union as an international organisation as well as the context of its unique features which allow it to be called a supranational organisation.

1. Establishing the European Union – a short historic sketch

The European Union was founded in 1992 under the Maastricht Treaty[1], marking a new stage in the process of forging ever closer links between European nations.

The shape of the European Union as it is known today is the result of the process of European economic and political integration. The creation of the Union was preceded by the establishment and development of cooperation between European states as part of the Communities established in the 1950s – the European Coal and Steel Community (ECSC), the European Economic Community (EEC, whose name was later changed to EC – the European Community) and the European Atomic Energy Community (Euratom). Chronologically, the first was the European Coal and Steel Community founded by the so called Paris Treaty[2] of 18th April 1951. The Treaty establishing the European Economic Community (TEEC) and the Treaty Establishing the European Atomic Energy Community (TEAEC) were signed in Rome on 25th March 1957. The establishment of the three Communities

1 *Treaty on European Union*, OJ C 191 of 29 July 1992.
2 *Treaty establishing the European Coal and Steel Community*, http://eur–lex.europa.eu/en/treaties/index.htm#founding

was a symptom of progressive economic integration in Western Europe. However, attempts at political integration did not bring the expected results.

The Communities continued on the path to economic integration. They remained as separate international organisations, but underwent a number of reforms which gradually brought them closer together – both in the legal and institutional dimensions. In the sixties, for example, a Merger Treaty was signed on 8th April 1965, which established one Council and one Commission for all the Communities[3]. The Treaty also contained a protocol concerning the privileges and the immunities of the Communities.

The agreement reforming the Communities was the Single European Act (SEA), signed in February 1986; more significantly, this included a political dimension to integration within the Communities. The Act contained provisions concerning the development of the European Political Cooperation which, until then, happened only informally. The SEA also became the legal foundation for the functioning of the European Council – now one of the Union's institutions.

The Treaty of Maastricht (formally the Treaty on the European Union, TEU) was signed on 7th February. It entered into force on 1st November 1993. This Treaty marks the establishment of the European Union. Since then the development of the Communities is interlinked with the evolution of the Union itself.

The establishment of the European Union did not automatically put an end to the Communities' existence. On the contrary – a unique integration structure was established, linking the international organisation (the Communities) with other forms of cooperation between the Member States of the Union (the common foreign and security policy and cooperation within the criminal justice system and internal affairs). The newly–established Union therefore had a three–pillar structure; however, the community regime and the legal regime of the other two pillars were very different (see the next point).

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3 Earlier the common bodies were the Court of Justice and the European Parliamentary Assembly (now the European Parliament).

The Treaty on the European Union – apart from establishing the EU – also introduced amendments to the Treaties which were the basis for the Communities (e.g. the name of the European Economic Community was changed to the European Community). It can be therefore regarded as having a dual purpose (the Treaty on the constituting the Union at the same time as reforming the Communities).

The following reforms of the Union also brought changes to the functioning of the Communities. For example, the so called Amsterdam Treaty[4] made some alterations to the pillars of the Union. Matters belonging to certain categories (the so called *acquis Schengen*) were included in the flow of cooperation within the Community (Pillar I). The Treaty of Nice[5], in turn, included a range of reforms preparing the Union institutions for the planned enlargement.

In 2002 the Treaty establishing the European Coal and Steel Community, concluded in the fifties, expired. Its function was taken over by the European Community.

On 13th December 2007 the Treaty of Lisbon was signed. After all sorts of turmoil concerning its ratification, the Treaty finally entered into force on 1st December 2009, becoming the basis for far reaching reforms of the European Union political system.

The above – by necessity brief – historical sketch does not fully explain the complexities of the parallel functioning of the Union and the Communities and the importance of the Lisbon reform. These issues will be expanded in the next sections.

2. The European Union as a three pillar structure

With the Treaty of Maastricht entering into force the Communities (ECSC, EC, Euratom) became the foundations of a wider integration

4 *Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and related Acts*, OJ C 340 of 10 November 1997.

5 *Treaty of Nice amending the Treaty on European Union, the Treaties Establishing the European Communities and certain related Acts*, OJ C 80 of 10 March 2001.

structure – the European Union. According to Art. 1 TEU[6] in its previous version, the Union was founded on the European Communities (especially the European Community, functioning on the basis of the Treaty establishing the European Community, TEC), supplemented by the policies and forms of cooperation established by the Treaty on the European Union. This formed the basis for the imaginative description of the Union as a structure based on the **three pillars**. The first pillar was the Communities (the European Community and Euratom), and the second and third pillar were respectively: the common foreign and security policy (Title V TEU) and the Police and Judicial Cooperation in Criminal Matters (Title VI TEU)[7]. The above pillars displayed wide differences yet were strongly interlinked. It is worth discussing further their inter–institutional and legal relations.

In terms of institutional issues, it is worth highlighting that the European Union had a **single institutional framework** at its disposal according to Art. 3 TEU (in its unamended version). This was to ensure the integrity and continuity of actions undertaken to achieve particular EU objectives, while at the same time respecting and building on the Communities' achievements. The functioning of the European Union was not therefore based on the existence of its own institutional system, separate from the Communities. The institutional framework of the Union and the Communities was uniform[8] and was to ensure the integrity and continuity of actions undertaken to achieve the Union's objectives. As a consequence the Community institutions also implemented the objectives indicated in the Treaty on the European Union and were not limited to only achieving the objectives of the Communities.

The principle of the single institutional framework was expressed in Art. 5 TEU[9]. It stated that the contemporary Communities' institutions (indicated in Art. 7 TEC – the European Parliament, the Council, the

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6 *Traktat o Unii Europejskiej (Treaty on the European Union)* [in:] *Prawo Unii Europejskiej*, Bielsko–Biała 2004, p. 177.

7 More on the subject of the pillar structure of the EU: C. Mik, *Europejskie prawo wspólnotowe. Zagadnienia teorii i praktyki*, Warszawa 2000, p. 393–406; W. Schröder, *Verfassungsrechtliche Beziehungen zwischen Europäischer Union und Europäischen Gemeinschaften* [in:] A. von Bogdandy (Hrsg.), *Europäisches Verfassungsrecht*, Berlin–Heidelberg 2003, p. 373–414.

8 K. Lankosz (ed.), *Traktat o Unii Europejskiej. Komentarz*, Warszawa 2003, p. 32.

9 C. Mik, W. Czapliński, *Traktat o Unii Europejskiej. Komentarz*, Warszawa 2005, p. 67.

Commission, the Court of Justice and the Court of Auditors) exercise their competences in accordance with the conditions and objectives envisaged in, on one hand, the Treaties establishing the European Communities, but also those contained in other provisions of the TEU. In other words, the functioning of the Communities' institutions was defined not only by the Treaties establishing the European Communities, but also by the Treaty on the European Union.

The solution adopted meant that all pillars have a uniform organisational structure. Community institutions, except for the First pillar, were involved in implementation of the common foreign and security policy and in cooperation within the third pillar. It is worth noting, however, that in separate areas of cooperation (Pillar I, II & III) the same institutions had a different range of competences and legal (and political) instruments at their disposal. This highlighted, naturally, the autonomy and the unique nature of the separate pillars[10], but this does not alter the fact that their organizational structure remained uniform.

The existence of a single institutional framework did not mean that the institutions indicated in Art. 7 TEC automatically become institutions of the European Union. On the contrary, they continued as the Communities' institutions, which remained at the Union's disposal. In this context Polish academics proposed that Member States, cooperating as part of the Union, could deploy Community institutions as a kind of 'loan'[11]. In principle, the one institution (a body) with a typical 'Union' nature was the European Council – a political body combining intergovernmental and Union elements.

Summing up, it can be argued that the principle of a single institutional framework has provided the Union with such a framework. The Community institutions remained as Community institutions, and carried out certain tasks as part of the second and third pillar under the Treaty provisions forming the foundations of the Communities and the Union.

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10 *Ibid.* p. 68.

11 J. Barcz, *Charakter prawny i struktura Unii Europejskiej. Pojęcie prawa UE* [in:] J. Barcz (ed.), *Prawo Unii Europejskiej. Zagadnienia systemowe*, Warszawa 2006, p. 30.

Although the European Union had a uniform organisational structure, the same cannot be said about uniformity of law (*Einheit der Rechtsordnung*), understood as an integration of the Community legal order 'melting into' the legal system of the whole of the EU.

Of course the very organisational uniformity of the EC and the EU could be seen as an argument in support of the thesis on the parallel unity of legal orders of the Communities and the EU. Similarly, the contents of certain Treaty provisions could also support the thesis of the unity of legal orders of the Communities and the EU. It should be remembered that Arts. 48–49 TEU established common principles for revisions to the Treaties – both those at the foundations of the Union and the EC – and the possibility of joining the Union only when joining the EC at the same time; these therefore were the common foundations of the pillar structure of the Union. The above regulations could be seen as an important, or even sufficient, basis for accepting that the Community platforms (first pillar) together with the others (second and third pillar) form one legal order. This, however, would be a fairly simplistic argument.

In this context the differences in procedures and legislative means available to each pillar (community and intergovernmental) come to the forefront[12]. While the Communities operated on the basis of the so–called Community Method, the common foreign and security policy and the police and judiciary cooperation in criminal matters were forms of intergovernmental cooperation.

The **Community Method** meant, in shorthand, that a number of Member States' competences were passed onto the Community level. For matters within its capacity, the EC had the power to issue legally binding acts (regulations, directives and decisions); these acts were in fact issued with the participation of institutions largely independent of the Member States (apart from the Council – the European Parliament and the Commission), under the provisions indicating that decisions were to be passed with a qualified majority. Community acts had a number of advantages in terms of precedence over national law and a direct effect.

12 W. Schröder, *Verfassungsrechtliche Beziehungen…, op. cit.,* p. 408.

Through this, Community legal norms deeply penetrated the legislative orders of the Member States, determining matters applicable not solely to these states, but also to private subjects (including individuals). Consequently, in areas under the Communities' regime, the EC could intervene quite extensively in national laws determining the situation of wide ranging subjects.

At the same time, within the framework of the Second and Third Pillars, the formula of intergovernmental cooperation was accepted. This meant that within the common foreign and security policy (CFSP) and the police and judiciary cooperation in criminal matters, the cooperation of the Member States was based on the principles assuming that decisions would be made by institutions representing those States (the European Council and the Council) unanimously at least in principle (especially in terms of the CFSP – c.f. Art. 23 TEU). Acts adopted within the Second and Third pillar also had a different nature. Common strategies, actions and positions typical for Pillar II did not have the same nature as the Community acts described above. Similarly, the acts adopted within the Third Pillar – joint positions, framework decisions and conventions – had different specifics to acts adopted within the First Pillar (although it should be indicated that the Third Pillar, in time, came closer to the First Pillar – an example of this is the reform of the EU mentioned above, introduced under the Treaty of Amsterdam). Cooperation in the above areas was very close to the traditional cooperation model within the classic international organizations framework – decisions are made on the Member States forum (by the bodies representing those states) and are binding for those states.

It would also seem that the separate nature of the legal orders described here was accentuated in Art. 47 TEU, which formulated the principle of non–violation of Communities' law. As a 'collision norm' it could protect 'integrity and unity of Community law from infringements and gradual erosion by later regulations in the Second and Third Pillar'[13].

13 K. Lankosz (ed.), *Traktat…, op. cit.,* p. 518–524.

Lastly, it should be indicated that the unity of legal order should be demonstrated by the existence of a single, common judiciary body, able to issue final decisions – an institution which could in this way attune (match) different areas regulated by law. We do not encounter such a solution at the transition point between the Communities and the Union, mainly because areas regulated in the TEU were effectively excluded from the jurisdiction of the Court of Justice. Legislation created within the Second and Third Pillar could be subject to judiciary control of the Court only in strictly defined cases, indicated in Art. 46 TEU[14]. The Court's competences established under the Communities Treaties under the TEU framework concerned:

- provisions revising Community foundation treaties,
- provisions concerning police and judiciary cooperation in criminal matters in accordance with Art. 35 TEU,
- provisions concerning strengthened cooperation under Art. 11 & Art. 11a TEC as well as Art. 40 TEU,
- Art. 6 para. 2 TEU, in matters appropriate to the Court on the basis of the Treaties establishing the European Communities and under TEU,
- procedural decisions defined in Art. 7 TEU,
- provisions of Arts. 46–53 TEU.

The competences of the Court in matters regulated by the TEU were therefore fragmented.

In light of the above points, it may be accepted that until the Treaty of Lisbon entered into force it was not possible to speak of the Union as a uniform international organisation but rather as a unique integration structure based on the three pillars. It was equally impossible to speak of a uniform system of European Union law incorporating the Communities' legal order, only of mutual influence of both legal orders.

14 W. Schröder, *op. cit.,* p. 408.

The Treaty of Lisbon brought with it fundamental changes. The European Union – replacing the European Community and as its legal successor (Art. 1 of the revised TEU) – became a uniform international organisation and shed the pillar structure. It should be highlighted that the reform did not lead to the incorporation of the entire Community regime into the Union framework. The European Atomic Energy Community (Euratom) had been excluded from the European Union[15]. This solution is seen as a disadvantage of the reform of the Union (a "lame reform"), especially within the context of the need for the revision of the Treaty establishing Euratom, already postulated by some Member States[16]. Consequently the EU as a uniform international organization includes the fragment of the Communities' achievement which concerns the functioning of the European Community. In the current legal order, however, a far reaching legal and institutional union was achieved in terms of areas of cooperation which so far had belonged to separate pillars under different forms of cooperation.

3. The Treaty of Lisbon. The European Union as an international organisation

In the introduction to this chapter it was stated that since the introduction of the Lisbon Treaty the European Union has been a structure which, in light of the achievements of international public law, should be regarded as an international organisation. This thesis should, however, be supported by solid arguments. If we are to regard the Union as an international organisation, the main elements distinguishing this category of international law subjects should be identified.

15 J. Barcz, *Przewodnik po Traktacie z Lizbony. Traktaty stanowiące Unię Europejską. Stan obecny oraz teksty skonsolidowane w brzmieniu Traktatu z Lizbony*, Warszawa 2008, p. 46.

16 J. Barcz, *Unia Europejska na rozstajach. Traktat z Lizbony. Dynamika i główne kierunki reformy ustrojowej*, Warszawa 2009, p. 109–110. C.f. also C. Herma, *Likwidacja „struktury filarowej" Unii – podmiotowość prawno międzynarodowa UE oraz reforma systemu aktów prawa pierwotnego i wtórnego* [in:] J. Barcz (ed.) *Traktat z Lizbony. Główne reformy ustrojowe Unii Europejskiej*, Warszawa 2008, pp. 127–128, source: http://polskawue.gov.pl/files/Dokumenty/Publikacje_o_UE/Traktat_z_Lizbony.pdf [verified on: 6 February 2010].

Traditionally, an **international organization** is defined as *a form of cooperation between states, subject to a multilateral international agreement, encompassing relatively constant membership, whose main feature is the presence of permanent bodies with clearly defined competences and powers acting to achieve common objectives*[17]. International organizations defined in this way posses international legal personality. At the same time their legal personality is of a secondary nature, which means that the source of this personality is the will of the countries forming the organisation. These also define the extent to which the organisation can exercise its legal subject status. In other words, the states determine the range and features of international legal personality of the international organisation they are establishing.

Considering the separate element of the above definition it is possible to state that, as the result of the last reform, the European Union fulfils the qualifying criteria as an international organization. Moreover, the TEU directly provides the Union with a legal personality (Art. 47 TEU).

3.1. The Union as a form of cooperation between states based on an international agreement

That the Union is a form of cooperation between countries is beyond doubt; this is confirmed directly in Art. 1 TEU: *By this Treaty, the High Contracting Parties establish among themselves a EUROPEAN UNION, hereinafter called 'the Union', on which the Member States confer competences to attain objectives they have in common. The Treaty itself is a new stage in the process of creating an ever closer union among the peoples of Europe.*

The basis for the establishment and the functioning of the Union as a form of cooperation between countries are also international

17 W. Góralczyk, J. Symonides, *Prawo międzynarodowe publiczne w zarysie*, Warszawa 2004, p. 288. International organisations are similarly defined by Z. Doliwa–Klepacki: *an international organisation is a relatively permanent union of sovereign states, established on the basis of an international agreement and possessing permanent bodies with competences defined in this agreement, acting to achieve common objectives,* see.: Z.M. Doliwa–Klepacki, *Encyklopedia Organizacji Międzynarodowych*, Warszawa 1997, p. 14, cf. J. Klabbers, *An Introduction to International Institutional Law*, Cambridge 2009, p. 7–12.

agreements. The current basis is provided by the Treaty on the European Union and the Treaty on the Functioning of the European Union[18]. Both treaties have equal legal value (Art. 1 TEU). They contain fundamental provisions concerning the range of competences, institutional structure and the *modus operandi* of the Union. Both Treaties are multilateral international agreements. They have been signed by the Heads of the twenty–seven Member States.

The European Union has a fairly permanent range of members. Of course, several enlargements happened in the process of the development of the European Communities and the Union itself. It is worth noting that the integration process has been ongoing since the early 1950s. It is also worth remembering that – with reference to one of the entry criteria (one of the classification criteria for an international organisation) – the Union (and earlier the Communities) could be called a conditionally open organisation. This signifies that the acts that form the foundations of the Union allow it to accept new members. The membership is, however, subject to meeting certain – often strict – requirements. According to Art. 49 TEU, any country respecting the values such as: respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights (Art. 2 TEU) may join the Union. The accession procedure is discussed in some detail in a later chapter, but it indicates that meeting all accession requirements is not a simple matter. It is worth just signalling here that the possibility of withdrawing from the Union envisaged in Art. 50 TEU is a new development.

3.2. European Union institutions and competences

An international organisation should also have its own permanent bodies equipped with certain competences. In the international law science the bodies of international organisations are classed in numerous ways. When combining the composition criteria of various bodies with the criterion defining their functions, it may be argued that the bodies of classic international organisations are divided into plenary

18 *Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union*, OJ C 83 of 30 March 2010.

bodies, bodies with limited composition, administrative bodies and arbitration (judiciary) bodies[19]. The first category of bodies are bodies with decision making capacity. The bodies of the second category usually perform an executive (management) function, however, it is not impossible for them to participate directly in decision making processes. Administrative bodies (secretariats) perform an administration and support function, and judiciary bodies are established to determine disputes. This classification is a 'model' solution, characteristic for the vast majority of classic international organisations. Some exceptions are permissible – these could be linked to the specific nature of separate international organisations.

The Union also has its own bodies, which are called **institutions** after the Treaties. Their list is included in Art. 13 TEU. 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.

According to Art. 13 para 2 TEU *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 practice mutual sincere cooperation. The Union's institutions form an institutional framework of the Union 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.* Other than institutions, the Treaties also refer to the category of bodies, offices or agencies of the Union. The institutions of the Union have

19 Similarly: C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, Cambridge 2005, p. 131–159.

their competences enshrined in the Treaties and fulfil a certain role within the Union institutional system. These issues are discussed in detail in the following chapters.

Against this background it is worth noting, however, that the competences of the European Union institutions are derived from competences allotted to the Union itself as an international organisation. Therefore we are dealing with a situation where the EU institutions must act within competences entrusted to the Union, at the same time respecting the range of competences conferred upon themselves and the principles of dividing these competences between different institutions. In relation to the competences of the European Union, the Treaty of Lisbon brought a number of interesting developments.

The limits of Union competences are governed by the **principle of conferral**. Under this principle, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States. While the principle of conferral is not new, the clear Treaty provision concerning the different categories of the Union competences has been achieved through the last reform of the EU.

Currently the competences of the European Union can be divided into three categories: exclusive EU competences, competences shared between the Union and the Member States and supportive, coordinating and supplementing competences.

According to Art. 3 para. 1 TFEU the Union shall have **exclusive competence** in the following areas:

- customs union;
- the establishing of the competition rules necessary for the functioning of the internal market;
- monetary policy for the Member States whose currency is the Euro;
- the conservation of marine biological resources under the common fisheries policy;
- common commercial policy.

The Union also has an exclusive competence to conclude *an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.*

In areas where it has exclusive competences only the Union may legislate and adopt legally binding acts. Member States may perform these functions only when authorised by the Union or in order to implement Union acts.

The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas of exclusive competence and those referred to in Art. 6 TFEU (supportive, coordinating and supplementing competences). The main subject areas for shared competences are (Art. 4 para. 2 TFEU):

- the internal market;
- social policy, for the aspects defined in this Treaty;
- economic, social and territorial cohesion;
- agriculture and fisheries, excluding the conservation of marine biological resources;
- the environment;
- consumer protection;
- transport;
- trans–European networks;
- energy;
- the areas of freedom, security and justice;
- common safety concerns in public health matters, for the aspects defined in this Treaty.

In principle, in areas covered by competences shared with the Member States both the Union and the Member States may legislate and adopt legally binding acts in that area (Art. 2 para. 2 TFEU). However, *the Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again*

exercise their competence to the extent that the Union has decided to cease exercising its competence.

Lastly, the European Union may undertake tasks with the aim of **supporting, cooperating and supplementing** the actions of Member States in certain areas (Art. 6 TFEU). The Union may not, however, supersede the Member States in discharging their competences (Art. 2 para. 5 TFEU). The areas subject to the above provision are:

- the protection and improvement of human health;
- industry;
- culture;
- tourism;
- education, vocational training, youth and sport;
- civil protection;
- administrative cooperation.

It should also be added that the Union discharges its competences with respect to the **principles of proportionality and subsidiarity**. The principle of proportionality (Art. 5 para. 4 TEU) means that *the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties*. According to the principle of subsidiarity *in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level* (Art. 5 para. 3 TEU). These principles are vital for the way that the Union discharges its competences. Notably, even in areas subject to exclusive Union competences the principle of proportionality may not be breached, which precludes an absolute freedom to act on the part of the Union. At the same time, in areas covered by shared competences, the Union may act in accordance with the subsidiarity principle.

In summing up the discussion on the range of the European Union competences it should be indicated that the Union still holds competences concerning the common foreign and security policy.

The Union competences in this matter *shall cover all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a common defence policy that might lead to a common defence* (Art. 24 para. 1 TEU). It should be stressed that the above indicated area of cooperation – despite abandoning the pillar structure of the EU – displays a number of differences in relation to other areas of cooperation which are currently subject to the Union regime (the Union Method). This is linked, in general terms, with respecting the special role the States have in this area. The main role within the CFSP is performed by institutions representing the Member States (c.f. Art. 26 TEU). As a rule the decisions within the CFSP are made unanimously (Art. 31 para. 1 TEU).

3.3. The objectives of the European Union

Another feature of international organisations is the fact that they were established in order to achieve the common objectives of their members. Various bodies (institutions) are given specific competences precisely in order to enable the whole organisation to achieve its aims. The European Union as an international organisation also has defined aims and objectives. These are specified in Art. 3 TEU. **The Union's aims are**:

- to promote peace, its values and the well–being of its peoples,
- to offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime,
- to establish an internal market,
- to combat social exclusion and discrimination,
- to promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child,
- to promote economic, social and territorial cohesion, and solidarity among Member States,

– to respect its rich cultural and linguistic diversity,
– to ensure that Europe's cultural heritage is safeguarded and enhanced.

It can therefore be argued that the range of competences of the Union itself, as well as its institutions, corresponds with the aims indicated in the Treaties. The defined institutional structure of the Union, together with the range of competences granted, allow it to implement the objectives indicated in the Treaties.

It may also be worth indicating here that the range of the aims and objectives of any organisation is vital in determining the range of its competences. In the case of the Union, the defined objectives also influence its competences and, to a certain extent, determine their range.

The provisions of the TFEU concerning the conclusion of international agreements by the Union may serve as an example here. According to Art. 216 TFEU, the Union may conclude agreements with countries or international organisations not only in the circumstances envisaged by the Treaties, but also when this is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties. Another example in this matter, concerning the competences of the institutions, is Art. 352 para. 1 TFEU. According to this Article, if action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures.

3.4. The European Union as a supranational organisation

In summing up the arguments of the previous paragraphs it may be concluded that since the Treaty of Lisbon entered into force, the European Union displays characteristics typical for international organisations. However, among international organisations there is a unique type in the form of a supranational organisation.

Supranational organisations are those displaying distinctive features against the background of classic international organisations. Polish researchers count the following among these features[20]:

- a particularly intense concentration of competences of a given organisation,
- the inclusion of bodies independent of the Member States in the organisation's institutional framework,
- special procedures based on decision making through the majority of votes,
- unique features of the legal system created within the organisation, apparent, for example, in specific rules concerning the application of the organisation's law (primacy over national law, the direct effect),
- the presence of judiciary bodies within the framework of the organisation, established in order to oversee the uniformity and effectiveness of the application of the organisation's law – also at the national level.

The above features already characterised the European Community as an international organisation. We should also recall that the Union, under Art. 1 TEU, *shall replace and succeed the European Community*. Therefore the Union assumed the supranational characteristics of the Community. Of course the above indicators of the supranational status of the Union will be analysed in detail in the following sections of this handbook, devoted to the Union's institutional framework, the decision making processes, or the sources of European Union law. Here it is simply worth noting the following points.

First and foremost, it should be noted that in terms of its competences alone, the European Union is an organisation whose range of competences encompasses a number of essential areas. Concurrently, in certain areas the Union has exclusive competences, which means

20 C.f. J. Barcz, M. Górka, A. Wyrozumska, *Instytucje i prawo Unii Europejskiej*, Warszawa 2011, p. 36–37 as well as M.M. Kenig–Witkowska (ed.), *Prawo instytucjonalne Unii Europejskiej*, Warszawa 2007, p. 32.

that in these areas the Member States can act only when authorised by the Union or in order to implement its acts.

The Union's institutional structure is based on the co–existence of institutions representing the Member States (the European Council and the Council) as well as institutions independent of these states. Moreover, institutions outside of the influence of the Member States represent a variety of interests. The European Parliament is an institution bringing together the representatives of the Union's citizens. However, the Commission, in accordance with the Treaties, supports the general interests of the Union itself. All these institutions help to shape Union law.

European Union law is also created uniquely. It assumes institutions of differing nature (intergovernmental, representative and supranational) participating and, as a rule, adopting decisions through a majority of votes, as determined by the Treaties. At the same time EU law displays unique characteristics in terms of its primacy over national laws and its direct effect. These features mean that Union law can have a direct effect on its private subjects.

Lastly, within the institutional structure of the Union functions a judiciary institution (the Court of Justice of the European Union) which ensures that in the interpretation and application of the Treaties the law is observed. In this capacity it not only considers complaints as envisaged by the Treaties, but may also decide in preliminary proceedings on how primary law should be interpreted and on the interpretation and validity of secondary legal acts of the Union.

The above characteristics justify the thesis on the supranational nature of the European Union as an international organisation.

Part 2

INSTITUTIONAL FRAMEWORK OF THE EUROPEAN UNION

The European Union – according to Article 13 para. 1 TEU – *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.* According to Art. 13 TEU, the EU institutions are: the European Parliament, the European Council, the Council, the European Commission, the Court of Justice of the European Union, the European Central Bank and the Court of Auditors. The list of the Union's institutions is therefore finite. It is worth stressing here that the Treaties frequently refer to the Union's 'advisory bodies' (Part Six, Title I, Chapter 3 TFEU), which are the European Economic and Social Committee and the Committee of the Regions, as well as bodies, offices and agencies of the Union (c.f Art. 9, 15 TEU or Art. 15 paras. 1 and 3; Art 123 para. 1, Art. 228 para. 1, or 263 TFEU). Consequently, the whole organisational structure of the Union seems broader than its institutional framework alone. However, whereas it is possible to directly define an 'institution' or an 'advisory body', this is not always straightforward when referring to 'bodies, offices and agencies'. The treaties do not include their definitions or comprehensively list such bodies. Certain clues are contained in protocols appended to the treaties and in acts defining the organisation and functions of individual bodies and units. For example, *Protocol No. 6 On the Location of the Seats of the Institutions and of Certain Bodies, Offices, Agencies and Departments of the European Union* in addition to institutions and advisory bodies of the EU, also mentions the European Investment Bank and the European Police Office (Europol). This may indicate that

these two are part of the 'bodies, offices or agencies' of the EU (they do not feature in the list of institutions and advisory bodies). In turn, Art.1 Act 2 of the *Council Decision of 26 July 2010 establishing the organisation and functioning of the European External Action Service*[1] simply defines EEAS *as an autonomous body of the European Union, separate from the General Secretariat of the Council and from the Commission with the legal capacity necessary to perform its tasks and attain its objectives.*

This chapter will look at EU institutions as the core of the EU organisational structure. A close analysis should reveal the variety in their character and the interests they represent on the European level. The institutions will be discussed in the same order as that within the European Union Treaty. The main focus will be on their composition and internal structure, scope and powers, their method of functioning and legal character. In addition, advisory bodies will also be discussed (the European Economic and Social Committee and the Committee of the Regions).

1. The European Parliament

In the current legal order, the European Parliament (also referred to as the parliament or EP) is an institution of the European Union mentioned in Art. 13 Act 1 TUE. 2 The legal basis for its functioning are found in Art. 14 TEU and in Arts. 223–234 TFEU. The characteristics of the European Parliament should also be considered in light of Art. 10 paras. 1 and 2 TUE, which state *that the functioning of the Union shall be founded on representative democracy* and *citizens are directly represented at Union level in the European Parliament*. The organisation of the European Parliament and its remit seem to accord with these premises.

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1 *Council Decision of 26 July 2010 establishing the organisation and functioning of the European External Action Service*, OJ L 201 of 3 August 2010.

2 An interesting analysis of a reform of the European Parliament, including the context of institutional balance, features in: *Treaty of Lisbon: Implementing the Institutional Innovations*, Joint Study CEPS, EGMONT and EPC, November 2007, s. 7–16, http://www.ceps.eu/node/1385

Article 14 TUE states that **the European Parliament is composed of the representatives of European Union citizens**. Since 1979 the composition of the Parliament is established through direct elections. Previously Members of the European Parliament (MEPs) were elected by national parliaments. With Bulgaria's and Romania's accession, the number of MEPs rose to 785[3]. In the 2009–2014 term, the European Parliament has 736 elected members. According to Art. 14 para. 2 TEU, the number of MEPs should be limited to 750, not including the President.

So far, a uniform electoral system to the European Parliament has not been established. However, Article 223 para. 1 obliges the European Parliament to draft legislation necessary for the election of its Members by direct universal suffrage in accordance with a uniform procedure in all Member States, or in accordance with principles common to all Member States. On this basis, the appropriate legislation is accepted by the Council (unanimously and with the agreement of the European Parliament). Detailed regulation of the elections so far have remained within the domain of the Member States. The treaties require that Members of the European Parliament are elected for a five year term in direct and universal elections through a free and secret ballot (Art. 14 para. 3 TEU). Certain common rules on European elections have also been established by the Council in the Act Concerning the Election of the Representative of the Assembly by Direct Universal Suffrage (later – the Act). It stated that elections to the Parliament should be direct and free, based on proportional representation in a secret ballot.[4]

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3 See: *Treaty between the Kingdom of Belgium, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Republic of Bulgaria and Romania, concerning the accession of the Republic of Bulgaria and Romania to the European Union,* OJ L 157 of 21 June 2005.

4 *Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Decision 76/787/ECSC, EEC, Euratom*, OJ L 278 of 8 October 1976 and *Council Decision of 25 June 2002 and 23 September 2002 amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Decision 76/787/ECSC, EEC, Euratom*, OJ L 283 of 21 October 2002.

The election procedure in Poland is regulated by the 23rd January 2004 Act *Ordynacja Wyborcza do Parlamentu Europejskiego (European Parliamentary Elections Act*, later, the *Act*)[5]. According to the Act, the elections are free, universal, direct and proportional, carried out through secret ballot (Art. 2 para. 1 of the Act). Polish citizens who have turned eighteen on the day of the elections at the latest have a valid voting card (Art. 7); this also applies to EU citizens who are not Polish citizens but are residents in Poland and are are included in the electoral register. (Art. 8). Those with valid voting cards who on the date of the elections are 21 or over can stand for election. Other requirements include a lack of a criminal record or a period of residence in Poland (or in another EU country).

Members of the European Parliament are independent in their actions. This is confirmed by Art 6. para 1 of the Act, according to which Members vote individually and in person. They are not bound by any instructions and do not have a binding mandate. They have the right to use the privileges and immunities specified in the Protocol On Privileges And Immunities Of The European Union appended to the Lisbon Treaty (Protocol 7). Moreover, a MEP's mandate cannot be combined with, for example, a governmental function in a member state, membership of the Commission, being a judge, the Ombudsman or the Secretary of the European Court of Justice, a member of the Court of Auditors, an ombudsman or an MP in a member state.

The Parliament's internal structure is relatively complex. The European Parliament is headed by a President, elected for two and a half years. The President directs the work of the Parliament, presides over its sessions, and ensures that they run smoothly. The President, together with fourteen Vice–Chairmen and six questors are forming the Praesidium of the Parliament, and are responsible for the internal functions of the European Parliament.

An important element of the Parliament's internal structure are the parliamentary committees. Each committee specialises in a given field and is composed of between 24 to over 76 Members. Currently there are

5 *Ustawa z dnia 23 stycznia 2004 r. Ordynacja wyborcza do Parlamentu Europejskiego (The 23 January 2004 r. European Parliamentary Elections Act),* Dz.U. 2004 r., No 25, item 219.

20 standing committees. These include the committee of foreign affairs (AFET – including two sub–committees), international trade (INTA), budget (BUDG) as well as employment and special affairs. (EMPL). Parliamentary bills, analysis of European Council and Commission proposals and briefings given during plenary sessions are prepared within appropriate committees. The committees are in session once or twice a month in Brussels. The Parliament may also establish temporary and special committees. The work of the committees is coordinated through the Conference of Committee Chairs, which includes the heads of all the committees within the European Parliament, both permanent and temporary.

Political groups also feature within the European Parliament structure. These bring together MEPs sharing a similar political outlook. National political parties retain the freedom of choice which political group they would like to belong to[6]. Each political group is composed of Members elected in at least a quarter of the Member States, the minimum number of Members necessary to form a group being 25. Membership of more than one group is disallowed. Currently there are seven such groups within the Parliament: the European People's Party (EPP), the Progressive Alliance of Socialists and Democrats (S&D), Alliance of Liberals and Democrats for Europe (ALDE), the Greens/ European Free Alliance Group (Greens/EFA), European Conservatives and Reformists (ECR) and the Group of the European United Left/ Nordic Green Left (GUE/NGL) and Europe of Freedom and Democracy Group (EFD). The President of the European Parliament together with the leaders of various political groups form the Conference of Presidents. A representative of unfederated MEPs also has a seat in the Conference but without the right to vote. The Conference of Presidents is a parliamentary body responsible for organising the work of the European Parliament, planning legislative work and contacts between the European Parliament and other European institutions, national parliaments and third party countries.

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6 P. Tosiek, *Funkcjonowanie grup politycznych w Parlamencie Europejskim (quantitative study)*, "Studia Europejskie", No 2/2000, p. 92.

Coordination of legislative works, organising plenary sessions and meetings of the European Parliament as well as technical and research support of parliamentary bodies and MEPs are some of the tasks of of the General Secretariat. It is headed by the Secretary General and its organisational structure is determined by the Praesidium.

Article 14 para. 1 TEU loosely defines **the European Parliament's functions**: the European Parliament shall, jointly with the Council, exercise legislative and budgetary functions. It shall exercise powers of political control and consultation as laid down in the Treaties. It shall elect the President of the Commission. The general formula of Art. 14 para. 1 TEU as well as the legislation of the Treaty on the Functioning of the European Union allow the following functions to be distinguished: legislative (and budgetary), control, creative and international functions of the European Parliament.

The Parliament shares its **legislative powers** with the Council through the ordinary legislative procedure. (Art. 294 TFEU). This procedure means that any regulation, directive or decision is passed jointly by the European Parliament and the Council. The Parliament may also pass legislative acts with the Council's participation as part of a special legislative procedure. Examples are Art. 223 para. 2 and 226 TFEU. Article 223 para. 2 states that *The European Parliament, acting by the means of regulations on its own initiative in accordance with a special legislative procedure, after seeking an opinion from the Commission and with the consent of the Council, shall lay down the regulations and general conditions governing the performance of the duties of its Members.* It is worth noting that in this case, participation in passing an act by the European Parliament takes the form of giving consent. The above article also dictates the type of act to the Parliament (regulation) and places a requirement to obtain an opinion from the Commission. Article 226 TFEU gives the Parliament the power to determine specific conditions for conducting inquiries by (temporary) parliamentary inquiry committees. This also requires the consent of the Council. Interestingly, the agreement of the Commission is also required.

As part of the special legislative procedure the European Parliament also participates in passing legislative acts by the Council. Depending on the circumstances, the Parliament's role will be either to give consent to pass the Council's act (e.g. Art. 19 para. 1 TFEU), or to give an opinion (e.g. Art. 64 para. 3 TFEU).

At the same time, based on Art. 225 TFEU the European Parliament may request that the Commission submit any appropriate proposals on matters in which it considers that a Union act is required for the purpose of implementing the Treaties. This right of the Parliament is called the power of secondary indirect legislative initiative.

In the context of the European Parliament's functions in the aforementioned area, it may be helpful to explain that Art. 14 para. 1 TEU clearly states the legislative and budgetary functions of the Parliament. However, passing the budget is currently subject to special legislative procedure (c.f Art. 314 TFEU). Its passing therefore occurs within a single (albeit extended) legislative procedure, and therefore may be regarded as part of the legislative function of the European Parliament. The differentiation accepted in Art. 14 para. TEU may also concern the other powers of the European Parliament in the context of establishing, implementation and control of the EU budget.

It may be worthwhile to mention certain other powers of the European Parliament to modify primary legislation. According to Art. 48 para. 2 TEU PE, it may present proposals to amend the Treaties to the Council. European Parliament representatives participate in a coven considering proposed amendments and accept recommendations for the Conference of the Member States representatives. As part of the simplified revision procedures, the European Parliament accepts the Opinion concerning the decision of the European Council, amending part of the agreements of Part Three of the TFEU, and consents to the decision of the European Council on the subject of changes to TFEU envisaged in art. 48 art. 7 TEU.

The EP has also a number of powers with regard to its **control function**. One of the most important instruments in this area, indicating a close connection of the Parliament with citizens, is the power to consider petitions. The right to bring a petition before the European

Parliament belongs to all EU citizens and to all legal entities who reside in a member state. Petitions may concern any subject matter within the scope of the European Union, provided that the petition directly concerns those submitting it (Art. 227 TFEU).

The European Parliament's control functions are largely related to the work of the Commission[7]. According to Article 17 para. 8 TEU *the Commission, as a body, shall be responsible to the European Parliament*. The European Parliament may direct questions to the Commission (Art. 230 TFEU), which the Commission may answer verbally or in writing. The European Parliament has the power to submit a motion of no confidence in the Commission. The passing of a vote of no confidence (which requires the majority of two thirds of cast votes, representing the majority of the MEPs), results in mass resignation of the Commission's members from their functions (Art. 234 TFEU).

The European Parliament may also, according to Art. 226 TFEU, set up a temporary Committee of Inquiry to investigate alleged contraventions or maladministration in the implementation of Union law. The Parliament also has the right to submit cases to the European Court of Justice, e.g. to declare an act of the Union invalid (Art. 263 TFEU).

It should also be mentioned that EU Treaties place certain requirements on some institutions to report to the European Parliament. The President of the European Council presents the European Parliament with a report after each of the meetings of the European Council (Art. 15 para. 6 TEU). The Ombudsman submits an annual report to the Parliament on the outcome of his inquiries (Art. 228 para. 1 TFEU). In turn, the European Central Bank reports on the work of the European System of Central Banks and on monetary policy (Art. 284 para. 3 TFEU) to the European Parliament.

The **creative powers** of the European Parliament are based on its involvement in appointing and possible dismissal of members of certain bodies. The Parliament has the right to elect a nominated person

7 M.M. Kenig–Witkowska (red.), *Prawo instytucjonalne Unii Europejskiej,* Warszawa 2007, p. 114.

as the Chair of the Commission and to endorse all of its membership (Art. 17 para. 7 TEU).

In this context, it is worth recalling the European Parliament's power to vote on the motion of censure on the activities of the Commission (Art. 234 TFEU). The Parliament also appoints the Ombudsman (Art. 228 para. 1 TFEU). As an aside, it may be worth remembering that the Ombudsman holds controlling powers. He is able to receive complaints concerning instances of maladministration in the activities of the Union's institutions, bodies, offices or agencies, with the exception of the Court of Justice of the European Union acting in its judicial role. Complaints may be brought forward by any citizen of the Union or any natural or legal person residing or having their registered office in a Member State. Although the Ombudsman is appointed by the Parliament he is fully independent in his work *and shall neither seek nor take instructions from any Government, institution, body, office or entity.* It would seem therefore that the work of the Ombudsman should not be regarded as a form of control of the Parliament itself.

The European Parliament also participates in the Union's procedure of concluding international treaties. According to Art. 218 TFEU, the Council's decisions on concluding a treaty are taken with the consent of the Parliament in the following cases: association agreements, agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms, agreements establishing a specific institutional framework by organising cooperation procedures, agreements with important budgetary implications for the Union and agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required. In other matters, decisions on agreements are made by the Council after consulting with the European Parliament. If, however, the opinion of the European Parliament is not available by the deadline established by the Council, the Council is able to proceed with the decision making.

The European Parliament holds an annual session. It may meet in an extraordinary part–session at the request of a majority of its component Members or at the request of the Council or of the Commission (Art. 229

TFEU). Save as otherwise provided in the Treaties, the European Parliament shall act by a majority of the votes cast (Art. 231 TFEU).

In light of the above, it seems fitting to conclude that the European Parliament, as an institution of the European Union, is a representative, one–chamber collective body established for a limited term (MEPs are elected for a five year term – Art. 14 para. 3 TEU). An important factor is that as a European Union institution, it is a pan–European forum representing EU citizens whose representatives are directly elected. It does not represent national or local government, nor the Union itself, but the citizens of Member States (European citizens). At the same time, its powers, especially its legislative and control powers, mean that the Parliament is not simply a debating body within the EU.

2. The European Council

The European Council has evolved into its present shape from informal meetings of the highest ranking representatives of the Member States. These types of conferences of the heads of state or the governments of Member States have been conducted since 1974 under the name of the European Council. This formula, however, until the signing and implementation of the Single European Act, was lacking a treaty framework.

The European Council has acquired the status of an institution of the European Union only since the signing of the Lisbon Treaty. This resolved any issues concerning the character of the European Council within the support structure of the European Union itself. Notably the European Council was not one of the institutions of the Community and that Art. 7 TEC omits it. However, Art. 4 TEU applied to the Council, but without referring to it as an institution (a body) of the Union. Given this state of affairs, regarding the European Council as an institution of the European Union might have been controversial[8]. In the current legal status, Art. 13 para. 1 TEU defines the European Council as a EU institution.

8 C.f. however M.M. Kenig–Witkowska (red.), *op. cit.*, p. 98.

Considering the legal framework within which the European Council functions as well as Art. 13 para. 1 TEU, one should also mention Art. 15 TEU, Art. 235 and 236 TFEU. These regulations concern general issues, e.g. the membership of the European Council, its tasks, functions and working methods. It is worth bearing in mind that a number of detailed issues on the functioning of the European Council were regulated in Treaties concerning various areas of cooperation or policies of the European Union (e.g. a common EU foreign and security policy) and through internal regulations[9].

The members of the European Council are the heads of state or government of the Member States and the President of the European Council (art. 15 para. 2 TEU). These are complemented by the President of the European Commission, which is a new development, and by close working with a high representative of the Union for foreign affairs and security policy who, at the same time, holds the office of one of the Vice–Presidents of the Commission, as defined by the Treaties (Art. 18 para. 2 TEU). If the order of the debate requires it, members of the European Council *may decide each to be assisted by a minister and, in the case of the President of the Commission, by a member of the Commission* (art. 15 para. 3 TEU).

It should be stressed that the membership structure of the European Council primarily ensures the representation of Member States. This is confirmed by Art. 10 para. 2 TEU, which states that on the Union platform, *Member States are represented in the European Council by their Heads of State or Government*, whereas these are democratically accountable before national parliaments or their citizens. The differentiation between "Heads of State or Government" of Member States, stressed in the treaties, requires explanation. This results from the practice of certain bodies representing various states on the European Council forum. Some countries are represented by a president (France) others by the head of government (prime minister, chancellor). In Poland, due to certain constitutional standards and depending on the current political situation, the issue of representation

9 *European Council Decision adopting its Rules of Procedure* (2009/882/EU), OJ L 315 of 2 December 2009.

within the European Council leads to certain controversies. Article 126 of the Polish Constitution states that *The President of the Republic of Poland shall be the supreme representative of the Republic of Poland.* In this context, Art. 133 of the Constitution is also of significance as it concerns the President's powers in foreign policy. In turn, according to Art. 146 of the Constitution, *The Council of Ministers shall conduct the internal affairs and foreign policy of the Republic of Poland*. This lead to certain arguments between the President of Poland and the Prime Minister. The solution, however, lies in formulating consistent political practice, not in *ad hoc* changes to legislation. The Polish Constitutional Tribunal also took a stance on this issue[10].

According to Art. 15 para. 1 TEU *The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof.* At the same time, unequivocally, the European Council was denied a legislative function (Art. 15 para. 1 TUE). The general formula of the above legislation confirms the European Council's role as an institution making strategic decisions concerning the direction of the development of the EU. Such decisions, having a political dimension, are then reflected in the Union's legislation and even primary law.

One must, however, stress that Art. 15 para. 1 TEU does not fully reflect the powers of the European Council and the degree of its involvement in separate areas of Union policy and forms of cooperation. The Council has a number of detailed competences listed in the treaties regulating the EU's involvement in certain areas. It would be beneficial to examine the powers of the European Council, together with their subject classification, in more detail.

The Treaty on the European Union contains regulations defining the powers of the European Council concerning, for example, modifying primary law or a common foreign and security policy. TEU grants the European Council certain powers in terms of control over Member States' observance of the fundamental rules of the European Union. Consequently the powers of the European Council could be categorised

10 See: eg. J. Barcz, M. Górka, A. Wyrozumska, *Instytucje i prawo Unii Europejskiej*, Warszawa 2011, p. 334–337.

as **decision making powers (which do not equate to legislative powers), control powers and creative powers**.

Within the ordinary procedure of amending the Treaties (ordinary revision procedure – Art. 48 paras. 2–5 TEU) the European Council makes a decision (after consulting with the European Parliament and the Commission) upon consideration of proposed modifications. Its President calls a Convention (consisting of representatives of national parliaments and heads of state or government of Member States, European Parliament and Commission) whose task is to consider the proposed changes and agreeing recommendations for the Conference of the representatives of Member States' governments. Possible changes are introduced through the Conference. The European Council may also, with the consent of the European Parliament, decide not to call the Convention if the scope of the proposed changes does not justify this. In this situation *the European Council shall define the terms of reference for a conference of representatives of the governments of the Member States.*

As part of simplified revision procedure (Art. 48 paras. 6 and 7, TEU) the European Council may (after consulting with the European Parliament, the Commission and, in certain cases, with the ECB) unanimously make a decision *amending all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union* (Art. 48 para. 6 TEU). This decision is, however, implemented only after it has been approved by Member States in accordance with their constitutional requirements. The European Council may also decide to authorize the Council to make a decision based on a qualified majority in a case or matter where TFEU or Title V TEU have forestalled a unanimous decision (art. 48 para. 7 TFEU). The European Council may also make a decision (unanimously and with the consent of the European Parliament) allowing acts to be passed through ordinary legislative procedure where the TFEU specifies a special legislative procedure. In both cases the European Council decides unanimously and with the consent of the European Parliament. Details of the above procedures will be discussed in Part 4.

On common foreign and security policy of the EU (CFSP), the European Council makes decisions concerning EU strategic goals and interests. These concern common foreign and security policy, and other issues concerning the Union's external actions. They may concern *the relations of the Union with a specific country or region or may be thematic in approach. They shall define their duration, and the means to be made available by the Union and the Member States.* The European Council also defines *general guidelines for the common foreign and security policy, including for matters with defence implications.* It should also be indicated that a decision on possible common defence within the EU lie also within the powers of the European Council (Art. 42 para. 2 TEU). The European Council is also the institution able to nominate the High Representative of the Union for Foreign Affairs and Security Policy, and may also end his term of office (Art. 18 para. 1 TEU). In both cases the European Council makes the decision by a qualified majority with the consent of the President of the Commission.

As defined by Art. 7 para. 2 TEU, the European Council may determine a serious and permanent breach of the values outlined in Art. 2 TEU (e.g. freedom, democracy, equality, the rule of law and respect for human rights) by a Member State. This is an element of a control mechanism over Member States observing the principles and values on which the Union is based (Art. 7 TEU).

A number of the European Council's powers can be found in the Treaty on the Functioning of the European Union. These concern specific issues for example on free movement of workes (Art. 48 TFEU), areas of freedom, security and justice (Arts. 68, 82 para. 3; Art. 83 paras. 3 and 86 TFEU) or economic and monetary policy (Art. 121 para. 2; Art. 148 para. 1 TFEU).

Of the creative powers of the European Council the following should be mentioned: the power to elect its own President, the power to nominate a European Parliament candidate for the President of the Commission, to nominate the Commission members, to modify the number of the Commission members, and to nominate the president,

vice president and the members of the European Central Bank Executive Board.

As the office of **the President of the European Council** has been made permanent, its most important aspects should be considered here. The President is elected by the European Council for the period of two and a half years through a qualified majority. He can only stand for office twice. The President of the European Council shall chair it and drive forward its work, ensure the preparation and continuity of the work of the European Council in cooperation with the President of the Commission, and on the basis of the work of the General Affairs Council, endeavour to facilitate cohesion and consensus within the European Council, present a report to the European Parliament after each of the meetings of the European Council. The president – without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy – represents the Union outside in *matters concerning its common foreign and security policy*.

The European Council meets at least twice every six months as called by the President[11]. If required, the President may call an extraordinary session. The European Council makes decisions through consensus, unless the Treaties state otherwise. A qualified majority is required when, for example, electing the President of the European Council (Art. 15 para. 5 TEU) or when nominating a European Parliament candidate for the president of the Commission (Art. 17 para. 7 TEU). The European Council decides unanimously on procedures concerning changes to primary law (e.g. Art. 48 paras. 6 and 7 TEU).

The membership of the European Council as described above together with its establishment and its powers allow us to define it as an international institution, and a political decision making body[12]. One should stress, however, that within the membership of the European Council an interaction of intergovernmental and pan–European factors takes place through the representatives of the Commission. Moreover,

11 As confirmed by Art. 1 *European Council Rules of Procedure.* See: Appendix to *the Decision of the European Council 2009/882/UE of December 2009 r. on accepting internal regulations*, OJ L 315 of 2 December 2009.

12 C. Mik, *Europejskie prawo wspólnotowe. Zagadnienia teorii i praktyki*, Warszawa 2000, p. 129.

wide ranging decision–making powers (e.g. concerning changes to primary law) of the European Council should be noted. In this light, the European Council seems to be more than simply an institution fostering a forum for a political debate.

3. The Council

Unlike the European Council, the Council of the European Union was one of the EC institutions (Art. 7 TEC). Since the Treaty of Lisbon came into force the Council has been an institution of the European Union as indicated in Art. 13 para.1 TEU. In addition to Art. 13, the legal basis for its functioning can currently be found in Arts. 16 TEU and 237–243 TFEU. Of course, similarly to the European Council, a number of issues (e.g. concerning specific powers of the Council) have been dealt with through regulations concerning the separate spheres of EU activities.

The Council is a collective body whose membership equals the number of Member States (presently 27). The membership however is not fixed. First of all, Art. 16 para. 2 TEU states that *The Council shall consist of a representative of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote.* Because the membership of the Council consists of representatives of governments, it is therefore determined by the current political balance of power in each Member State. Secondly, the makeup of the Council is dependent on the topic and a decision on the issue of who should sit on the Council is made by the European Council through the procedure defined in Art. 236 TFEU. In its current legal state, **the Council may function in the following configurations**:

- General Affairs
- Foreign Affairs
- Economic and Financial Affairs
- Justice and Home Affairs Council
- Employment, Social Policy, Health and Consumer Affairs Council

– Competitiveness (Internal Market, Industry and Research)
– Transport, Telecommunications and Energy
– Agriculture and Fisheries
– Environment
– Education, Youth and Culture[13]

It should be stressed that the Treaties themselves envisage the General Affais Council and Foreign Affairs Council (Art. 16 para. 6 TEU). Their existence is therefore independent of the decision of the European Council.

In its separate configurations, the Council of the European Union is composed of representatives of appropriate departments (e.g. the Foreign Office). Regardless of the configuration, they have to be representatives of a ministerial level, empowered to make commitments on behalf of the government of their Member State. (Art. 16 para. 2 TEU). It is possible for an absent member of the Council to be represented by a delegate of another Member State (Art. 4 of the Council's Rules of Procedure[14]). But when it comes to voting, each member of the Council could be a proxy for only one of the remaining members (Art. 11 para. 3 of the Rules).

The Council **does not have a complex internal structure**. The presidency of the councils, with the exception of the Foreign Affairs Council, headed *ex officio* by the High Representative of the Union for Foreign Affairs and Security Policy (Art. 18 para. 3 TEU), is held on a rotating basis by the Member States' representatives on the Council, as agreed by the European Council through the provisions of Art 236 TFEU. The internal Rules of Procedure of the Council state in Art. 1 para. 4, that the Presidency of the Council, with the exception of the Foreign Affairs Council, is held by previously defined groups of three Member States for 18 months. These groups are established in

13 See: *Decision of the Council (General Affairs) of 1 December 2009 establishing the list of Council configurations in addition to those referred to in the second and third subparagraphs of Article 16(6) of the Treaty on European Union (2009/878/EU)*, OJ L 315 of 2.December 2009.

14 *Council Decision of 1 December 2009 adopting the Council's Rules of Procedure (2009/937/EU)*, OJ L 325 of 11 December 2009.

rotation from Member States, with consideration given to variety and geographical balance within the Union. Each member of the group in turn holds the presidency of each configuration for six months, with the exception of the Foreign Affairs Council. The remaining members of the group support the presidency in all duties, based on an 18 month programme or on other mutually agreed arrangements[15].

Supporting the Council is the **Committee of Permanent Representatives** (COREPER – from the French *Comité des représentants permanents*), responsible for preparing the work of the Council (Art. 16 para. 7 TEU). The COREPER may also carry out tasks entrusted to it by the Council. It can also make procedural decisions as defined in the *Council's Rules of Procedure* (Art. 240 para. 1 TFEU). These decisions (Art. 19 para. 7 of the Rules) may concern for example the Council meeting in a place other than Brussels or Luxemburg, or having an open or closed debate.

The Council is also supported by the General Secretariat (Art. 240 para. 2 TFEU) headed by the Secretary General. The General Secretariat shall be closely and continually involved in organising, coordinating and ensuring the coherence of the Council's work and implementation of its 18–month programme. Under the responsibility and guidance of the Presidency, it shall assist the latter in seeking solutions.

The powers of the Council are loosely defined in Art. 16 para. 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*. Closer analysis of the TEU and TFEU regulations allows a distinction to be made between **the legislative powers** (broadly speaking – powers to issue legally binding acts) **and the executive, creative, international and control powers of the Council**.

With the Treaty of Lisbon's introduced reforms on EU secondary law forms and formal definition of EU legislature, it is possible to conclude that the Council has wide ranging powers in this matter.

15 *European Council Decision of 1 December 2009 on the exercise of the Presidency of the Council (2009/881/EU)*, OJ L315 of 2 December 2009.

Together with the European Parliament it can adopt legislative acts (regulations, directives and decisions) through ordinary legislative procedure (Art. 289 & 294 TFEU). Through special legislative procedure the Council may adopt legal acts with the participation of the European Parliament (i.e. requiring consultation with, or consent of, the European Parliament – c.f. Art. 19 para. 1; Art. 64 para. 3; Art. 86 para. 1, or Art. 194 para. 3 TFEU) or participate in passing a legislative act by the Parliament (see: Art. 223 para. & 226 TFEU). In the Union legislation, according to Art. 241 TFEU, the Council can also *request the Commission to undertake any studies the Council considers desirable for the attainment of the common objectives, and to submit to it any appropriate proposals*. This right is often referred to as a secondary (indirect) power of legislative initiative of the Council. It is worth pointing out that the Council participates in alteration to primary legislation (see: Art. 48 paras. 2, 3 TEU). In the same category (as is the case with the European Parliament) we should also list the Council's right to participation in establishing the EU Budget (special legislative procedure regulated in Art. 314 TFEU).

The rules of the Treaty on the functioning of the European Union confer upon the Council the power to introduce legally binding acts which, however, are not part of the Council's legislative function. This concerns acts such as regulations and directives adopted by the Council outside of legislative procedure (c.f. Art. 103 para. 1 TFEU). These acts, even though they remain legally binding according to the definitions indicated in Art. 288 TFEU, are not classed as legislative acts. Consequently these can be regarded as part of exercising a legislative function, with a clause that the EU legislature will therefore be simply regarded as the introduction of legally binding acts (therefore this category will be broader than the adoption of legislative acts – these issues will be discussed in more detail in Part 3).

The Treaty of Lisbon has also introduced a category of implementing acts. If the power to adopt such acts can be regarded as part of the executive function, the competences of the Council in this area should also be specified. The rule is that Member States *shall adopt all measures of national law necessary to implement legally binding Union acts* (Art. 291 para. 1 TFEU). In the same way, the implementation of EU

law is largely part of their competences. However, one should point out that in a situation where *uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission*; such is the rule. However, in *duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union* implementing powers are entrusted to the Council (Art. 291 para. 2 TFEU).

Among the creative powers of the Council one should mention its involvement in the establishment of Commission, (Art. 17 para. 7 TEU), the power to establish specialised courts within the Court (together with the European Parliament – Art. 257 TFEU), the right to shape the membership of certain institutions (and bodies) of the EU (e.g. increasing the number of advocates general in the Court of Justice of the EU – Art. 252 TFEU), appointing members of the Court of Auditors (Art. 286 para. 2 TFEU) and the members of the Economic and Social Committee and the Committee of Regions (respectively: Arts. 302 & 305 TFEU).

The international competences of the Council are immensely important, especially its function in the procedure of contracting international agreements by the European Union. According to Art. 218 para. 2 TFEU *The Council shall authorise the opening of negotiations, adopt negotiating directives, authorise the signing of agreements and conclude them*. Of course, depending on the type of the agreement, the Council makes a decision with a prescribed level of participation of the European Parliament. Particular conditions may also apply to a required majority in the Council in making a decision about an international agreement. However, the Council's role in this matter seems to be at the forefront.

Finally, the Council also performs a control function. In light of this, the procedure regulated in Art. 7 TEU, enabling control over the Member States' observance of the founding values of the EU, seems particularly significant. In the procedure defined in Art. 7 para. 1 TEU, the Council *may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2 TEU*. Moreover, if the European Council decides that a serious and permanent breach of

these values has occurred in a particular Member State, the Council *may decide to suspend certain rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council* (Art. 7 para. 3 TEU).

In regard to the rule that the Council makes its decision though a vote, there are three possible voting procedures, depending on the necessary majority to pass a specific Act of the Council: an ordinary majority, a qualified majority and unanimity. According to Art. 16 para. 3 TUE, the Council decides though a qualified majority unless the Treaties decree otherwise. Details of the Council's decision making procedures are discussed in Part 4.

To conclude, the composition of the Council speaks of **its intergovernmental character** – Member States are represented through government members at ministerial level. At the same time, the Council is a collective institution with its main focus on the legislative function. However, one should bear in mind that the Council of the European Union also has certain other powers in such important areas as international agreements or nominating and determining the number of members of other EU bodies or institutions.

4. The European Commission

Before the Treaty of Lisbon came into force, the European Commission functioned as one of the European Community institutions (Art. 7 TEC). Presently it is an institution of the European Union (Art. 13 TEU) but, due to its composition, its members' status and the extent of its tasks and powers, it can be regarded as a supranational body. The main regulations concerning the functioning of the European Commission can be found in Art. 17 TEU and Art. 244–250 TFEU.

At present, the Commission **is composed of 27 members** (Commissioners) – one from each Member State. This composition also includes the **President of the Commission** and **the High Representative of the Union for Foreign Affairs and Security Policy**

(Art. 17 para. 4 TEU). From 2014, the membership of the Commission will be limited to two thirds of the number of Member States (including the High Representative), unless the European Council unanimously decides otherwise (Art. 17 para. 5 TEU). They will be elected on rotational basis while applying the principle of equality; the detailed system for the election of Commissioners will be decided unanimously by the European Council in accordance with the procedure established in Art. 244 TFEU. For the first time ever, representatives of individual Member States will be (albeit temporarily) excluded from the Commission[16]. Commission Members serve for a five year term (Art. 17 para. 3 TEU).

The procedure of establishing the Commission (Art. 17 para. 7 TEU) begins with the European Council nominating its candidate for the President of the Commission to the European Parliament. The European Council decides this through a qualified majority of votes, taking into consideration the results of the European parliamentary elections and after appropriate consultations. The candidate shall be elected by the European Parliament through a majority of Members' votes. Next the Council, in mutual agreement with the appointed President, agrees the list of candidates for the membership of the Commission. The list reflects proposals of each Member State. Established this way, the membership of the Commission, together with the President and the High Representative of the Union for Foreign Affairs and Security Policy, is collectively approved by the European Parliament. On this basis, the European Council appoints the Commission through a qualified majority of votes.

According to Art. 17 para. 3 TEU, the Commission's term of office is five years. Significantly, its members *shall be chosen on the ground of their general competence and European commitment from persons whose independence is beyond doubt. In carrying out its responsibilities, the Commission shall be completely independent. The members of the Commission shall neither seek nor take instructions*

16 J. Lieb, A. Maurer, *Der Vertrag von Lissabon. Kurzkommentar,* SWP Diskussionspapier, April 2009, p. 25, źródło: http://www.swp–berlin.org/fileadmin/contents/products/arbeitspapiere/Vertrag_Lissabon_Kurzkommentar_3rd_edition_090421_KS.pdf

from any Government or other institution, body, office or entity. They shall refrain from any action incompatible with their duties or the performance of their tasks. The issue of the Commissioners' independence is spelled out in Art. 245 TFEU. The Commissioners have a duty to refrain from any actions incompatible with their function. In turn, Member Sates respect the independence of the Commission's members and do not seek to influence the Members in their tasks. When embarking on their role, the Commission's Members *shall give a solemn undertaking that, both during and after their term of office, they will respect the obligations arising thereof and in particular their duty to behave with integrity and discretion as regards the acceptance, after they have ceased to hold office, of certain appointments or benefits*. The members' privileges and immunities are an additional guarantee of their independence (Protocol on the Privileges and Immunities of the European Union annexed to the Lisbon Treaty – Protocol 7). On this basis the members of the Commission enjoy, for example, immunity from legal proceedings in respect of acts performed by them in their official capacity, including spoken or written words. This immunity continues to protect them also after they have ceased to hold office.

The members of the Commission cease to perform their functions at the moment of their resignation or dismissal. A dismissal of a member may be decreed by the Court of Justice, in circumstances provided for in Art. 245 and 247 TFEU, upon application by the Council or the Commission itself. Moreover, members of the Commission collectively resign their functions should a motion of censure be passed by the European Parliament (Art. 17 para. 8 TFEU).

Members of the Commission perform the functions entrusted to them by the President of the Commission and are answerable to him (Art. 248 TFEU). The President decides the guidelines for the work of the Commission, decides on the internal structure of the Commission and nominates Vice–Presidents (except for the High Representative) – Art. 17 para. 6 TEU. The President may also alter the division of tasks during the Commission's term of office (Art. 248 TFEU).

The inclusion of **the High Representative of the Union for Foreign Affairs and Security Policy** in the Commission's membership is a new

development (Art. 18 para. 4 TEU). He is one of the Commission's Vice–Presidents and at the same time presides the Foreign Affairs Council (Art. 18 para. 3 TEU). As part of the Commission he is answerable for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union's external action. He is nominated by the European Council through a qualified majority of votes, with the consent of the President of the Commission. It is worth pointing out that the High Representative is a function linking the supranational Commission and the intergovernmental Council in the specific issue of the single foreign and security policy of the European Union.

Moreover the functioning of the Commission is based on the work of a well developed administrative apparatus. It consists of a number of departments (the so called Directorates – General) with their separate policy areas (e.g. regional policy, employment, social affairs and industry, competition or budget) and appropriate service areas responsible for administrative issues and for specific tasks. This structure constitutes the real administrative (bureaucratic) arm of the Commission.[17]

The treaties broadly define the extent of the Commission's functions. According to Art. 17 para. 1 TEU, *the Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. It shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Treaties. With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union's external representation. It shall initiate the Union's annual and multiannual programming with a view to achieving inter–institutional agreements*. On this basis and in light of the specific provisions of TEU and TFEU, **executive functions**,

17 For more information see: J. Peterson, M. Shackleton, *The Institutions of the European Union,* Oxford 2001, s. 142–163.

specific powers concerning adopting legally binding acts of the EU, control and international functions can be distinguished.

As secondary acts of the Union are divided into legislative, delegated and implementing acts, the power of the Commission to adopt the latter should be stressed. According to Art. 291 para. 2 TFEU, *where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission* (the Council has extraordinary implementing powers). It is worth mentioning that the basis for an implementing act is a legally binding act of the European Union, and therefore not just a legislative act (more about the acts of the European Union in Part 3). Implementation of its implementing powers by the Commission should be under the Member States' control, the form of which is to be decided by the Council and the European Parliament (Cf. considerations in Part 4).

Delegated acts are a specific group of legally binding acts. They are adopted by the Commission according to the provisions of Art. 290 TFEU. These are passed on the basis of powers conveyed in the legislative act, are generally applicable and may supplement or amend certain non–essential elements of the legislative act. The Commission's power to adopt this type of acts is of course subject to certain conditions (see Part 4). Due to the Treaties clearly distinguishing legislative, delegated and implementing acts according to a formalised criteria, it is difficult to regard this power of the Commission simply as a power to implement. Likewise, it is not simply part of its legislative work; however, delegated acts may interfere with the content of legislative acts. In the domain of formally defined legislature (passing legislative acts) the Commission's powers are relatively important although it should be stressed that the Commission is not a legislative body. However, it has the power of legislative initiative. According to Art. 17 para. 2 TEU, *legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise.* This is confirmed by the regulations regarding legislative procedures. *The ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission* (Art. 289 para. 1; Art. 294 TFEU). Only in special cases can legislative acts be adopted

on a proposal of other bodies (such as a group of Member States or the European Parliament– Art. 289 para 4 TFEU). The Commission's part in various stages of legislative procedures (both ordinary and special) should also be stressed.

Apart from legislative, delegated and implementing acts the Treaties foresee the possibility of the adoption of unspecified acts, i.e. legally binding acts as in Art. 288 TFEU, which cannot be easily placed in any of the above categories. The Commission has powers to adopt such acts. Art. 106 para. 3 TFEU may serve as an example here – the Commission has the power to issue appropriate directives and decisions to Member States. These acts are listed in Art. 288 TFEU. They do not, however, constitute legislative acts or implementing acts – the Commission adopts these on the basis of the powers conveyed by the Treaties, not on the basis of a legislative act or other legally binding act of the European Union (this is without any reference to any legislative procedure, which, incidentally, do not have the Commission as a legislative body). Adoption of the acts mentioned above may be regarded as part of the Commission's executive role only if it is accepted that by doing so it is implementing the specific regulations of the TFEU. It would appear therefore that strict implementing powers are being exercised by the Commission on the basis of Art. 291 para. 2 TFEU. In addition, the Commission's powers resulting from Art. 106 TFEU can be regarded to a certain extent as part of its control functions.

The control powers of the Commission make it the '**Guardian of the Treaties**'. Based on Art. 17 para. 1 TUE, the Commission's task is to watch over the implementation of the Treaties and the measures adopted by institutions on its basis. It oversees the application of the EU laws under the control of the European Court of Justice. The Commission's tool in this instance are its powers to initiate infringement procedures before the European Court of Justice. The Commission may bring complaints against Member States if it decides that they are not fulfilling their treaty obligations (Arts. 258–260 TFEU). The Commission has also got the power to lodge complaints about the legality of legislative acts (Art. 263 TFEU). The Commission exercises control powers relating to the EU competition rules (aforementioned Art. 106 para. 3 TFEU, c.f. Art. 105 para. 1; Art. 108 paras. 1 & 2

TFEU). The exercise of control functions is to enable the proper functioning and development of the Union, which in effect underlines the supranational character of the Commission as an institution of the European Union.

The extent of the Commission's competences is complemented by its powers relating to the Union's external relations. In addition to one of its Vice–Presidents acting as the High Representative of the Union for Foreign Affairs and Security Policy, the Commission takes part in concluding international agreements. It is the Commission (or the High Representative) who submit their recommendations on commencing talks to the Council (Art. 218 para. 3 TFEU). The Commission is also represented within the European Union External Action Service (EEAS, Art. 27 para. 3 TEU). The Commission can also influence the EEAS organisation and functioning – a decision in this matter is made by the Council with the consent of the Commission. In principle the Commission acts as a collective body, exercising its powers through the *College of Commissioners*[18]. Apart from decisions being made during a session, it is also possible to apply an oral or written procedure, a delegated or sub–delegated empowerment procedure[19]. In terms of the principle of decision making process, the Commission decides through the majority of its members' votes (Art. 250 TFEU).

In light of the above, it is worth stressing that the Commission, as an institution of the European Union, is a collective body whose composition is unchanging. The composition is permanent, but the Commission itself is a body with a fixed term of office. It is also an institution whose supranational character should be beyond any doubt. The Commissioners' independence is a treaty requirement. The Commission and its members do not represent Member States but the interests of the European Union itself (Art. 17 para. 1 TEU). The extent of the Commission's functions and its powers allows its qualification as mainly an executive (management) body. However, it is also necessary to bear in mind its competences in regard to legislative processes (the

18 *Ibid*, p. 71–95.

19 M. Górka, *System instytucjonalny Unii Europejskiej* [in:] J. Barcz (ed.) *Ustrój Unii Europejskiej*, Warszawa 2010, p. II–46 – II–47.

power of legislative initiative) and important control powers. It also has at its disposal other competences outside of the formal division of powers in the Union, which highlight its role as a supranational institution.

5. The Court of Justice of the European Union

Since the Treaty of Lisbon came into force, the structure of the EU judiciary has changed. Existing until then, the Court of Justice of the European Communities and the Court of the First Instance, with their court chambers, have been replaced with one institution, which is the Court of Justice of the European Union (CJEU). Currently the Court of Justice of the European Union is an institution of the European Union as indicated in Art. 13 para. 1 TEU. The main regulations concerning the functioning of the CJEU are found in Art. 19 TEU and Art. 251–281 TFEU.

The internal structure of the CJEU is complex. This includes: the **Court of Justice, the General Court and specialised courts** (Art. 19 para. 1 TEU). One may pose a question here regarding the status of individual parts of the CJEU. It would seem, however, that based on the literal content of Art. 13 para. 1 and Art. 19 para. 1 TEU, the Court of Justice of the European Union as the whole has the status of an EU institution (the whole with its complex internal structure).

The Court of Justice is composed of 27 judges and 8 advocates general. They are 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. They shall be appointed by common accord of the governments of the Member States for a term of six years* (Art. 253 TFEU). Candidates are verified by a committee composed of *seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognised competence* (Art. 255 TFEU). Every three years some of the judges and advocates general are replaced.

The President of the CJEU is elected by the judges from among their peers for a term of three years. The Court nominates its Registrar and establishes its rules of procedures (Art. 253 TFEU). It is noteworthy that the role of the advocates general is to present, in an unbiased way, justified petitions in cases which, according to the CJEU Statute, require its involvement. The Council can, through a unanimous vote, increase the number of advocates general (Art. 252 TFEU).

The Statute of the Court of Justice of the EU sets the number of General Court judges at 27. The members of the Court, as well as being unquestionably independent, must be eligible for high office in court. (Art. 254 TFUE). Similar to judges of the Court of Justice, they are jointly nominated by agreement of Member States' governments for a period of six years (Art. 254 TFEU), after consultations with the committee required in Art. 255 TFEU. The judges elect from among their number the President of the Court and nominate the Registrar. The CJEU Statute may permit the Court's judges to be supported by advocates general.

According to Art. 257 TFEU, the European Parliament and Council may establish specialised courts competent to consider, in the first instance, certain categories of cases brought before the court concerning specific disciplines. The judges of these specialised courts are nominated through a unanimous decision of the Council (Art. 257 TFEU). They are elected from persons of indisputable impartiality eligible for high office in court. Currently one such court is in existence – the Civil Service Tribunal. Detailed regulations regarding its composition, powers and working practice are defined in Appendix 1 to the CJEU Statute. At present the European Civil Service Tribunal is composed of seven judges nominated for the period of six years. However, the Council may increase their number.

The task of the Court of Justice of the European Union is to ensure *that in the interpretation and application of the Treaties the law is observed* (Art. 19 para. 1 TEU). As part of its functions, the Court of Justice of the European Union may rule in the following cases: actions brought in by Member States, institutions and legal entities and by individuals, preliminary rulings concerning the interpretation of the

treaties or interpretation and validity of acts adopted by institutions as well as in other matters envisaged in the Treaties (Art. 19 para. 3 TEU). The CJEU may also rule on other matters envisaged in the Treaties, such as: decisions on the compulsory retirement of a member of the Commission, or on withdrawing their pension rights or similar benefits (Art. 245 TFEU). The judiciary complaint system and preliminary rulings procedures will be discussed in Part 5, but it is useful to indicate here the extent of the competences of the Court of Justice, the General Court and specialised courts.

Article 256 para. 1 TFEU envisages that **the General Court** is competent in cases concerning annulment of acts (art. 263 TFEU), failure to act (Art. 265 TFEU), compensation (Art. 268 & 340 TFEU), in disputes between the EU and its workers (Art. 27 TFEU) and in cases covered by Art. 272 TFEU. The court also has jurisdiction to hear and determine questions in preliminary rulings under Art. 267 TFEU. The exceptions are the cases entrusted to a specialised tribunal and cases reserved by the CJUE Statute for the Court of Justice.

In the current legal setup, the **Civil Service Tribunal** is the court of the first instance with the jurisdiction to consider disputes between the EU and its employees under Art. 270 TFEU. The **Court of Justice** is competent to adjudicate in complaints indicated in Art. 263 & 265 TFEU, brought in by a member state against an act or a failure to act by the European Parliament or the Council, or both of these institutions (with the exception of Council decisions under Art. 108 para. 2 TFEU), and against a Commission's act or a failure to act on the basis of Art. 331 para. 1 TFEU. The Court of Justice is also competent in cases defined in Art. 263 & 265 TFEU, where the complaint is submitted by one of the EU institutions and concerns an act or a failure to act of the European Parliament, the Council or both of these institutions deciding jointly, and the Commission or ECB.

The decisions of the General Court can be appealed to the Court of Justice; this, however, is limited to the points of law. In turn, the General Court is competent to consider appeals against the decisions of specialised courts. In the course of a preliminary rulings procedure the General Court may pass the case to the Court of Justice if it decides

*that the case requires a decision of principle likely to affect the unity or consistency of Union law. Moreover, decisions given by the General Court on questions referred for a preliminary ruling may exceptionally be subject to review by the Court of Justice, where there is a serious risk of the unity or consistency of Union law being affecte*d (Art. 256 para. 3 TFEU).

The Court of Justice sits in chambers (three or five judges), a Grand Chamber (thirteen judges) or as a full court. *The Court shall sit in a Grand Chamber when a Member State or an institution of the Union that is party to the proceedings so requests*. The Court of Justice sits as a full court in cases submitted under Art. 228 para 2 (a ruling on the compulsory retirement of the European Ombudsman), Art. 245 & 247 (a ruling on the compulsory retirement of a member of the Commission) and Art. 286 para. 6 TFEU. The General Court sits in chambers of three or five judges. The Civil Service Tribunal sits in chambers of three judges.

Given the above arrangements, the Court of Justice of the European Union is a judiciary institution with a complex internal structure. At the same time, it is an institution independent of both the Member States and other Union institutions. The impartiality of the CJUE is reinforced by a range of privileges and immunities (Protocol 7). The Court may therefore be regarded as a supranational body.

6. The European Central Bank

The European Central Bank (ECB) currently has the legal status of an institution of the European Union (Art. 13 para. 1 TEU). However, it is **a unique institution**. Under Art. 282 para. 3 TFEU it is classed as a separate legal entity and is independent in exercising its powers and in managing its finances. Other institutions, bodies and units as well as Member States' governments respect this independence. The ECB is also an institution lacking general functions in that they do not concern all – or the majority of – areas of cooperation within the EU. Its

competences may be regarded as specific. Main regulations concerning the ECB are found in Art. 282–284 TFEU.

The decision making bodies within the ECB are the Governing Council and the Executive Board (Art. 129 para. 1, Art. 283 TFEU). The Governing Council includes the members of the Executive Board and the governors of the national central banks of the 17 euro area countries (Art. 283 para. 1 TFEU). The Board consists of the President, the Vice–President and four other members. They are appointed by the European Council acting by a qualified majority on a proposal by the Council and after consulting the European Parliament and the Governing Council of the ECB. These should be highly respected persons with authority and work experience in banking or monetary policy. Only EU citizens can be members of the Board.

The ECB has **considerable decision–making powers**. Under Art. 132 para. 1 TFEU it has the power to adopt regulations and make the necessary decisions to undertake its tasks as defined in the Statute *(Protocol No. 4 on the Statute of the European System of Central Banks and the European Central Bank)* and in the Treaties. These do not constitute legislative powers of the ECB. However, acts adopted by the ECB are legally binding, according to the regulation under Art. 288 TFEU. Within the Union's legislature the ECB's powers are not wide–ranging. It has the competence to initiate legislative proceedings of the European Parliament and the Council (Art. 129 para. 3 TFEU) and Council procedures for adopting acts outside of legislative procedure (e.g. Art. 129 para. 4 TFEU).

A number of the competences of the European Central Bank are **consultative powers**. On the European Union level, the ECB is consulted on each proposed Union act subject to its competences (Art. 127 para. 4, 282 para. 5 TFEU). It is also consulted on each proposed new regulation on a national level within the same remit. The consultative competences of the ECB are confirmed in detailed regulations under the Treaties regarding the ordinary (e.g. Art. 133 TFEU) and special legislative procedure (e.g. Art. 126 para. 14 TFEU). It can also give opinions to national governments and EU institutions in relevant subjects within its competences.

It seems important to highlight that the ECB has the right to protect its prerogatives through a complaints procedure envisaged in Art. 263 TFEU (review of the legality of acts). The European Central Bank, under Art. 340 TFEU, is liable for damages caused by the bank or its employees while carrying out their duties.

The ECB and national central banks form the **European System of Central Banks** (ESCB – Art. 282 para. 1 TFEU). At the same time the ECB and the central banks of the Member States within the Euro area form the Eurosystem and conduct the European Union monetary policy. The European System of Central Banks is responsible for maintaining price stability (Art. 282 para. 2 TFEU). It also supports the general economic policies of the Union with the goal of achieving Union objectives. The objectives of the ESCB are specified in Art. 127 para. 2 TFEU. These include: the definition and implementation of monetary policy, the conduct of foreign exchange operations, the holding and management of the official foreign reserves of the euro area countries and the promotion of the smooth operation of payment systems.

It should be concluded that the European Central Bank is an independent financial institution of the European Union, with a separate legal personality. At the same time, the ECB does not have universal competences but rather its powers are limited to a certain area.[20] In terms of its tasks, as a European Union institution, it has wide ranging decision making and consultative powers, which allows it to perform certain tasks while maintaining a large degree of independence and self sufficiency.

7. The Court of Auditors

The Court of Auditors (later, the Court) has been in existence since 1977. It acquired the status of an institution of the European Community with the Maastricht Treaty coming into force.[21] At present, the Court of

20 A. Doliwa–Klepacka, Z. Doliwa–Klepacki, *Struktura organizacyjna (instytucjonalna) Unii Europejskiej (z uwzględnieniem Traktatu z Lizbony)*, Białystok 2009, p. 243.

21 *Treaty on European Union*, OJ C 191 of 29 July 1992.

Auditors functions on the legal basis of Art. 13 para. 1 TUE, which lists the Court among the institutions of the European Union. The main regulations concerning the functioning of the Court are contained in Art. 285–287 TFEU.

The Court of Auditors currently consists of 27 members (one from each Member State – Art. 285 TFEU). They are selected *from among persons who belong or have belonged in their respective States to external audit bodies or who are especially qualified for this office* (Art. 286 para. 1 TFEU). Their independence must be beyond doubt. Their term of office is six years. The Court of Auditors membership list, based on Member States' proposals, is adopted by the Council after consulting the European Parliament (Art. 286 para. 2 TFEU).

According to Art 286 para. 3 TFEU, the Court of Auditors' members are **fully independent** in performing their tasks – they have no right to ask for instructions or to accept them from any government or body. They are obliged to refrain from any actions conflicting with their role. Under Art. 286 para. 4 TFEU, the Court of Auditors' members cannot engage in any other occupation, whether paid or unpaid, while performing their role. They also undertake to respect obligations arising from their office. When no longer in office, they have a duty to act with integrity and discretion when accepting certain posts and privileges. Member's functions expire with their resignation or dismissal. The latter is decided by the Court of Justice upon application by the Court of Auditors. (Art. 286 paras. 5 and 6 TFEU).

Members elect a President from among their number for the period of three years. The internal structure of the Court of Auditors includes five chambers (the right to form chambers is specified in Art. 287 para. 4 TFEU). Four of these chambers are responsible for separate areas of income and expenditure. The fifth has a parallel structure and is responsible for coordination, communications, evaluation, quality assurance and development. Chambers receive reports (annual and special – with the exception of an annual general budget report for the EU and an annual report on European Development Fund) and supply comments and proposed observations adopted by the Court of Auditors as a whole. The chambers are headed by deans elected for the period

of two years. They form, together with the President of the Court of Auditors, the Administration Committee responsible for administrative matters. The Committee also submits to the Court draft decisions on policy, principles and strategic decisions. The work of the Court of Auditors is supported by the General Secretariat.

According to Art. 285 TFEU, the Court of Auditors' **main task is to exercise control over the Union' finances**. It also examines the accounts of all revenue and expenditure of all bodies, offices or agencies set up by the Union *in so far as the relevant constituent instrument does not preclude such examination* (Art. 287 para. 1 TFEU). The subject of the Court's audit is the legality and regularity of revenue and expenditure. The audit of revenue is carried out on the basis both of the amounts established as due and the amounts actually paid to the Union. The expenditure audit is done on the basis both of commitments undertaken and payments made (Art. 287 para. 2 TFEU).

The audit is based on records and, if necessary, performed on the spot in the other institutions of the Union, on the premises of any body, office or agency which manages revenue or expenditure on behalf of the Union and in the Member States, including on the premises of any natural or legal person in receipt of payments from the budget (Art. 287 para. 3 TFEU).

The Court of Auditors also carries certain obligations linked with its control function, i.e. reporting obligations. These include preparing an annual audit report at the end of each financial year. This report is forwarded to Union institutions and published in the Official Journal of the European Union. The Court is also tasked with assisting the Council and the European Parliament in exercising their powers of control over the implementation of the budget (Art. 287 para. 4 TFEU). The Court may also, at any time, submit observations, mainly in the form of special reports, on specific matters and also deliver opinions when required by other EU institutions.

Certain **consultative powers** of the Court of Auditors ought to be indicated here, in particular those regarding legislative procedure (Art. 322 para. 1, Art. 325 para. 4 TFEU) as well as non–legislative work of the Council (Art. 322 para. 2 TFEU).

The Court of Auditors may bring actions under Art. 263 TFEU in order to protect its prerogatives.

Annual and special audit reports as well as observations are approved by the majority of its members. The chambers adopt decisions by the majority of their members' votes. The Court of Auditors, acting as a collective body, approves decisions after they have been considered by the chambers.

The Court of Auditors should therefore be regarded as a collective auditing body, which is independent and supranational. One should, however, remember that the auditing functions of the Court do not cover all areas of the Union's activity but are limited to a financial audit.

8. European Union advisory bodies

According to Art. 13 para. 4 TEU *the European 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*. Both of these bodies are not, therefore, regarded as EU institutions. The above treaty regulation points to their classification as advisory bodies. This is further confirmed by the systematics of Part Six of the TFEU (Institutional and Financial Provisions), where Chapter 3 *The Union's Advisory Bodies* directly applies to both of the above bodies.

8.1. The Economic and Social Committee

Members of the Economic and Social Committee are *representatives of organisations of employers, of the employed, and of other parties representative of civil society, notably in socio– economic, civic, professional and cultural areas* (Art. 301 para. 2 TFEU).

Article 301 TFEU states that the number of the members of the Economic and Social Committee (later: the Committee) should be **no greater than 350**. Currently the Committee has 344 members, and with that each Member State has 5, 6, 7, 9, 12, 15, 21 or 24 members. The members of the Committee are appointed for five years. The Council,

after consulting the Commission, adopts the list of members drawn up in accordance with the proposals made by each Member State (Art. 302 TFEU).

The members of the Economic and Social Committee should not be bound by any mandatory instructions. They shall be completely independent in the performance of their duties, in the Union's general interest (Art. 301 para. 4 TFEU).

The Committee members are organised into **three Groups** representing employers, employees and other socio–economic entities of organised civil society. These groups participate in the preparation, organisation and coordination of the work of the Committee and its parts. They may suggest candidates for the posts of President and Vice–President of the Committee. Group Presidents support the management of the Committee in shaping different policy areas. The internal structure of the Committee is composed of the following bodies: the Plenary, the Bureau, the President and specialist sections. The term of office of the President and the Bureau is two and a half years (Art. 303 TFEU).

The Plenary may chose the President and Vice–Presidents of the Economic and Social Committee. Within the Plenary, decisions are made on Committee's opinions (based on proposals of specialised sections).

The Bureau is composed of the President, two Vice–Presidents, Group Presidents, heads of specialist sections and a variable number of Members, whose number does not exceed the number of Member States. The Bureau determines the organisation and internal structure of the Committee. It also carries political responsibility for the overall management of the Committee, and in particular ensures that the actions of the Committee, its sections and staff are appropriate to its task. The President directs the overall work of the Committee and its sections, and possesses the necessary competences to ensure that the Committee decisions are implemented correctly and the Committee functions properly.

The work of the committee is also based on its specialist sections. Each section is responsible for a specific area of relations within the EU interest (e.g. economic and monetary union, the single market, external relations and employment and social issues). Their main task is to produce evaluations and reports on specific issues as required.

The Committee acts as a **consultancy**. According to Article 304 TFEU, the Committee is consulted by the European Parliament, the Council or the Commission, in instances envisaged by the Treaties. In such instances consultation is obligatory. These kind of consultations are envisaged in Art. 43 para. 2; Art. 50 para. 1; Art. 91 para. 1; Art. 114 para. 1; Arts. 149, 194 para. 2 TFEU.

The European Parliament, the Council and the Commission may also consult the Committee whenever they deem it appropriate (Art. 304 TFEU) – such consultation is voluntary. The Committee may also give opinions on its own initiative, whenever it thinks it is appropriate.

It may be worth indicating that specified EU insitutions are required to report to the Committee. For example, every three years the Committee receives reports of the Commission concerning the application of decisions contained in Part Two TFEU – Non–discriminatrion and Citizenship of the Union (Art. 25 TFEU).

The Committee is assembled by its President when requested by the European Parliament, the Council or the Commission. It may also meet on its own initiative. Except for extraordinary circumstances specified in the Committee regulations, its decisions and documents are approved by the majority of votes cast.

8.2. The Committee of the Regions

The Committee of the Regions (later: CoR) is composed of *representatives of regional and local bodies who either hold a regional or local authority electoral mandate or are politically accountable to an elected assembly* (Art. 300 para. 3 TFEU). Similarly to the Economic and Social Committee members, they are fully independent in their tasks and act for the general benefit of the Union. They are not constrained by any instructions (Art. 300 para. 4 TFEU).

The number of CoR members **shall not exceed 350** (Art. 305 TFEU). At the moment, there are 344, with each member having a deputy (members with full rights and alternate members). The members of the Committee and an equal number of alternate members shall be appointed for five years and their term of office shall be renewable. The list of members and their deputies is compiled according to suggestions of each Member State and endorsed by the Council.

The **main bodies** of the Committee of the Regions are: the Plenary Assembly, the President, the Bureau and commissions.

The **Plenary Assembly** is responsible for adopting opinions, reports and resolutions, approving the political programme of the Committee, electing the President, the first Vice–President and other Bureau members, and setting up commissions. The Plenary Assembly is convened by the CoR President at least once per quarter.

The following members form the CoR Bureau: the President, the first Vice–President, one Vice–President for each Member State, 27 other members and presidents of political groups. The Bureau is elected by the Plenary Assembly for two and a half years. The President and the first Vice–President are elected by the majority of votes cast, but in separate elections.

The Bureau is responsible for developing its own political programme, which it presents to the Plenary Assembly at the beginning of each term. The Bureau is then responsible for delivering this programme and submits an appropriate report to the Plenary Assembly at the end of term. Moreover, the Bureau oversees the organisation and coordination of work of the plenary Assembly and the commissions.

The President oversees the working of the Committee of the Regions, and is its representative.

The bodies responsible for the research and preparation of the CoR work are the commissions. Their main task is to draft opinions, reports and resolutions which are then presented to the Plenary Assembly for approval. The Plenary Assembly decides to set up each commission and determines its composition and attributes their powers. However,

the makeup of the commissions should reflect the Member States participation in the Committee.

Political groups within the CoR are formed by members and alternate members with similar political views. The minimum required to form a political group is 18 members of the Committee or alternate members. Jointly, they must represent at least one fifth of all Member States, with at least half of the membership being composed of the CoR members.

The Committee of the Regions acts as a **consultancy** to the Council, the European Parliament and the Commission (Art. 307 TFEU). The Committee's opinions may be obligatory which means that obtaining an opinion is a duty conditioned by the Treaties. Examples of regulations requiring consultation with the CoR Art. 100 para. 2; Art. 149, Art. 166 para. 4, or 194 para. 2 TFEU. Consultation may also be voluntary – the European Parliament, the Council and the Commission may ask for the Committee's opinion in any situation that they see fit (especially in circumstances affecting cross boundary cooperation, c.f. Art. 307 TFEU).

Significantly the European Parliament, the Council or the Commission may, if they think it necessary, give the Committee a deadline by which the opinion should be delivered (Art. 307 TFEU). The deadline must not be shorter than a month from the date on which the chairman receives notification to this effect; however if the opinion is not forthcoming after that deadline is passed, this is not an impediment to progressing the scheme.

If the CoR is consulted under Art. 304 TFEU, the European Parliament, the Council or the Commission inform the Committee that they require an opinion. If the CoR decides in such case that specific regional interests are affected, it may issue an opinion on the required matter.

The Committee of the Regions may also give opinions on their own initiative if it is thought to be necessary.

Part 3

SOURCES OF EUROPEAN UNION LAW

This chapter presents general information concerning the sources of European Union law. This is a complex task. The list of sources of Union law includes a score of different categories; EU law, considered both as a system and in respect of its separate elements, has a unique character, e.g. in relation to national laws.

In the first instance, the list of sources of European Union law will be presented and its general categories outlined. Secondly, primary legislation will be analysed, followed by secondary legislation. At the same time, the main categories of secondary legislation will be discussed – legislative, delegated and implementing acts – listing their distinct and distinguishing features. Legally binding acts which do not fit to the above categories will also be presented.

Outside of primary and secondary legislation, international agreements concluded by the European Union as well as general principles of EU law will also be included.

Procedural issues dealing with adoption and amendment of European Union's legal acts will not be included here. These will be discussed in detail in Part 4.

1. Sources of European Union law. General classification

EU legal regulations do not automatically define their sources. Art. 288 TFEU may be a useful guideline here; it states that *to exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions*. The above

clause does not comprehensively list all sources of EU law, but merely indicates the type of acts that may be adopted by European institutions. The sources of European Union law form a much more complex system. The acts indicated in Art. 288 TFEU are an important element within this system, but the list of sources of EU law is not exhaustive.

In order to be able to present a more complete list of the sources of EU law and any possible relations between its different categories, it is necessary to make a few preliminary observations.

Since the implementation of the Treaty of Lisbon, the European Union became a uniform international organisation. As such, it was established on the basis of international agreements (the Treaties) concluded by the Member States. It therefore follows that Union law will naturally consist of the Treaties upon which the EU functions. It should be remembered that the so called founding treaties underwent successive modifications, which were also based on international agreements concluded by the Member States (amending treaties). Moreover, international agreements (accession treaties) were the basis for successive expansion of the European Union. It is therefore possible to conclude that the above treaties constitute sources of EU law and can be taken as a starting point to establishing a full list of these sources.

It should be also highlighted that the European Union, as an international organisation, was established to enable Member States to achieve common objectives as defined by the Treaties. To this effect, the states have provided the Union with a range of competences which include the institutional power to adopt legally binding acts; this is confirmed by Art. 288 TFEU cited above. Of course, the acts of the institutions of the European Union have varying characteristics and features. They are, however, the tools for achieving the Union's objectives and, as legally binding acts, are also included in the list of sources of EU law.

Achieving the Treaty objectives requires at times the entering into treaties of relations with other countries or with international organisations. The European Union has the competence to conclude international agreements under Art. 216 TFEU. If so envisaged by the Treaties, these agreements can be concluded, as necessary, to achieve

one of the objectives specified in the treaties, or if such an agreement is envisaged in a legally binding act of the Union. At the same time, *agreements concluded by the Union are binding upon the institutions of the Union and on its Member States*. Therefore they should also be included in the list of sources of EU law.

Last but not least it should be mentioned that the Treaties upon which the functioning of the European Union (and earlier of the Community) is founded belong to the so called framework treaties (*traité cadre*). This means that they have been, and still are, focused on achieving certain objectives (political, economic and social)[1]. They contain a number of very general provisions, with undefined and abstract terms[2]. It is evident therefore that the legal order of the Community could not solely consist of written legal norms[3] and this statement is to a certain extent still valid today. Quite often in the process of applying EU law, difficulties were caused by loopholes in the provisions of the treaties, which needed closing. A solution applied by the Court of Justice was to refer to general principles of law applied by the judiciary, which in this way entered the legal order of the EU and acquired a normative character.[4] Therefore, the general principles of EU law could also be included in the list of sources of EU law.

Against this background it is possible to outline probably the most natural and most widely accepted **classification of the sources of European Union law** into primary and secondary law. If the Treaties constitute the grounds for the existence and functioning of the EU, their definition as **primary law** is understandable. This law forms the basis for legislative acts of the Union institutions. Legally binding acts are adopted by the institutions on the basis of powers conveyed by the Treaties and therefore have a **secondary** character to the regulations contained in the Treaties.

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1 O. Wiklund, J. Bengoetxea, *General Constitutional Principles of Community Law* [in:] U. Bernitz, J. Nergelius (ed.), *General Principles of European Community Law,* The Hague–London–Boston 2000, p. 120.
2 T. Tridimas, *The General Principles of EC Law*, Oxford 2000, p. 18.
3 O. Wiklund, J. Bengoetxea, *op. cit.*, p. 120.
4 *Ibid*

It should be mentioned, however, that if the division into **primary and secondary law** is clear and simple in relation to the treaties and acts adopted by institutions of the European Union (according to art. 288 TFEU: regulations, directives and decisions), classifying international agreements and general principles of law in one of these categories is not equally straightforward. This problem is not clarified by the Treaties and the theory is also not consistent in this matter. For the sake of clarity of any future analysis, we will adopt a classification which includes the Treaties establishing the European Union (and earlier of the Communities) and the amending and accession treaties in primary sources of law, and EU institutions' acts (mainly regulations, directives and decisions) in secondary sources. Due to their separate nature, the international agreements of the Union will be discussed in a separate section. The general principles of EU law will be treated similarly as a separate category due to their distinct features, their role in the legal order of the Union and their relation to written primary law (the Treaties). At the same time, aiming to impose a logical order on further analysis, primary law of the EU will be discussed in the first instance, followed by the general principles of EU law, international agreements of the Union and secondary legislation.

2. Primary law of the European Union

2.1. Treaties founding the European Union

Treaties upon which the European Union is presently based are the **Treaty of the European** Union (TEU) and the **Treaty on the Functioning of the European Union** (TFEU). Their current form is the result of changes undergone by the treaties founding the European Communities. (TECSC, TEEC, TEAEC – see Part 1).

When the **Treaty of Lisbon** entered into force, the treaties defining how the EU should function have been: the Treaty on the European Community (TEC), the Treaty Establishing the European Atomic Energy Community (EURATOM) and the Treaty on the European Union. The Treaty of Lisbon changed the legal character of the Union and its structure. Changes to the TEC included its title, which at

present reads: The Treaty on the Functioning of the European Union. EURATOM still functions today, but outside of the reformed European Union structure.

There is no consensus in European law science with regards to having two treaties as the foundations of the functioning of the European Union simultaneously in force. It is worth remembering that, at first, a single treaty (a Constitution for Europe) was envisaged. The disadvantage of the current system is the dispersal of regulations concerning the political system between the two Treaties, which does not aid clarity. It is worth bearing in mind that the latest reform of the European Union was very controversial, and its final shape was the result of a compromise between the 27 Member States.

Both Treaties have equal legal value (Art. 1 TEU).

The Treaty on the European Union and the Treaty on the Functioning of the European Union are multilateral international agreements which form the basis of a unique international organisation. Naturally, they contain regulations which are fundamental to the functioning of the European Union. They define its character, competences, the terms of membership, institutional framework and the main principles of the legal order established by the Union. The Treaty on the European Union is not a vast document. It contains 55 articles divided into six Titles: Common Provisions, Provisions On Democratic Principles, Provisions On The Institutions, Provisions On Enhanced Cooperation, General Provisions On The Union's External Actions and Specific Provisions On The Common Foreign And Security Policy. It is the TEU that indicates, for example, the principles of the Union, its objectives, the list of the institutions of the European Union and their main functions or the procedures for the amendment of the Treaties.

The Treaty on the Functioning of the European Union is a much larger document. It is possible to say that, in a sense, it refines and develops the provisions of the TEU. However, both treaties have equal legal value.

TFEU encompasses 358 Articles divided into seven parts: Principles, non–discrimination and citizenship of the Union, Union

policies and internal actions, association of the overseas countries and territories, external action by the Union, institutional and financial provisions, and general and final provisions. Each part of the TFEU is divided into Titles, Titles are divided into Parts and these into sections.

37 Protocols and 65 declarations were appended to the Treaties. Protocols appended to the Treaties concern a number of important issues. For example: Protocol No. 1 defines the role of national parliaments in the EU, Protocol No. 2 concerns the principles of subsidiarity and proportionality, Protocol No. 3 contains the Statute of the Court of Justice of the European Union, and Protocol No. 7 defines the extent of the privileges and immunities of the European Union. It is worth highlighting that the *Charter of Fundamental Rights* of the European Union has legal value equal to the Treaties.

Treaty regulations ought to be considered in the light of the application of European Union Law, such as the principle of the primacy of EU law or the direct effect principle. These issues will be discussed in detail in Part 5.

2.2. Accession and amending treaties

The European Union, and earlier the European Community, were established on the basis of international agreements. These agreements, after a number of reforms, amendments and modifications, are the basis for the European Union as it stands today. These modifications of the founding treaties materialized through other international agreements: accession and amending treaties.

Accession treaties are international agreements enabling countries to join the European Union. The procedure for concluding accession treaties will be discussed in Part 4. Here it is worth signalling just a few basic principles concerning this category of treaties, which are part of primary legislation.

The parties to accession treaties are all existing Member States of the Union and the country(ies) joining the Union. Accession treaties can therefore be regarded as a certain form of amending treaties. This is

because the area covered by the treaties, in which the Union is grounded, changes; institutions are adjusted and transition periods granted.[5]

Accession treaties encompass two elements: the main treaty of joining the Union and an act specifying the terms of accession. The main accession treaty itself is an act containing relatively few provisions. For example, the 2003 accession treaty has three articles, of which Article 1 is of primary importance: *The Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic hereby become members of the European Union and Parties to the Treaties on which the Union is founded as amended or supplemented*. The terms and conditions of accession are specified in separate acts. These contain specific conditions on institutional and other adjustments, which may be necessary due to the Union's expansion.

Amending treaties are international agreements on the basis of which Member States introduce changes and adjustments to the founding Treaties of the Union, and earlier of the Communities. Through this, amending treaties become part of primary legislation.

Against this background it is worth highlighting the Maastricht Treaty, or the 1992 Treaty on the European Union. The European Union was founded by this very treaty, which therefore can be regarded as the treaty establishing a new integration structure. Yet, in addition to establishing the Union, the Treaty of Maastricht introduced a number of changes to the Communities' treaties, hence its dual character.

Accession and amending treaties are naturally international agreements concluded between states. Their conclusion is subject to conditions specified in the Treaty on the European Union (the treaty upon which the Union is based). The procedure for amending treaties is regulated in Art. 48, and for accession treaties in Art. 49 TFEU. Both will be discussed in detail in Part 4.

5 J. Barcz (ed.), *Ustrój Unii Europejskiej*, Warszawa 2010, p. III–5.

The Treaty of Lisbon also introduced the possibility of **withdrawing from the Union** (Art. 50 TEU). The terms of withdrawal from the Union and also the framework for future relations with the country which has withdrawn from the Union are specified by an appropriate international agreement. It would be difficult to unambiguously define the nature of such an agreement today in terms of classification of the sources of European Union law. Any questions as to whether this would be an agreement as part of primary legislation or simply an international agreement of the Union will perhaps be clarified by future practice and theory.

3. General principles of European Union law

The "General principles of European Union law" are also included by some in the sources of European Union law. It is worth clarifying from the start certain questions concerning terminology. Even before the Treaty of Lisbon came into force, on the basis of Communities law, the terms such as "principles of Community law" "general principles of Community law" or "general principles of law" were very often used, even overused, in theoretical works[6]. There was a lack of clarity as to how these terms relate to each other, as well as difficulties in defining them. It is not possible, within the scope of this chapter, to clarify all these questions. It would, however, seem that, until the introduction of the Lisbon Treaty, it was appropriate to refer to the 'general principles of the Community' law'. This term was present both in treaty legislation – Art. 6 para. 2 TEU (as was) – and in the Court's decisions e.g. judgements in joined cases C–90/90 and C–91/90 (*Jean Neu*)[7], or C–105/94 (*Ditta Angelo Celestini v. Saar–Sektkellerei Faber GmbH & Co. KG*).[8]

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6 S. Biernat, *Źródła prawa Unii Europejskiej*, [in:] *Prawo Unii Europejskiej. Zagadnienia systemowe*, J. Barcz (ed.), Warszawa 2006, p. 197. Cf.R. Bieber, *Institutionen* (in:) R. Schulze, M. Zuleeg (Hrsg.), *Europarecht. Handbuch für die deutsche Rechtspraxis*, Baden–Baden 2006, p. 51–52.

7 See: the judgement of the Court of Justice of 10th July 1991 in joined cases C–90/90 and C–91/90 (*Jean Neu and others v. Secrétaire d'Etat à l'Agriculture et à la Viticulture*), ECR 1991, p. I–03617.

8 See: the judgement of the Court of Justice of 5th June 1997 in case number C–105/94 (*Ditta Angelo Celestini v. Saar–Sektkellerei Faber GmbH & Co. KG*), ECR 1997, p. I–02971.

In the current legal situation it seems appropriate to refer to **the general principles of European Union law**. The Union became a legal successor to the European Community and therefore it is correct to refer to the legal order of the European Union. In this context, it should be noted that the Treaty itself makes a direct reference to this term (Art. 6 para. 3 TEU – *Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law*).

The general principles of European Union law (earlier – of Community law) were introduced to the legal order of the Union through decisions of the Court of Justice of the European Union. The Court derived these principles from the legal order of the Union itself, as well as from international law and legal systems of the Member States.

Invoking appropriate general principles of European Union law allowed the Court to make decisions in cases which could not have been solved by applying the Treaty regulations alone. The treaties founding the Community and the Union are, by their nature, framework treaties and contain general provisions, often referring to undefined and somewhat abstract terms (*traité cadre*)[9]. The Court had to, therefore, refer to those principles in order to fulfil its basic function – to ensure that the law is applied in interpreting and implementation of the Treaties. (Art. 19 para. 1 TEU).

The general principles of European Union law have a **unique role** to play in the Union's legal order. First and foremost they are a vital element in interpreting Union law (both the Treaties and secondary legislation). Closely related to this is their second function – they enable closure of legal loopholes in provisions of EU's written law. Thirdly, they may form the basis for examining the legality of secondary law acts of the EU and for possibly declaring them invalid. Last but not least – acts not compatible with the general principles may be the

9 T. Tridimas, *op. cit.*, p. 18.

basis for establishing Union or Member State responsibility the for infringements of Union law[10].

The general principles of European Union law **can be classified in several ways**. Two of these will be discussed here.

The **origins** of separate general principles themselves and their genesis in the Union's legal order may form a criterion for their classification. It is possible to tease out those categories of general principles which originated in legal systems of respective Member States. These are: the principle of legal certainty, the principle of protecting legitimate expectations, principles concerning procedural fairness and principles of good administration, but this list is not exhaustive. The second category encompasses principles derived from the Treaties themselves (or, more generally, from the EU legal system as a whole). This category includes: the principle of equality and non–discrimination, the principle of the precedence of EU law[11]. The last category in the above list are the fundamental rights, derived from international public law.

Taking the above classification into consideration, it is possible to propose a different division, based on the **content of individual principles**. For example T. Tridimas[12] distinguishes first of all between principles derived from the principle of the rule of law (e.g. equality, proportionality, legal certainty, protecting legitimate expectations or protection of fundamental rights). These principles mainly concern the relationship between the individual and the state authorities – both national and EU. These are mainly derived by the Court from national legal orders of the Member States and their main role is to supplement and refine the provisions of the Treaties[13].

The second category of general principles encompasses systemic principles *which underlie the constitutional structure of the Community*

10 The above list of the general principles' functions is referred to, e.g. T. Tridimas, *op. cit.,* p. 29–35; M.M. Kenig–Witkowska (ed.), *Prawo instytucjonalne Unii Europejskiej,* Warszawa 2007, p. 146 and J. Maliszewska–Nienartowicz, *Zasady ogólne jako źródło europejskiego prawa wspólnotowego*, „Państwo i Prawo", nr 4/2005, p. 33–34.

11 J.A. Usher, *General Principles of EC Law*, London 1998, p. 54–79 and 13–36.

12 T. Tridimas, *op. cit*., p. 4.

13 *Ibid*

and define the Community legal edifice[14]. These concern the relationship between the Community and Member States (primacy, subsidiarity) and between the EU institutions (such as the principle of institutional balance).

Polish academic sources combine the origins criteria with the content of general principles of European Union law and distinguish between general principles which are "domestic" and "borrowed" (from international law and laws of the Member States). Domestic general principles include systemic principles (e.g. solidarity and proportionality), institutional principles (including the principle of institutional balance)[15] and principles concerning the application of EU law (direct effect and supremacy)[16].

It would also seem that general principles of European Union law rank higher than secondary legislation of the European Union. Questions may arise at the point where the general principles overlap with the law of the Treaties. It is generally accepted that the general principles of European Union law do not take precedence over the Treaties and may not invalidate their provisions,.

4. International agreements of the European Union

The sources of EU law also include international agreements concluded by the European Union. This is only natural given the fact that the Union is nowadays an international organisation, i.e. an entity able to sign international agreements. At the same time, these agreements remain outside the category encompassing those agreements on which the Union is built, neither are they typical acts of European institutions (however, their conclusion involves a number of such acts – see Part 4). This justifies a separate section for their analysis.

The general competence of the European Union to conclude international agreements is derived from Art. 216 para. 1 TFEU: *The*

14 *Ibid*

15 Cf. B. de Witte: *Institutional Principles: A Special Category of General Principles of EC Law* [in:] U. Bernitz, J. Nergelius (ed.), *op. cit.*, p. 143–159.

16 Z. Brodecki, *Prawo europejskiej integracji*, Warszawa 2003, p. 86.

Union may conclude an agreement with one or more third countries or international organisations […]. It should be noted that, in principle, the EU may conclude international agreements in four cases: *where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope*. At the same time, the main elements of the procedure for concluding international agreements are defined in Art. 218 TFEU (however, exceptions to the rules specified are possible, see e.g. Art. 207 para. 3 TFEU concerning trade agreements).

Some Treaty provisions include specific powers for conclusion of international agreements by the Union. An example here may be Art. 191 para. 4 TFEU concerning agreements on the protection of the environment, or Art. 217 TFEU, empowering the Union to make agreements of association. Similarly, detailed competences to conclude international agreements found in the TEU concern common foreign and security policy (Art. 37 TEU) or even the exceptional question of withdrawing from the Union (Art. 50 TEU).

The competences of the European Union to conclude international agreements may also be considered in the context of treaty regulations concerning the extent of exclusive and shared competences, as well as supporting, coordinating and supplementary competences (see Part 1).

According to Art. 3 TFEU the Union, apart from the ability to adopt legally binding acts, *shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope*. This rule is spelled out in Art. 3 para. 2 TFEU.

At the same time it should be remembered that the Union shares its competences with Member States in such areas as: internal market, environment, consumer protection and transport (Art. 4 para. 2 TFEU). We should also bear in mind that the structure of shared competences assumes that the power to adopt legally binding acts in areas specified

in Art. 4 para. 2 TFEU belongs to the Union and to Member States. However, Member States can exercise their powers *to the extent that the Union has not exercised its competence. They shall again exercise their competence to the extent that the Union has decided to cease exercising its competence* (Art. 2 para. 2 TFEU).

It would seem that a similar solution should be adopted in relation to international agreements which fall under shared competences. In these areas, Member States may conclude international agreements to the extent that the Union has not exercised its competences.

Similarly, in terms of supporting, coordinating and supplementary competences of the Union, we should accept that in this matter the EU has the power to conclude international agreements. Such agreements will only cover actions supporting, coordinating and supplementing those of Member States, and as such they will not be able to replace the competences of these countries in areas indicated in Art. 6 TFEU (e.g. protection and improvement of human health, industry, culture, tourism and education, vocational training, youth and sport).

It should also be noted that separate treaty provisions directly enable the Union and its Member States to cooperate with "third countries" (and international organisations), including negotiating and concluding agreements concerning specific areas. For example, already quoted Art. 191 para. 4 TFEU, concerning protection of the environment, (shared competences) enables the Union to conclude international agreements in this matter. This provision, however, directly states that both the Union and its Member States cooperate with third party countries and international organisations within the scope of their respective competences. The Union's right to conclude international agreements does not infringe Member States' competence to negotiate with international bodies and to conclude international agreements.

The Treaties do not leave room for any doubt over the binding nature of international agreements signed by the Union. According to Art. 216 para. 2 TFEU, agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.

5. Secondary law of the European Union

5.1. Regulations

According to the treaty definition (Art. 288 TFEU) *a regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States*. These defining features allow a regulation to be described as an act **unifying** the law. These should be examined more closely.

A regulation has general application. This means that it may concern a number of agencies and situations which may occur in the future in an undefined number of cases; a regulation has, by its nature, general application. As such it may concern both Member States and the work of European Union institutions and regulate the situation of physical and legal persons. Regulations may be aimed at Member States or private entities.

A regulation **shall be binding in its entirety**. This means that Member States are not able to apply regulations selectively. A state may not 'select' those aspects of a regulation which it wants to implement and ignore the remaining ones. Member States are obliged to fully comply with regulations, otherwise the rule of uniform and effective application of European Union law would have been undermined.

Regulations are also **applied directly in all Member States**. This means that from the moment a regulation had entered into force it becomes part of the national legal system of each Member State. Appropriate governmental bodies apply it directly without any pre–implementation action by the state legislator. Moreover, Member States are banned from transposing regulations by issuing appropriate national legislation. Such a solution would have undermined the principle that regulations are directly applicable (national entities would have invoked national legislation)[17]. Member States also must not modify, supplement or refine the content of a regulation.

17 J. Barcz, M. Górka, A. Wyrozumska, *Instytucje i prawo Unii Europejskiej*, Warszawa 2011, p. 283–284.

Circumstances may, however, arise where the regulation itself dictates that the national legislator should adopt appropriate legislation in order to implement the regulation. Then, based on the regulation, national bodies will be obliged to introduce appropriate legal provisions. This mechanism will be further analysed below.

As an example, a relatively new Regulation will be discussed, namely the Regulation of the European Parliament and Council No 1082/2006, dated 5th July 2006 concerning the European grouping of territorial cooperation (EGTC)[18].

The Regulation envisages the possibility of creating a certain form of trans–boundary cooperation (European grouping of territorial cooperation) by specific entities in order to pursue a specified goal. Some provisions of the Regulation require the involvement of the national legislator. Art. 4 indicates, for example, that a Member State agrees to a given entity participating in the EGTC, but it may apply its national legislation to this effect. This is necessary, as the Regulation does not define precisely which body may give such consent. In turn, Art. 5 of the Regulation states that the EGTC Statute must be registered or published in the Member Sate of the registered office, in accordance with national law. Again, we lack an indication what bodies are responsible for the registration or the publication of the Statute. At the same time it should be noted that the above questions need to be resolved in order for the Regulation to be implemented correctly.

In Poland, appropriate legislation ensuring the application of Regulation 1082/2006 was introduced by the 7th November 2008 *Act on European Territorial Cooperation Grouping*.[19] In terms of the issues indicated above, the Act defines that, for example, the consent for joining the EGTC is given by the Foreign Secretary (with the agreement of the Home Secretary, the minister responsible for public finance and the minister of regional development – Art. 6 of the Act). The Act also

18 *Regulation (EC) No 1082/2006 of the European Parliament and of the Council of 5 July 2006 on a European grouping of territorial cooperation (EGTC)*, OJ L 210 of 31 July 2006.

19 *Ustawa z dnia 7 listopada 2008 r. o europejskim ugrupowaniu współpracy terytorialnej*, Dz.U. 2008 No. 218 *item* 1390.

specifies that the entity responsible for running a register of European Territorial Groups is the Home Secretary (Art. 7 of the Act).

In this way the national legislator supplements the European regulation. It must be remembered, however, that this is not done arbitrarily, but that the legislator acts within the framework of the regulation itself.

The above discussion would indicate that regulations are instruments of deep intervention into national legal orders. They allow uniform solutions to be adopted throughout the Union's territories. It is also worth adding that regulations, as an element of the union's secondary legislation, utilise the attributes of this legal system in relation to national laws. These issues will be discussed in detail in one of the next chapters. Here it should be indicated that regulations also enjoy the (so called) direct effect and primacy over national laws.

Regulations can take form of legislative, delegated or implementing acts.

5.2. Directives

According to the Treaty definition in Art. 288 TFEU *directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods*. The above definition and, based upon it, the role of a directive in the European Union legal order, allow the directive to be assigned the traditional role of **an instrument for harmonising the law**.

The recipients of directives are Member States. A Directive may be addressed to all (most common) or some, or even a single state.[20]

A directive **is binding in terms of the outcome it is intended to produce**. This means that directives oblige their recipients (Member States) to achieve a specified objective. At the same time Member States are free to chose the means and methods of achieving the prescribed

20 For example *Council Directive 81/527/EEC of 30 June 1981 on the development of agriculture in the French overseas departments*, OJ L 197 of 20 July 1981.

outcome. This deceptively simple formula makes directives unique among European acts.

It must be noted, first of all, that, unlike regulations, directives do not automatically become part of national legal order. They define the objective which Member States are obliged to achieve through appropriate means on the national level. A directive must therefore be 'introduced' to the national legal order. This process is called the **implementation** of the directive.

The implementation process requires the adoption of appropriate national regulations which ensure that the aim of the directive is achieved within the national legal system of a given member State. An element of this process is the transposition of directives into national law, through which the directive is entered into the national legal system by the appropriate bodies through appropriate legislative means.[21] It may prove necessary to introduce new legislative solutions or to alter existing legal acts. It may also transpire that national law already complies with the directive's requirements and that there is no need for adjustment.[22] Implementation – other than legislative actions – may also involve other actions by national bodies to achieve the desired outcomes. These actions may involve, for instance, adjustments to the internal structure of state administration or its practices to comply with the directive's requirements. It should be stressed, however, that these actions alone will not be sufficient for the proper implementation of the directive.

By rule, a directive allows Member States freedom of choice in terms of the form and means of implementing its objective. This solution means that the legal traditions of Member States and their unique legal provisions in various fields may be taken into account. It may, however, turn out that the degree of specification within the directive limits this freedom. At the same time, regardless of national measures and the degree of freedom they are allowed, Member States are obliged to implement directives on time, fully and effectively.

21 S. Biernat, *op. cit.*, p. 202.
22 *Ibid*

Directives, as secondary legislation, indicate a period within which they should be implemented by Member States – this may be as long as several years. The countries are obliged to implement directives into their own legal systems fully and comprehensively within the specified period. At the same time, there is no obligation for early implementation of a given directive. Despite that, even before the implementation period has expired, the countries are obliged to refrain from actions which may put the directive's objective into jeopardy. This obligation results from the principle of loyal cooperation (Art. 4 para. 3 TEU). In addition, lack of timely implementation of a directive enables an individual (provided that other conditions are met) to invoke the directive against the state (the direct effect of a directive – see Part 5).

A directive should also be implemented comprehensively. This means that Member States are obliged to implement all of the directive's regulations without being selective about its provisions. Comprehensive implementation also assumes that national legislation possesses a set of rules fully defining the rights and obligations of specific agencies, or the powers of state administration, which ensures that the objective of the directive may be fully and successfully achieved. This principle was confirmed by the CJEU in its ruling in the case number 14/83 (*von Colson and Kamann v. Land Nordrhein–Westfalen*). In this decision the Court, invoking the Treaty definition of a directive, ruled that although treaty regulations ensure that Member States are *free to choose the ways and means of ensuring that the directive is implemented, that freedom does not affect the obligation, imposed on all the Member States to which the directive is addressed, to adopt, within the framework of their national legal systems, all the measures necessary to ensure that the directive is fully effective, in accordance with the objective which it pursues*. At the same time the Court invoked the principle of loyal cooperation, ruling that *the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty* (now Art. 4 para. 3 TEU) *to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on al the authorities of Member States including, for matters within their jurisdiction, the courts.*

The above characteristics of European directives demonstrate their unique character as instruments of harmonising the law. They ensure that Member States have the freedom to choose the form and the measures of implementing its objectives. At the same time, the necessity of timely and full implementation is highlighted. This is important as directives, although addressed to Member States, may regulate the legal standing of private entities, including individuals. Simplified, the mechanism appears as follows: the directive's provisions should be included in the national legal system. Should the directive be implemented correctly and on time, the toolkit for achieving its objectives are national legal measures adopted during implementation. The consequence of not implementing the directive correctly and on time is the possibility that individuals may use the provisions of that directive against the state (provided that other conditions of a direct effect have been met – see Part 5). A state which does not implement a directive fully and on time does not meet its treaty obligations (the obligation to fulfil the objective of a directive– Art. 288 TFEU). In such circumstances it is possible to submit a complaint against the state, contrary to Art. 258–260 TFEU (see Part 6). In certain situations the state may bear the responsibility for any damages sustained as the result of non–implementation (see Part 6).

The principles of primacy and direct effect in relation to directives will be discussed in Part 5.

Directives, as part of secondary legislation, can take the form of legislative, delegated or implementing acts.

5.3. Decisions

According to Art. 288 TFEU, **a decision is fully binding**. Decisions which are addressed to specific recipients are binding only to those recipients.

The current text of the above provision in relation to decisions is the result of changes introduced by the Lisbon Treaty. Previously, the TEC in Art. 249 stated that the decision is fully binding to those to whom it is addressed.

According to the current definition, European decisions may have a dual character. They may indicate to whom they are addressed and become individual, specific acts. Decisions can be addressed to many different subjects: Member States, legal or physical persons.

It is also possible for a decision not to indicate to whom it is addressed. Then, according to literature on the subject, the decision becomes universal.[23] In such case, the decision will be effective for all entities that it may concern.[24] Consequently, institutional acts in the form of a decision do not have to be individual and specific. In European legislation they become something more than a traditionally understood instrument for implementing acts of general application. This is particularly apparent in the light of the division into legislative, delegated and implementing acts. A decision may belong in each and any of these categories. Decisions are universally binding, regardless of whether or not addressed to specific entities. Moreover, as a European act, a decision may be directly applicable. It also enjoys primacy over national legislation.

6. Recommendations and opinions

Recommendations and opinions, according to Art. 288 TFEU, **are not legally binding**. Both these acts are therefore completely different to the acts discussed above. Their importance in European legal system is, however, far from marginal.

Recommendations and opinions may be issued by European institutions; this results directly from the first paragraph of Art. 288 TFEU. In addition, with regards to the Council, the Commission and the European Central Bank, their right to issuing recommendations is confirmed in Art. 292 TFEU.

A **recommendation** is an act in which an institution advocates a certain course of action or conduct, e.g. to other institutions, or suggests a way of resolving or regulating issues. The European

23 J. Barcz, M. Górka, A. Wyrozumska, *op. cit*., s. 288–289.
24 *Ibid*

Parliament may issue recommendations e.g. under Art. 36 TEU (CFSP). The Commission may, in turn, direct its recommendations to Member States under Art. 60 or Art. 97 TFEU. Detailed competences of the Council with regards to recommendations are found in Art. 121 para. 2 TFEU.

An **opinion** expresses an institution's stance, an opinion or evaluation on a specific matter or issue. Opinions may be given by institutions on their own initiative. More often, an Opinion is an important element of the decision making process in the European Union. For example, in the ordinary legislative procedure an opinion of the Commission, given at the point of the second reading, is fairly significant. An opinion may be an obligatory element in the different variants of special legislative procedure. For example, under Art. 223 para. 2 TFEU, the EP makes a decision after obtaining an opinion of the Commission. In turn, according to Art. 21 para. 3 the Council decides after obtaining an opinion from the European Parliament.

Despite the fact that recommendations and opinions are not binding, their importance for the process of the application of European Union law should not be underestimated, especially in relation to recommendations. The judgement in the case number C–322/88 (*S. Grimaldi v. Fonds des maladies professionnelles*)[25] stated the following concerning recommendations: *Since they are measures which, even as regards the persons to whom they are addressed, are not intended to produce binding effects, they cannot create rights upon which individuals may rely before a national court. However, since recommendations cannot be regarded as having no legal effect at all, the national courts are bound to take them into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions*. In this light, the role of recommendations in the process of interpretation of national laws by the courts in Member States, should be highlighted.

25 The judgement of the Court (Second Chamber) of 13 December 1989 in Case C–322/88 (*Salvatore Grimaldi v Fonds des maladies professionnelles*), ECR 1989, p. 04407.

7. Legislative and non–legislative acts

The Treaty of Lisbon distinguished between legislative, delegated and implementing acts (see: Art. 289–291 TFEU). This is a new development, which does not lend itself to a definitive assessment. It means, for instance, that the legally binding institutional acts discussed above – regulations, directives and decisions – may now take the form of legislative, delegated and implementing acts. At the same time, the feature distinguishing legislative acts is their mode of adoption. Therefore, a legislative act may be both a regulation, which (as discussed above) may take on the characteristics of national general statutes, or a decision, traditionally perceived to be a specific legal instrument. Moreover, separate Treaty provisions (but not many) envisage EU institution issuing regulations, directives and decisions which would not be contained in any of the above categories.

The solutions introduced by the Treaty of Lisbon allow a general division of the Union's acts into legislative and non–legislative acts – this is also accepted by the Polish literature on the subject. Non–legislative acts include mainly delegated and implementing acts as well as other types of acts, including "acts without an adjective". The above categories of acts will be discussed further below.

7.1. Legislative acts

According to Art. 289 para. 3 *legal acts adopted by legislative procedure shall constitute legislative acts*. Consequently legislative acts are those regulations, directives and decisions which have been adopted through **ordinary or special legislative procedure**. Therefore it is the procedure through which a given act has been adopted that decides whether it can be classed as a legislative act. Every time the Treaty dictates that an act should be adopted through legislative procedure (ordinary or special), this results in a legislative act. At the same time, as ordinary legislative procedure assumes a joint adoption by the European Parliament and Council and special legislative procedure assumes the adoption by the Parliament or the Council (with

the participation of the other institution – see Part 4), legislative acts are adopted by one or both of these institutions.

In terms of procedure it is noteworthy that legislative acts are, by rule, adopted on the initiative of the Commission (Art. 289 para. 1 TFEU). In exceptional circumstances these acts may be adopted *on the initiative of a group of Member States or of the European Parliament, on a recommendation from the European Central Bank or at the request of the Court of Justice or the European Investment Bank*.

It is worth noting that a legislative act may be both a regulation or a directive or a decision; all are very different types of acts. In some of their provisions referring to the procedures, the Treaties define the desirable formula of an act (comp. e.g. Art. 223 & Art. 226 and Art. 291 para. 3 TFEU). When *the Treaties do not specify the type of act to be adopted, the institutions shall select it on a case–by–case basis, in compliance with the applicable procedures and with the principle of proportionality*. The institutions adopting legislative acts have a duty to chose the most appropriate form of the act for the subject matter.

An interesting development is the requirement that, for draft legislative acts, debate and voting should take place in open sessions of the Council and the European Parliament. This highlights the importance of legislative acts.[26]

Draft legislative acts are also forwarded to national parliaments, which may submit to the Presidents of the Council, the Parliament and the Commission their reasoned opinion on the compatibility of the proposal with the principle of subsidiarity (c.f. *Protocol No. 1 On the Role of National Parliaments in the European Union*).

Details of legislative procedures and the principles of adoption and publication of legislative acts will be discussed in detail in Part 4.

7.2. Non–legislative acts

As indicated in the introduction to this section, non–legislative acts are a relatively broad category, encompassing both delegated and

26 J. Barcz, *op. cit.*, p. III–20.

implementing acts[27], as well as other legal acts which cannot be classed in either of the above groups.

7.2.1. Delegated acts

Delegated acts are acts issued by the Commission on the basis of powers conferred by a legislative act, enabling the Commission (to an extent) to influence the contents of legislative act.

According to Art. 290 para. 1 TFEU *a legislative act may delegate to the Commission the power to adopt non–legislative acts of general application to supplement or amend certain non–essential elements of the legislative act*. This provision means that only the Commission is competent to adopt delegated acts. Moreover, the Commission adopts these acts by the powers conferred by a legislative act, not just by any legally binding act of the European Union. At the same time, the characteristics of legislative procedures allow us to conclude that the Commission is empowered to adopt delegated acts by the European Council and the Parliament – the authors of legislative acts. Therefore it should be argued that the fact of conferring upon the Commission the power to adopt delegated acts is dependent on the Union's legislators.

Delegated acts **may supplement or amend the legislative acts in their certain non–essential elements**. This gives the Commission the flexibility to react to changing circumstances and to amend legislative acts accordingly without the need of applying a legislative procedure. The work of the Commission must not, however, interfere with essential elements of the subject matter – these are reserved for legislative acts. The Treaty does not explain which elements of a legislative act should be regarded as essential.

It should be stressed here that delegated acts may take the form of regulations, directives and decisions. The Treaty does not refer to this directly, but Art. 290 para. 1 states that delegated acts are generally applicable. The above characteristics of legally binding acts of the European Union would indicate that this refers not just to regulations

27 On the delegated acts see: A. Kaczorowska, *European Union Law*, New York 2011, p. 213–217.

(which are generally applicable by definition) but also to directives and even to decisions.

If the Council and the European Parliament decide to give the Commission the power to adopt delegated acts, they should define *the objectives, content, scope and duration of the delegation of Power* in the appropriate legislative act.

The European Parliament and the Council retain their control powers over the Commission and over delegated acts adopted by it. They have the right to revoke previously conferred powers (delegation). They may also, within a certain timescale specified in the legislative act, object to the entry into force of a delegated act.

Procedural aspects of adopting delegated acts will be discussed in Part 4.

7.2.2. Implementing acts

It should be indicated from the onset that implementation of European law is the domain of Member States. According to Art. 291 para. 1 TFEU, *Member States shall adopt all measures of national law necessary to implement legally binding Union acts*. Executive competences of the Union and its institutions have, therefore, an extraordinary character.

Consequently the passing of implementing acts by European Union institutions takes place *where uniform conditions for implementing legally binding Union acts are needed. In such circumstances these acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council*.

Implementing acts of the Union **differ from** legislative and delegated acts not only due to their aim, but also due to several other aspects. First of all, by rule, the body competent to adopt implementing acts is the Commission. However, in justified circumstances and in circumstances specified in Art. 24 & 26 TEU, these acts may also be adopted by the Council. Articles 24 & 26 TEU concern the common foreign and security policy of the EU.

Secondly, the power to adopt implementing acts should be derived from legally binding acts of the Union. This is a category broader than legislative acts, from which stems the power of the Commission to adopt delegated acts. It encompasses both legislative and delegated acts as well as other acts not included in these categories (more about these anon).

Implementing acts may come in the form of regulations, directives or decisions.

Art. 291 para. 3 TFEU obliges the European Parliament and Council to draft regulations and general principles concerning Member States' control over the Commission's use of its implementing powers. These issues have been regulated in Regulation of the European Parliament and Council number 182/2011.[28] This Regulation defines a number of detailed issues concerning the adoption of implementing acts by the Commission, and Member States' influence over appropriate procedures in this matter. Its scope is, therefore, largely procedural and therefore will be discussed in the next chapter.

7.2.3. Other acts

For the sake of completeness of the above analysis, it should be added that the Treaties envisage the European institutions adopting legally binding acts which cannot be classed as legislative, delegated or implementing acts.

Polish sources classify these acts in the following manner[29]:

1. **Council Acts –** these may be adopted with (e.g. Art. 103 para. 1 TFEU) or without (e.g Art. 108 para. 2 TFEU or Art. 215 para.

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28 *Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers*, OJ L 055 of 28 February 2011.

29 C.f. C. Herma, *Reforma systemu aktów prawa pochodnego UE w Traktacie z Lizbony*, „Europejski Przegląd Sądowy", No 5/2008, p. 27 and, by the same author; *Likwidacja „struktury filarowej" Unii – podmiotowość prawno międzynarodowa UE oraz reforma systemu aktów prawa pierwotnego i wtórnego* [in:] J. Barcz (ed.) *Traktat z Lizbony. Główne reformy ustrojowe Unii Europejskiej*, Warszawa 2008, pp. 140–141, source: http://polskawue.gov.pl/files/Dokumenty/Publikacje_o_UE/Traktat_z_Lizbony.pdf [verified on: 6 February 2010 r.]; J. Barcz (ed.), barcz, ustrój, *op. cit.*, pp. III–22–24.

1 & para. 2 TFEU) the participation of the European Parliament. In both cases acts are adopted by the Council under the powers conferred by the Treaty. Therefore these are neither delegated nor implementing acts. Even in the circumstances where the Council makes a decision after consulting the Parliament (Art. 103 para. 1 TFEU) – such act does not become a legislative act as it lacks references to any legislative procedure.

2. **Acts of the Commission –** as these are acts adopted under the Treaties (e.g. Art. 105 para. 2 or Art. 106 para. 3 TFEU) these do not have the character of delegated or implementing acts. Neither are they legislative acts, as these acts are adopted by the European Parliament and the Council through appropriate legislative procedures.
3. **Acts of the European Council** concerning the common foreign and security policy of the European Union (this excludes adoption of legislative acts altogether).
4. **Acts of the European Council** concerning amendments of the Treaties (Art. 48 TEU).
5. **Acts of the European Central Bank** (regulations and directives– Art. 132 para. 1 TFEU).

The fact that the above acts are not included in the three categories of legislative, delegated and implementing acts does not deprive them of their legally binding nature. Their adoption procedures will be discussed in Part 4.

Part 4

DECISION MAKING PROCESSES IN THE EUROPEAN UNION

This chapter will present the general premises for decision making processes within the European Union. These processes are varied in terms of their character and course; they involve different agencies and produce different effects. This chapter includes both the decision making processes in selected institutions and major procedures leading to amendment and creation of primary and secondary European legislation.

At the beginning, the main aspects of the decision making process in selected European institutions will be indicated – these will include the European Council, the Council of the European Union, the European Parliament and the European Commission. The choice of these institutions is primarily dictated by the fact that they exercise probably the greatest influence over amending primary legislation and creation of secondary law – both in terms of the Union's legislature and delegated and implementing acts. At the same time the stance taken by various institutions – their 'decisions' – is an external aspect of their actions resulting from certain decision–making processes taking place on the 'inside' of these institutions. The decision making process seems to correspond with the nature of institutions. Consequently it is possible to perceive certain unique features of how institutions function within the broad framework of actions performed by the EU itself. The decision–making mechanism of the European Parliament will be discussed only briefly; this is dictated by the multitude of specific developments and the complex internal structure of the institution itself. The scope of this publication makes it virtually impossible to undertake a detailed analysis of this issue.

In the second part of this chapter, the general procedures for amending primary legislation and for creating secondary legislation of the Union will be presented. The scope for shaping primary legislation is relatively broad. Importantly, participation of Member States in the traditional setting of an international conference is not always necessary. Decisions in this area may be taken at the fora of certain institutions of the European Union, which do, however, represent Member States.

The procedures leading to the adoption of certain types of secondary legislation of the European Union are also quite extensive. These assume different levels of participation from various institutions, all having separate roles within the Union's legislature, its executive functions and other specific EU actions. It may also be argued that the decision–making procedures envisaged by European law correspond to the classification of sources of secondary legislation accepted by the Treaty of Lisbon. With regards to the categories of subsidiary legislation discussed in the previous chapter, it seems advisable to illustrate in a similar way the decision making–processes leading to adoption of legislative, delegated and implementing acts and other, unnamed acts.

1. Decision–making in selected institutions of the European Union

The treaty provisions concerning **decision–making by the European Parliament** are not well developed. The general rule is that the Parliament decides through the majority of cast votes. Any exceptions to this rule must be founded in the provisions of the Treaties. For example, under Art. 225 TFEU, the European Parliament may require the Commission to submit appropriate proposals on matters where it considers that a Union act is required (indirect power of legislative initiative). In such cases, the EP decides through a majority of Members' votes. A vote of motion of censure of the Commission requires a majority of two thirds of the votes cast (Art. 234 TFEU).

The European Council, unless the Treaties state otherwise, makes its decisions through consensus (Art. 16 para. 4 TEU). Exceptionally, the European Council may decide through a vote. Procedural issues

and internal regulations are decided through an ordinary majority. But decisions concerning the composition and the presidency of the Council require a qualified majority. In such cases, the rules concerning the qualified majority in the Council are applied (Art. 235 para. 1 TFEU); these are discussed below.

In cases where the European Council makes a decision through a vote, its President, together with the President of the Commission abstain from voting. The vote is instigated by the President. If the majority of the Council's members decide so, the President is required to commence the voting procedure on the proposal of one of its members. Voting may take place when two thirds of the European Council's members are present; albeit for this purpose the Presidents of the European Council and the European Commission are not counted. If a vote takes place, each member may vote as a proxy for one other member only.

The European Council can make a decision on urgent matters through a written procedure. This kind of voting may take place with the agreement of all eligible members of the European Council.

The best developed Treaty provisions are those concerning decision making by **the Council**. Some of these also apply when the European Council makes a decision through a qualified majority. According to Art. 16 para. 3 TFEU – unless the Treaties provide otherwise – the Council decides through a qualified majority. A qualified majority is therefore the default decision–making process in the Council. In exceptional situations provided for by the Treaties, the Council may decide through an ordinary majority, or unanimously.

A vote requiring an ordinary majority is a rare event. According to Art. 240 TFEU, this majority is required when the Council decides on the structure of the General Secretariat, in procedural matters and when adopting its own internal regulations.

Unanimous decisions are also not very common, but this requirement has been preserved for matters of particular importance. We may recall that issues concerning the common foreign and security policy require, as a rule, a unanimous decision of the European Council

and the Council. Another example are certain variants of the special legislative procedure specified in the TFEU. Under Art. 19 para. 1, the Council unanimously adopts anti–discrimination decisions. Similarly, according to Art. 22 para. 1 TFEU, the Council establishes the rules for citizens' participation in local elections. Abstentions by members present or represented is not an impediment to an unanimous decision by the Council.

The default decision–making procedure is through a **qualified majority**. The basic principles of this voting system are also applied in cases where the European Council adopts decisions through a qualified majority (Art. 235 para. 1 TFEU).

Currently, according to Art. 3 of the *Protocol No. 36 on Transitional Provisions* appended to the Treaty of Lisbon, the principles established on the basis of Community law apply to a qualified majority. A qualified majority is defined as "weighted votes" which means that each Member State has a defined number of votes in the Council. The allocation of votes for the purpose of a qualified majority in the Council is as follows:

France – 29	Bulgaria – 10
Germany – 29	Sweden – 10
Italy – 29	Denmark – 7
United Kingdom – 29	Ireland – 7
Poland – 27	Finland – 7
Spain – 27	Lithuania – 7
Romania – 14	Slovakia – 7
Netherlands – 13	Cyprus – 4
Belgium – 12	Estonia – 4
Czech Republic – 12	Latvia – 4
Greece – 12	Luxembourg – 4
Hungary – 12	Slovenia – 4
Portugal – 12	Malta – 3
Austria – 10	

In total, the number of **weighted votes** equals 345. When the Council decides upon the proposal of the Commission, the required majority is 255 votes "for" by the majority of members. In other cases, adoption of an act by the Council requires the majority of 255 votes "for", cast by the majority of at least two thirds of members. At the same

time, if the adoption of an act by the European Council or the Council requires a qualified majority, a member may request verification to confirm whether the qualified majority was achieved through votes of the countries representing at least 62% of the total population of the European Union. Should this condition not be met, the act cannot be adopted.

The solution described above applies **until 31st October 2014** (c.f. Art. 16 para. 4 TEU and Art. 238 TFEU). From 1st November 2014 a new formula for a qualified majority will come into force, but until 31st March 2017 a member of the Council may request that an act be adopted according to the above procedure. After March 2017 this will cease to be the case.

The target formula of calculating the qualified majority abandons the weighted votes system and replaces it with the **double majority test**. According to the new voting system, a qualified majority is established by 55% of the Council's members, who must number no less than 15. At the same time, they must represent Member States whose joint population represents at least 65% of the total EU population (Art. 16 para. 4 TEU). This combines the requirement for an appropriate number of Member States with the requirement for a demographic representation. The so–called blocking minority must include at least four members of the Council, otherwise it is declared that a qualified majority has been reached.

Particular rules apply in the circumstances where the Council makes a decision without the proposal from the Commission or from the High Representative for Foreign Affairs and Security Policy. In such cases the qualified majority requires the agreement of at least 72% of the Council's members, representing Member States with at least 65% of the Union's population.

If not all of the Council members partake in the vote, the qualified majority constitutes at least 55% of the Council's members representing participating states, whose population equates to at least 65% of the total population of these countries. A blocking majority in this case is constituted by the minimum number of the Council's members representing over 35% of the population of the countries taking part in

the vote plus one other member. If these requirements have not been met, it is accepted that a qualified majority has been reached. If the Council does not decide upon an application by the Commission or the High Representative for Foreign Affairs and Security Policy, a qualified majority is constituted by 72% of the Council's members representing the number of countries whose population equates to at least 65% of the population of these countries.

In the Council, voting is instigated by its President. However, the President is also required to commence the voting procedure on the proposal of a member of the Council, or of the Commission, provided that this is decided by the majority of the Council's members. Each member of the Council may act as a proxy for only one other member. Voting may take place if the majority of members entitled to vote are present.

It should also be added that the Council, apart from voting, may also make decisions through **an ordinary written vote procedure or through the silence procedure (simplified written procedure)**.

Ordinary written procedure is usually applied in urgent matters. An act of the Council may be adopted through this procedure if a ballot is unanimously agreed by the Council or the COREPER. In exceptional cases this procedure can be adopted upon the President's proposal. In matters submitted to the Council by the European Commission, written procedure may only be applied with the Commission's consent.

In certain cases, as indicated in the *Council's Rules of Procedure*, the Council may make a decision through a silence procedure (simplified written procedure). In such cases the presidency agrees a period within which members may object to the decision proposed. If no objections are received within this period, the document is regarded as adopted.

The Commission takes its decisions through the majority of its members (Art. 250 TFEU). The majority of the Commission's members, as specified in the Treaties, constitutes a quorum (currently 14). The Commission votes upon proposals submitted by one or more of its members. Voting is carried out upon application by one of the Commission's members.

Commission decisions shall be taken at meetings. The Commission may also make decisions through a written procedure. If this procedure is to be followed, the proposed bill must first be agreed by Legal Services and other services need to be consulted. Then the proposed legislation is submitted in writing to all members of the Commission. A deadline for submission of objections or amendments is also established. If none of the members applies for the suspension to the written procedure before the deadline, the bill is carried through.

The Commission may also make decisions by empowerment. This is where the Commission invests one or more of its members with the powers to agree on its behalf management or administrative measures. This is on condition of the principle of collective responsibility being fully followed. Moreover, powers invested through this procedure may be in turn delegated to director generals and heads of service, if this is not prohibited by the empowering decision.

Last but not least the Commission may take decisions by delegation. The Commission delegates the powers to adopt on its behalf management or administrative measures directly to directors and heads of service.

The Commission generally meets at least once a week. Sessions are called by the President of the Commission, who also agrees the agenda for each session.

2. Treaty procedures for amending primary legislation

The Treaties – primary legislation – encompass the fundamental principles for the functioning of the European Union, the scope of its competences, its system and institutional framework. As international agreements they may, of course, be modified. However, amending the Treaties is subject to requirements and procedures specified in the Treaties themselves. Currently, two procedures for amending the Treaties are possible – an ordinary and a simplified revision procedure. Their main elements are given below.

2.1. Ordinary revision procedure

According to Art. 48 TEU, the bodies entitled to propose amendments to the Treaties are the Member States, the European Commission and the European Parliament. It seems natural that Members States should have the right to propose such changes. Modifications to primary law mean changes to the Treaties upon which the European Union is based, the parties to the Treaties being no other than the Member States who are sometimes called the "masters of the Treaties"[1]. These agreements are the result of a consent of the countries to a certain content of the founding Treaties and, what follows, a consent to investing the EU with certain powers to enable the implementation the objectives indicated in the Treaties. Any changes to the Union's tasks, its competences and internal structure, should also be based on an international agreement resulting from a consensus of all contracting parties.

Amendments may also be proposed by the Commission and the European Parliament. The participation of international organisation bodies in the process of revising the Treaties which form its foundations is not exceptional nowadays. Such a possibility is envisaged in, for example, the *United Nations Charter* (Art. 108 and Art. 109)[2] and in the Statute of the Council (Art. 41)[3]. In this light, however, it is worth stressing the special character of the Commission and the Parliament as supranational European institutions independent of Member States (see Part 2).

Proposed amendments are submitted to the Council, which passes them to the European Council, and forwarded to national parliaments.

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1 See: e.g. M. Herdegen, *Stosunek Wspólnot Europejskich i Unii Europejskiej do państw członkowskich*, „Edukacja Prawnicza", no 8(44), May 2002, http://www.edukacjaprawnicza.pl/index.php?mod=m_artykuly&cid=57&id=76 [verified on: *4 February 2010*]. This term is also applied by J. Barcz, *Aspekty prawne wejścia w życie Traktatu konstytucyjnego i ewentualne konsekwencje prawno–polityczne jego odrzucenia*, expert text available on UKIE, source: http://www1.ukie.gov.pl/HLP/files.nsf/0/3D96841D6AA3B4C0C12572D800341C28/$file/expertyza_barcz.pdf, p. 1.

2 *Karta Narodów Zjednoczonych (*Charter of the United Nations), *Statut Międzynarodowego Trybunału Sprawiedliwości i Porozumienie ustanawiające Komisję Przygotowawczą Narodów Zjednoczonych (Statute of the International Court of Justice and the Resolution Establishing the Preparatory Commission of the United Nations)*, Dz.U. of 1947 r., No 23, item. 90 with later amendments.

3 *Statut Rady Europy* [in:] A. Łazowski, *Prawo międzynarodowe publiczne. Zbiór przepisów*, Kraków 2003, pp. 221–233.

The European Council, through ordinary majority of votes, may decide to consider the proposed amendments. Such a decision is made after consulting the European Parliament and the European Commission. When a decision is taken, the President of the European Council calls **a convention** composed of representatives of national parliaments, heads of state or government of Member States, the European Parliament and the Commission. The task of the convention is to examine proposals for amendments to the Treaties and to adopt, through a consensus, a recommendation for the future **conference of representatives of Member States governments**. This means that final proposals of amendments to primary legislation are shaped on a wide forum, representing both the Member States, their societies and select EU institutions. These proposals form the basis of solutions adopted during the intergovernmental conference. It is worth noting that the European Council may decide not to convene the convention if the extent of proposed amendments does not justify this. The European Council may take such a decision only after obtaining the consent of the European Parliament. In this case, the European Council itself decides the mandate of the intergovernmental conference.

Amendments to the founding treaties are adopted in the course of an **intergovernmental conference**, called by the President of the Council. The introduction of amendments requires a multilateral agreement. Their final shape requires a consensus over their content. Amendments come into force only once they have been **ratified** by each member State in accordance with their constitutional requirements. This is an important provison. On the basis of the provisions of Art. 48 TEU, the process of amending the Treaties involves first and foremost the executive arm of the State. According to the law, national legislative bodies may also be included in the process of ratifying the amending treaty internally. It may therefore transpire that the ratification process in different Member States may not run smoothly, due to, for example, constitutional issues or the current political situation. If, within two years of signing, an amending treaty has been ratified by four–fifths of the Member States while one or more states experience difficulties in the ratification procedure, the matter is directed to the European Council (Art. 48 para. 5 TEU).

Summing up, it is possible to state that in accordance with Art. 48 TUE the final content of amendments to the founding Treaties is dependent on the will of the Member States and the shape of the compromise reached between them. Proposed amendments may themselves originate not only from Member States, but also from the European Commission, that is from a formally independent supra–national institution, and from a representative body such as the European Parliament. It is also worth noting that the European Parliament and Commission may influence the extent of the mandate of the intergovernmental conference, as institutions taking part in the convention.

2.2. Simplified revision procedures

The Treaty on the European Union envisages changes to primary legislation through a different procedure than the ordinary procedure indicated in Art. 48 TEU. The Treaty calls these simplified revision procedures. To a certain extent these are the continuation of the so called **'passerelle'**, or **'bridge'**, procedure contained in the TEU and the TEC (before the Treaty of Lisbon). These assumed the possibility of amending Treaty provisions through decisions of Community institutions, if these institutions were empowered directly by the Treaties to undertake such tasks[4]. An example would be the provisions of Art 42 TEU (transfer of certain tasks belonging to the framework of intergovernmental cooperation as part of the third pillar of the TEC) and Art. 67, Art. 137 para. 2, Art. 190 para. 4, Art. 222, Art. 245 or Art. 269 TEC. All of the above *passerelle* procedures were ways of modifying primary legislation. The main differences were the need for the decision by the Council to amend the Treaties to be verified by the Member States (ratification). Amendments under Art. 190 para. 4 and Art. 269 TEC required this acceptance. Procedures under Arts. 67, 137 para. 2, 222 and 245 TEC were enacted by the decision of the Council alone; therefore some authors concluded that, in reality, amendments

4 J. Barcz, *Procedura tzw. kładki na podstawie art. 42 TUE – aspekty prawne [in:] Możliwość wykorzystania tzw. procedury kładki (art. 42 TUE) dla reformy ustrojowej Unii Europejskiej*, Niezależny Instytut Prawa Międzynarodowego i Europejskiego. Centre for European Studies demosEuropa, http://www.nipmie.pl/pliki/art42TUE.pdf, p. 7 [verified on: 3 February 2010].

were based on a specific international agreement[5] in the form of the decision of the Council.

Through the provisions of Art. 48 TEU, *passerelle* procedures became structural procedures enabling important reforms of the European Union system[6]. It is worth highlighting, however, that due to the change in the status of the European Council, this is now the decision making body in this instance. The Treaty on the European Union contains two simplified revision procedures; the decision of the European Council is the key element in both of these. In the first case, this decision is subject to ratification by Member States (simplified procedure for concluding an amending treaty), in the second the amendment is made on the basis of the decision of the European Council (pure 'passerelle' procedure)[7].

Under Art. 48 para. 6 TUE (simplified revision procedure for amending a treaty), proposals of amendments to all or any provisions of **Part Three TFUE** (*Union Policies and Internal Actions*) may be presented by the government of any Member State, the European Parliament or Commission. Proposals are submitted to the European Council. The European Council may adopt a decision amending some or all of the provisions of Part Three TFUE through a unanimous decision, having consulting with the European Parliament and the Commission (as well as ECB in the case of institutional changes affecting monetary matters). The decision of the European Council is only implemented after it has been approved by the Member States, according to their respective constitutional requirements. The decision of the European Council enters into force only after it has been adopted by the Member States. The final consent to adopt a decision amending the founding Treaties is therefore expressed by the Member States. It can be therefore assumed that the procedure indicated in Art. 48 para. 6

5 K. Lankosz (red.), *Traktat o Unii Europejskiej. Komentarz*, Warszawa 2003, p. 459,

6 J. Barcz, *Unia Europejska na rozstajach. Traktat z Lizbony. Dynamika i główne kierunki reformy ustrojowej*, Warszawa 2010, p. 165. For similar, but considering constitutional requirements of Member States on the example of Germany, see: J. Barcz, *Legitymacja demokratyczna zmiany postanowień Traktatów stanowiących UE na podstawie tzw. procedur kładki (wprowadzonych przez Traktat z Lizbony) w świetle rozwiązań niemieckich*, http://www.nipmie.pl/pliki/legitymacja_demokratyczna.pdf [verified on: 8 February 2010].

7 *Ibid*

TUE is a simplified procedure for an amending treaty, provided for in Art. 48 TUE through the ordinary revision procedure.

Amending the Treaty through this simplified procedure imposes certain limitations in terms of the range of possible revisions. Whereas Art. 48 para. 2 TEU does not define what amendments can be made, the only revisions permitted through the simplified procedure are amendments to Part Three TFEU (*Union Policies and Internal Actions*). Changes may concern all or just some of the provisions of Part Three TFEU. They may not, however, lead to an increase in competences of the Union conveyed by the Treaties.

The second simplified revision procedure – the 'passerelle' clause – assumes that the Treaties can be revised on the basis of a decision of the European Council, without the necessity to have them adopted by the Member States. Amendments introduced in this way may concern two sets of circumstances only. Firstly, such amendments, according to Art. 48 para. 7 TUE, may concern empowering the Council to make decisions through a qualified majority in areas where the Treaty on the Functioning of the European Union or Title V TEU require a unanimous decision (apart from military or defence matters). Secondly, an amendment may enable the Council to adopt legislative acts through ordinary legislative procedure in cases where the TFEU envisages the application of the special legislative procedure. If a decision of the European Council does not require approval of the Member States, passing such decision is subject to a number of requirements. The proposed amendments should be presented to national parliaments. These in turn have a six month period to register their objections. If objections are notified within that set period, a decision cannot be taken. Moreover, the European Council makes decisions regarding amendments unanimously, after obtaining the European Parliament's consent.

Additionally, TFEU contains provisions enabling revisions of primary law outside of the procedures discussed above. The current legal order preserves, for example, the possibility of revising the Statute of the Court of Justice of the European Union, as it takes the form of a Protocol to TL (Protocol No. 3) – Art. 281 TFEU (revisions

to Title I and Art. 64 of the Statute are not permitted). Amendments to the Statute are currently decided by the European Parliament and the Council through ordinary legislative procedure; this change results from legislative actions of appropriate institutions. This is different to the simplified revision procedure for amending the Treaties, where a decision is made by the European Council which formally does not have a legislative function. The range of agencies competent to initiate amendments is also different – the Council and the European Parliament decide upon application of the Court or the Commission.

2.3. Concluding accession treaties. Withdrawal procedures from the European Union

Another element of primary legislation of the European Union are **accession treaties**. It is worth mentioning at the start that these are a form of agreement amending the foundation treaties. The revisions are not limited to changing the number of Member States in the European Union. Broadening the Union requires amendments (including institutional changes) to the founding treaties; these are introduced through accession treaties. The main procedures for concluding these treaties are referred to in Art. 49 TEU.

Membership of the European Union can be sought by countries respecting the principles specified in Art. 2 TEU (e.g. the principles of liberty, democracy, respect for human rights and the rule of law, common for all Member States). A candidate state makes an appropriate application to the Council[8]. The European Parliament and national parliaments are also notified of the application. The Council reaches the decision unanimously, after obtaining an Opinion of the Commission and the consent of the European Parliament, expressed through the majority of the Members' votes. Qualifying criteria established by the European Council are applied at the same time.

The nature of the Council's decision at this stage of the accession procedure requires an explanation. Article 49 TEU does not specify exactly what does this decision concern. Should this be a decision about

8 Cf. T.C. Hartley, *The Foundations of European Union Law*, Oxford 2010, p. 92.

commencing entry talks upon application, or is this a decision about concluding an accession agreement[9]? Current practice would indicate that this is a decision about concluding an accession agreement[10] (a decision of consent to such an agreement)[11]. This would mean that the decision is being made after the negotiations on accession, the results of which form the basis for the Council's decision.

The entry talks process has not been comprehensively covered in the treaties. It is therefore necessary to refer to established practice, bearing in mind that this was established before the introduction of the Lisbon Treaty (there has been no enlargement of the European Union since then).

The course of the accession process[12] is set, to a certain extent, by Art. 49 TUE, which states that only countries observing the principles defined in Art. 2 TEU may apply for the membership of the Union. The above provision is complemented by the provisions of the Declaration of the European Council adopted at the European Summit in Copenhagen in June 1993[13] defining the membership principles (**the Copenhagen Criteria**)[14]. As mentioned earlier, in the present legal order the TEU requires that the eligibility criteria established by the European Council are applied. Consequently it is necessary to establish whether a prospective member state meets the above criteria. Practice shows that the Council applied to the Commission for an assessment. The Commission would then submit an **initial assessment** (an *acquis*) as to whether the applicant meets the membership criteria. This opinion (not binding) was the basis for another decision of the Council whether

9 As indicated by C. Mik. See: C. Mik, W Czapliński, *Traktat o Unii Europejskiej: komentarz*, Warszawa 2005, p. 351.

10 Formally a Council's decision contains the wording: „a decision on", see: *Decision of the Council of the European Union of 14 April 2003 on the admission of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union,* OJ L 236 of 23 September 2003.

11 As in: Z. Brodecki, M. Drobysz, S. Majkowska, *Traktat o Unii Europejskiej, Traktat ustanawiający Wspólnotę Europejską z komentarzem*, Warszawa 2002, pp. 110–111, C. Mik, W. Czapliński, *op. cit*., p. 352, K. Lankosz (ed.), *op. cit,*, p. 571.

12 Cf. A. Kaczorowska, *European Union Law*, New York 2011, pp. 61–66.

13 European Council in Copenhagen, 21–22 June 1993, Conclusions of the Presidency, http://www.consilium.europa.eu

14 J. Barcz, *Prawne aspekty procesu rozszerzenia Unii Europejskiej. Traktat akcesyjny* [in:] J. Barcz (ed.), *Prawo Unii Europejskiej. Zagadnienia systemowe,* Warszawa 2006, p. 486.

to grant the applicant the status of a candidate and to start negotiations on accession[15].

The first stage of proper negotiations is a review of EU law and an analysis of the compatibility of the national law or laws of the candidate country(ies) with the overall legal legacy of the Union, referred to as ***screening***. During this stage of the procedure the Union is represented by the Commission, which is responsible for preparing a screening report. The candidate country prepares its own position in different areas under negotiation. This position, until now, has been passed to the President of the Commission. The Commission would then prepare a draft common position of the Member States. The Council would also set out its view. The phase of technical negotiations would therefore commence, with the participation of the Council and the candidate country or countries. At this stage in the procedure, the role of the Commission was to monitor the state of preparations of the candidate countries to joint the EU. The European Parliament played an indirect role – it could, at any stage of the negotiations, submit opinions and recommendations and require their consideration[16].

Negotiations are conducted during an intergovernmental accession conference. The text of the treaty agreed during the conference forms the basis for the decision of the Council, referred to in Art. 49 TEU, that is the decision granting consent to concluding a treaty of accession. This decision, as described earlier, is taken unanimously after obtaining an Opinion of the Commission (*avis definitif*) and the agreement of the European Parliament (**avis conforme**) expressed through the majority of the Members' votes[17].

The last stage in the accession procedure is the signing of the accession treaty and its ratification by all contracting states. This stage is required by the treaties. The accession treaty should define the conditions of accession and resulting amendments to the foundation Treaties of the European Union. In practice, the accession treaty itself

15 Granting the candidate country status did not have to lead automatically to the commencement of negotiations; see: *casus* of Turkey in: J. Barcz, *Prawne aspekty…, op. cit.*, p. 491.
16 C. Mik, W. Czapliński, *op. cit.*, p. 352.
17 J. Barcz, *op. cit.*, p. 492.

is not a vast document. Detailed provisions concerning the conditions of accepting a new country or countries and amendments to the treaties are contained in a separate act on the conditions of accession[18]. An accession treaty is subject to ratification by all contracting states in accordance with their constitutional requirements.

It is also worth highlighting as an aside that the Treaty of Lisbon introduced a possibility of **withdrawing from the European Union** (Art. 50 TEU). Each Member State can take the step to withdraw from the Union in accordance with its constitutional requirements. It would follow that this kind of situation would also require modification of primary legislation.

The state which decided to withdraw from the Union notifies the European Council of its intent. The European Union, in the light of the guidelines provided by the European Council negotiates and concludes an agreement with the state leaving it. This agreement defines the terms of leaving the Union and also the framework for future relations between the Union and the former member.

The possibility of withdrawing from the Union is a new (and previously questioned) development which, so far, has not been tested in practice. Therefore it would be difficult to clarify a number of detailed issues which only practical application would unravel. In terms of negotiating an agreement to withdraw from the Union, Article 50 para. 2 TEU refers to Art. 218 TFEU, which determines the procedure for contracting international agreements by the Union[19]. This procedure will be discussed below. Here it is worth noting that the procedure defined in Art. 218 TFEU highlights the role of the Council which authorises the commencement of accession talks, drafts the terms of

18 See: *Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded*, OJ L 236 of 23 September 2003.

19 On international agreements of the EC/EU see: M. Niedźwiedź, *Umowy międzynarodowe mieszane w świetle prawa Wspólnoty Europejskiej,* Warszawa 2004; J. Sozański, *Wspólnotowe a powszechne prawo traktatów – wzajemne relacje a jedność czy odrębność unormowań i systemów*, Toruń 2004; O. Kopiczko, *Negocjacje i zawieranie umów międzynarodowych przez Wspólnotę Europejską – zmagania kompetencyjne instytucji*, „Prawo i Podatki w Unii Europejskiej", No 9/2005.

negotiations, authorises the signing and contracts an agreement. With regards to withdrawal from the Union, Art. 50 para. 2 TEU clearly indicates that such an agreement is concluded by the Council after obtaining the consent of the European Parliament.

3. Adoption of European Union legislative acts

The Treaty of Lisbon upheld the basic forms of legally binding acts of the European Union institutions (regulations, directives and decisions) as well as those which are not binding (recommendations and opinions). At the same time specific categories of legally binding acts were introduced. These may assume the form of legislative, delegated and implementing acts, if formal criteria for this division are applied. To a large extent it is the adoption procedure of the particular act (and the scope of the institutions adopting it) that define its character. The main elements of the Union's legislative procedures (ordinary and special), as well as procedures leading to the adoption of non–legislative acts, are presented below.

3.1. Ordinary legislative procedure

Ordinary legislative procedure has been introduced into European Union law following the Treaty of Lisbon, and replaces the existing procedure of co–decision (Art. 251 TEC). This procedure involves **joint adoption** of a regulation, directive or decision by **the European Parliament** and **the Council** on the proposal from the Commission. This procedure is currently regulated by Art. 294 TFEU. As a legislative procedure it is well developed and, at present, constitutes the principle procedure, widely applied. The legislative process is initiated by the Commission (in special circumstances, provided for by the Treaties, the initiative may come from a group of Member States, the Parliament, ECB, EIB or the Court of Justice of the European Union – Art. 289 para. 4 TFEU). The Commission drafts an act and submits a proposal to the Council and the European Parliament. This shows a conveyed right of legislative initiative. However, the secondary (indirect) right

of legislative initiative, belonging to the Parliament, should also be highlighted (Art. 225 TFEU).

When the proposal is submitted by the Commission, **the first reading** commences. At this stage, based on the proposal submitted by the Commission, the European Parliament adopts its position and passes it to the Council. If the Council approves the position of the Parliament, the act concerned is accepted in the wording which reflects the Parliament's position; this signals the end to the legislative procedure with the adoption of the act. Should the Parliament's position not be accepted by the Council, it adopts its own standpoint during the first reading and communicates it to the Parliament, together with full statement of its reasons. The Commission informs the Parliament fully of its position. This indicates that the lack of approval for the European Parliament's position by the Council does not mean an end to the procedure. **The second reading** commences at this point. At this stage, the European Parliament has certain options available. If within three months of receiving the position of the Council this position is either approved by the Parliament or there is no further communication on the issue, the act concerned is regarded as passed in the form that reflects the stance of the Council; the procedure ends at the second reading with the adoption of the act. However, if the Parliament, within three months, through the majority of votes of its members, rejects the Council's stance, the act is is deemed not to have been adopted. Therefore, in the second reading, the procedure may end with the rejection of the act through Parliament's decision. The Parliament, however, has one other option. If it does not accept the stance of the Council it may, within a three month period, introduce amendments to the Council's position through a majority vote by its members. The amended version is forwarded to the Council and the Commission, which delivers an opinion on the amendments introduced by the European Parliament. Within three months of receiving the amendments from the Parliament the Council may – through a qualified majority – accept all of them. The act is deemed to have been adopted and the procedure ends. It should be noted, however, that the final version of the bill will reflect the stance of the Council with parliamentary amendments. It should also be stressed that any amendments proposed by the European Parliament

which receive a negative opinion from the Commission may only be accepted by the Council unanimously.

If the Council does not accept all of the Parliament's amendments, the procedure carries on. In these circumstances, within six weeks, the President of the Council in agreement with the President of the Parliament calls a conciliation committee; this starts the **conciliation procedure**.

The **conciliation committee** contains the Council members or their representatives and an equal number of representatives of the European Parliament. The task of the committee is to find an agreement on a joint text. The basis for this are the positions of the Council and the Parliament expressed during the second reading. The agreement must be achieved through a qualified majority of the members of the Council and the majority of Members representing the European Parliament. From the point of establishment, the committee has six weeks to accomplish its task. The work of the committee also involves the Commission, which undertakes any necessary tasks to draw the stances of the Council and the Parliament closer together. If the committee fails to achieve a compromise within the specified time framework and does not approve a joint proposal, the the proposed act shall be deemed not to be adopted. If, however, a joint proposal is established within that time, the next stage of the procedure – the **third reading** – commences.

The Council and the European Parliament may adopt the act within six weeks of a joint proposal being approved by the conciliation committee. The Parliament decides through a majority vote, the Council through a qualified majority. The bill is adopted only at the moment when both institutions accept it through the respective majority required. If one of the institutions fails to pass the act in the form of the joint proposal, the act fails. This means that at the last stage of the ordinary legislative procedure neither the Council nor the Parliament can cause the act to be passed single handedly. The proposal resulting from the joint work of the reconciliation committee may be received negatively by either institution. During the third reading all depends on the results of the vote in the Parliament and the Council.

The ordinary legislative procedure involves extensive interaction between certain EU institutions, in particular between the Council, the Commission and the European Parliament.

A strong position is, of course, that of the Council – as an intergovernmental institution it has considerable influence over the final shape of a European Union act. However, a strong influence of the Parliament upon the shape of the proposed legislation may also be observed; this corresponds to the main principles of the procedure – the joint adoption of an act by the Council and the European Parliament. In the procedure discussed above, the Parliament is included in the legislative process as equal co–author of EU law. It has been mentioned that the Parliament may block the legislative process already during the second reading, by rejecting the Council's position. The Parliament may also influence the initiation of the legislative process (Art. 289 para. 4 and Art. 225 TFEU).

The position of the Commission is also worth stressing. It is the Commission who, in principle, has legislative initiative. It prepares appropriate proposals and submits them to the Council and the Parliament. However, the draft prepared by the Commission may be subject to modifications[20]. First of all the Council, deciding unanimously has got the right to change the content of the draft submitted by the Commission (Art. 293 para. 1 TFEU, except for circumstances defined in Art. 294 paras. 10 & 13, Arts. 310, 312, 314 and 315 TFEU). Secondly, modifications may also be introduced by the Commission itself, but only up to the point when the Council begins to act (Art. 293 para 2 TFEU). The Commission also plays an important role in the following stages of the ordinary legislative procedure. Its opinion will influence the nature of the majority through which the Council may accept the Parliament's amendments to its position. The Commission also actively participates in the conciliation procedure. These competences of the Commission within the legislative process are relatively important given that this institution does not formally have a legislative function.

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20 K. Michałowska–Gorywoda, *Podejmowanie decyzji w Unii Europejskiej*, Warszawa 2002, p. 167.

The accepted formula of the ordinary legislative procedure makes it quite complex. This allows institutions of differing nature to express their stances in the course of the procedure. On the other hand there is a danger that the procedure becomes drawn out in time. This requires the institutions to show a certain degree of discipline and goodwill for cooperation on achieving a compromise[21].

3.2. Special legislative procedure

Legislative acts of the European Union can also be adopted through special legislative procedure. There is **no single Treaty regulation for this procedure**; its course is defined in detail in separate provisions of the Treaties. TFEU refers to special legislative procedure in over thirty articles. This procedure is applied in extraordinary circumstances and must be based on the provisions of the Treaties (Art. 289 para. 2 TFEU).

A special legislative procedure means that an act of the European Union is adopted by the Council with the European Parliament's participation, or by the European Parliament with the participation of the Council. This differs significantly from the ordinary procedure, where such act is adopted by both institutions jointly. The participation of the Council or the European Parliament in the adoption of the act may take different forms (consultation or consent). It follows that the Parliament or the Council may therefore exert a different degree of influence over the legislative process in the special legislative procedure.

In principle, legislative initiative in the special legislative procedure belongs to the Commission (c.f. Art. 17 para. 2 TEU). The Commission's initiative is therefore a constant element in the legislative procedures of the EU. In exceptional circumstances foreseen by the Treaties, legislative acts may be adopted through special legislative procedure on the initiative of the European Parliament, ECB or the Court of Justice of the European Union (Art. 289 para. 4 TFEU).

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21 C.f. *Joint Declaration On Practical Arrangements For The New Co–Decision Procedure (Article 251 of the Treaty establishing the European Community)*, OJ C 148 of 28 May 1999 and *Declaration on respect for time limits under the co–decision procedure* annexed to the *Treaty of Amsterdam*, OJ C 340 of 10 November 1997.

The mechanism of the special legislative procedure is far **less complex** than ordinary legislative procedure. In principle this mechanism is limited to the adoption of the act by the Council with the Parliament's participation or by the European Parliament with the Council's participation. An exception to this rule is the budgetary procedure, which the TFEU also calls special legislative procedure (Art. 314 TFEU). Which institution plays the role of the legislator and how the other institution (and possibly other EU bodies) participates in the process depends on the case in hand.

The most common outcome of the special legislative procedure is the adoption of an act by the Council (Arts. 19, 21 para 3; Art. 22 paras. 1 & 2, 23, 25; Art. 64 para. 3; Art. 77 para. 3; Art. 81 para. 3; Art. 86 para. 1; Art. 87 paras. 3 89, 113, 115, 118; Art. 126 para. 14; Art. 127 para. 6; Art. 153 para. 2; Art. 182 para. 4; Art. 192 para. 2; Art. 194 para. 3; Art. 203; Art. 223 para. 1; Arts. 262, 308 or 333 TFEU). Respective provisions define the precise nature of the European Parliament's participation – whether this should be in the form of a consent or an Opinion. Additional requirements may be placed on the Council, e.g. the Council may be required to adopt the act unanimously (Art. 19 para. 1 or Art. 86 TFEU).

Special legislative procedure where the EP is the legislator is relatively rare within the TFEU. Here acts will be adopted by the Parliament with the Council's participation, which in this case will require obtaining its consent (Arts. 223 para. 2, 226 or Art. 228 para. 4 TFEU). Depending on the case, additional requirements, other than obtaining the consent of the Council, may be placed upon the European Parliament. For example the TFUE dictates the type of act adopted by Parliament – this usually is a regulation. In certain cases the Parliament may also be required to obtain an opinion or the consent of the Commission for the adoption of a certain act (respectively Art. 223 para. 2 & Art. 226 TFEU).

It should also be highlighted that – depending on the variation of the special legislative procedure applied – obtaining the consent or an Opinion of the European Parliament or the Council is an important procedural requirement. The requirement to consult other institutions,

such as the Commission, seems to be of similar nature. Should this requirement not be met, this could become a factor in declaring the act invalid.

3.3. The budgetary procedure

The annual budget of the European Union is defined by the Council and the European Parliament in accordance with the **special legislative procedure** (Art. 314 TFEU). Therefore the budgetary procedure is a specific form of special legislative procedure. It seems that the deviation from the general framework of the special legislative procedure presented above, the degree of involvement of the Council, the EP and the Commission and the subject matter of the procedure do justify its discussion in a separate section.

The procedure is initiated with a draft budget proposal prepared by the Commission on the basis of projected expenditure submitted by EU institutions (apart from the ECB – Art. 314 para. 1 TFEU). The draft contains the prognosis of revenue and expenditure and is submitted to the Council by 1st September of the year prior to the implementation of the budget.

The Council adopts its position on the draft budget and forwards it to the European Parliament together with a full statement of reasons for adopting this position (Art. 314 para. 3 TFEU). This must be accomplished by 1st October of the year prior to the implementation of the budget. If the EP approves the position of the Council within 42 days or fails to reach a decision, the budget is adopted. The Parliament may also adopt amendments by a majority of its component members; the amended draft is then referred back to the Council and to the Commission. At the same time the President of the EP, in cooperation with the President of the Council, immediately convenes a meeting of the Conciliation Committee. The Committee is not convened, however, if within ten days of forwarding a revised draft the Council informs the Parliament of accepting all the proposed amendments.

The Conciliation Committee, whose membership includes an identical number of members of the Council or their representatives and

representatives of the EP, meets in order to work out a compromise on the budget proposal, based on the current positions of the Council and the Parliament. This needs to be achieved within 21 days of convening the Committee. It is worth highlighting that this element of the procedure is very similar to the actions of a Conciliation Committee in an ordinary legislative procedure. The Commission also plays a similar role – it takes part in the work of the Committee and takes all initiatives necessary to reconcile the positions of the EP and the Council (Art. 314 para. 5 TFEU).

Lack of a consensus achieved by the Conciliation Committee within the above timescale necessitates a new proposal to be submitted by the Commission (Art. 314 para. 8 TFEU). If, however, a compromise is reached, the Council and the European Parliament have fourteen days to approve the joint budget proposal (Art. 314 para. 6 TFEU). At this point, adoption of the budget depends on the position of both these institutions. If the EP and the Council approve the proposal or do not take a decision, or if one institution approves the proposal and the other fails to take a decision, the budget is regarded as adopted according to the joint text. If both these institutions reject the joint proposal, or if one rejects it while the other fails to take a decision, the Commission submits a new draft budget. The variants indicated above highlight equal positions of the Council and the EP, which, according Art. 14 & 16 TEU, jointly exercise budgetary powers. It should be indicated, however, that should the joint proposal be rejected by the EP, the Commission has to submit a new proposal even though the Council may have approved the joint proposal prepared by the Conciliation Committee. Moreover, if the EP approves the joint proposal and the Council rejects it, the European Parliament may confirm (within 14 days of the proposal being rejected by the Council) all or some of the amendments introduced by itself to the position of the Council on the original budget proposal. If any of the above amendments are not confirmed, the position agreed upon within the Conciliation Committee on the line of the budget which is the subject matter of the amendment, is retained. The budget is then finally regarded as adopted on this basis. Therefore the approval of the joint proposal by the EP, even though the Council may reject it, does not result in a new budgetary procedure. The

budget will be adopted even though the Parliament may not confirm some of its amendments – the outcomes of the Conciliation Committee will weigh decisively here.

The budgetary procedure in the shape and form described above is a specific and complex special legislative procedure. It assumes close cooperation of the Council and the European Parliament as well as visible involvement by the Commission. It could even be said that, to a degree, budgetary procedure is closer to the ordinary legislative procedure than to the simple framework of the special legislative procedure. It would seem, however, that the shape of the budgetary procedure is determined by the nature of the EU budget and its role in the functioning of all Member States.

4. Procedure for adopting non–legislative acts

In the chapter devoted to the sources of European Union law it was indicated that not all acts within secondary legislation may be classed as legislative acts. Outside of this category remain delegated and implementing acts, and acts which do not belong to any of these groups, defined by Polish literature on the subject as 'acts without an adjective'. The most important aspects of procedures for adopting legislative acts have been presented in the previous section. The main principles of the process for adopting acts which do not have legislative nature will be discussed below.

4.1. Adoption of delegated acts

The Treaty on the Functioning of the European Union conveys upon the Commission the right to adopt delegated acts (Art. 290 TFEU). Through delegated acts the Commission may amend or supplement some, non–essential, elements of a legislative act. A legislative act should clearly define the aims, content, extent and timescale of delegated powers. Therefore the Commission has a certain amount of flexibility in terms of altering or supplementing a legislative act[22].

22 C.f. *Communication from the Commission to the European Parliament and the Council – Implementation of Article 290 of the Treaty on the Functioning of the European Union*,

The nature of delegated acts has already been discussed (Chapter 3). It is worth reminding that the nature and the process of adoption of delegated acts are close to one of the previous comitology procedures – the regulatory procedure with scrutiny. After the introduction of the Treaty of Lisbon this procedure acquired a treaty basis, but at the same time it was stripped of the characteristics of an executive (implementing) function through a clear distinction being made between delegated and implementing acts (Art. 290 & 291 TFEU).

It should also be observed that the course of all **comitology procedures** has been regulated through the so–called comitology decision[23] replaced in 2011 by Regulation of the European Parliament and the Council Number 182/2011[24]. In relation to the adoption of delegated acts, closer treaty procedural regulations are lacking. The TFEU devotes most space to the forms of control exercised by the Council and the EP over adoption of delegated acts; this fact is stressed by the Commission itself. In its Communication[25], the Commission reserves for itself a large degree of autonomy over the procedure of adoption of delegated acts, subject to methodological and time limitations resulting from the legislative act. In the procedural aspect, the Commission highlights the importance of preparatory work and intends to carry out wide ranging consultations, use expert opinion and consultancy and carry out the research and analysis required in the subject areas covered by delegated acts. The Commission also highlights the need for an efficient exchange of information in relations with the Parliament and the Council.

If regulations concerning the process leading to the adoption of a delegated act are not extensive, **the control over the powers exercised**

COM(2009)673final,http://eur–lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0673:FIN:PL:DOC

23 *Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission*, OJ L 184 of 17 July 1999.

24 *Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers,* OJ L 55 of 28 February 2011.

25 *Communication from the Commission to the European Parliament and the Council – Implementation of Article 290 of the Treaty on the Functioning of the European Union*, COM(2009)673 final.

by the Commission has been regulated more precisely. At the Treaty level (Art. 290 TFEU) it is declared that the terms of bestowing upon the Commission the powers to issue delegated acts should be clearly defined in the legislative act. These may at the same time stipulate that the European Parliament and the Council may have the right to **revoke** the competences passed to the Commission. It is also possible to condition the delegated act entering into force on the lack of **objections** from the Parliament or the Council within the timescale stipulated in the legislative act. Recalling the powers should be seen as an instrument comprehensively depriving the Commission of the competences passed to it. As such, it should be applied in specific circumstances, that is in situations which undermine the basis of conveying the powers to issue delegated acts. An objection has a more concrete nature. It is an instrument directed against specific acts, without depriving the Commission of its overall right to issue such acts[26].

Even before the introduction of the Treaty of Lisbon the Commission proposed that basic (legislative) acts contain standard clauses concerning the details of transferral of, and control over, the exercising of power to issue delegated acts, to the Commission. These were to concern the scope of the Commission's delegated acts, any time limits on the powers to issue such acts (e.g. unlimited time) and specific conditions under which these powers may be recalled as well as for lodging objections to delegated acts (e.g. reciprocal information requirement in relations between the Council the EP and the Commission).

The proposals of the Commission, in principle, do find an application in the current practice of the Council and the EP. An example here may be the 19th May Directive 2010/30/EU of the European Parliament and the Council on the indication by labelling and standard product information of the consumption of energy and other resources by energy–related products, in particular Articles 10–13[27]. These contain detailed provisions concerning delegated acts (Art. 10) and the scope of the powers delegated to the Commission (Art. 11).

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26 *Ibid*

27 See: OJ L153, 18.06.2010, p. 1–12.

Precisely defined are also the conditions when the powers of the Commission may be revoked. This can be done through either the Council or the EP; the institution revoking the powers informs the second legislator and the Commission about actions undertaken in this intention even before the final decision is taken. Such information should define, for example, those powers which would be revoked together with justification for such a decision (Art. 12). The decision to revoke ends the delegation of the powers specified in it to the Commission, and is effective immediately, or from the later date indicated in the decision. It does not however alter the validity of delegated acts already in force.

Article 13 of the Directive defines the terms of an objection to delegated acts of the Commission. The European Parliament and the Council have two months to register their objections (this period may be extended by another two months). An objection must be justified. An objection lodged by one of the institutions means that the delegated act does not enter into force. However, if neither the Council nor the European Parliament submit an objection before the two month deadline, the delegated act may be implemented. A delegated act may also be implemented before the above deadline if the Council and the European Parliament inform the Commission that they do not intend to object.

4.2. Adoption of implementing acts

At the beginning it is worth noting that the implementation of EU law remains, in principle, within the competences of the Member States. Article 4 para. 3 TEU clearly indicates that it is the Member States who should adopt appropriate measures (general or specific) to ensure that obligations resulting from the Treaties or from acts of EU institutions are fulfilled. Article 291 para. 1 TFEU provides that *Member States shall adopt all measures of national law necessary to implement legally binding Union acts*. Execution (implementation) of EU law remains largely within the competences of the Member States[28].

28 K–D. Borchardt, *Die rechtlichen Grundlagen der Europäischen Union*, Heidelberg 2002, p. 170; A. Wyrozumska, *Państwa członkowskie a Unia Europejska* [in:] J. Barcz (ed.), *Prawo*

In this area actions undertaken by EU institutions have an exceptional character[29]. This solution is also reflected in the structure of executive powers belonging to EU institutions, discussed in Part 3.

In terms of procedures the consequence of the above principle is the fact that detailed provisions concerning executive procedures in relation to European Union law are contained in the internal legislation of the Member States. The Member States define appropriate bodies and procedures in this matter, naturally under obligation to ensure that Union law is implemented effectively.

Implementing acts at the European level, in accordance with Art. 291 para. 2 TFEU, are adopted in situations when *uniform conditions for implementing legally binding Union acts are needed*. In such cases legally binding acts (basic acts) of the Union *shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council*. The above clause does not, at the same time, envisage detail procedural provisions. It is worth stressing, however, that Art. 291 para. 3 TFEU places an obligation upon the European Parliament and the Council to establish *the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers*. In light of the above, two issues should be highlighted. Firstly, the Treaties do not envisage a single procedure for adoption of implementing acts, referring instead to secondary legislation (legislative regulations of the Council and the European Parliament). Secondly, procedural provisions (rules and regulations) in the above area should be centered on "mechanisms for control by Member States of the Commission's exercise of implementing powers". In other words, the procedural regulations of secondary law concerning the adoption of the Union's implementing acts should define the mechanism through which the Member States represented in the Council should control the exercise of the implementing powers by the Commission. They should be viewed from this perspective.

Unii Europejskiej …, *op. cit.*, p. 366. Similarly: C. Herma, *Reforma systemu aktów prawa pochodnego UE w Traktacie z Lizbony*, „Europejski Przegląd Sądowy", nr 5/2008 p. 30.

29 K–D. Borchardt, *op. cit.,* pp. 170–171.

This is a kind of continuation of the mechanisms which were functioning already within Community law. On the basis of Art. 202 TEC, the Council passed to the Commission the right to implement the norms established by it. The Council could, however, condition this right and also – in exceptional cases – reserve for itself the right to directly exercise the implementing powers. The terms and conditions of passing the implementing powers and of their exercise were to be defined by the Council upon application by the Commission and after consulting the European Parliament. The consequence was the adoption of the Decision of the Council Number 1999/468/EC[30] (**a comitology decision**). It introduced detailed procedures for adopting implementing acts by the Commission (the so called comitology procedures – management procedure, regulatory procedure, regulatory procedure with scrutiny, advisory procedure and procedure concerning protective measures). Their principal element was the participation of **committees** composed of representatives of Member States. The committees' influence over the adoption of an act by the Commission depended on the procedure. In the most advanced comitological procedures, a negative opinion of the committee on the draft act of the Commission could lead to implementing powers being moved to the Council level.

In the current legal order, the Member States' control over the Commission's implementing powers is regulated in the Regulation of the European Parliament and the Council Number 182/2011[31]. This seems to be the fundamental act defining the **procedure for issuing implementing** acts of the EU.

It must be noted that the adopting institutions must be willing to pass implementing powers to the Commission. Consequently the ability to issue and develop more detailed related conditions depend on the legislator and are defined in the basic act. The term 'basic acts' denotes legally binding EU acts.

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30 *Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission*, OJ L 184 of 17 July 1999.

31 *Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers,* OJ L 55 of 28 February 2011.

Regulation envisages **two procedures for adoption of implementing acts** by the Commission – an advisory procedure and an examination procedure. It also includes regulations concerning the adoption of implementing acts in exceptional cases, and implementing acts with immediate effect.

An examination procedure should be deployed in particular, for the adoption of: implementing acts which are general in scope and other implementing acts relating to:

- programmes with substantial implications;
- the common agricultural and common fisheries policies;
- the environment, security and safety, or protection of the health or safety, of humans, animals or plants;
- the common commercial policy;
- taxation.

In other cases **an advisory procedure** should be followed. In the above mentioned areas it can be employed only in duly justified cases.

General provisions concerning both of the above procedures assume that in the process of adopting implementing acts the Commission is assisted by a Committee composed of representatives of the Member States. The committee shall be chaired by a representative of the Commission, who shall not take part in the committee vote.

In principle, the president calls the session of the committee no earlier than 14 days from the date the draft implementing act was submitted. The committee issues an opinion on the subject matter of the implementing act by the deadline established by the president, depending on the urgency of the matter. In sufficiently justified cases an opinion of the committee can be sought through the written procedure. In this situation the president forwards the draft implementing act to members and, depending on the urgency of the matter, sets the deadline for responses. It is accepted that the members of the committee who have not objected to the draft before the deadline and who do not clearly abstain from voting on it, express a tacit agreement to the draft

implementing act. A written procedure returns no result if the president decides so, or upon an application by a member of the committee.

Through an **advisory procedure** the committee simply expresses an opinion on a draft implementing act. If an opinion is to be adopted through a vote, an ordinary majority of the committee members is required. The Commission then decides which draft of the act should be adopted. It takes into consideration – as much as possible – both the opinion of the committee and results of discussions within the committee.

The **examination procedure** is more complex. The Committee adopts an opinion through a majority of votes specified in Art. 16 paras. 4 & 5 TEU and in Art. 238 para. 3 TFEU. Depending on the content of the opinion, further possibilities of adopting an implementing act emerge.

If the Committee issues a positive opinion, the Commission adopts the draft implementing act.

If a negative opinion is delivered, the Commission is not able to adopt the draft act. In these circumstances, if the act is regarded as essential, the chair of the committee may, within two months from returning a negative opinion, present a new draft proposal to the same committee. The chair may also, within a month, submit a draft act for further discussion, this time to an appeal committee. The appeal committee returns an opinion through the majority of votes defined above. If the appeal committee returns a favourable opinion, the Commission adopts the proposed act. The Commission may also adopt the proposed act if no opinion is forthcoming. If, however, a negative opinion is returned, the Commission does not adopt the proposed implementing act.

If the committee fails to give an opinion, the Commission may adopt the proposed implementing act, except when the act concerns: taxation, financial services, the protection of the health or safety of humans, animals or plants, or definitive multilateral safeguard measures. If the opinion of the committee is lacking, the adoption of a proposed implementing act is also not possible if the basic act prevents it or if the

committee, through an ordinary majority of its members' votes, objects to it. If such act is regarded as essential, the chair has alternatives similar to those which can be employed should the committee return a negative opinion (changed draft or forwarding the original draft to an appeal committee for further debate).

In both of the above situations (a negative opinion or no opinion) – as an exception – an adoption of an implementing act by the Commission may be possible if adoption with immediate effect is necessary to avoid significant disturbance on the agricultural market, or a threat to EU financial interests. In such a situation the Commission immediately presents an adopted implementing act to the appeal committee. The act remains in force if the appeals committee returns a favourable opinion or if no opinion is returned. In the case of a negative opinion, the Commission immediately revokes the act.

The Regulation also envisages the possibility of adopting implementing acts, **applicable immediately**. Whether such solution is allowed is determined in the basic act – it may provide that, should a sufficiently justified sudden need arise ("duly justified imperative grounds of urgency"), Art. 8 of the Regulation would become applicable. Article 8 of the Regulation gives the Commission the power to adopt an implementing act which will be applicable immediately without having been submitted to the committee. Such act remains in force for the period of six months (unless the basic act provided otherwise). An act adopted in this way is submitted by the president to the committee for an opinion no later than 14 days from its adoption. If an examining procedure was applied, a negative opinion of the committee would oblige the Commission to revoke the implementing act immediately.

In addition, the Regulation envisages certain powers of control for the European Parliament and the Council. In a situation when the basic act has been adopted through ordinary legislative procedure (legislative act), both these institutions may at any time indicate to the Commission that in their opinion the draft implementing act exceeds implementing powers stipulated in the basic act. The Commission then revises the draft act taking into consideration the position of the Parliament and

the Council and informs both institutions whether it intends to uphold, amend or withdraw the draft implementing act.

4.3. Adoption of other legally binding acts

Another example of the work of European Union institutions is adoption of legally binding acts which do not take the form of legislative, delegated or implementing acts. The possibility of adopting such acts is envisaged, for example, in Articles 31, 66, 103, 106, 108, 203 of 215 TFEU. Acts adopted through the above provisions can be put in the following categories: acts adopted without the participation of the European Parliament, acts adopted by the Council with the EP's participation and acts of the Commission itself[32].

Adoption of legal acts by the **Council without the participation of the European Parliament** takes place according to a simple framework: the Council adopts the rules (Art. 203 TFEU), the measures (Art. 215 para. 1 TFEU) or defines Customs Tariff duties (Art. 31 TFEU) by itself. The most common requirement in these types of situation is a proposal from the Commission (Art. 31, 66 and 203 TFEU), or a joint proposal from the Commission and the High Representative of the Union for Foreign Affairs and Security Policy (Art. 215 para. 1 TFEU). The Treaty also stipulates the required majority of the votes in the Council. Acts adopted in this way have a legally binding nature. However, they are not contained in any formally defined category of European Union institutions' acts (legislative, delegated and implementing acts).

In the light of Art. 288 TFEU, acts of the Council are also legally binding, when they are adopted with the participation of the European Parliament but outside of the Treaty legislative procedures. An example here may be acts adopted under Art. 103 para. 1 TFEU. The mechanism envisaged in the above provision is that the Council may issue a regulation or a directive on the proposal of the Commission,

32 C.f. C. Herma, *op. cit.*, p. 27 and by the same author: *Likwidacja „struktury filarowej" Unii – podmiotowość prawno międzynarodowa UE oraz reforma systemu aktów prawa pierwotnego i wtórnego* [in:] J. Barcz (ed.) *Traktat z Lizbony. Główne reformy ustrojowe Unii Europejskiej*, Warszawa 2008, pp. 140–141, http://polskawue.gov.pl/files/Dokumenty/Publikacje_o_UE/Traktat_z_Lizbony.pdf

after consulting the EP. This framework is similar to the variant of the special legislative procedure which envisages the adoption of an act by the Council after obtaining an Opinion from the EP. The above provision does not refer to any legislative procedure, which excludes acts adopted in this way from the category of legislative acts. Notably, the Council in this case is acting under the provisions of the Treaty itself, therefore such an act does not have an implementing nature (such acts may be adopted by the Council in certain situations). Neither is it a delegated act, as these are adopted by the Commission on the basis specified in the TFEU.

The competences to issue legally binding acts also belong to the **Commission**. An example here is Art. 106 para. 3 TFEU, under which the Commission has the power to direct to Member States directives and decisions on the rules of competition (in this case relating to certain categories of enterprise). Moreover, under the above Article, the Commission may, in principle, adopt by itself. Developed procedural provisions are therefore lacking. It is worth indicating, however, that in this situation we find ourselves in an area which cannot be defined through legislation nor through implementing actions. An act has not got a legislative nature as it has been adopted outside of legislative procedures. Neither has it a delegated character, even though the Commission is a body competent to issue such acts. The actions of the Commission here result from the Treaty itself, not from a legislative act. Lastly, an act adopted under the above provisions is not an implementing act – even though these are adopted by the Commission, this happens on the basis of legally binding acts rather than the Treaty itself.

5. The procedure for concluding international agreements by the European Union

Separate provisions are envisaged for the process of the Union concluding international agreements with third countries or international organisations. Its main elements are regulated in Art. 218 TFEU.

A special role in the procedure of concluding international agreements has been reserved for the Council. The Council *shall authorise the opening of negotiations, adopt negotiating directives, authorise the signing of agreements and conclude them*. The adopted solution means that the process of concluding an agreement by the Union is based on a number of consecutive decisions by the Council, marking different stages in the procedure.

The decision authorising the opening of negotiations is taken by the Council on the basis of recommendations by the Commission or – where the envisaged agreement relates exclusively or principally to the common foreign and security policy – by the High Representative of the Union for Foreign Affairs and Security Policy. The decision authorising the opening of negotiations is at the same time the decision on the basis of which, depending on the subject matter of the proposed agreement, a negotiator or the head of a team of negotiators is nominated.

The Council directs its guidelines to the negotiator. It can also appoint a committee to be consulted in the course of the negotiations. Then, on the negotiator's proposal, the Council makes a decision authorising the signing of the agreement or – in appropriate cases – to apply the agreement provisionally before it enters into force.

The next step is **the decision concerning the conclusion of the agreement**. The decision is adopted by the Council, again on the negotiator's proposals. Decisions in this matter are made after consulting the European Parliament. At the same time the Council may, depending on the urgency of the matter, set the deadline for obtaining an opinion of the EP. In the absence of an Opinion within that time–limit, the Council may act. Art. 218 para. 6 indicates cases in which the decision of the Council about concluding an agreement is taken after obtaining the EP's consent. Such situations concern

association agreements, agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms, agreements establishing a specific institutional framework by organising cooperation procedures, agreements with important budgetary implications for the Union and agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required. In urgent cases the Council and the EP may set the deadline for giving the consent.

It is worth adding that during the entire procedure the Council – in principle – decides through a **qualified majority**. *However, it shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of a Union act*. **Unanimity** is also required in relation to association agreements and agreements indicated in Art. 212 TFEU (agreements concerning economic, financial and technical cooperation measures, including assistance, in particular financial assistance, with third party countries other than developing countries applying for membership). The Council shall also act unanimously for the agreement on accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms. In this case there is an additional requirement that the decision on concluding this sort of agreement is approved by the Member States.

Some differences occur in the procedure for concluding international agreements on **common commercial policy** (Art. 207 TFEU). The core of the provisions of Art. 218 is preserved. Notably, appropriate recommendations are submitted to the Council by the Commission and it is the Commission who is authorised to commence necessary negotiations. At the same time both of the above institutions are responsible for ensuring that agreements negotiated are compatible with the Union's internal policies and regulations.

Negotiations are conducted by the Commission supported by a committee appointed by the Council. The Council may also issue guidelines for the negotiations to the Commission. Crucially, the Commission submits to the EP a report on the negotiations.

Decisions on negotiating and concluding agreements in the fields discussed above are made by a qualified majority in the Council. However, in relation to agreements over of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, the Council shall act unanimously, where such agreements include provisions for which unanimity is required for the adoption of internal rules. Unanimity is also required in relation to negotiations and conclusion of agreements concerning exchange of cultural services, if such agreements could pose a threat to cultural and linguistic diversity of the Union; ditto for agreements concerning the exchange of social, education and health services, if such agreements could compromise the national service delivery, or could be detrimental to the statutory duty of the Member States to provide such services.

Summing up, it should be highlighted that the Member States, the EP, the Council and the Commission have the right to obtain an opinion of the Court of Justice on the compatibility of the proposed international agreement with the Treaties. Should a negative opinion be returned by the Court, the agreement may not come into force. A solution can be found in either revising the agreement, or introducing appropriate amendments into the Treaties.

6. The decision making process in area of the EU common foreign and security policy

Common foreign and security policy (CFSP) is a **special form of cooperation** within the EU. It is characterised by a number of idiosyncrasies, including a unique list of legal acts and specific procedural solutions.

We should recall that CFSP is realised through decisions defining the actions to be undertaken by the EU, positions to be taken by the Union, and arrangements for the implementation of the decisions concerning these actions or positions. Adoption of legislative acts is not included as part of CFSP.

Decisions on common foreign and security policy are made **unanimously** by the European Council and the Council; this applies in principle throughout CFSP. (Art. 31 para. 1 TEU). Allowable exceptions regarding voting in the Council are defined in Art. 31 para. 2 TUE. The Council decides through a qualified majority when adopting a decision concerning action or position of the Union on the basis of the Decision of the European Council concerning the strategic interests and objectives of the EU, adopted under Art. 22 para. 1 TEU. The Council also decides through a qualified majority when adopting a decision defining actions or the position of the Union according to the proposal of the High Representative of the Union for Foreign Affairs and Security Policy, submitted as the result of a specific request from the European Council made of its own initiative, or on the initiative of the High Representative. Decisions concerning the implementation of a Decision on actions or the position of the Union and the nomination of the High Representative in accordance with Article 33 TEU are also made through a qualified majority.

Broadening the scope for decision making through a qualified majority in the Council may be accomplished by the European Council. Based on its unanimous decision the Council will be able to decide through a qualified majority in instances other than those specified above (Art. 31 para. 3 TEU). Procedural issues are resolved through a majority of Council members' votes (Art. 31 para. 5 TEU). At the same time, the indicated exceptions to the principle of unanimity in decision making may not include decisions on matter having military or defence implications (Art. 31 para. 4 TEU).

The common foreign and security policy is a specific area of cooperation. It includes issues of foreign and defence policy traditionally linked to the sovereignty of individual states; they are factors defining the national interests of separate Member States. It is therefore understandable that decision making functions are entrusted to those institutions which most fully represent the Member States. It is also understandable that the principle of unanimous decision–making has also been maintained. It is worth pointing out, however, that the above principles are accompanied by procedures securing Member States' interests. According to Art. 31 para. 1 TEU, there is

an option of abstaining from voting. At the same time each member of the Council who exercises this right may make **a formal declaration** and will therefore be released from the obligation to apply the adopted decision; they must however accept that the decision will be formally binding for the Union. The country also refrains – in the spirit of mutual solidarity – from any actions which may contravene or hamper any actions of the Union resulting from the decision. If members of the Council which have made a declaration accompanying abstaining from voting represent at least a third of the Member States, and their joint population equals to at least one third of the population of the Union – the decision may not be adopted.

Moreover, a vote in the Council does not occur if a member of the Council declares that, for vital and stated reasons of national policy, it intends to oppose the adoption of a decision to be taken by qualified majority. The role of the High Representative is such a case is to look, together with the state concerned, for a solution which would suit this state. If such a solution cannot be found the Council has the right, deciding through a qualified majority, to apply to have the matter submitted to the European Council in order to have a decision adopted unanimously.

It should also be highlighted that the role of the European Parliament and the Commission – institutions independent of the Member States – within the decision making mechanisms of the CFSP is reduced mainly to consultative functions and, to a lesser extent, control and support functions. For example, the Decision of the Council on the organisation and functioning of the European External Action Service (EEAS) – a service supporting the High Representative for Foreign Affairs and Security Policy – is adopted after consulting the European Parliament. Similarly, when defining special procedures for quick access to budgetary resources of the Union ringfenced for immediate financing of initiatives within the CFSP, the Council decides after consulting with the Parliament. The High Representative for Foreign Affairs and Security Policy has a duty to regularly consult with the EP (Art. 36 TEU), and to inform the EP on development of the common foreign policy and security policy. He also ensures that the views of the EP have been taken into consideration. The European

Parliament itself may direct questions to the Council and to the High Representative and formulate recommendations for them. Twice per year it also holds a debate over the progress of the CFSP, including the common security and defence policy (Art. 36 TEU). The influence of the Commission on decisions made as part of the CFSP becomes apparent in relation, for example, to the above mentioned Decision of the Council on the organisation and functioning of EEAS. This decision is made after the consent of the Commission has been obtained (Art. 27 para. 3 TEU). The Commission is also charged with supporting the High Representative of the EU for Foreign Affairs and Security Policy in formulating questions for the Council and submitting proposals and recommendations (Art. 30 para. 1 TEU). It is worth stressing here that the High Representative is one of the vice Presidents of the Commission. His/her role is the implementation of the CFSP. Implementation of the CFSP happens to a certain extent on the level of the Commission, but it is worth remembering that the High Representative also heads the Foreign Affairs Council; therefore he also acts at the intergovernmental level.

7. Signing, publication and entry into force of European Union acts

We shall end the discussion of the decision making processes within the European Union with an explanation of the issues of signing, publication and implementation of European Union acts. In principle these issues are regulated in Art. 297 TFEU.

Legislative acts adopted under ordinary legislative procedure are signed by the Presidents of the European Parliament and the Council, being the institutions jointly adopting these acts. If the special legislative procedure is applied, the act is signed by the president of the institution adopting the act; depending on the case, this will be the President of the Parliament or the Council.

Legislative acts are published in the *Official Journal of the European Union*. The Journal is the publication of the European Union, issued in all official languages of the EU, which constitutes a collection

of EU legislation. The journal includes two series. The L series is the EU legislation (acts of secondary EU law), the C series contains information and announcements (e.g. the judgements of the Court of Justice of the European Union or minutes of the European Parliament sessions). The date that an act is published in the Official Journal may be important. Legislative acts enter into force on the date specified in them or – if no date is given – on the 20th day after publication.

With non–legislative acts in the form of regulations, directives or decisions which do not indicate their recipient, these are signed by the heads of the institutions which had adopted them. At the same time regulations and directives addressed to all Member States and decisions which do not indicate to whom they are addressed are published in the Official Journal of the EU. They enter into force on the date specified or, if no date is indicated, on the 20th day after publication. Other directives (that is, those not addressed to all Member States) and decisions indicating recipients are notified to the recipients and are effective with that notification.

Part 5

EUROPEAN UNION LAW VERSUS MEMBER STATES LAW

In Part 1 the supranational nature of the European Union as an international organisation was outlined and the characteristics of this type of organisation were outlined. In the case of the European Union, these characteristics include the unique nature of its adopted laws. Legally binding acts of the Union are adopted by institutions largely independent of the Member States representing a variety of interests; in most cases legislation is adopted through a qualified majority, with acts affecting a wide subject area. The institutional structure of the Union, the sources of Union law and the procedure for its adoption (and revision) and the Union's competences have been discussed in the earlier chapters. The special nature of European Union law will be highlighted here.

Among the characteristics defining the Union's legal order are its nature in comparison with classic international law and the issue of relations between European Union law and domestic laws of the Member States.

As the European Union is now an international organisation, it is impossible to analyse specific aspects of law created by the Union separately from the basic assumptions of international law which determine how this form of international cooperation should function. In the context of the relationship between the Union legal order and national laws the main principles of applying EU law should be indicated. The fundamental principles are those developed through the CJEU decisions: the primacy (priority) of EU law over internal laws of the Member States and the direct effect.

In the first instance the nature of European Union law will be discussed in context of international public law, followed by the principle of primacy. Its origins and current contents will be described in relation to sources of primary and secondary Union legislation. The position of the Member States in relation to this principle will also be explained. In the latter part of the chapter the issue of the direct effect of EU law will be taken up. The differences between the direct effect and direct binding force and application of EU law will be indicated. Two aspects of the principle of the direct effect will be highlighted – its vertical and horizontal dimension. Finally, the direct effect principle will be discussed in relation to separate sources of European Union law.

1. European Union law as the 'new legal order of international law'

Before discussing the **principles of primacy and direct effect**, it is worth making a few general points which will allow us to appreciate the specifics of European Union law not only in relation to national laws but also against the background of international law. This perspective is vital in respect of the last reform of the European Union system and its nature as an international organisation.

The European Union in its present shape and form replaced the European Community and is its legal successor. In Part 1 it was argued that the Union is an international organisation – an integral structure whose elements match the definition of an international organisation (see Part 1). The definition of international organisation belongs to international public law. To recap, an international organization is a form of cooperation between states. International law is a sum total of legal provisions governing relations between sovereign states, and between states and others subject to this law, and also between those other entities[1]. Those other entities are first and foremost international organisations, but also mini–states or freedom fighters.

1 W. Góralczyk, S. Sawicki, *Prawo międzynarodowe publiczne w zarysie*, Warszawa 2004, p. 16.

International organisations are subject to international law – they are established through the will of the states expressed in an international agreement, in order to pursue certain common objectives; they possess their own bodies and a defined range of competences. This means that international organisations may have rights and responsibilities resulting directly from international law. Their subject status has a secondary nature in relation to the will of the states forming international organisations. Consequently, it is the will of the states that determines the capacity of an organisation to use the privileges of its status as a subject of international law. Traditionally these include: the capacity to contract international agreements, using diplomatic privileges and immunities, legislative powers, the capacity to bear international responsibility and the capacity to submit international demands.

International organisations as subjects of international law may carry out a number of functions classified in different ways. These may be coordinating, operating or control functions. From our point of view the most significant are the regulatory functions of international organisations. Performing regulatory functions allows an organization to establish certain standards – also legal standards – defining the actions and/or functioning of certain categories of subjects of international law. The above function is usually exercised through adoption of bills of varied nature. These bills may take the form of both binding and non–binding acts. These may also be bills regulating internal functions (*pro foro interno*) as well as Decisions addressed to Member States (*pro foro externo*) but regulating their actions outside the organisation[2]. Clearly in the context of further discussion on the European Union and its legislation the most important are bills in the form of binding Decisions directed *pro foro externo*. These would have a standard nature – these are bills addressed to the Member States of an organisation, which determine the scope of their responsibilities (or rights). Therefore

2 It should also be indicated that within the framework of some organisations establishment of standards governing the actions of member states happens through development of international agreements proposals, which are then adopted by the organisations' member states. In these cases the international organisation becomes a kind of forum for the preparation of appropriate international agreements. Their possible adoption and ratification is usually subject to the ordinary procedure for concluding international agreements.

Decisions made at the level of an organisation are binding for its Member States and may place certain duties upon them. It is worth highlighting, however, that, first of all, in both cases the capacity of an organisation to make binding decisions should strictly reflect the range of competences given to the same organisation by its Member States and – secondly – the organisation's decisions establish duties between the Member States themselves. In other words, the Member States utilise the forum of the organisation they themselves have established and accept certain duties aimed at progressing common objectives.

If the same points are applied to the European Union, it is possible to discern specific aspects of its law against the canvas of classic international law, especially in those aspects which apply to the functioning of international organisations.

Whereas, just like traditional international organisations – the Union was created on the basis of an international agreement in order to implement certain common objectives, it possesses its own bodies (institutions) and has a range of competences determined by the Treaties, its legislation does not lend itself to the categories known to classic international law. It displays certain unique characteristics which allow the Union's legal order to be called autonomous, which is a new quality in international law. Its unique nature becomes apparent both in relation to the range of entities subject to EU law and in relations along the axis of Union law – internal laws of the Member States.

The unique nature of Union law (and earlier Community law) has been stressed in the Court's judgements. It is worth briefly considering two verdicts of fundamental importance for the issues discussed here.

Already in 1963, in the judgement in the famous case No. 26/62 (Van Gend en Loos)[3], the Court of Justice of the European Communities (Today: the Court of Justice of the European Union) indicated certain characteristics of the Community (the European Economic Community, the predecessor of today's Union) and the legislation adopted within its framework. The matter concerned the actions of The Netherlands in

3 See the judgement of the Court of Justice of 5th February 1963 in case 26/62 (*NV Algemene Transport– en Expeditie Onderneming van Gend & Loos v. Nederlandse administratie der belastingen*), ECR 1963, p. 00001.

relation to duties imposed upon goods imported from other countries which were, however, EEC members. The complainant maintained that the classification of goods adopted by The Netherlands and its consequences in terms of duties were contrary to the contemporary Art. 12 TEC (now Art. 30 TFEU). The above provision prohibited the introduction of duties and equivalent charges between the Member States of the Community. Because the decisions of the Dutch authorities were being questioned by a private business, a question arose whether this type of subject (an individual) may relay on treaty provisions against a Member State in a national court of law. The detailed findings of the Court concerning the direct effect of the Treaty will be discussed later. Here it is worth noting that, presented with this case, the Court made some vital points relating to the nature of the Community and its law.

First of all, the Court noted **the nature of the Treaties establishing the Community** (it is worth bearing in mind that the Union, as we know it today, is its legal successor; it has assumed the distinguishing features of the Communities and functions on the basis of the modified Treaties which originally formed the basis for the functioning of the Communities). According to the Court's position, the Treaty establishing the EEC is more than an agreement which merely creates mutual obligations between contracting states (which would be characteristic for classic international law). *The Treaty refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens. Furthermore, it must be noted that the nationals of the states brought together in the Community are called upon to cooperate in the functioning of this Community through the intermediary of the European Parliament and the Economic and Social Committee*. Notably, according to the position of the Court, the Treaties upon which the Union (and earlier the Communities) is founded concern not solely the countries (as parties) but also the citizens of the Member States. Therefore, in the Court's opinion, the states have acknowledged that the community law has an authority which can be invoked by their nationals before national courts and tribunals. The consequence of the

above assumption is an assertion that *the Community* (today: the Union) *constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but also intended to confer upon them rights which become part of their legal heritage*. At the same times these rights *arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and the institutions of the Community*. Unlike in classic international law the substance of Union law is the fact that it does not define the legal situation of the States only, but also includes individuals (private subjects) and may apply to their rights and responsibilities.

The line of argument deployed in the Van Gend decision was to be continued. In the judgement concerning Costa v. ENEL (6/64)[4] the Court found: *By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.* Consequently it can be argued that **Union law becomes part of the legal systems of the Member States**; when absorbed into those systems it produces certain consequences both for these states and for individuals. The second part of the decision reads: *By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the Community, the Member States have limited their sovereign rights and have thus created a body of law which binds both their nationals and themselves*. The Court also decreed that the introduction of Community legislation into the legal systems of the Member States – and speaking more generally, the letter and the

4 See the judgement of the Court of Justice of 15th July 1964 in case 6/64 (*Flaminio Costa v ENEL*), ECR 1964, p. 00585.

spirit of the Treaties – has deprived those countries of the opportunity to give priority to their own legal acts over the legal system of the Community.

The above judgements would indicate that, although the Court has not denied the Community (today: the Union) a legal subject status of an international organisation, it noted both its unique nature and that of its legislation. This **unique nature of the Union** manifests itself both in limiting the competences of sovereign Member States in its favour and in the range of those subject to its legislation and the way that its law interacts with laws of the Member States. To simplify – Member States have passed a range of their competences to the Union. In those subject areas the Union takes over the sovereign powers of the states. At the same time, it has the power to regulate certain areas through its own legislation. Its legislation becomes part of national legal systems and may determine the circumstances of not only the Member States but also of individuals (private subjects). At the same time effective and uniform application of Union law assumes its primacy over national laws and the possibility of its standards being invoked both by countries and by private subjects.

The above decisions highlight the nature of European Union law as an autonomous legal system. The Court clearly indicated what constitutes the specific nature of the Union (Community) as an international organisation. It also highlighted the unique nature of the sources of Union law, markedly different to the legislative solutions of classic international law.

The decisions quoted also indicate how important for the specific nature of the Union legal system are the principles of primacy and direct effect cited in the introduction to this chapter. To a large extent these reflect the unique nature of Union law. These will be discussed in the following sections.

2. The principle of the primacy of European Union law

Recognition of the fact that European Union law permeates the Member States' legal systems and becomes part of them means that the issue of the relationship between the legal provisions in both these systems is of primary importance. Circumstances may occur when both the articles of national law and the conflicting provisions of Union law become applicable. In such cases the conflict is resolved by determining which provisions should be applied in a given matter. In the light of points made in the previous section, solving this particular issue may have huge significance, also from an individual's perspective.

The necessity of a clear definition of the relationship between Union law (and Community law previously) had been noted by the Court of Justice of the European Union. Its decisions have supported the principle of the primacy (priority) of European Union law over national laws. How it was shaped in the Union legislation and the position of national judiciary in relation to this principle will be discussed below.

Although **the primacy principle** is at the very core of the Union legal system, it does not find a direct expression in the Treaties. Presently the principle is referred to in the Declaration No. 17, appended to the Treaty of Lisbon (*Declaration concerning primacy*). It indicates that, in accordance with the case–law established by the Court of Justice of the European Union, the Treaties and legislation adopted by the Union on their basis take precedence over national law on conditions established in the Court decisions. The Declaration quotes the opinion of the Council's Legal Services in this matter, which seems also worth quoting here: *It results from the case–law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (Costa/ENEL, 15 July 1964, Case 6/641 (1)) there was no mention of primacy in the treaty. This is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case–law of the Court of Justice*. The Opinion concerns the legal regime of the Community. However, considering the nature of the

reform of the Union carried out on the basis of the Treaty of Lisbon, the points contained in the Opinion should be applied to the present legal system of the Union, together with Court decisions made on the grounds of Community law.

As the Court decisions are the main basis for the discussed principle, some key judgements ought to be presented here, together with defining the key assumptions of the principle of the primacy of EU law.

The primacy principle was expressed for the first time in the decision in Case No. 6/64 Costa v. ENEL (cited above). This matter brought up the issue of the discrepancy between Italian national law and the provisions of the Treaty establishing the European Economic Community and the question over which provisions should be applied.

The Court's findings gave unequivocal priority to the provisions of Community (now Union) law. The Court stressed that *the integration into the laws of each member state of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the states, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity (Community legal system). Such a measure cannot therefore be inconsistent with that legal system. The executive force of Community law cannot vary from state to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty set out in articles 5 (2)* (now replaced by Art. 4 para. 3 TEU) *and giving rise to the discrimination prohibited by Article 7* (currently Art. 18 TFEU).

In the latter part of the decision the Court stressed that the precedence of Community law is confirmed by article 189 (currently art. 288 TFEU), whereby a regulation *shall be binding* and *directly applicable in all Member States*. The Court was of the opinion that this provision *would be quite meaningless if a state could unilaterally nullify its effects by means of a legislative measure which could prevail over Community law*. These findings lead to the conclusion *that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by*

domestic legal provisions (…) without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.

The unique character of Community (and today: Union) law together with the advantage of priority was highlighted as follows: *The transfer by the states from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.*

Thus proclaimed, the principle of primacy of Union law over national law was further developed and refined by the Court. Two questions are worth highlighting at this point. In the first instance, it was necessary to clarify whether, in case of conflict between the provisions of national law and the provisions of EU law, the Union legislation automatically overrides national provisions, or whether their application is dependent upon national provisions having been annuled. Secondly, an issue arose as to whether Union law takes priority over all provisions of national laws, including the Constitution.

The first of the above issues was addressed by CJEU in the judgement in Case No. 106/77 (Simmenthal)[5]. The Court declared that *every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule*. National courts are therefore obliged to apply European provisions and disregard any national legislation which remains in conflict with the appropriate provisions of EU law. This led to the development of the position where the primacy of Union law is not seen as the primacy of enforcement, but the **primacy of application**. Consequently, where the Union provision is in conflict with national legislation, bodies applying the law in Member States apply Union provisions without waiting for the annulment of national legislation

5 See the judgement of the Court of Justice of 9th March 1978 in case 106/77 (*Amministrazione delle Finanze dello Stato v Simmenthal SpA.*), ECR 1978, p. 00629.

through appropriate procedures. The incompatibility of national law with Union law in itself does not result in automatic annulment or reversal of national legal provisions. It should be, however, accepted that according to the loyalty principle (Art. 4 para. 3 TEU), the Member States should refrain from retaining in their legal systems provisions which are incompatible with Union law[6].

The question of the extent of the primacy of European Union law was particularly controversial. The key issue was the relationship between the legal provisions of the Union and provisions of the Constitutions of the Member States. This question was addressed by the Court in its decision in Case No. 11/70 (Internationale Handelsgesellschaft)[7] stating that the validity of measures adopted by institutions of the Community (today the Union) can only be judged in the light of Community law. Later in its verdict the Court highlighted the fact that *the validity of a Community measure or its effect within a member state cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or principles of its constitutional structure*. Therefore CJUE has supported **the primacy** of Union law even **over constitutional provisions of the Member States**.

This position of the Court has not been fully accepted by national constitutional tribunals. A review of stances taken by separate constitutional tribunals is not possible here. Notably, the Polish Constitutional Tribunal stresses the supremacy of the Polish Constitution. Should Polish law become constitutionally incompatible with Union law, the Tribunal indicated the legislator three possible solutions: amending the Constitution, achieving a change to Union law or Poland's withdrawal from the Union. The Polish Constitutional

6 Cf. Art. 4 par. 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 jeopardise the attainment of the Union's objectives*).

7 See the judgement of the Court of Justice of 17th December 1978 in case 11/70 (*Internationale Handelsgesellschaft mbH v Einfuhr– und Vorratsstelle für Getreide und Futtermittel*), ECR 1970, p. 01125.

Tribunal addressed the issue even before the Treaty of Lisbon was adopted and entered into force. The possibility of withdrawing from the Union was then in some doubt. In the current legal system it is a realistic possibility (Art. 50 TEU)[8].

An evolving position on the question in hand has been presented by the German Federal Constitutional Tribunal. In the seventies it maintained (in the famous decision Solange I) that it makes allowances for the control over the legality of Acts of the Communities in terms of their compatibility with the fundamental rights guaranteed in the German Constitution (*Grundgesetz*) until the Community develops its own provisions for protection of those laws. In the 1980s (1986) it decided in turn that the Community provisions guaranteeing the fundamental rights are sufficient from the point of view of the provisions of the German Constitution. It decreed then that, while these provisions are sustained, it is going to recognize the primacy of the application of Community law.

3. The direct effect of European Union law

In addition to the principle of the primacy of European Union law, the other principle which characterises its legal order is the principle of its direct effect. Its main elements will be discussed below.

3.1. The definition of direct effect. The direct effect and its horizontal and vertical application

The judgements of the Court quoted above repeatedly maintained that EU law also applies to individuals. It has also been indicated that EU legal provisions have **a direct effect**, which allows private subjects to assert their rights relying directly on EU law in national courts. The Treaties, court decisions and academic sources contain references to the **direct applicability** of EU law and its **direct binding force** as well as to its direct effect. These are closely related and therefore the relationship between the above terms requires an explanation.

8 See: Judgement of 11th May 2005, K 18/04 and the judgement of 27th April 2005, P 1/05.

The direct binding force of European Union law means that European law becomes part of legal systems of the Member States without the need of further enactment. As such, European Union law is binding also on the national level. This aspect has been highlighted by the Court in the decisions quoted above. The bodies which apply the law in the Member States are bound in their actions also by the law enacted on the European Union level – this law is the basis for their actions and decisions.

The direct applicability of Union law means that the provisions of this law should be applied by the courts and other relevant bodies in the Member States. Notably, the direct applicability is strictly related to its direct binding force (effectiveness). The principle of the direct applicability of EU law has not been fully expressed in the Treaty provisions. It is worth highlighting, however, that in relation to the regulations (secondary legal acts), the TFEU clearly states that these should be directly applicable in all Member States (Art. 288 TFEU). Because Acts of European Union law become part of national legal systems (and are enforceable as part of their framework), national bodies are bound by the provisions of Union law and are obliged to apply these directly in disputes (cases) presented to them.

The direct effect of European Union law is closely related to the above qualities of EU law. This principle means that Union law gives private subjects (legal entities and individuals) certain rights and that those subjects can directly invoke the Union provisions before the national bodies. Through this legal entities and individuals may assert their guaranteed rights resulting from European legislation[9]. In a certain sense the direct applicability and direct effect of European Union law are two perspectives on the same principle – in the first instance this would be the Member States' perspectives and in the second that of private subjects.

Let it be stressed once again that the above characteristics of Union law are closely related. In short, it is possible to argue that the provisions of Union law are directly enforceable in the Member States, without

9 Cf. J. Barcz (ed.), *Ustrój Unii Europejskiej*, Warszawa 2011, p. III–147–148.

the need for further enactment by those Member States (exceptions will be discussed below). As such they must be applied by state bodies and private individuals (subjects) may invoke those provisions directly to those institutions.

Of course, a Union legal provision must fulfil certain conditions in order to have a direct effect. Given the diverse nature of sources of European Union law it is necessary to examine the direct effect in relation to primary law and the separate acts of secondary legislation. This analysis will be undertaken in one of the following sections.

It is also worth indicating here that the direct effect of European Union law may be considered in its **horizontal and vertical aspect**. The difference lies in the subject in relation to which an individual invokes the Union legal provisions. In a traditional vertical setup an individual invokes Union law against the state. This relationship is characterised by the individual being subordinate to the state. The horizontal dimension concerns the possibility of invoking Union law directly against other private subjects – therefore this is a relationship between equals. Depending on the source of law, there are different possibilities of relaying on EU law against another individual. This issue will be discussed in the following sections in relation to the separate sources of European Union law.

3.2. The direct effect of Treaty provisions

The Treaties forming the base of the European Union are of course international agreements. These traditionally are concluded by states (and possibly other entities subject to international law) and it is between those that certain obligations arise. In this light the direct effect of Treaty provisions – the fact that these may be relied on by individuals – was indeed controversial.

This issue was addressed by the Court of Justice of the European Union in the decision concerning the Van Gend en Loos case. We may recall that an issue arose in this case concerning an alteration to the classification of customs and excise duties by the Dutch authorities which lead to – contrary to the Treaties – an increase in the duties on

certain goods. The Netherland's actions were questioned by a private subject invoking the Treaty provisions (then Art. 12 TEEC).

The Court, stressing the special nature of Community (Union) law, indicated that Member States gave this legal system its binding nature which may be invoked by individuals from those countries before their courts. This is because the Community forms a new legal order according to international law, for whose benefit the states limited their sovereign rights and whose provisions are applicable not only to the Member States, but also to individuals in those Member States.

At the same time the statement that Community law, independent of the legislation in the Member States, not only places obligations upon individuals but also may be a source of rights forming part of the legal status of those individuals, proves vital for the discussed matter. Notably, the possibility of individuals invoking Treaty provisions is strictly related to the unique nature of EU law, encompassing not only the Member States but also legal subjects (physical and legal persons). These subjects may derive both obligations and rights from Union law, therefore the law may widely govern the legal standing of individuals. It is also worth noting that the rights do not have to be conferred upon individuals directly in the Treaty – they may derive from obligations imposed by the Treaty upon individuals and the Member States as well as the Community (and today Union) institutions.

In the decision discussed above the Court also clarified the conditions concerning the Treaty provisions which have to be met in order for these provisions to have the direct effect. This was achieved on the basis of the contemporary Art. 12 TEEC (currently Art. 30 TFEU – *Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature*). According to the Court this provision could have a direct effect because it contains a clear and unconditional prohibition of certain actions (a negative obligation) which is not dependent on any caveats which could make its application conditional. In this light the **pre–requisites of the direct effect** include: **clarity of the provision, a certain degree of precision, its unconditional character and its non–dependent** (unconditional)

nature (completeness – a characteristic which means that no other action is required for the provision to be effective, by either the Member States or the Union institutions)

The nature of the prohibition contained in Art. 12 TEEC causes the prohibition to have a direct effect in the relationship between a Member State and a citizen. To simplify, an individual may derive certain rights from an obligation imposed by the Treaty upon the Member State (prohibition of certain actions) and rely directly upon appropriate Treaty provisions.

The above findings of the Court would allow for the establishment of the direct effect of the Treaty provisions. It is worth highlighting, however, that the facts of the Van Gend en Loos case upon which the Court's argument was based concerned the relationship between the state and the individual, and therefore the vertical alignment. It has already been indicated that the direct effect of European Union law can also be considered in a horizontal alignment, meaning a relationship between equal subjects not defined by a subordinate relationship.

This issue has been noted by the Court and was clarified in the judgement concerning the Defrenne case (43/75)[10]. This case concerned a dispute between an air hostess Gabrielle Defrenne and Sabena airline, her employer. The complainant accused the employer of discriminatory treatment (in the specified period of time G. Defrenne was to receive a lower salary than male colleagues in the same post)[11] contrary to the Treaty (then Art. 119 TEEC, currently Art. 157 para. 1 TFEU – *Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied*). The question arose whether an individual may rely directly on the provisions of the Treaty against a subject other than the state (a private subject). In other words the issue concerned the direct effect of Treaty provisions in a horizontal alignment.

10 See the judgement of the Court of Justice of 8th April 1976 in case 43/75 (*Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*), ECR 1976, p. 00455.

11 See: M. Zdanowicz (ed.), *Wybór orzeczeń Trybunału Sprawiedliwości Wspólnot Europejskich*, Białystok 2007, p. 47.

In this case the Court presented the following argument. First of all the Court found that the provision contained in Art 119 TEEC unquestionably meets the requirements to have a direct effect. Next, the Court found that the fact that the above provisions are addressed to the Member States does not preclude individuals from deriving from them certain rights, when it is in their interest that the state should carry out the duties imposed upon it by the same provisions. Article 119 TEEC imposes upon the Member States the obligation to achieve a specific result in terms of equality of men and women. At the same time, due to the obligatory nature of Art. 119 TEEC, the prohibition of discrimination it includes is applicable not only to the actions of the public sector, but also encompasses any collective agreements concerning paid employment as well as agreements between individuals (private subjects). Therefore the principle of pay equality envisaged in Art. 119 TEEC could be relied upon in national courts; the courts, in turn, are obliged to ensure the protection of rights that an individual may derive from this principle. Therefore the Court also allowed a horizontal direct effect of Treaty provisions.

3.3. The direct effect of secondary acts of the Union

The issue of the direct effect of the Treaties forming the foundation of the Union is a vital one. These Treaties are international agreements which, as sources of law, create obligations between parties to the agreement – which tend to be countries. Equally important is establishing whether secondary legislation of the European Union also has the direct effect, and, if so, on what terms. This issue will be discussed in relation to the binding acts of the European Union: regulations, directives and decisions.

3.3.1. Regulations

To recap, the regulations of the European Union are legal acts which, due to their specific nature, are instruments of unifying the law. They become part of the legal system of the Member States and, according to the TFEU, are applied directly in those countries. These characteristics mean that regulations are exempt from implementation

procedures – they enter into force and are directly applied in the Member States. These states must not 'adapt' regulations to the requirements of national laws unless the regulation itself specifies such a possibility. The Court confirmed this in its judgment in the case 34/73 (Fratelli Variola) stating that once the regulations are adopted, an application in favour or against those subject to their provisions is independent of whatever measures which incorporate them into national law[12]. Situations where the regulation itself requires national authorities to take steps to enable their proper application do occur. An example of this may be the Regulation of the European Parliament and the Council No 1082/2006 of 5th July 2006 concerning the European Grouping for Territorial Cooperation (EGTC)[13], discussed in Part 3.

Considering the nature of regulations, the fact that these should have a direct effect seems entirely appropriate, i.e. that individuals (private subjects) may rely directly on their provisions in order to protect the rights conferred upon them.

The principle of the direct effect has been confirmed by the Court in Case No. 93/71 (Orsolina Leonesio)[14]. The heart of the matter was the suspension of payments by the Italian authorities for the slaughter of milk cows to which certain categories of farmers were entitled. The suspension was based upon the argument that the payments were supposed to be dependent on the legislator adopting necessary measures to ensure the financial provisions to achieve this. The Court declared that the nature of the regulation as a general act applied directly in all Member States speaks for its direct effect, which means that it may confer singular rights upon individuals which national courts are obliged to protect. The Court also decreed that the Community regulations (and today those of the Union) apply with equal force to citizens in all Member States and become part of the national legal system which allows them to have a direct effect. Consequently invoking regulations

12 See the judgement of the Court of Justice of 10th October 1973 in case 34/73 (*Fratelli Variola S.p.A. v Amministrazione italiana delle Finanze*), ECR 1973, p. 00981.

13 *Regulation (EC) No 1082/2006 of the European Parliament and of the Council of 5 July 2006 on a European grouping of territorial cooperation (EGTC)*, OJ L 210, 31.7.2006, p. 19–24.

14 See the judgement of the Court of Justice of 17th May 1972 in case 93/71 (*Orsolina Leonesio v Ministero dell'agricoltura e foreste*), ECR 1972, p. 00287.

directly by individuals may not be limited by national legislation or practice.

The above rule was confirmed by the Court in subsequent decrees. For example in the judgment quoted earlier and concerning the Fratelli Variola case, the Court stressed that the nature of regulations and their place in the system of sources of Community law mean that they have an immediate effect conferring upon individuals rights which should be upheld by national courts.

3.3.2. Directives

The direct effect of directives is an issue **more complicated** than the direct effect of other secondary acts. This is due to the specific nature of directives as instruments of harmonizing the law. It should be recalled that, according to Art. 288 TFEU, a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave the choice of form and methods to the national authorities. This means that the objective specified in the directive assumes that the Member States will take steps to incorporate the directive into their domestic laws. Hence the problem of the transposition of directives into domestic law, understood as a set of actions undertaken in order to incorporate the provisions of a directive into the national legal system and ensuring the achievement of the results specified on the national level.

Considering the essence of the direct effect of European Union law, in relation to directives it should be stressed that, should these be implemented correctly and on time the issue of the direct effect usually does not arise. If the implementation is correct, then the desired effect is achieved by appropriate provisions of domestic legislation implementing the directive and guaranteeing the achievement of the specified result.

The direct effect of directives will therefore be considered in situations where the Member State fails to implement the directive on time or if the transposition is flawed (i.e. it fails to achieve fully and effectively the result specified in the directive on the national level). It should be noted that in such situation – in light of the points made in

the previous sections of this chapter – it would be appropriate to enable individuals to directly invoke the provisions of directives.

The situation, however, is complicated, as directives, as a specific type of legal acts, are in reality addressed to the Member States and place certain obligations upon these. Of course, the result specified in a directive may aim at ensuring certain rights for individuals but this does not alter the fact that the duty to guarantee those on the basis on the directive rests upon the states. Moreover, due to their unique nature, the provisions of directives are not always sufficiently precise and clear in order to determine unequivocally what rights an individual exercises on their basis. It is worth recalling that one of the conditions of the direct effect is the transparency of the given provision of Union law. Lastly – due to the specific nature of directives – there were uncertainties concerning their direct effect in the horizontal alignment. These matters were clarified by the Court in its reach case history.

The Court addressed the issue of the direct effect of directives for the first time in the judgement concerning Case No. 41/74 (van Duyn)[15]. The dispute was based on an attempt by a Dutch citizen to gain employment in the UK. The Dutch woman was going to work for the Church of Scientology. However, she was refused entry into the UK – the country invoked the provisions of an Act implementing one of the directives concerning special measures with regards to the entry and stay of foreign nationals. According to the Dutch citizen, the British authorities had implemented the directive incorrectly and she therefore decided to seek to establish her rights relying directly on the provisions of the directive. In its decision the Court highlighted the binding nature of directives and, combined with the principle of the effectiveness of Union law, allowed the direct effect of directives. It deployed the following argument in this case: It would be incompatible with the binding effect attributed to a directive by Article 189 (currently Art. 288 TFEU) to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned. According to the Court, especially in cases where *the Community authorities have, by directives,*

15 See the judgement of the Court of Justice of 4th December 1974 in case 41/74 (*Yvonne van Duyn v Home Office*), ECR 1974, p. 01337.

imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before the national courts and if the latter were prevented from taking it into consideration as an element of Community law. However, the Court stressed that in each and every case where the direct effect of directives is considered, *it is necessary to examine whether the nature, general scheme and wording of the provision in question are capable of having direct effects on the relations between Member States and individuals*. It should be stressed, therefore, that the provisions of directives also **ought to meet certain conditions** in order to have a direct effect. The Court referred to these conditions in the judgment in Case No. 8/81 (Ursula Becker)[16] stating that *wherever the provisions of a directive appear, as far as their subject–matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions define rights which individuals are able to assert against the state*. Among the requirements for the direct effect are the following: **a lack of timely implementation** of a directive by a Member State or **incorrect transposition**, and the features of the provisions such as **sufficient degree of precision** and its **unconditional character**[17]. The above principle was confirmed by the CJEU e.g. in the judgment in the case number 80/86 Kolpinghuis[18] indicating that *wherever the provisions of a directive appear to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against the state where that state fails to implement the directive in national law by the end of period prescribed or it fails to implement the directive correctly*.

16 See the judgment of the Court of 19 January 1982 in case 8/81 (*Ursula Becker v Finanzamt Münster–Innenstadt*), ECR 1982, p. 00053.

17 Cf. the judgment of the Court of 5 April 1979 in case 148/78 (*Criminal proceedings against Tullio Ratti*), ECR 1979, p. 01629.

18 See the judgment of the Court (Sixth Chamber) of 8 October 1987 in case 80/86 (*Criminal proceedings against Kolpinghuis Nijmegen BV*), ECR 1987, p. 03969.

The above cases formulate and justify the general principle of the direct effect in relation to directives. They also indicate the general requirements for the direct effect of directives.

In subsequent judgments the Court gradually clarified further matters concerning this issue, already signalled at the start of this section. In the judgment in the Becker case cited above, CJUE also referred to the vertical direct effect of directives. The directives have such an effect (provided that they meet the requirements indicated above). The Court stressed, however, that the direct effect of directives in the vertical alignment only works in one direction – the provisions may be relied upon by an individual against the state, but not by the state against an individual. In the opinion of the Court *a member state which has not adopted the implementing measures required by the directive within the prescribed period may not plead, when against individuals, its own failure to perform the obligations which the directive entails*. In other words, if the state was able to rely on the provisions of a directive against an individual this would equate to deriving profit from its own negligence (not fulfilling the obligation to implement the directive). We should recall that in principle the direct effect of directives can be considered on lack of timely or correct implementation by the state. The Court unequivocally ruled out the possibility of the state invoking the provisions of directives against individuals in the ruling in the Kulpinghuis case cited above. The court stressed that it is only possible to directly rely upon a directive against each Member State to which it is addressed. At the same time a directive *may not of itself impose obligations on an individual and a provision of a directive may not be relied upon as such against such a person before a national court*.

The specific nature of the **vertical direct effect** of directives was accompanied by doubts as to the possible direct effect in a **horizontal alignment**. A question appeared over whether an individual may directly rely on the provisions of directives only against the state (a relationship of dependency), or, also against other individuals (private subjects in a more equal relationship). In the judgment of July

1994 in the case No C–91/92 (Faccini Dori)[19] CJUE declared that, **in the absence of measures of transposition within the prescribed time–limit, an individual may not rely on a directive in order to claim a right against another individual and enforce such a right in a national court**. Therefore the Court denied the directives having a direct effect in a horizontal alignment. To consider it otherwise, by broadening the direct effect of directives into the area of relationships between individuals, would be, according to the CJEU, *to recognize a power in the Community to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations*.

It should be pointed out, however, that **lack of the direct effect in a horizontal alignment** is balanced out in the Union law. In the two previous judgements the **definition of a "state"** was broadened out. In certain circumstances it is possible to directly rely on the provisions of Directives against the state; this wider definition broadened the range of subjects against whom an individual may directly rely on directives.

In the judgment in Case No. 152/84 (Marshall)[20] the Court allowed references to provisions of directives against the state as the employer. The Court declared that when an individual may rely on a directive against the state, it may do so regardless of whether the state has the role of an employer or public authority. In each and every case the state should be prevented from profiting from its own negligence if it failed to implement the directive or has not implemented it correctly. Therefore the direct effect of directives includes also those actions of the Member States which do not involve discharging traditional authority functions but appear in the relationship between the employer (state) and employee (individual). Any individual may also rely on the provisions of the directives against subjects remaining under state supervision or control, or the subjects which exercise special powers exceeding those which stem from ordinary rules applicable in relations

19 See the judgment of the Court of 14 July 1994 in case C–91/92 (*Paola Faccini Dori v Recreb Srl.*), ECR 1994 p. I–03325.

20 See the judgment of the Court of 26 February 1986 in case 152/84 (*M.H. Marshall v Southampton and South–West Hampshire Area Health Authority (Teaching)*), ECR 1986, p. 00723.

between individuals. In the judgement in Case No. C–188/89 (Foster)[21] the Court decreed that: *a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied upon.*

The definition of the state widened in this way does extend the range of subjects against whom the individual may rely directly on provisions of directives. This mitigates against a lack of a horizontal direct effect of directives.

3.3.3. Decisions

A decision – when compared to other legally binding secondary legislative acts – seems to be an act with a very tangible, individual nature, allowing the execution of more general acts (Treaties, regulations). According to Art. 288 TFEU a decision is a fully binding act; if addressees are indicated then it is applicable to those addressees only. It should be borne in mind, however, that the individual–tangible nature of directives may be subject to certain modifications since the Treaty of Lisbon introduced the category of legislative, delegated and implementing acts.

The issue of the direct effect of a decision arose due to the question posed by a German court in relation to one of the Council's decisions[22]. In the preliminary rulings the national court directly enquired whether the provisions of a Council decision have a direct effect on legal relations between Member States and those under their jurisdiction in such a way, that these provisions confer rights upon individuals which national courts are bound to safeguard.

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21 See the judgment of the Court of 12 July 1990 in case C–188/89 (*A. Foster and others v British Gas plc*), ECR 1990, p. 03313.

22 *Council Decision of 13 May 1965 on the harmonisation of certain provisions affecting competition in transport by rail, road and inland waterway*, OJ 88, 24.5.1965 (English special edition: Series I Part 1965–1966, p. 0067).

The Court addressed the query of the national court in the decision in Case No. 9/70 (Franz Grad)[23]. In the first instance the Court found that the fact that directives have a direct effect does not prevent decisions having a similar effect. This declaration was important in the light of the position of the German government. This position maintained that differentiation between the direct effect of regulations and the effect of Directives and Decisions prevents the latter from having the direct effect. The direct effect would apply only to regulations. The Court maintained that the unique nature of regulations does indeed justify their direct effect. But this does not preclude the direct effect of other categories of secondary legislative acts. The Court highlighted that in the context of a decision a question does appear whether obligations resulting from decisions can be relied upon solely by the Union institutions against those to whom decisions are addressed, or could these be quoted by agencies that have an interest in fulfilling these obligations arising from a decision. According to the Court, if individuals were denied the chance to relay upon obligations resulting from decisions, this would be against the binding nature of this type of act (Art. 288 TFEU states the following: A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them). Specifically in cases where the Union institutions imposed upon a Member State obligations for certain actions through a decision, the effectiveness of such a measure would be compromised if citizens of those countries could not rely upon those obligations in national courts, and those courts were not able to consider this measure as part of European law. As a result, although the effects of a decision do not have to be identical with those of a regulation, their end result, i.e. that individuals may invoke these acts, can be the same.

In this way the CJUE allowed and justified the direct effect of Decisions as acts of secondary legislation of the European Union. It is worth recalling that the direct effect of a decision depends on whether a given provision meets certain requirements (principles of the direct effect). Those requirements were indicated in the judgment in Case

23 See the judgment of the Court of 6 October 1970 in case 9/70 (*Franz Grad v Finanzamt Traunstein*), ECR 1970, p. 00825.

No. 156/91 Hansa Fleisch[24], where the Court declared that a decision addressed to a Member State may be relied upon against the state if a given provision imposes upon the addressee an obligation which is unconditional and sufficiently clear and precise.

4. The procedure of preliminary rulings

The nature of European Union law as discussed above, and especially its relationship with domestic law, means that national bodies are charged with correct application of Union law. National bodies, in particular courts, may encounter certain difficulties when applying European law, relating to establishing the precise meaning of Treaty provisions or secondary legislative acts. These issues ought to be decided before resolving the dispute presented to the national court. Otherwise the court carries the risk of applying Union provisions unlawfully which could result in damages payable by the Member State for breaking European law.

The Treaties envisage a unique mechanism enabling national courts to clarify any points of law pertaining to its interpretation or validity of Union acts before a judgment is passed. This mechanism involves preliminary rulings, for which national courts can apply to the Court of Justice of the European Union.

According to Art. 19 para. 3 TEU, the Court of Justice of the European Union shall give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions. The CJEU's competence in this area was refined in Art. 267 TFEU. According to the above provision, the CJEU can give **preliminary rulings** concerning:

- the interpretation of the Treaties,
- the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.

24 See the judgment of the Court (Second Chamber) of 10 November 1992 in case C–156/91 (*Hansa Fleisch Ernst Mundt GmbH & Co. KG v Landrat des Kreises Schleswig–Flensburg*), ECR 1992, p. I–05567.

It should be noted that the Court has **no competence** to decide on interpretation or validity of national legislative acts. Its jurisdiction in terms of preliminary rulings concerns only the interpretation of the Treaties and adjudicating on the validity of the Union's secondary law acts. National courts should therefore formulate questions concerning the above aspects of European law. It is, however, possible to frame a question in such a way that will allow, e.g. through interpretation of Union law, to obtain *de facto* an answer concerning the compatibility of national legislation with that of the Union. A simplified question may be as follows: should a given provision of European law (primary or secondary) be interpreted in a way that would indicate that the following domestic legislation (content) is incompatible with it? Therefore the CJEU, through interpreting European law, may provide an indirect answer indicating the compatibility of domestic legislation with that of the Union. However, the preliminary decision will still pertain to the interpretation of Union law and not domestic law, as the latter is outside the Court's competence.

In accordance with Art. 267 TFEU, if issues concerning interpretation or validity of Union acts are raised before any court or tribunal of a Member State, *that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon*. In turn, in a situation when *any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court*. It should be noted, therefore, that depending on its instance, a national court may, or must, apply for a preliminary ruling.

There are at least two exceptions to the duty to apply for a preliminary ruling. The Court may forego the application for a preliminary ruling if an answer to the query on interpretation of European law can be found in the previous decisions of the CJEU. If the Court in a comparable case has already provided an explanation to issues (provisions) which may cause doubt, the (national) court does not have to apply for a preliminary decision (*acte eclairê* doctrine). Secondly, the national court may forego the application for a preliminary ruling if the case

and certain provisions do not generate significant issues concerning the application of European law (*acte clair* doctrine).

A last remaining issue requires an explanation. In terms of the preliminary decision procedure the Treaties refer to '**the court**' as a subject empowered to apply for a preliminary ruling. It seems, however, that in terms of the case history of the Court, the definition of a 'court' is applied from the perspective of Union law and not national law. Accordingly, preliminary rulings may be requested by those bodies of Member States which are not courts according to national legislation but which display such features as would allow the Court to regard them as courts in light of European law. These features include the fact that a given body was called by a parliamentary act; acts according to procedures envisaged in the internal legislation of the Member State with the power to settle disputes and its decisions are binding for the parties[25]. This wide definition of court in European law increases the chances of uniform interpretation of EU law and should aid its correct application by the wide range of state agencies.

25 Cf.J. Barcz (ed.), *op. cit.*, p. V–310.

Part 6

CONTROL OVER THE OBSERVANCE OF EU LAW

In previous parts it was argued that the European Union is a special kind of an international organisation. It developed a unique legal system where legislation is created through specific procedures by institutions largely independent of the Member States. EU legislation enjoys precedence over domestic laws, it is also characterized by its direct binding force (effectiveness), applicability and the direct effect. Therefore European Union law has been described as an autonomous legal system – and the Union itself as a supranational organisation.

One of the unique features of the European Union as a supranational organisation is the fact that it has at its disposal certain control measures which help ensure uniform and effective application of EU law. This seems vital and desirable in light of the specific nature of EU law. It is worth recalling that EU law, in addition to the Member States themselves, also concerns private subjects and may directly influence their legal standing. Ensuring full and effective application of EU legislation becomes vital also from the point of view of legal and physical persons. The Treaties envisage a range of mechanisms aimed at ensuring efficient and effective control over observance of European Union law. Together these mechanisms form the legal protection system in the EU. They can be considered at the same time in the judicial and extra–judicial dimension, and will be discussed in this order in the following sections. In terms of judicial control – as well as the system of judicial complaints envisaged by the Treaties – the basic issues concerning proceedings in the Court of Justice of the European Union, its jurisdiction and the division of competences between the Court of Justice, the General Court and specialist courts will be discussed. The major aspects of extra–judiciary control over the observance of the EU

law will be discussed in the following part of the chapter; these concern the work of the Ombudsman and petitioning the European Parliament.

1. Judicial review

From the point of view of judicial control over the observance of Union law, an enormously important institution of the EU is the Court of Justice of the European Union as the body which shall ensure that in the interpretation and application of the Treaties the law is observed. The extent of the CJEU's jurisdiction, the division of competences between its various parts and the main principles of proceedings will be discussed below. In the second part of this section the main cases brought before the CJEU will be presented.

1.1. The scope of jurisdiction of the Court of Justice of the European Union

According to Art. 19 para. 1 TEU, the Court of Justice of the European Union is responsible for ensuring the observance of the law in the interpretation and application of the Treaties. This general competence of the CJEU is clarified in the second part of the above Article. Article 19 para. 3 states that The Court of Justice of the European Union shall, in accordance with the Treaties: rule on actions brought by a Member State, an institution or a natural or legal person; give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the legality of acts adopted by the institutions and rule in other cases provided for in the Treaties.

The CJEU competences therefore include adjudicating in matters envisaged by the Treaties. These matters include first and foremost actions against violations of the Treaties (Arts. 258–260 TFEU), actions concerning the legality of EU institutions' acts (Art. 263 TFEU) or complaints about negligence of institutions (Art. 265 TFEU). As part of complaints envisaged by the Treaties actions under Art. 270 TFEU (adjudicating in industrial disputes between the EU and its employees) should be included, as well as under Art. 272 TFEU (adjudicating under

the arbitration clause contained in an agreement under public or private law concluded by the EU or in its name). These will be discussed below. CJEU competences also include preliminary rulings upon application by the Member States (Art. 267 TFEU). It is worth noting that in this particular capacity the CJEU can adjudicate on the interpretation of the Treaties and on the interpretation and legality of acts adopted by EU institutions. It is not, however, competent to determine the legality or interpretation of national laws. The preliminary ruling procedure was discussed in Part 5. Lastly, the CJEU competences also include ruling in "other matters envisaged by the Treaties". This category of 'other' matters would include: dismissing a member of the Commission or withdrawing their pension rights or similar benefits (Art. 245 TFEU), giving opinion on whether a new draft international EU agreement is compatible with the Treaties (Art. 218 para. 11 TFEU), deciding on dismissal of the Ombudsman (Art. 228 para. 2 TFEU), adjudication in disputes determined in Art. 271 TFEU, or adjudication in disputes between the Member States on Treaty matters, submitted to it through a compromise (Art. 273 TFEU).

It should be highlighted that the CJEU – in principle – is not competent to rule on Treaty provisions concerning the common foreign and security policy of the EU and on acts adopted on their basis. However, the CJEU is competent to monitor compliance with Article 401 of the Treaty on European Union and to give judgment in proceedings brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty (complaints regarding the legality of a Union Act), reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Part 2 of Title V of the Treaty on European Union (special provisions concerning the common foreign and security policy).

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1 Art. 40 TEU: *The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union. Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Part.*

The above provisions concern the Court of Justice of the European Union as an institution. It has been established that the CJEU includes the Court of Justice, the General Court and specialised courts. In the current legal situation the division of competences between the above bodies is relatively complex and deserves a closer study.

According to Art. 256 para. 1 TFEU, the General Court shall have jurisdiction to hear and determine at first instance actions or proceedings referred to in Articles 263, 265, 268, 270 and 272, with the exception of those assigned to a specialised court set up under Article 257 and those reserved in the Statute for the Court of Justice. This means that – in principle – it is the General Court which is competent in the first instance to adjudicate in matters concerning the legality of EU acts and actions concerning institutional failure, damages, industrial disputes (between the Union and its servants) and on the basis of the arbitration clause in contracts under private or public law concluded by the EU or on its behalf. The CJEU Statute may confer competences in other matters upon the Court.

At the same time, Article 256 indicates potential exceptions to the above rule. The General Court is not competent in the first instance in matters entrusted to specialised courts and reserved by the CJEU Statute for the Court of Justice.

With regards to matters entrusted to a specialised court (at present there is only one functioning specialised court – the Civil Service Tribunal), its competences include, in the first instance, disputes between the Union and its servants (Art. 270 TFEU), including disputes between bodies and administrative units and their employees, provided that these fall within the jurisdiction of the Court of Justice of the European Union – Art. 1 Appendix No. 1 to the CJEU Statute).

Article 51 of the CJEU Statute determines what categories of cases – as the exception to the rule indicated in Art. 256 TFEU – will be considered in the first instance by the General Court of Justice. These cases can be classed into two groups. The first group would include cases concerning the validity of an act and institutional failure (respectively – Arts. 263 & 265 TFEU) brought by a member State against:

– an act or failure to act by the European Parliament or the Council, or both these institutions deciding jointly with the exception of: decisions of the Council adopted on the basis of Art. 108 para. 2 section 3 TFEU (state aid within the Union competition rules), acts of the Council adopted in accordance with its regulation concerning trade protection measures under Art. 207 TFEU, and acts of the Council through which the Council exercises its executive function (c.f. Art. 291 para. 2 TFEU);
– an act or a failure to act by the Commission contrary to Art. 331 para. 1 TFEU (enhanced cooperation)

The second group contains cases concerning (in)validity and negligence (Arts. 263 & 265 TFEU) brought in by an institution of the Union against:

– an act or a failure to act by the European Parliament or the Council, or both these institutions acting jointly, or by the Commission;
– an act or failure to act by the European Central Bank.

Cases concerning violations of the Treaties are not among those indicated in Art. 256 TFEU (Arts. 258–260 TFEU). It should therefore be expected that the Court of Justice will be the appropriate institution to consider these.

It can be therefore concluded that, in relation to cases indicated in Arts. 263, 265, 268, 270 and 272 TFEU, the General Court decides in the first instance as a rule. The Treaties envisage exceptions to this rule which are determined in a more detailed manner by the Statute of the Court of Justice of the European Union.

At the same time, the Treaties provide specific rules for appeals in matters brought before the CJEU. Decisions of the General Court issued on the basis of Art. 256 para. 1 can be appealed to the Court of Justice, but this is limited to the points of law. Under Art. 256 para. 2, the General Court is competent to consider complaints against decisions of specialised courts.

Detailed conditions for appeals to the Court of Justice are listed in the CJEU Statute. An appeal may be brought before the Court of Justice, within two months of the notification of the decision appealed against, against final decisions of the General Court and decisions of that Court disposing of the substantive issues in part only or disposing of a procedural issue concerning a plea of lack of competence or inadmissibility (Art. 56 of the CJEU Statute). The CJEU Statute confirms that an appeal to the Court of Justice is limited only to the points of law and may be based upon lack of competence of the General Court, a breach of procedure before it which adversely affects the interests of the appellant as well as the infringement of Union law by the General Court (Art. 58 of the Statute).

Where an appeal is justified, the Court of Justice repeals the General Court's decision. It may then give a final judgment on the matter provided that the state of proceedings allows it. It may also return the matter to the General Court to be investigated again.

The appeals procedure against decisions issued by specialised courts is similar although it must be borne in mind that at present it concerns only the one specialised court, namely the Civil Service Tribunal (Appendix No. 1 to the CJEU Statute). An appeal may be brought before the General Court, within two months of notification of the decision appealed against, against final decisions of the Civil Service Tribunal and decisions of that Tribunal disposing of the substantive issues in part only or disposing of a procedural issue concerning a plea of lack of jurisdiction or inadmissibility. Again, an appeal is limited to the points of law and it may be based on lack of jurisdiction of the Civil Service Tribunal, a breach of procedure before it which adversely affects the interests of the appellant, as well as the infringement of Union law by the Tribunal. In this case, however, if an appeal is justified, the General Court repeals the decision of the Civil Service Tribunal and gives its own verdict. If the state of proceedings does not enable the General Court to make a decision, the Court directs the matter back to the Tribunal for further investigation. It is worth indicating here that Court judgments given as part of the above procedure may be, exceptionally, submitted under the control of the

Court of Justice if there is a significant risk of the unity or consistency of Union law being affected (Art. 256 para. 2 TFEU).

The CJEU Statute also envisages the possibility of Court judgments being revised. An application for a revision of judgment may be made to the Court of Justice only on discovery of a fact which is of such a nature as to be a decisive factor, and which, when the judgment was given, was unknown to the Court and to the party claiming the revision (Art. 44 of the Statute). However, no application for revision may be made after the lapse of 10 years from the date of the judgment.

It can also be recalled that, apart from considering appeals as provided for in the Treaties, the CJEU is also competent to give preliminary rulings (Art. 267 TFEU). Under Art. 256 para. 3 TFEU, these should be considered by the General Court. The Court can, however, if it considers that the matter requires a decision concerning principles likely to affect the unity or consistency of Union law, refer the case to the Court of Justice for a ruling. Judgments of the General Court given as preliminary rulings may also, exceptionally, come under the control of the Court of Justice if there is a high risk of the unity or consistency of Union law being affected (Art. 256 para. 3 TFEU).

1.2. Basic assumptions of procedure before the Court of Justice of the European Union

The Court of Justice of the European Union's Statute provides for a number of procedural solutions concerning the proceedings before the CJEU. The most important ones will be discussed below. The main procedural principles related to preliminary rulings have been discussed in Part 5.

According to Art. 20 of the Statute, proceedings before the CJEU are comprised of a **written and oral part**. As part of the written procedure, the parties and EU institutions whose decisions the case concerns, are given access to claims, statements of case, defences and observations, and of replies, if any, as well as of all papers and documents in support or of certified copies of these. It is a given assumption therefore, that – depending on the case – the claim itself

should be accompanied by other documents. For example, an action for annulment (Art. 263 TFEU) should be accompanied by the act which the claimant seeks to have declared invalid. An allegation of a failure to act (Art. 265 TFEU) should be accompanied by evidence material indicating when the institution was called upon to act.

The oral procedure includes a reading of the summary of the facts of the case by an appointed judge, the hearing by the Court of agents, advisers and lawyers and of the submissions of the Advocate–General, as well as the hearing, if any, of witnesses and experts. At this stage of the procedure the applications of Advocates–General are an important element. We should recall that, according to Art. 252 TFEU, their role is to publically submit, while remaining fully impartial, justified Opinions in matters requiring their involvement. Having heard the Advocate–General, the Court may also (if it decides that the matter does not raise a point of law) decide the case without the Advocate's Opinion.

The CJEU Stature also envisages some interesting solutions regarding the principle of **representation** in proceedings before the General Court. EU institutions and Member States are represented by an agent appointed for each case. The agent may be supported by a lawyer or by an adviser. Other parties must be represented by a lawyer entitled to practice before a court of a Member State.

The general rules of procedure indicated above are applied, according to the CJEU Statute, in proceedings before the Court of Justice and the General Court, and also, with some differences, before the Civil Service Tribunal.

The above principles concern proceedings before the Court of Justice of the European Union itself. It should be highlighted, therefore, that depending on the nature of the complaint, the course of the proceedings will never be identical, and outside of the courtroom other procedures will take place. Differences marking proceedings in certain matters will be highlighted at appropriate points in this section.

1.3. Actions before the Court of Justice of the European Union

1.3.1. Action for failure to fulfil Treaty obligations

A complaint (an action) against failure to fulfil Treaty obligations, (Art. 258–260 TFEU), also called a complaint against violations of the Treaty, is a particular kind of complaint, due to both the nature of the defendant, the role of the Commission and the course of the proceedings. Complaints against Member States **can be brought in by the Commission** (Art. 258 TFEU) and **other Member States** themselves (Art. 259 TFEU). It is worth noting at the outset that, in practice, states rarely become complainants in cases against other states. It would seem, therefore, that the type of complaint discussed here is an especially important control measure available to the Commission – it is an instrument which allows it to 'discipline' the Member States and to enforce observance of the Treaty obligations and punish any infringements. In addition, the Treaty definition of a failure to complete an 'obligation upon the State arising from the Treaty' does not mean exclusively a violation of the Treaty. It involves all obligations arising from the Treaties. Such obligations include the observance of secondary legislation. Infringing their provisions may also result in this type of complaints procedure.

Notably, the course of the procedure is different depending on whether these are instigated by the Commission or a Member State.

Under Art. 258 TFEU, *if the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations*. Only when the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union. This solution means that the Commission, even before the complaint is brought forward, strives to reach an agreement with the Member State – it signals an infringement (through a letter of formal notice) and expects the State to answer presented charges. **A reasoned opinion** is issued in the situation when the Commission does not accept the justification provided by the Member State, or if

the Member State does not reciprocate the Commission's efforts. The reasoned opinion is the final stage of procedure before a formal complaint is made. If the Member State does comply with the Opinion within the timescale specified by the Commission, there is a strong probability that the Commission will drop the complaint. If, however, the State fails to comply, the Commission may bring an action before the CJEU. It is worth noting that, in accordance with Art. 258 TFEU, the Commission can submit a complaint, but the decision to do so rests with the Commission.

The ruling of the Court of Justice at this stage ascertains whether the Member State did fail to complete one of the obligations arising from the Treaties (Art. 260 para. 1 TFEU). If the CJEU ascertains an infringement – the State shall be required to take the necessary measures to comply with the judgment of the Court. If the Member State complies with the ruling of the Court in an appropriate manner, i.e. ceases to infringe on one of the Treaty obligations, the matter is closed. However, the Commission monitors whether or not the state has complied with the CJEU ruling. If it transpires that the state has not implemented the decision of the Court, the procedure enters a new stage.

If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. This time, however, the Commission stipulates the amount of the **lump sum** or **penalty payment** to be paid by the Member State concerned which it considers appropriate in the circumstances (Art. 260 para. 2 TFEU). Of course, in its calculations the Commission is not guided by a freestanding assessment of the situation but refers to established measures. It adopts a certain calculation including: the base rate (currently 600 Euro), a factor reflecting the seriousness of the infringement (on the scale of 1 to 20), a factor reflecting the time over which the infringement occurred

(on the scale of 1 to 3), and a factor n calculated separately for each Member State[2]. In turn the Court, if it establishes that the Member State concerned has not complied with its judgment, may impose a lump sum or penalty payment on it.

By rule, the complaints procedure against an infringement of the Treaties includes two stages (unless the State meets its obligations as the result of the CJEU ruling finding an infringement). The first stage establishes whether a failure to complete the Treaty obligation did occur. The second involves the imposition upon the state which failed to comply with the judgment of a financial penalty in the form of a lump sum or a sum payable over a period of time.

Notably, the Treaty of Lisbon introduced a new procedural solution for dealing with a complaint by the Commission concerning a Member State's failure to notify of the measures adopted to transpose a Directive adopted through an ordinary legislative procedure (Art. 260 para. 3 TFEU). Should the Commission decide that a state has failed to comply with the above obligation and bring a complaint under Art. 258 TFEU, it may – if it deems it appropriate – indicate the lump sum or a staged payment which the state is liable to make. If the Court finds that there is an infringement, it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. This is a summary procedure, which does not require the two stages of the court proceedings. The matter is already closed at the stage when the Commission submits a complaint under Art. 258 TFEU.

The complaints procedure is different if the complaint is brought in by a Member State, although this rarely happens.

A complaint can be made by any Member State which considers that another Member State has not met one of its obligations arising from the Treaties (Art. 259 TFEU). Before the complaint is submitted, the matter should be brought before the Commission. The proceedings

2 J. Łacny, *Periodic penalty payments, lump sums and financial corrections imposed on Member States for the infringement of the EU law*, "Zeszyty natolińskie" 41 (2010), p. 107–108. *Cf. Communication from the Commission – Application of Article 228 of the EC Treaty*, SEC(2005)1658.

before the Commission involve the States concerned which, at this stage, have an opportunity – on adversary basis – to present written and oral arguments. Next, the Commission issues its reasoned opinion. If the Commission fails to present an opinion within three months, this does not constitute an impediment for the matter to be brought before the CJEU. Procedural differences for complaints brought forward by a member State therefore concern the stage before the complaint is submitted.

In conclusion, it is worth noting that a complaint against failure to complete Treaty obligations is an important control measure in the hands of the Commission. A complaint is relatively rarely submitted by Member States. At the same time the complaints procedure allows Member States to avoid court proceedings resulting potentially in a hefty penalty charges or a lump sum fine. The pre–court stage is important as there are opportunities for the State charged with a failure to meet a Treaty obligation to reach an agreement with the Commission. The full complaints procedure formula includes, in addition, stages involving court proceedings. The first stage aims to establish whether an infringement has taken place and the second to impose a penalty upon the offending state in a situation when the state continues to fail to meet the established obligation.

1.3.2. Action for annulment

Actions concerning the legality of EU acts allow the CJUE to assess the validity of acts passed by the institutions, agencies and bodies of the Union and – if certain Treaties provisions are met – to annul them. The main regulations concerning this type of complaint are found in Art. 263 and Art. 264 TFEU.

According to Art. 263 TFEU, the Court of Justice of the European Union oversees the legal aspect of certain categories of EU acts and, if a complaint is justified, may annul them (Art. 264 TFEU). In relation to complaints concerning legality of EU acts, close attention needs to be paid to categories of acts which may be subject to such complaint, who such complaints can be submitted by, and grounds for complaints.

CJEU can determine the **legality** of the following types of EU acts:

- legislative acts,
- acts of the Council, of the Commission and of the European Central Bank, other than Recommendations and Opinions,
- acts of the European Parliament and of the European Council intended to produce legal effects *vis–à–vis* third parties.

The Court may also determine the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects *vis–à–vis* third parties.

The above measures mean that **a wide range of Union acts may be subject to judicial inquiry**. First of all, these are legislative acts, and therefore acts passed by the Council and the EP, either jointly (through ordinary legislative procedure) or by one of these institutions with appropriate participation of the other (under different variants of a special legislative procedure). Notably, however, actions may concern, in addition to legislative acts, delegated acts (as acts of the Commission other than recommendations and opinions) and implementing acts (as acts of the Commission or the Council other than recommendations or opinions). Action can be brought against other acts which remain outside the categories of legislative, delegated or implementing acts, but which do, however, have the characteristics of legally binding acts (regulations, directives or decisions "without an adjective").

The above category also includes acts of the European Council and the EP, which are designed to have legal effects upon third persons. The famous decision of the Court in the 294/83 Les Verts case[3] may serve as an illustration of this type of Parliamentary act. The case questioned the act issued by the European Parliament chambers concerning the reimbursement of the costs of a campaign in European Parliamentary elections. The action was brought by one of the political parties which maintained that, in short, the adopted mechanism of distribution of financial resources was discriminatory (this was one of the claims). The

3 See the judgement of the Court of Justice of 23th April 1986 in case 294/83 (*Parti écologiste "Les Verts" v European Parliament*), ECR 1986, p. 01339.

Court declared that this type of act by one of the Parliament's offices ought to be regarded as an act of the European Parliament itself. And because it really does have legal effects on third persons, the complaint was allowed. At the time when the Court was making its decision, the Treaties did not envisage the possibility of legal action against European Parliament's acts. Today such possibility results directly from the Treaties (Art. 263 TFEU) and does not solely concern EP acts, but also similar acts passed by the European Council (and the Union agencies and bodies).

The **grounds for an action** leading to annulment of an act are the dubious legality of a given act. This charge should be based upon one of the following factors in existence during the passing of the act: lack of competence, infringement of an essential procedural requirement, misuse of powers or an infringement of the Treaties or any rule related to their application.

Lack of competence can be given as the grounds for invalidity of an act when the institution passing the act in reality has no authority to have the act adopted. A situation can be envisaged when the Union itself lacks competences to adopt a certain act.

Important procedural requirements may not be met when regulations governing the process of adoption of certain Union acts are infringed. This concerns separate elements of legislative procedure envisaged by the Treaties, but also other procedures leading to the adoption of other types of legally binding acts. It ought to be recalled here that the legality of acts other than legislative acts can be questioned under this complaints procedure.

A misuse of power should not be confused with exceeding the competences. A misuse of powers does not necessarily mean that the body issuing the act lacked competences for its adoption. However, it does mean that the body used those competences for a different purpose than those which were conferred upon it. In several of its judgments, the Court expressed this principle in the following way (69/83 Charles Lux, 331/88 Fedesa): A decision may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent factors, to have been taken with the exclusive purpose, or at any rate

the main purpose, of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case (Fedesa)[4].

Lastly, the grounds for annulment of an act may be **an infringement of the Treaties or of any rule of law relating to their application**. These grounds are defined relatively broadly. It may even seem that it is a repetition – a more generalised one – of the grounds discussed above. Exceeding competences or failure to meet procedural requirements are also infringements of the Treaty. It is worth stressing, however, that infringements of the Treaties may take different forms, other than exceeding competences, misuse of powers, or infringement of procedure. Notably, "infringement of the Treaty" as the grounds for declaring the act invalid would also include the circumstances such as infringing certain principles of the Union legal system. A good example here may be a violation of the principle of proportionality (Art. 5 para. TEU), which defines to a large extent the way in which the Union can exercise its competences.

An action concerning the legality of an act **may be brought by**: the Member States, the European Parliament, the Council, the Commission, the Court of Auditors, the European Central Bank, the Committee of the Regions as well as legal and physical persons (individuals). Action can be therefore brought in by a wide range of subjects. It should be stressed, however, that de facto eligibility is not identical for different categories of complainants.

Member States, the European Parliament, the Council and the Commission have virtually an **unlimited scope** for bringing complaints to court. This means that they are not obliged to indicate that they have a 'specific interest' in order to have an act declared illegal. They can also bring action in respect of all types of acts liable under the complaints procedure.

The Court of Auditors, the European Central Bank and the Committee of the Regions may submit cases only where this is

4 See the judgement of the Court of Justice of 13th November 1990 in case C–331/88 (*The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others*), ECR 1990, p. I–04023.

motivated by **protecting their prerogatives**. This means that they can query the legality of acts only in situations where these acts in some way limit their competences.

Cases can also be submitted by legal and physical persons. However, they can only instigate action against those acts which are addressed to them or where they are directly and individually concerned. Whereas the concept of an act 'addressed' to a physical or legal person does not raise any questions (e.g. Decisions may indicate recipients – c.f. Art. 288 TFEU), the concept of an act concerning legal or physical persons (individuals) directly and individually' may require further explanation. Notably, Art. 263 contains a mutually exclusive alternative: it concerns either an act addressed to a physical or legal person, or an act of direct and individual concern to them.

The Treaties do not clarify the above concept. It was expanded through case law of the Court of Justice of the European Union (and earlier the Court of Justice of the European Communities). It can be argued that an act affects a given subject (individual or institution) directly where it directly regulates their situation – without the necessity of further implementing measures being introduced by the Member State[5]. Past decisions of the Court have interpreted the statement that an act concerns a particular person individually. According to the CJEU position, Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed (the so called Plaumann test)[6].

A physical or a legal person may bring in an action against an act of the Union only where the act is addressed to them or is of individual and direct concern to them – in accordance with the above principles. Of course, other conditions for submitting a complaint also have to be

5 J. Barcz (ed.), *Ustrój Unii Europejskiej*, Warszawa 2010, p. V–167.

6 See the judgement of the Court of Justice of 15th July 1963 in case 25/62 (*Plaumann & Co. v Commission of the European Economic Community*), ECR 1963, p. 00095.

met (an act that may be subject of a complaint, grounds for having the act annulled specified under the Treaty provisions).

According to Art. 264 TFEU, if the action is well founded, the CJEU declares the act concerned to be void. In turn, under Art. 266 TFEU, should CJEU declare an act of an institution (a body or agency) of the Union invalid, the above are obliged to take steps to ensure that the decision of the Court is implemented. This obligation should be regarded as an order to eliminate an act which has been declared void, from the Union's legal system. Article 264 TFEU, however, allows the Court to uphold certain elements of acts which have been declared invalid (However, the Court shall, if it considers this necessary, state which of the effects of the act which it has declared void shall be considered as definitive).

1.3.3. Action concerning failure to act

The Treaties also envisage a mechanism designed to counteract an unlawful failure to act by institutions, bodies and agencies of the European Union. This mechanism consists of a complaint of negligence (failure to act) against EU institutions, under Art. 265 TFEU.

Action may be instigated for failure to act **against** the European Parliament, the European Council, the Council, the Commission and the European Central Bank. The Treaty of Lisbon also enabled negligence complaints against the bodies and offices of the European Union.

A complaint **may be submitted** if one of the institutions indicated above has been negligent in a way that constitutes an infringement of Treaties. This means that it is not possible to submit a complaint concerning just any failure to act. A complaint will be allowed only in a situation where an institution (a body or an office) of the European Union has unlawfully failed to act, or in other words failed to act where action was legally required. Consequently, it will not be possible to submit a complaint where the subject of the complaint has passively not taken action, in circumstances where it could have acted but was not obliged to (a degree of choice in the matter existed). The aim of the complaint – according to Art. 265 TFEU – is not to decide on

negligence, but to determine whether an infringement of the Treaties occurred, based on a failure to act contrary to a Treaty obligation.

A complaint against a failure to act shall be admissible only if the institution, body, office or agency concerned has first been called upon to act. If, within two months of being so called upon, the institution, body, office or agency concerned has not defined its position, the action may be brought within a further period of two months (Art. 265 TFEU).

A complaint may be brought forward, on the above conditions, by the Member States and other Union institutions. Their right to complaint is not specifically limited. A complaint may also be submitted by legal and physical persons. However, for these, the Treaty envisages certain limitations. Physical and legal persons may submit a complaint only in situations where failure to act amounts to failure to adopt an act directed to them other than a Recommendation or an Opinion. It should be highlighted here that the Treaty closely defines the type of failure which entitles private subjects to bring in a complaint, unlike for complaints brought forward by the Member States or Union institutions. In the case of physical and legal persons, only failure to adopt an act other than a Recommendation or an Opinion (and therefore a legally binding act) results in a right to submit a complaint. It is also worth noting that a complaint by physical and legal persons can be directed against institutions as well as bodies and offices of the Union. It goes without saying that other conditions regarding the complaint (unlawful nature of a failure to act, calling upon an institution to act) must also be met.

Under Art. 266 TFEU, the decision that failure to act by an institution (body or agency) was contrary to the Treaty results in an obligation to undertake the necessary measures to comply with the judgment of the Court of Justice of the European Union.

1.3.4. EU liability in damages (non–contractual liability)

The characteristics of the European Union and its legislation bring up the significant issue of EU liability for damages, important from the point of view of the Member States and physical and legal persons.

The Union legislation permeates the legal systems of the Member States to a significant degree; it regulates the legal status of both the States and of private individuals. Circumstances may well arise where damages may occur as the result of an unlawful action of the Union or its failure to act. The legal protection system established by the Treaties themselves includes a compensation claim, which enables to seek from the EU redress for damages which arose in the manner described above. Primary provisions in this matter are contained in Arts. 268 and 340 TFEU.

Article 268 TFEU states that the Court of Justice of the European Union shall have jurisdiction in disputes relating to compensation for damage provided for in the second and third paragraphs of Article 340. Article 340 TFEU in turn defines the main principles of the Union's liability for damages.

From the outset, it needs to be stated that the Union can bear **contractual** and **non–contractual liability**.

It is only natural that the Union, with the help of its legal subject status (Art. 47 TEU), may shape its contractual relations not only on the level of international but also that of private law. According to Art. 340 TFEU, the contractual liability of the Union shall be governed by the law applicable to the contract in question. This provision means that national courts may be appropriate in contractual liability cases in which the Union is one of the parties involved (c.f. also Art. 274 TFEU).

In terms of non–contractual liability (or liability for tort), Art. 340 TFEU envisages that the European Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties. This mechanism therefore looks as follows: the Union, as an international organisation (subject) makes good damages caused by its institutions and its officers when performing their duties. As an **exception** to this rule, the **European Central Bank**, which is a Union institution, is itself liable for damages caused by the Bank or its employees when carrying out their duties. In this context it may be worth recalling the ECB's status as an institution of the Union.

According to Art. 282 para. 3 TFEU, the ECB has a legal personality and is independent in the exercise of its powers and in the management of its finances.

Article 340 TFEU does not envisage specific terms and conditions under which the Union makes good damages caused by the actions or a failure to act by its institutions or officers. In this matter the Treaty clearly refers to legislative attainments of the Member States – the Union makes good damages in accordance with the general principles common to the laws of the Member States. The principles and grounds for the Union's extra–contractual liability have been expanded upon through case law and the CJEU judgments.

The **grounds** for extra–contractual (tort) liability of the European Union include: an action (or failure to act) by the Union, an unlawful aspect of such action (or a failure to act), resulting damage and a cause and effect relationship between the action (or a failure to act) and the damages incurred.

If the grounds for liability is an action (or negligence) it is especially important that this can be attributed directly to the Union, which is only natural given the reading of Art. 340 TFEU (the Union shall make good any damage caused by its institutions or by its servants). Because the EU is an international organization, it functions through institutions acting in its name or through actions of its employees (institutions' officers). Therefore, the matter must involve an action (or a failure to act) by an institution or an employee of the Union (whilst carrying out their duties). This action or failure to act must at the same time be unlawful (liability for damages caused by lawful acts will not be discussed here). In the case law established by CJEU decisions the requirement of an unlawful act (or failure to act) as the grounds for establishing liability differ depending on the subject area of Union activity in which the act or failure to act occurred. The court distinguishes in this context between legislative activity and activity involving – to simplify matters – administrative acts. In other words, for establishing the unlawful nature as the grounds for liability, it is important to determine whether the subject acted in an executive capacity (by issuing an administrative act) or within the area of Union legislation. In the first case the subject's

freedom to act is very restricted. In the second case the subject enjoys much greater discretion. Because of this, with administrative actions it is generally accepted that the unlawful nature of the act constitutes sufficient grounds. However, where legislative actions are involved, the unlawful nature of the act must be sufficiently aggravated. An illustration of the above rule is the famous decision of the CJEU in the 5/71 case (Schoepennstaedt)[7], where the court declared that where legislative action involving measures of economic policy is concerned, the Community (today the Union) does not incur non–contractual liability for damage suffered by individuals as a consequence of that action, by virtue of the provisions contained in Article 215, second paragraph, of the Treaty, unless a sufficiently flagrant violation of a superior rule of law for the protection of the individual has occurred. This principle was confirmed by the Court in cases 83/76 and 94/76, 4/77, 15/77 and 40/77 (HNL Bayerische) as well as 261 and 262/78 (Interquell)[8], which clearly demonstrated that a declaration that a legislative act of the Community (today: the Union) is invalid (and therefore adopted unlawfully) alone is insufficient for extra–contractual liability of the Union to arise for damages sustained by an individual. The Community (Union) liability for acts of law whose adoption requires economic–political decisions may only be caused by a sufficiently grave infringement of a superior provision safeguarding individuals[9].

Liability for damages also arises where an actual harm occurs, and where a cause and effect may be established between an unlawful act (failure to act) and the resulting harm.

It is also worth highlighting that similar principles apply to liability for damages borne by the Member States for infringements of European law. This is only natural given the nature of Union law and the role that the Member States have in its proper application. Member States should

7 See the judgements of the Court of 2nd December 1971 in case 5/71 (*Aktien–Zuckerfabrik Schöppenstedt v Council of the European Communities*), ECR 1971, p. 00975.

8 See the judgements of the Court of 25th May 1978 in joined cases 83 and 94/76, 4, 15 and 40/77 (*Bayerische HNL Vermehrungsbetriebe GmbH & Co. KG and others v Council and Commission of the European Communities*), ECR 1978, p. 01209 and the judgements in joined cases 261/78 and 262/78.

9 Cf. the judgement of the Court of 5th March 1996 in joined cases C–46/93 and C–48/93 (*Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*), ECR 1996, p. I–01029.

make good any damage where this resulted from their unlawful acts of failure to act. In addition, the grounds of unlawful nature are similar to those concerning the Union's liability for compensation. In turns, acts (or failure to act), which can be attributed to a Member State, include in this category also actions of the Member States' justice systems.[10]

2. Non–judicial forms of control over the observance of European Union Law

In the previous section the basic elements of the court control over the observance of European Union law were discussed. In this area, the centre stage is occupied by the Court of Justice of the European Union as a judiciary body, and the outcome of the dispute is in the form of a binding court judgment generating specific results.

Union law also provides other control mechanisms, outside of a judiciary function performed by EU institutions or bodies. In this area we will encounter traditional court judgments. The essence of control outside of the courts are actions of empowered institutions and bodies which have the nature of an enquiry or an investigation. The result of an investigation into a given matter is, most of all, assistance to the parties involved by, e.g. directing them to the appropriate body, referring the matter to that body or persuading an institution or a body to alter its practices. Of course, actions of agencies involved in control mechanisms outside of court may result in the matter being submitted to the Court of Justice of the European Union. However, these agencies do not themselves determine the outcome of a dispute in a binding or final manner.

In terms of the control of observance of European Union law outside of the court it is worth examining more closely the work of the **European Ombudsman** and the right to **petition the European Parliament**.

10 Cf. the judgement of the Court of 30th September 2003 in case C–224/01 (*Gerhard Köbler v Republik Österreich*), ECR 2003, p. I–10239. See also the judgement of the Court (Grand Chamber) of 13th June 2006 in case C–173/03 (*Traghetti del Mediterraneo SpA v Repubblica Italiana*), ECR 2006, p. I–05177.

2.1. The European Ombudsman

The European Ombudsman is not a Union institution. However, they can be assigned the status of a European body. The Ombudsman shall be elected after each election of the European Parliament for the duration of its term of Office (Art. 228 para. 2 TFEU). Although the Ombudsman is elected by the European Parliament (Art. 228 para. 1 TFEU) and cooperates with the Parliament to a great extent, it is an independent office. In execution of their duties, the Ombudsman must not seek instructions from any Member State government or any institution, body, agency, office or entity. They have got no right to accept such instructions. During the term of office, the Ombudsman must not have any other employment, both paid and unpaid (Art. 228 para. 3 TFEU). In circumstances where the Ombudsman ceases to meet the necessary conditions for the performance of the function, or is guilty of a serious misconduct, they may be dismissed (the dismissal is decided by the Court of Justice upon application by the European Parliament – Art. 228 para. 3 TFEU).

According to Art. 228 para. 1 TFEU, the European Ombudsman is *empowered to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the Union institutions, bodies, offices or agencies, with the exception of the Court of Justice of the European Union acting in its judicial role*.

The above provision means that the European Ombudsman is competent to consider **complaints against** actions of EU institutions, bodies, offices or agencies submitted by a variety of subjects. The list of Union institutions is found in Art. 13 TEU. The Treaties do not clarify the term of 'body, agency or office' of the Union and do not list these. It can be accepted, however, that this term encompasses advisory bodies and agencies of the Union. Significantly, the Ombudsman's mandate does not include the actions of the CJEU (the Court of Justice, specialised courts) acting in its judicial role. Whereas the range of subjects eligible to submit a complaint, as well as of those whose

actions may be subject of a complaint, does not poise any issues, the term 'maladministration' requires an explanation.

The term '**maladministration**' has no explanation in the Treaties. A proper definition is also lacking in secondary legislation. The definition of maladministration has been coined by the Ombudsman's office: Maladministration occurs when a public body fails to act in accordance with a rule or principle which is binding upon it[11]. This definition has been accepted by the European Parliament and the Commission. The definition quoted above is a broad concept. To arrive at a more precise definition of acts of maladministration, the Ombudsman quotes Union legal heritage. A special place in this matter is reserved for the Charter of Fundamental Rights[12], which has the legal standing equal to the Treaties (Art. 6 para. 1 TEU); its Article 41 defines the right to good administration – Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union. This right, according to the Charter, includes the following:

- the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
- the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
- the obligation of the administration to give reasons for its decisions.

The Ombudsman investigates instances of maladministration either of their own initiative or on the basis of complaints received. The Ombudsman does not carry out an investigation when the matter is or has been subject to court proceedings. When maladministration is established, the Ombudsman refers the matter to an appropriate institution, body, agency or office of the European Union which have

11 Cf. *The Annual Report 2009*, p. 27, source: http://www.ombudsman.europa.eu/activities/annualreports.faces

12 *Charter of Fundamental Rights of the European Union*, OJ C 83 of 30.03.2010. Cf. *The European Code of Good Administrative Behaviuor*, source: http://www.ombudsman.europa.eu/en/resources/code.faces

to submit their response within three months. Next the Ombudsman submits a report to the European Parliament and to the institution (body, agency or office) concerned. The complainant is informed about the results of the investigation.

The work of the European Ombudsman is very intensive. For example, of 727 complaints received in 2009, 230 did not meet the admissibility criteria, 162 had insufficient grounds to start an inquiry (despite the admissibility criteria being met). On the basis of complaints received, 335 inquiries were instigated. Four inquiries were opened on the Ombudsman's own initiative. At the same time 57% of inquiries initiated in 2009 were concluded in the same year.

Most complaints received in 2009 originated from Germany, Spain, France and Poland. The complaints were most commonly directed against the Commission, but also frequently against the European Parliament and the European Personnel Selection Office. The main allegations directed against institutions, bodies, offices and agencies concerned refusal to provide information, misuse of power or unjustified delay.

2.2. Petitions to the European Parliament

The European Parliament exercises a number of control functions. The means which allow the EP to react to possible infringements of EU law is the petition.

The right **to submit petitions** to the European Parliament affects a wide range of legal subjects. According to Art. 227 TFEU, any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State may petition the Parliament. The categories of subjects listed above may submit petitions individually or collectively (together with other citizens of the Union or with other physical or legal persons).

Considering the range of European Union competences – exclusive, shared and supporting, coordinating and complementary – it may be concluded that petitions to the European Parliament may concern a broad range of subject matters. Article 227 TFEU envisages that

petitions may concern any area of European Union activity. However, the condition is that the subject matter is of direct concern to those submitting the petition. Matters submitted to the European Parliament concern mainly: the rights of European Union citizens, consumer rights, environmental protection or social policy and mutual recognition of professional qualifications.

Petitions may be submitted both in the traditional way by post, or electronically through a form available on the EP website.[13]

A petition should contain an exhaustive description of the circumstances and facts significant for the submitted matter in one of the official languages of the Union. Formal requirements for the submission of a petition are minimal. The petition should contain the name and surname of the petitioner and their nationality and home address. It should also be signed.

Petitions are considered by one of the permanent committees of the European Parliament, the **Petitions Committee**. The Committee does not exercise a judiciary function and therefore will not decide the matter through a binding judgment. It may, however, deploy measures which would result in a solution to the identified problem. The Committee may, for example, submit the matter to the European Commission which has extensive control powers including the power to instigate legal proceedings against the Member State. Circumstances highlighted in a petition may also be reflected in Union's legislative activities, which the Parliament may currently influence to a significant degree. The Petitions Committee in the current parliamentary term of office has 34 members and its sessions as a rule take place once a month (apart from August).

13 http://www.europarl.europa.en

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