## Governmental Structure
### Union Institutions 1

### Contents

**Introduction**  
147

1. The 'Separation-of-Powers' Principle and the European Union  
2. The European Parliament  
   a. Formation: Electing Parliament  
      aa. Parliament's Size and Composition  
      bb. Members of the European Parliament and Political Parties  
   b. Internal Structure: Parliamentary Organs  
   c. The Plenary: Decision-making and Voting  
   d. Parliamentary Powers  
      aa. Legislative Powers  
      bb. Budgetary Powers  
      cc. Supervisory Powers  
      dd. Elective Powers  
2. The European Council  
   a. The President of the European Council  
   b. The European Council: Functions and Powers  
4. The Council of Ministers  
   a. The Council: Composition and Configuration  
   b. Internal Structure and Organs  
      aa. The Presidency of the Council  
      bb. 'Coreper' and Specialised Committees  
      cc. Excursus: The High Representative of Foreign Affairs and Security Policy  
   c. Decision-making and Voting  
   d. Functions and Powers  

### Introduction

The creation of governmental institutions is the central task of all constitutions. Each political community needs institutions to govern its society; as each society needs common rules and a method for their making, execution and arbitration. It is no coincidence that the first three articles of the 1787 American Constitution establish and define – respectively – the 'Legislative Department', the 'Executive Department' and the 'Judicial Department'.
The European Treaties establish a number of European institutions to execute and arbitrate European law. The Union’s institutions and their core functions are defined in Title III of the Treaty on European Union. The central provision here is Article 13 TEU:

1. The Union shall have an institutional framework which shall aim to promote and protect the values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions.
   - The Union’s institutions shall be:
     - the European Parliament,
     - the European Council,
     - the Council,
     - the European Commission (hereinafter referred to as ‘the Commission’),
     - the Court of Justice of the European Union,
     - the European Central Bank,
     - the Court of Auditors.

2. Each institution shall act within the limits of the powers conferred on it by the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall exercise their authority in the conditions defined by the Treaties.

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

Where do the Treaties define the Union institutions? The provisions in the Treaties split the Union institutions as follows.

Table 5.1 Treaty Provisions on the Institutions

<table>
<thead>
<tr>
<th>EU Treaty – Title III</th>
<th>FEU Treaty – Part VI – Title I – Chapter 1</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 13 Institutional Framework</td>
<td>Section 1 European Parliament (Articles 223–34)</td>
</tr>
<tr>
<td>Article 14 European Parliament</td>
<td>Section 2 European Council (Articles 235–6)</td>
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<tr>
<td>Article 15 European Council</td>
<td>Section 3 Council (Articles 237–43)</td>
</tr>
<tr>
<td>Article 16 Council</td>
<td>Section 4 Commission (Articles 244–50)</td>
</tr>
<tr>
<td>Article 17 Commission</td>
<td>Section 5 Court of Justice (Articles 251–81)</td>
</tr>
<tr>
<td>Article 18 High Representative</td>
<td>Section 6 European Central Bank (Articles 282–4)</td>
</tr>
<tr>
<td>Article 19 Court of Justice</td>
<td>Section 7 Court of Auditors (Articles 285–7)</td>
</tr>
</tbody>
</table>

(Selected) Protocols: Protocol No. 3: Statute of the Court of Justice; Protocol No. 4: Statute of the ESCB and the ECB; Protocol No. 6: Location of the Seats of the Institutions etc.


and the Treaty on the Functioning of the European Union as shown in Table 5.1.

What is the composition and task of each Union institution? Chapters 5 and 6 will provide an analysis of each institution alongside three dimensions: its internal structure, its internal decisional procedures and its internal powers. The external interactions between the various institutions in the exercise of the Union’s governmental functions will be discussed in Part II – dealing with the powers and procedures of the Union. Can we nonetheless connect the institutions as ‘organs’ of the Union with their external interaction in a governmental function? And what does Article 13(2) TEU mean when insisting that each institution must act within the limits of its powers and according to the Treaties’ procedures? Is this the separation-of-powers principle within the Union legal order? We shall look at this ‘horizontal’ question in section 1 of this chapter, before analysing the ‘internal’ structure of each institution in turn.

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

2 Many of these ‘internal’ issues will be found in an institution’s ‘Rules of Procedure’. On the status of these procedural rules, see S. Lefevre, ‘Rules of Procedure Do Matter: The Legal Status of the Institutions’ Power of Self-organisation’ (2005) 30 EL Rev 802.
1. The ‘Separation-of-Powers’ Principle and the European Union

When in 1748, Baron Charles de Montesquieu published ‘The Spirit of Laws’, the enlightened aristocrat espoused his views on the division of powers in a chapter dedicated to ‘The Constitution of England’. Famously, three powers were identified:

In every government there are three sorts of power: the legislative; the executive, in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law. By virtue of the first, the prince or magistrate enacts temporary or perpetual laws, and amended or abrogates those that have been already enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions. By the third, he punishes criminals, or determines the disputes that arise between individuals. The latter we shall call the judiciary power.  

Having identified three governmental ‘powers’ or functions, Montesquieu moved on to advocate their ‘distribution’ between different institutions:

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty, if the judicial power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

Would the distribution of power mean that each power would need to be given to a ‘separate’ institution? Did the distribution of power thus lead to a separation of powers? This reading of Montesquieu’s oracular passage appears – at first sight – to have been chosen by the founding fathers of the United States of America. The idea behind the American constitutional structure seems to be that different governmental powers correlate with different institutions. Legislative power and thus vested in ‘Congress’, the executive power is vested in a ‘President’, while the judicial power is vested in the ‘Supreme Court’. But there is a second possible reading of the famous Montesquieu passage. The distribution of powers here leads to a combination of powers. ‘To form a moderate government, it is necessary to combine the several powers; to regulate, temper, and set them in motion; to give, as it were, ballast to one, in order to enable it to counterpoise the other.’ The exercise of the legislative function should thus ideally involve more than one institution.

The legislative body being composed of two parts, they check one another by the mutual privilege of rejecting. They are both restrained by the executive power, as the executive is by the legislative. These three powers should naturally form a state of equipoise or inaction. But as there is a necessity for movement in the course of human affairs, they are forced to move, but still in concert.

The idea behind this second conception of the separation-of-powers principle is thus a system of checks and balances. And it is this second conception of the separation-of-powers principle that informs the European Treaties. The European Treaties do not – unlike the US Constitution – discuss each institution within the context of one governmental function. Instead, the European Treaties have adopted the opposite technique. Each institution has ‘its’ article in the Treaty on European Union, whose first section describes the combination of

![Figure 5.1 Separation of Power Models](Image)


7 On the impact of Montesquieu on the American Constitution, see J. Madison, *Federalist No. 47* in J. Madison et al., *The Federalist*, ed. T. Ball (Cambridge University Press, 2003), 230. In order to form correct ideas on this important subject, it will be proper to investigate the sense in which the preservation of liberty requires that the three great departments of power should be separate and distinct. The oracle who is always consulted and cited on this subject is the celebrated Montesquieu.

8 Art. I, section 1 US Constitution: ‘All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.’


10 *Ibid.* Art. III, section 1: ‘The judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.’


governmental functions in which it partakes. The European Treaties have then set up a system for distributing powers among different institutions, assigning to each institution its own role in the institutional structure of the Union and the accomplishment of the tasks entrusted to the Union. It is the conception of the separation-of-powers principle that informs Article 13(2) TEU. The provision is known as the principle of inter-institutional balance and reads:

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 provision contains three constitutional commands. First, each institution must act within its powers as defined by the Treaties. It is thus not possible for an institution to unilaterally extend its powers through constitutional practice. Nor may an institution consensually transfer its powers to another institution — unless the Treaties expressly allow for such delegations of power. (The Union legal order has indeed expressly permitted such delegations from the very beginning and thus never subscribed to the ‘static’ non-delegation doctrine that characterised nineteenth-century American constitutional thought.)

Secondly, [o]bservance of the institutional balance means that each of the institutions must exercise its powers with due regard for the powers of the other institutions. This principle of ‘mutual sincere cooperation’ between the institutions in Article 13(2) TEU is the horizontal extension of the principle of sincere cooperation in Article 4(3) TEU. One manifestation of this principle is inter-institutional agreements, in which the institutions agree to exercise ‘their’ powers in harmony with each other.

Finally, each institution is embedded within the governmental procedures of the European Union. Thus, under the (ordinary) legislative procedure, three of the Union institutions will need to take part: the Commission must formally propose the legislative bill, and the Parliament as well as the Council must co-decide on its adoption. And even where an institution only needs to be consulted, this involvement through consultation ‘represents an essential factor in the institutional balance intended by the Treaties’.

What types of governmental ‘powers’ or ‘functions’ may be identified for the European Union? Apart from defining what constitutes the legislative procedure(s), the European Treaties do not formally classify the Union’s governmental functions according to a particular procedure. In line with classic constitutional thought, the Treaties thus continue to be based on a material conception of governmental powers. The legislative power thereby relates to the competence of making laws. The executive power relates to the competence of proposing and implementing laws. The judicial power relates to the competence of arbitrating laws in court. In addition to the classic trinity, modern constitutions have also come to recognise additional governmental powers. A separate ‘fourth power’ thus relates to the external competences of a body politic.

The fourth power must be located as lying in between the legislative and the executive department, for it involves both the creation of ‘laws’ and — in the worst case — the execution of wars against an enemy. Finally, many modern States now also acknowledge a ‘fifth power’ relating to institutional agreements, see B. Driessen, ‘Interinstitutional Conventions and Institutional Balance’ (2008) 33 EL Rev 550 at 551: ‘Although such arrangements often do no more than lubricate interinstitutional relations, in many cases they affect the effective balance of influence between the institutions.’

22 The recognition of foreign affairs as a public function distinct from the gestation of domestic affairs received its classic formulation in the political philosophy of John Locke. Locke had identified the ‘federalive power’ as ‘the power of war and peace, leagues and alliances, and all the transactions with all persons and communities without the commonwealth’ (J. Locke, Two Treatises of Government, ed. P. Laslett (Cambridge University Press 1985) 365, § 146).
23 Hamilton, Federalist No. 75 (n. 7 above), 365 (emphasis added): ‘Though several writers on the subject of government place that power in the class of executive authorities, yet this is evidently an arbitrary disposition; for if we attend carefully to its operation, it will be found to partake more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either of them. The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society; while the execution of the laws, and the employment of the common strength, either for this purpose or the common defence, seem to comprise all the functions of the executive magistrate. The power of making treaties is, plainly, neither the one nor the other. It relates neither to the execution of the subsisting laws, nor to the enactment of new ones; and still less to an exertion of the common strength. Its objects are CONTRACTS with foreign nations, which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign. The power in question seems therefore to form a distinct department, and to belong, properly, neither to the legislative nor to the executive.’

13 This is normally the first section of the TEU article dealing with the respective institution.
16 On the delegation of legislative power, see Chapter 9, section 2(a) below.
18 Case C-70/88, Parliament v. Council (Chemnthy) [1990] ECR 1-2041 para. 22; and see more recently Case C-133/06, Parliament v. Council [2008] ECR 1-3189, para. 57.
19 Art. 4(3) TEU only deals with the federal relations between the Union and its Member States. We shall analyse this provision in detail in Part II of the book.
20 The Treaties envisage inter-institutional agreements for example in Art. 295 TFUE, which states: ‘The European Parliament, the Council and the Commission shall consult each other and by common agreement make arrangements for their cooperation. To that end, they may, in compliance with the Treaties, conclude inter-institutional agreements which are not of a binding nature.’ For a list of inter-institutional agreements concluded between 1958–2005, see W. Hummer, ‘Annex: Interinstitutional Agreements Concluded during the Period 1958–2005’ (2007) 13 ELJ 92. On the various theories of the nature of inter
Table 5.2 Union Institutions Correlating to Governmental Functions

<table>
<thead>
<tr>
<th>Legislative</th>
<th>External</th>
<th>Executive</th>
<th>Judicial</th>
<th>Financial</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parliament</td>
<td>(European) Council</td>
<td>European Council</td>
<td>Court</td>
<td>Central Bank</td>
</tr>
<tr>
<td>Council</td>
<td>Parliament</td>
<td>Commission</td>
<td>Commission</td>
<td>Investment Bank</td>
</tr>
</tbody>
</table>

to the governmental control of financial markets. The task of governmental banks is to regulate and stabilise a polity's money supply.

How do the Union's institutions (and 'bodies') correlate with these governmental powers so identified? It is important to keep in mind that '[t]he principle of institutional balance does not imply that the authors of the Treaties set up a balanced distribution of the powers, whereby the weight of each institution is the same as that of the others'. It simply means that '[t]he Treaties set up a system for distributing powers among the different Union institutions, assigning each institution its own role in the institutional structure of the Union and the accomplishment of the tasks entrusted to the Union'.

Table 5.2 simply provides an overview of the major institutional participants that combine in each function.

2. The European Parliament

Despite its formal place in the Treaties, the European Parliament has never been the Union's 'first' institution. For a long time it followed, in rank, behind the Council and the Commission. Parliament's original powers were indeed minimal. It was an 'auxiliary' organ that was to assist the institutional duopoly of Council and Commission. This minimal role gradually increased from the 1970s onwards. The Budget Treaty gave it a say in the budgetary process and subsequent Treaty amendments dramatically enhanced its role in the legislative process. Today the Parliament constitutes — with the Council — chamber of the Union legislature. Directly elected by the European citizens, Parliament constitutes not only the most democratic institution; in light of its collective 'appointment', it is also the most supranational institution of the European Union.

26 Case C-70/88 (n. 18 above), para. 21.
27 Art. 10(2) TEU; 'Citizens are directly represented at Union level in the European Parliament.'
28 Art. 137 EEC. See also Art. 20 ECSC.
29 Art. 138 EEC. See also Art. 21 ECSC.
30 Originally, the EEC Treaty granted 36 delegates to Germany, France and Italy; 14 delegates to Belgium and the Netherlands; and 6 delegates to Luxembourg.
31 Art. 138(3) EEC: 'The [Parliament] shall draw up proposals for elections by direct universal suffrage.' See also Art. 21(3) ECSC.
33 Art. 14(2) TEU.
aa. Parliament's Size and Composition

The Treaties stipulate the following on the size and composition of the European Parliament:

The European Parliament shall be composed of representatives of the Union's citizens. They shall not exceed seven hundred and fifty in number, plus the President. The representation of citizens shall be degressively proportional, with a minimum threshold of six members per Member State. No Member State shall be allocated more than ninety-six seats.

The European Council shall adopt by unanimity, on the initiative of the European Parliament and with its consent, a decision establishing the composition of the European Parliament, respecting the principles referred to in the first subparagraph.

The European Parliament has a maximum size of 751 members. While relatively large in comparison with the (American) House of Representatives, it is still smaller than the (British) House of Lords. The Treaties themselves no longer determine its composition. It is the European Council that must decide on the national 'quotas' for the Union's parliamentary representatives. The distribution of seats must however be 'degressively proportional' within a range spanning from 6 to 96 seats. The European Council has recently taken a formal decision on the principles governing the allocation of national 'quotas' within Parliament. The concrete distribution of seats among Member States can be seen in Table 5.3.

The national 'quotas' for European parliamentary seats constitute a compromise between the democratic principle and the federal principle. For while the democratic principle would demand that each citizen in the Union has equal voting power ('one person, one vote'), the federal principle insists on the political equality of States. The result of this compromise was the rejection of a purely proportional distribution in favour of a degressively proportional system. The degressive element within that system unfortunately means that a Luxembourg citizen has ten times more voting power than a British, French or German citizen.

34 Ibid.
35 To compare: the (American) House of Representatives has 435 members. The (British) House of Commons is designed to have 650 members, while the (British) House of Lords has about 830 members.
36 This had always been the case prior to the Lisbon Treaty. The composition of the Parliament has thus been 'de-constitutionalised'.
37 European Council, Decision establishing the Composition of the European Parliament [2013] OJ L 181/57, esp. Art. 1: 'In the application of the principle of degressive proportionality provided for in the first subparagraph of Article 142 of the Treaty on European Union, the following principles shall apply: the allocation of seats in the European Parliament shall fully utilise the minimum and maximum numbers set by the Treaty of European Union in order to reflect as closely as possible the size of the respective populations of Member States; the ratio between the population and the number of seats of each Member State before rounding to whole numbers shall vary in relation to their respective populations in such a way that each Member of the European Parliament from a more populous Member State represents more citizens than each Member from a less populous Member State and, conversely, that the larger the population of a Member State, the greater its entitlement to a large number of seats.'

Table 5.3 Distribution of Seats in the European Parliament (Member States)

<table>
<thead>
<tr>
<th>Member State (Seats)</th>
<th>Country (Seats)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium (21)</td>
<td>Ireland (11)</td>
</tr>
<tr>
<td>Bulgaria (17)</td>
<td>Italy (72+1)</td>
</tr>
<tr>
<td>Croatia (11)</td>
<td>Cyprus (6)</td>
</tr>
<tr>
<td>Czech Republic (21)</td>
<td>Latvia (8)</td>
</tr>
<tr>
<td>Denmark (13)</td>
<td>Lithuania (11)</td>
</tr>
<tr>
<td>Germany (96)</td>
<td>Luxembourg (6)</td>
</tr>
<tr>
<td>Estonia (6)</td>
<td>Hungary (21)</td>
</tr>
<tr>
<td>Greece (21)</td>
<td>Malta (6)</td>
</tr>
<tr>
<td>Spain (54)</td>
<td>Netherlands (26)</td>
</tr>
<tr>
<td>France (74)</td>
<td></td>
</tr>
</tbody>
</table>

*This additional seat was added, because of Italian intransigence, by the Lisbon Intergovernmental Council, see Declaration No. 4 on the composition of the European Parliament: 'The additional seat in the European Parliament will be attributed to Italy.' This is why the European Parliament has 751 and not 750 seats.

How are the individual members of Parliament elected? The Treaties solely provide us with the most general of rules: 'The members of the European Parliament shall be elected for a term of five years by direct universal suffrage in a free and secret ballot.' More precise rules are set out in the (amended) 1976 Election Act, Article 1 of the Act commands that the elections must be conducted 'on the basis of proportional representation.' This outlaws the traditionally British election method of 'first past the post'. The specifics of the election procedure are however principally left to the Member States.

38 Art. 14(3) TEU, 39 Art. 1(1) and (3) of the 1976 Election Act (p. 32 above).
40 This condition had not been part of the original 1976 Election Act, but was added through a 2002 amendment. This amendment was considered necessary as, hitherto, the British majority voting system 'could alone alter the entire political balance in the European Parliament' (F. Jacobs et al., The European Parliament (Harper Publishing, 2005), 17). The best example of this distorting effect was the 1979 election to the European Parliament in which the British Conservatives won 60 out of 78 seats with merely 50 per cent of the vote (ibid.).
41 Art. 8 of the 1976 Election Act: 'Subject to the provisions of this Act, the electoral procedure shall be governed in each Member State by its national provisions.' Under the Act, Member States are free to decide whether to establish national or local constituencies for elections to the European Parliament (ibid., Art. 2), and whether to set a minimum threshold for the allocation of seats (ibid., Art. 3). Moreover, each Member State can fix the date and times for the European elections, but this date must fall within the same period starting on a Thursday morning and ending on the following Sunday' for all Member States (ibid., Art. 10(1)).
parliamentary elections thus still do not follow ‘a uniform electoral procedure for all Member States’, but are rather conducted ‘in accordance with principles common to all Member States’. The Treaties nonetheless insist on a simple common constitutional rule: ‘every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State’.

bb. Members of the European Parliament and Political Parties

For a long time, the 1976 Election Act solely governed the status of an MEP determined, inter alia, that members would enjoy the privileges and immunities of the European Union. It also established that membership of the European Parliament was incompatible with a parallel membership in a national government or parliament, or with being a member of another European institution.

After years of debate and discontent, Parliament belatedly adopted its ‘Statute for Members of the European Parliament’. The Statute ‘lays down regulations and general conditions governing the performance of the duties of members of the European Parliament’. Accordingly, ‘members shall be independent’. They ‘shall vote on an individual and personal basis, and shall thus ‘not be bound by any instructions’’. Members are entitled to put proposals for Union acts and may form political groups. They are entitled to receive an ‘appropriate salary to safeguard their independence’, and might receive an ‘additional salary for a pension’.

Members of Parliament will, as a rule, be members of a political party. Yet despite a considerable effort to nurture European parties, European parliamentarians continue to be elected primarily as representatives of their national parties. Members of Parliament will however often choose to join one of the ‘European political groups’ (in reality, it is their national parties doing the naming for them). Parliament’s Rules of Procedure stipulate that a political group must comprise a minimum number of 25 members and ‘shall comprise’ members elected in at least one-quarter of the Member States. The advantage of being within a political group is that they enjoy a privileged status within Parliament.

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42 Ibid., Art. 9. Art. 10 fixes the salary as follows: ‘The amount of the salary shall be 38.5 per cent of the basic salary of a judge of the Court of Justice of the European Union.’
43 Ibid., Art. 14 et seq.
44 According to Art. 10(4) TEU: ‘Political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union. The Treaties et al. contain a legal basis in Art. 224 TFEU for ‘regulations governing political parties at European level referred to in Article 20(4) of the Treaty on European Union and in particular rules regarding their funding’. The legal basis has been used in the form of Regulation 2004/2003 on the regulations governing political parties at European level and the rule regarding their funding [2003] OJ L 297/1, as amended by Regulation 1524/2007 [2007] OJ L 343/3. The Regulation defines a ‘political party’ as an ‘association of citizens’, which pursues political objectives (ibid., Art. 2), and which must satisfy four conditions: (a) it must have legal personality in the Member States in which its seat is located; (b) it must be represented, in at least one quarter of Member States, by Members of the European Parliament or in the national Parties or regional Parliaments or in the national government or parliament, or with being a member of another European institution.
45 Art. 4.
46 Ibid., Art. 7.
47 Art. 6(2) of the 1976 Election Act. Art. 7.
48 European Parliament, Decision 2005/684 adopting the Statute for Members of the European Parliament [2005] OJ L 262/1 (Annex 2). The legal basis for this type of act can now be found in Art. 223(2) TFEU: ‘The European Parliament, acting by 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.’
49 Art. 1 MEP Statute.
50 Ibid., Art. 2. This is repeated in Art. 6(1) of the 1976 Act: ‘Members of the European Parliament shall vote on an individual and personal basis. They shall not be bound by any instructions and shall not receive a binding mandate.’
51 Art. 3 MEP Statute.
52 Ibid., Art. 5.
53 Ibid., Art. 8.
54 Ibid., Art. 9. Art. 10 fixes the salary as follows: ‘The amount of the salary shall be 38.5 per cent of the basic salary of a judge of the Court of Justice of the European Union.’
55 Ibid., Art. 14 et seq.
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57 Art. 4.
58 This has led Hix to characterise European elections as ‘second-order national contests’ (S. Hix, The Political System of the European Union (Palgrave, 2005), 193).
59 Each political group can itself decide on the membership in its Group Statute. For example, the European People’s Parties Statute (see www.europepeoplesparty.eu/subpagina. php?submenuID=5&subsubmenuID=38&subsubmenuID=84) is based on the membership of national parties and distinguishes between ‘Ordinary Member Parties’ and ‘Associated Member Parties’. According to Art. 5 of the Statute ‘all members of the EPP Group in the European Parliament elected on a list of a member party are also members ex officio of the association’. However, parliamentarians who are not attached to any national party can become Individual Members of the association by decision of the Political Assembly on the proposal of the Presidency of the association (ibid.).
There presently exist seven political groups within the European Parliament, the European People’s Party (EPP), the Progressive Alliance of Socialists and Democrats (S&D), the European Conservatives and Reformists (ECR), the Alliance of Liberals and Democrats for Europe (ALDE), the European United Left-Nordic Green Left (GUE-NGL), the Greens-European Free Alliance (G-EFA) and the Europe of Freedom and Direct Democracy (EFDD). At the 2014 elections, the distribution of seats among the political groups in the European Parliament is as shown in Figure 5.2.

b. Internal Structure: Parliamentary Organs

Formally, Parliament always acts as the plenary. Yet it is entitled to organise itself internally and thus to establish a division of labour. According to Article 14(4) of the Treaty of Amsterdam, ‘the European Parliament shall elect its President and its officers from among its members’. The various officers and their duties are laid down in Chapter IV of Parliament’s Rules of Procedure. According to its Rule 15, Parliament elects a secret ballot, a President, 14 Vice-Presidents, and five Quaestors.

The President is the ‘Speaker’ of the European Parliament, whose duties are set out in Rule 22: ‘The President shall direct all the activities of Parliament and its bodies’. S/he is entitled to open, suspend and close sittings; to rule on the admissibility of amendments, on questions to the Council and Commission; and s/he is also charged with maintaining order, calling upon speakers, calling the roll, or deciding matters to枣vote and announce the results of votes; and to refer to committees any communications that concern them. Finally, the President represents Parliament in inter-institutional or international relations.

Parliament is also supported by a number of internal parliamentary organs. The ‘Bureau’ is the body formed by the President and the Vice-President, charged with taking decisions on financial and administrative matters concerning the internal organisation of Parliament and its Members. The ‘Conference of Presidents’ is the body that consists of the President and the Chairs of the Political Groups. Importantly, it is the body that ‘shall take decisions on the organisation of Parliament’s work and matters of legislative planning’. It will thereby ‘draw up the draft agenda of Parliament’s part-sessions’, and constitutes ‘the authority responsible for the composition and competence of committees’.

Committees constitute the most important ‘decentralised’ organs of Parliament. The two principal committee types are ‘standing committees’ and ‘special committees’. Standing committees are permanent committees. They

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58 For example: the French Party ‘Union for a Political Movement’, as well as the German ‘Christian Democratic Union’ are members of this political group.
59 For example, the British ‘Labour Party’, the German ‘Social Democratic Party’ and the French ‘Socialist Party’ are members of this European political group.
60 The British Conservative Party and Poland’s ‘Law and Justice’ Party are members of this group.
61 For example, the British ‘Liberal Democrats’, the French ‘Democratic Movement’ and the German ‘Free Democratic Party’ are members of this European political group.
63 The term of office for all three offices is two-and-a-half years (see Rule 19 Parliament Rules of Procedure).
64 Rule 22(1) Parliament Rules of Procedure. 65 Ibid., Rule 22(2).
66 Ibid., Rule 22(4). 67 Ibid., Rule 24(1).
68 Ibid., Rule 25 – setting out the duties of the Bureau. 69 Ibid., Rule 26(1).

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70 Ibid., Rule 27(2). 71 Ibid., Rule 27(6) and (7). On the ‘draft agenda’, see Rule 149.
72 Ibid., Rule 196 and 197. ‘Special committees’ must generally expire after one year. For the detailed rules on Committees of Inquiry, see Rule 198 as well as Annex VIII of the Rules of Procedure.
Table 5.4 Standing Committees of the European Parliament

<table>
<thead>
<tr>
<th>Standing Committees</th>
<th>Foreign Affairs</th>
<th>Economic and Monetary Affairs</th>
<th>Transport and Tourism</th>
<th>Legal Affairs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Development</td>
<td>Employment and Social Affairs</td>
<td>Regional Development</td>
<td>Civil Liberties, Justice and Home Affairs</td>
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</tr>
<tr>
<td>International Trade</td>
<td>Environment, Public Health and Food Safety</td>
<td>Agriculture and Rural Development</td>
<td>Constitutional Affairs</td>
<td></td>
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<tr>
<td>Budgets</td>
<td>Industry, Research and Energy</td>
<td>Fisheries</td>
<td>Women's Rights and Gender Equality</td>
<td></td>
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<tr>
<td>Budgetary Control</td>
<td>Internal Market and Consumer Protection</td>
<td>Culture and Education</td>
<td>Petitions</td>
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</tbody>
</table>

There are set up as thematically specialised bodies that concentrate on one area of parliamentary affairs. With their mandates defined in the 2014 Rules of Procedure, Table 5.4 lists Parliament's Standing Committees.

Importantly, as committees functionally operate like miniature parliamentary committees 'shall, as far as possible, reflect the composition of Parliament. Committee members are elected after having been nominated by their political groups (or non-attached members). Standing committees have between 40 to 60 members, are headed by a 'Committee Chair', and are coordinated by 'Committee Coordinators'. The duties of standing committees are these defined as follows: 'Standing committees shall examine questions referred to them by Parliament or, during an adjournment of the session, by the President on behalf of the Conference of Presidents.' Voting within committees is by show of hands - with the Chair not having a casting vote. The responsibility of reporting back to the plenary is the task of a rapporteur. And this brings us to an important final point: committees only prepare decisions. For the tasks of decision-making belongs - exclusively - to the plenary.

c. The Plenary: Decision-making and Voting

The plenary is the formal decision-making 'organ' of the European Parliament, through the plenary that Parliament formally acts. The Treaties - anachronistically - determine that Parliament is to meet, as plenary, at least once a year.

73 Ibid., Rule 196. 74 Ibid., Annex VI. 75 Ibid., Rule 199(1). 76 Ibid., Rule 205. 77 Ibid., Rule 201(1). According to Rule 201(3): 'Should two or more standing committees competent to deal with a question, one committee shall be named as the committee responsible and the others as committees asked for opinions.' 78 Ibid., Rule 208.
Should a Parliament, which debates and votes in public, not also be required to record the votes of individual members? Two constitutional rationales complicate answering this question. From a democratic perspective, the ‘transparency’ of the vote is important in that it allows citizens to monitor their representatives. And while the latter cannot be bound by instructions or a binding mandate, citizens have at least a choice to ‘de-select’ their Member of Parliament in the following elections. On the other hand, an impersonal vote may better protect the independence of members of Parliament from less legitimate influences. These may be party-political pressures within Parliament or organised civil society in the form of corporatist lobbies.

**d. Parliamentary Powers**

When the Paris Treaty set up the European Parliament, its sole function was to exercise ‘supervisory powers’. Parliament was indeed a passive onlooker in the decision-making process within the first Community. The Rome Treaty expanded Parliament’s function to ‘advisory and supervisory powers’. This recognised the active power of Parliament to be consulted on Commission proposals before their adoption by the Council. After 60 years of evolution and numerous amendments, the Treaty on European Union today defines the powers of the European Parliament in Article 141 TEU as follows:

The European Parliament shall, jointly with the Council, exercise legislative and budgetary functions. It shall exercise functions of political control and consultation, as laid down in the Treaties. It shall elect the President of the Commission.**

This definition distinguishes between four types of powers: legislative and budgetary powers as well as supervisory and elective powers.

**aa. Legislative Powers**

The European Parliament’s principal power lies in the making of European law. In the recent past, it has indeed evolved into a ‘legislative powerhouse’. Its participation in the legislative process may take place at two moments in time. Parliament may informally propose new legislation. However, it is not - unlike many national parliaments - entitled to formally propose bills. The task of...
powers have consequently been described as the 'reverse of those traditionally exercised by parliaments'.

Be that as it may, Parliament's formal involvement in the Union budget started with the 1970 and 1975 Budget Treaties. They distinguished between compulsory and non-compulsory expenditure, with the latter being expenditure that would not result from compulsory financial commitments flowing from Union law. Parliament's powers were originally confined to this second category. The Lisbon Treaty has, however, abandoned the distinction between compulsory and non-compulsory expenditure, and Parliament has thus become a equal partner in establishing the Union's annual budget.

cc. supervisory powers
A third parliamentary power is that of holding to account the executive. Parliamentary supervisory powers typically involve the power to debate, question, and investigate.

A soft parliamentary power is the power to debate. To that effect, the European Parliament is entitled to receive the 'general report on the activities of the Union' from the Commission, which it 'shall discuss in open session'. And as regards the European Council, the Treaties require its President to 'present a report to the European Parliament after each of the meetings of the European Council'. Similar obligations apply to the European Central Bank.

The power to question the European executive is formally enshrined only in the Commission: 'The Commission shall reply orally or in writing to questions put to it by the European Parliament or by its Members.' However, both the European Council and the Council have confirmed their willingness to be questioned by Parliament. Early on, Parliament introduced the institution of 'Question Time'—modelled on the procedure within the British Parliament. And under its own Rules of Procedure, Parliament is entitled to hold 'an extraordinary debate' on a 'matter of major interest relating to European Union policy.'

Parliament also enjoys the formal power to investigate. It is constitutionally entitled to set up temporary Committees of Inquiry to investigate alleged contraventions or maladministration in the implementation of European law. These temporary committees thus complement Parliament's standing committees. They have been used, inter alia, to investigate the (mis)handling of the BSE crisis.

Finally, European citizens have the general right to 'petition' the European Parliament. And according to a Scandinavian constitutional tradition, the European Parliament will also elect an 'ombudsman'. The European Ombudsman 'shall be empowered to receive complaints' from any citizen or Union resident 'concerning instances of maladministration in the activities of the Union institutions, bodies or agencies'. S/he 'shall conduct inquiries' on the basis of complaints addressed to her or him directly or through a Member of the European Parliament.

dd. elective powers

Modern constitutionalism distinguishes between 'presidential' and 'parliamentary' systems. Within the former, the executive officers are independent from Parliament, whereas in the latter the executive is elected by Parliament. The European constitutional order sits somewhere 'in between'. Its executive was for a long time selected without any parliamentary involvement. This continues to be the case today for one branch of the Union executive: the European Council. However, as regards the Commission, the European Parliament has increasingly come to be involved in the appointment process. Today, Article 17 TEU describes the involvement of the European Parliament in the appointment of the Commission as follows:

Taking into account the elections to the European Parliament and after having held the appropriate consultations, the European Council, acting by a qualified majority, shall propose to the European Parliament a candidate for President of the Commission. This candidate shall be elected by the European Parliament by a majority of its component members ... The Council, by common accord with the President-elect, shall adopt the list


102 Art. 314 TFEU.

103 In the area of the Union's common foreign and security policy, the parliamentary powers to question and debate are now expressly enshrined in Art. 36(2) TFEU: The European Parliament may address questions or make recommendations to the Council or to the High Representative. Twice a year it shall hold a debate on progress in implementing the common foreign and security policy."

104 Art. 249(2) TFEU. 105 Art. 233 TFEU. 106 Art. 15(6)(d) TFEU.


108 Art. 230 TFEU—second indent.

109 The Council accepted this political obligation in 1973; see Jacobs, The European Parliament (n. 40 above), 284.


114 According to Art. 227 TFEU, any citizen or Union resident has the right to petition the European Parliament 'on any matter which comes within the Union's field or activity and which affects him, her or it directly'. See also Art. 20(2)(d) TFEU.

115 Art. 228 TFEU.
of the other persons whom it proposes for appointment as members of the Commission. They shall be selected, on the basis of the suggestions made by Member States ... The President, the High Representative of the Union for Foreign Affairs and Security Policy, and the other members of the Commission shall be subject as a body to a vote of confidence by the European Parliament. On the basis of this consent the Commission shall be appointed by the European Council, acting by a qualified majority.116

The appointment of the second branch of the European executive thus requires dual parliamentary consent. Parliament must — first — ‘elect’ the President of the Commission. And it must — secondly — confirm the Commission as a collective body. (Apart from the Commission’s President, the European Parliament has consequently not got the power to confirm each and every Commissioner.) In light of this elective power given to Parliament, one is indeed justified in characterising the Union’s governmental system as a ‘semi-parliamentary democracy’.118

Once appointed, the Commission continues to be ‘responsible to the European Parliament’.119 Where its trust is lost, Parliament may vote on a motion of censure. If this vote of mistrust is carried, the Commission must resign as a body. The motion of collective censure mirrors Parliament’s appointment power, which is also focused on the Commission as a collective body. This blunt ‘atomic option’ has never been used.120 However, unlike the appointment power, Parliament has been able to sharpen its tools of censure significantly by concluding a political agreement with the Commission. Accordingly, Parliament expresses lack of confidence in an individual member of the Commission, the President of the Commission shall either require the resignation of that Member or, after ‘serious’ consideration, explain the refusal to do so before Parliament.121 While this is a much ‘smarter sanction’, it has also not been used due to the demanding voting requirements in Parliament.

Parliament is also involved in the appointment of other European officers. This holds true for the Court of Auditors,122 the European Central Bank,123 the European Ombudsman,124 as well as some European Agencies.125 However,

116 Art. 17(7) TEU.
117 However, Parliament may request each nominated Commissioner to appear before Parliament and to ‘present’ his or her views. This practice thus comes close to ‘confirmation hearings’ [Judge and Earnshaw, The European Parliament (n. 101 above), 205].
119 Art. 17(8) TEU.
120 Once, however, the European Parliament came close to using this power when in 1999 it decided to censure the Santer Commission. However, the latter chose collectively to resign instead.
121 Framework Agreement (n. 110 above), para. 5. However, this rule has been contested by the Council; see Council statement concerning the framework agreement on relations between the European Parliament and the Commission [2010] OJ C 287/1.
122 Art. 286(2) TFEU.
123 Art. 283(2) TFEU.
124 Art. 228(2) TFEU.
125 For example, Parliament is entitled to appoint two members to the Management Board of the European Environmental Agency; see Regulation No. 401/2009 on the Environment Agency and the European Environment Information and Observation Network (Codified version) [2009] OJ L 126/13, Art. 8(1).

is not involved in the appointment of judges to the Court of Justice of the European Union.

3. The European Council

The European Council originally developed outside the institutional framework of the European Union.126 And for some time, the Member States even tried to prevent the European Council from acting within the scope of the Treaties.127 Since the 1992 Maastricht Treaty, the European Council has however steadily moved inside the institutional framework of the Union. And with the 2007 Lisbon Treaty, the European Council has finally become a formal institution of the European Union.128 This formalisation recognises a substantive development in which the European Council has become ‘the political backbone’ of the European Union.129

The composition of the European Council is as simple as it is exclusive. It consists of the Heads of State or Government of the Member States.130 With the Lisbon Treaty the European Council has its own President — who will be an additional member, as s/he cannot simultaneously serve as a Head of State or Government.131 The President of the Commission shall also be a formal member.132 However, neither the President of the European Council nor the Commission President enjoys a voting right.133 They are thus not full members, but rather ‘honorary’ members of this Union institution. Their status is not so dissimilar to the High Representative of the Union for Foreign Affairs and Security Policy, who — while not even being a formal member of the European Council — shall nonetheless take part in its work.

The European Council shall meet twice every six months, but can have additional meetings when the situation so requires.134 These regular meetings

122 European Council, ‘Solemn Declaration on European Union (Stuttgart, 1983) reproduced in A. G. Hasenwinkler, Documents on European Union (St Martin’s Press, 1997), 215, para. 2.1.3: ‘when the European Council acts in matters within the scope of the European Union, it does so in its capacity as the Council within the meaning of the Treaties’.
123 Art. 13(1) TFEU.
124 J. Werts, The European Council (TCM Ascer Institute, 1992), 296.
125 Art. 15(2) TFEU. The distinction between Heads of State or Government was originally made for France. For, under national constitutional law, the President, as Head of State, is principally charged with external relations powers. The situation is similar in Cyprus, Finland, Lithuania and — arguably — the Czech Republic and Poland.
126 Art. 15(6) TFEU — last indent: ‘The President of the European Council shall not hold a national office.’
127 Art. 15(2) TFEU.
128 Art. 255(1) TFEU: ‘Where the European Council decides by vote, its President and the President of the Commission shall not take part in the vote.’
129 Art. 15(3) TFEU. In urgent situations, the physical meeting can be replaced by a ‘written procedure’ (see Art. 7 European Council Rules of Procedure).
follow the seasons: there are spring, summer, autumn and winter meetings. The meetings were traditionally held in the Member State holding the Council Presidency. However, the European Council now ‘shall meet in Brussels’.135

How will it decide? The decision-making process within the European Council is shrouded in secrecy for its meetings are not public.136 The default principle is set out in Article 15(4) TEU: ‘Except where the Treaties provide otherwise, decisions of the European Council shall be taken by consensus.’ The general rule is thus unanimity of all the Member States. However, there are some instances within the Treaties in which the European Council may act by a qualified majority of the Member States. In such a case, the Council’s rules on what constitutes a qualified majority apply mutatis mutandis to the European Council.137

a. The President of the European Council

Traditionally, the European Council had a rotating presidency: every six months the Head of State or Government of the State that held the Council Presidency was to be the President of the European Council. The Lisbon Treaty has given the European Council its own – permanent – President.138 The permanent President is elected by the European Council,139 but cannot be elected from within the European Council. The period of office will be a (once renewable) term of two-and-a-half years.140 This is a relatively short time when compared with other governmental offices within the European Union. Nonetheless, the advantages of a permanent President over a rotating presidency are considerable. First, the rotating presidency of six months was very short. A permanent President has more permanence. Secondly, the idea of having the President of a Member State act as President of the European Council has always been incongruous. For how could the national loyalties of the highest State representative be harmoniously combined with the European obligation of standing above national interests? Thirdly, the tasks of the President of the European Council have become far too demanding to be the subject of shared attention. The tasks of the President are today set out in Article 15(6) TEU:

136 Ibid., Art. 4(3): ‘Meetings of the European Council shall not be public.’ However according to Art. 10, the European Council may decide to ‘make public the result of votes, as well as the statements in its minutes and the items in those minutes relating to the adoption of that decision’.
137 Art. 238 TFEU: ‘Article 16(4) of the Treaty on European Union and Article 238(2) of the Treaty apply to the European Council when it is acting by a qualified majority.’
139 Art. 15(5) TEU. 140 Ibid.

The President of the European Council: (a) Shall chair it and drive forward its work; (b) Shall 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; (c) Shall endeavour to facilitate cohesion and consensus within the European Council; (d) Shall present a report to the European Parliament after each of the meetings of the European Council.

The President of the European Council shall, at his level and in that capacity, ensure the external representation of the Union on issues concerning its common foreign and security policy, without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy.141

The tasks of the President are not very specific. The President has primarily coordinating and representative functions. S/he represents the European Council as an institution within the Union. Outside the Union, s/he ensures the external representation of the Union with regard to the Union’s CFSP – a task that is however shared with the High Representative for Foreign Affairs and Security Policy.142

Figure 5.3 European Council President: Donald Tusk

141 These powers are further defined in Art. 2 of the European Council Rules of Procedure.
142 On the High Representative, see section 4(b/ccc) below.
b. The European Council: Functions and Powers

What are the functions and powers of the European Council? Article 15 TEU defines them as follows:

The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof.\textsuperscript{144}

The political power to provide impulses and guidelines has been the traditional function of the European Council. It is the European Council that writes the Union’s ‘multiannual strategic programme’. And it is the European Council whose Presidency Conclusions offer specific and regular stimuli to the development of the Union and its policies.\textsuperscript{144} We find numerous expressions of the executive power of political guidance in the Treaties.\textsuperscript{145} However, the defining given in Article 15 TEU is reductionist in that it concentrates on the European Council’s ‘executive’ function. Yet the European Council also exercises three important additional functions.

First, it is given a significant constitutional function. We have seen above in relation to the simplified revision procedures.\textsuperscript{146} And in limited areas, the European Council is even given the power unilaterally to ‘bridge’ the procedural or competence limits established by the Treaties.\textsuperscript{147} These ‘passeerelle’ (little bridges) provide the European Council with partial competence-competence. Finally, the European Council agrees on the eligibility conditions for States hoping to become members of the Union.\textsuperscript{148}

Secondly, the European Council also has institutional functions. It can influence the composition of the European Parliament,\textsuperscript{149} as well as that of the European Commission.\textsuperscript{150} It shall adopt the various Council conclusions and determine that body’s presidency.\textsuperscript{151} It shall appoint the High Representative of the Union for Foreign Affairs and Security Policy.\textsuperscript{152}

143 Art. 15(1) TEU. 144 On this point, see Chapter 9, section 1 below.
145 For example, Art. 26(1) TEU: ‘The European Council shall identify the Union’s strategic interests, determine the objectives of and define general guidelines for the common foreign and security policy, including for matters with defence implications. It shall adopt the necessary decisions.’
146 On the European Council’s role within Art. 48 TEU, see Chapter 1, Conclusion.
147 For an example of such a special ‘bridge’, see Art. 31(3) TEU, as well as Art. 86(4) TFEU.
148 Art. 49 TEU. It is also charged to provide guidelines for the withdrawal of a Member State, see Art. 50(2) TEU.
149 Art. 14(2) TEU: ‘The European Council shall adopt by unanimity, on the initiative of the European Parliament and with its consent, a decision establishing the composition of the European Parliament, respecting the principles referred to in the first subparagraph.’
150 Art. 17(5) TFEU, as well as Art. 244 TFEU.
151 Art. 236 TFEU. For a detailed analysis, see section 4 (a and b) below.
152 Art. 18(1) TEU.

The 1957 Rome Treaty had originally charged the Council with the task of ‘ensur[e] that the objectives set out in this Treaty are attained’.\textsuperscript{158} This task involved the exercise of legislative as well as executive functions. And while other institutions would be involved in these functions, the Council was to be the central institution within the European Union. This has — over time — dramatically changed with the rise of two rival institutions. On one side, the ascendency of the European Parliament has limited the Council’s legislative role within the Union; on the other side, the rise of the European Council has restricted the Council’s executive powers.

By contrast, one of the functions that the European Council cannot exercise is to adopt legislative acts. Article 15 TEU is clear on this point: the European Council ‘shall not exercise legislative functions’.\textsuperscript{157}

4. The Council of Ministers

The 1957 Rome Treaty had originally charged the Council with the task of ‘ensur[e] that the objectives set out in this Treaty are attained’.\textsuperscript{158} This task involved the exercise of legislative as well as executive functions. And while other institutions would be involved in these functions, the Council was to be the central institution within the European Union. This has — over time — dramatically changed with the rise of two rival institutions. On one side, the ascendency of the European Parliament has limited the Council’s legislative role within the Union; on the other side, the rise of the European Council has restricted the Council’s executive powers.

Today, the Council is best characterised as the ‘federal’ chamber within the Union legislature. It is the organ in which national ministers meet.

What is the composition of this federal chamber, and what is its internal structure? How will the Council decide — by unanimity or qualified majority? And what are the powers enjoyed by the Council? This fourth section addresses these questions in four subsections.

a. The Council: Composition and Configuration

Within the European Union, the Council is the institution of the Member States. Its intergovernmental character lies in its composition. The Treaty on European Union defines it as follows: ‘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.\(^{159}\) Within the Council, each national
minister thus represents the interests of his Member State. These interests may
vary depending on the subject matter decided in the Council. And indeed,
depending on the subject matter at issue, there are different Council
configurations.\(^{160}\) And for each configuration, a different national minister will
be representing his State.\(^{161}\) While there is thus – legally – but one single Council,
there are – politically – ten different Councils. The existing Council config-

What is the mandate of each Council configuration? The Treaties only define
the task of the first two Council configurations.\(^{162}\) The ‘General Affairs Council’
has one upward and one downward task. It must ‘prepare and ensure the follow-
up to meetings of the European Council’.\(^{163}\) As regards its ‘downward’ task, it
is charged to ‘ensure consistency in the work of the different Council
configurations’ below the General Affairs Council.\(^{164}\) The ‘Foreign Affairs
Council’, on the other hand, is required to ‘elaborate the Union’s external action
on the basis of strategic guidelines laid down by the European Council and ensure
that the Union’s action is consistent’.\(^{165}\) The thematic scope and functional task
of the remaining Council configurations is constitutionally open. They will
generally deal with the subjects falling within their nominal ambit.

b. Internal Structure and Organs

1a. The Presidency of the Council

The Council has no permanent President. For unlike the European Council, the
council operates in various configurations, and the task of presiding over these
different configurations could not be given to one person. One therefore refers to
the depersonalised office of the Council ‘Presidency’ as opposed to the President
of the Council.

The Council Presidency is set out in Article 16(9) TEU: ‘The Presidency of
Council configurations, other than that of Foreign Affairs, shall be held by Member
State representatives in the Council on the basis of equal rotation.’ The Council
Presidency is thus a rotating presidency. The modalities of the rotating presidency
have changed with time. Originally, a single Member State held it for six months.
This has given way to ‘troika presidencies’. The Lisbon Treaty codifies these team
presidencies. The Council Presidency ‘shall be held by pre-established groups of
three Member States for a period of eighteen months’.\(^{166}\) And within the term of
these States, each member of the group shall chair the respective Council config-
urations for a period of six months.\(^{167}\) The great exception to the rotating
presidency in the Council is the ‘Foreign Affairs Council’. Here, the Treaty
contains a special rule in Article 18 TEU – dealing with the office of the High
Representative of the Union for Foreign Affairs and Security Policy. ‘The High
Representative shall preside over the Foreign Affairs Council.’\(^{168}\)

The tasks of the Presidency are twofold. Externally, it is to represent the
Council.\(^{169}\) Internally, it is to prepare and chair the Council meetings.

\(^{159}\) Art. 16(2) TEU.

\(^{160}\) Art. 16(6) TEU: ‘The Council shall meet in different configurations, the list of which shall
be adopted in accordance with Article 236 of the Treaty on the Functioning of the
European Union.’

\(^{161}\) Under the Rome Treaty, the dividing line between the European Council and the
Council was not very clear, since the Council could then meet in the formation of
Heads of State or Government (see A. Dashwood, ‘Decision-making at the Summit’
from the European Council to the Council. With the Lisbon Treaty, this problem has
disappeared as the Treaties no longer expressly call for a Council configuration consisting
of the Heads of State or Government.

\(^{162}\) Art. 16(6) TEU.

\(^{163}\) Ibid. For detailed rules on this task of the General Affairs Council, see Art. 2(3) Council
Rules of Procedure.

\(^{164}\) Art. 16(6) TEU. \(^{165}\) Ibid.

\(^{166}\) European Council Decision 2009/881 on the Exercise of the Presidency of the Council

\(^{167}\) Ibid., Art. 1(2). Until 2020, the Council Presidency order thereby is as follows: Latvia,
Slovakia, July–December 2016; Malta, January–June 2017; United Kingdom,
July–December 2017; Estonia, January–June 2018; Bulgaria, July–December 2018;

\(^{168}\) Art. 18(3) TEU. According to Art. 2(5) Council Rules of Procedure, the High
Representative may, however, 'ask to be replaced by the member of that configuration
representing the Member State holding the six-monthly presidency of the Council'.

\(^{169}\) Art. 26 Council Rules of Procedure: 'The Council shall be represented before the
European Parliament or its committees by the Presidency or, with the latter’s
agreement, by a member of the pre-established group of three Member States referred to
in Article 1(4), by the following Presidency or by the Secretary-General.'
The team presidency is thereby charged to write a 'draft programme' 18 months.\textsuperscript{170} The individual Member State to hold office shall further establish 'draft agendas for Council meetings scheduled for the next six-month period as the basis of the Council's draft programme.'\textsuperscript{171} Finally, the (relevant) chair of the Council configuration shall draw up the 'provisional agenda for each meeting.'\textsuperscript{172} And while the Council will need to approve the agenda at the beginning of the meeting,\textsuperscript{173} the power to set the provisional agenda is remarkable. The provisional agenda must thereby have the following form:

The provisional agenda shall be divided into two parts, dealing respectively with deliberations on the legislative and non-legislative activities. The first part shall be entitled 'Legislative deliberations' and the second 'Non-legislative activities'. The items appearing in each part of the provisional agenda shall be divided into A items and B items. Items for which approval by the Council is possible without discussion shall be entered as A items ...\textsuperscript{174}

The A items' constitute the vast majority of the agenda items.\textsuperscript{175} They are effectively decided by the Council's committees, in particular the Committee of Permanent Representatives — to which we shall now turn.

\textbf{bb. 'Coreper' and Specialised Committees}

The Council has, like the Parliament, developed committees to assist it. From the very beginning, a committee composed of representatives of the Member States would support the Council.\textsuperscript{176} That committee was made permanent under the Rome Treaty.\textsuperscript{177} The resultant 'Committee of Permanent Representatives' became known under its French acronym: 'Coreper'. The Permanent Representative is an ambassador of a Member State at the European Union. S/he is based in the national Permanent Representation to the European Union.

Coreper has two parts: Coreper I represents the meeting of ambassadors, while Coreper II — against all intuition — represents the meetings of their deputies. Both parts correspond to particular Council configurations. Coreper II prepares the first four Council configurations — that is the more important political decisions; whereas Coreper I prepares the more technical remainder.

The function of Coreper is vaguely defined in the Treaties: 'A Committee of Permanent Representatives of the Governments of the Member States shall be responsible for preparing the work of the Council.'\textsuperscript{178} The abstract definition has been somewhat specified in the following way: 'All items on the agenda for a Council meeting shall be examined in advance by Coreper unless the latter decides otherwise. Coreper shall endeavour to reach agreement at its level to be submitted to the Council for adoption.'\textsuperscript{179} In order to achieve that task, Coreper has set up 'working parties' below it.\textsuperscript{180} (These working parties are composed of national civil servants operating on instructions from national ministries.) Where Coreper reaches agreement, the point will be classed as an 'A item' that is rubber-stamped by the Council. Where it fails to agree in advance, a 'B item' will need to be expressly discussed by the ministers in the Council. (But importantly, even for 'A items', Coreper is not formally entitled to take decisions itself. It merely 'prepares' and facilitates formal decision-making in the Council.)

The Treaties also acknowledge a number of specialised Council committees that complement Coreper. These committees are (primarily) advisory bodies. Five will be mentioned here. First, there is the 'Political and Security Committee' (PSC) established in the context of the Common Foreign and Security Policy.\textsuperscript{181} According to the Treaties, it shall inter alia 'monitor the international situation and contribute to the definition of policies by delivering opinions to the Council.'\textsuperscript{182} The Committee has become so important that the Member State representative delegated to it has become the third person with ambassadorial rank within the Permanent Representations. Secondly, there exists the 'Article 207 Committee'. The latter receives its name from the article under which it is established. Article 207 TFEU stipulates that in international negotiations between the European Union and third countries, the '[t]he Commission shall conduct these negotiations in consultation with a special committee appointed by the Council to assist the Commission.'\textsuperscript{183} The following three committees deal with internal policies. A specialised Council committee is set up in the context of economic and monetary policy. The Economic and Financial Committee (EFC) is to 'promote coordination of the policies of Member States.'\textsuperscript{184} Furthermore, '[a] standing committee shall be set up within the Council in order to ensure that operational cooperation on the internal security is promoted and strengthened within the Union'.\textsuperscript{185} This has happened...

\begin{footnotes}
170. Ibid., Art. 2(6).
171. Ibid., Art. 2(7).
172. Ibid., Art. 3(1).
173. Ibid., Art. 3(7).
174. Ibid., Art. 3(6).
175. According to F. Hayes-Renshaw and H. Wallace, The Council of Ministers (Palgrave, 2005), some 85 per cent will be an 'A item'.
176. The Committee beneath the ECSC Council was called 'Commission de Coopération des Conseils des Ministres' (Cocom). Its members were not permanently residing in Brussels.
177. The Rome Treaty contained, unlike the Paris Treaty, an express legal basis for a Council Committee in Art. 151 EEC: 'The Council shall adopt its rules of procedure. These rules of procedure may provide for the setting up of a committee consisting of representatives of the Member States.' While the provision did not expressly mention that these representatives would be permanent representatives, this has been the intention of the Member States (E. Noel, 'The Committee of Permanent Representatives' (1967) 5 Journal Common Market Studies 219). The Merger Treaty formally established the Committee of Permanent Representatives (ibid., Art. 4).
180. Ibid., Art. 19(3). Under this paragraph, the General Secretariat is under an obligation to produce a list of these preparatory bodies. For a recent version of this list, see General Secretariat of the Council of the European Union, 20 July 2010, POLGEN/115.
182. Art. 38 TUE.
183. Art. 207(3) TFEU.
184. Art. 134(1) TFEU.
185. Art. 71 TFEU.
\end{footnotes}
must hold two offices at once. Put colloquially, s/he will have to wear two institutional 'hats'.

The High Representative shall conduct the Union's CFSP and chair the Foreign Affairs Council. In this capacity, s/he is subordinate to the Council.\footnote{188} The powers of the High Representative are defined in Article 27 TEU. The High Representative shall ensure the implementation of the decisions adopted by the European Council and the Council and make proposals for the development of that policy.\footnote{189} The High Representative will represent the Union for CFSP matters and shall express the Union's position in international organisations.\footnote{190} And to help fulfil her mandate, the High Representative will be assisted by the – newly created – European External Action Service (EEAS).\footnote{191} This is the diplomatic corps of the European Union.

c. Decision-making and Voting

The Council must – physically – meet in Brussels to make decisions.\footnote{192} The meetings are divided into two parts: one dealing with legislative activities, the other with non-legislative activities. When discussing legislation, the Council must meet in public.\footnote{193} The Commission will attend Council meetings.\footnote{194} However, it is not a formal member of the Council and is thus not entitled to vote. The quorum within the Council is as low as it is theoretical: a majority of the members of the Council are required to enable the Council to vote.\footnote{195}

Decision-making in the Council will take place in two principal forms: unanimous voting and majority voting. Unanimous voting requires the consent of all national ministers and is required in the Treaties for sensitive political matters.

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\footnote{186}{See Council Decision 2010/131 on setting up the Standing Committee on operational cooperation on internal security (COSI) [2010] OJ L 32/50. According to Art. 1: 'The Standing Committee on operational cooperation on internal security (hereinafter referred to as "the Standing Committee") foreseen in Article 71 of the Treaty is hereby set up within the Council.' Its tasks are defined in Art. 3, whose first paragraph reads: 'The Standing Committee shall facilitate and ensure effective operational cooperation and coordination under Title V of Part Three of the Treaty, including in areas covered by police and customs cooperation and by authorities responsible for the control and protection of external borders.' It shall also cover, where appropriate, judicial cooperation in criminal matters relevant to operational cooperation in the field of internal security.'}  

\footnote{187}{See Art. 18(3) (old EU): 'The Presidency shall be assisted by the Secretary-General of the Council who shall exercise the function of High Representative for the common foreign and security policy.'}  

\footnote{188}{See Art. 18(2) TEU: 'as mandated by the Council'. As the High Representative is also the Commissioner for External Relations, she or he will be subordinate to the Commission President. According to Art. 18(4) TEU (emphasis added): 'In exercising these responsibilities within the Commission, and only for these responsibilities, the High Representative shall be bound by Commission procedures to the extent that this is consistent with paragraphs 2 and 3.'}  

\footnote{189}{Art. 27(1) TEU.}  

\footnote{190}{Art. 27(2) TEU.}  


\footnote{192}{However, there exists an ‘ordinary’ and a ‘simplified’ written procedure established by Art. 12 Council Rules of Procedure.}  

\footnote{193}{Art. 16(8) TEU and Art. 5(1). According to Art. 8, the deliberation of a non-legislative proposal must also be in public where 'an important new proposal' is at stake (ibid., para.1). Importantly, Art. 9 demands that ‘the results of votes and explanations of votes by Council members’, and the minutes, must always be made public.}  

\footnote{194}{According to Art. 5(2) Council Rules of Procedure, the Council may however decide to deliberate without the Commission.}  

\footnote{195}{Ibid., Art. 11(4).}
questions. Majority voting, however, represents the constitutional norm. The Treaties here distinguish between a simple and a qualified majority. Where it is required to act by a simple majority, the Council shall act by a majority of at least member States. This form of majority vote is rare. The constitutional default is indeed the qualified majority: 'The Council shall act by a qualified majority except where the Treaties provide otherwise.'

What constitutes a qualified majority of Member States in the Council? This has been one of the most controversial constitutional concepts in the European Union. From the very beginning, the Treaties had instituted a system of weighted votes. Member States would thus not be 'sovereign equals' in the Council, as they would possess a number of votes that correlated with the size of their population. The system of weighted votes that traditionally applies is set out in Table 5.6.

**Table 5.6 Weighted Votes System within the Council**

<table>
<thead>
<tr>
<th>Member States: Votes</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Germany, France, Italy, United Kingdom</td>
<td>29</td>
</tr>
<tr>
<td>Spain, Poland</td>
<td>27</td>
</tr>
<tr>
<td>Romania</td>
<td>14</td>
</tr>
<tr>
<td>Netherlands</td>
<td>13</td>
</tr>
<tr>
<td>Belgium, Czech Republic, Greece, Hungary, Portugal</td>
<td>12</td>
</tr>
<tr>
<td>Austria, Bulgaria, Sweden</td>
<td>10</td>
</tr>
<tr>
<td>Croatia, Denmark, Ireland, Lithuania, Slovakia, Finland</td>
<td>7</td>
</tr>
<tr>
<td>Cyprus, Estonia, Latvia, Luxembourg, Slovenia</td>
<td>4</td>
</tr>
<tr>
<td>Malta</td>
<td>3</td>
</tr>
</tbody>
</table>

Qualified Majority: 260/352

196 Important examples of sensitive political issues still requiring unanimity are foreign affairs (see Chapter 8, section 3(a) below), and 'the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation' (see Art. 113 TFEU). The Council will sometimes try to reach an informal 'consensus' so as to avoid a formal vote. On the distinction between consensus and unanimous voting, see S. Novak, The Silence of Ministers: Consensus and Blame Avoidance in the Council of the European Union (2013) 51 J. of Common Market Studies 1091, esp. 1092. 'Council members sometimes use consensus instead of voting to avoid backlash against members who oppose a particular matter. Formal voting would disclose the identity of opponents and open them up to criticism or retaliation by other participants in the decision-making process ... The consensus method is used to preserve the silence of ministers. In other words, consensus is sometimes triggered by a strategy of blame avoidance.'

197 Art. 238(1) TFEU.

198 For example, Art. 150 TFEU. Most matters that allow for simple majority are internal, procedural or institutional matters.

199 Art. 16(3) TFEU.

The weighting of votes is to some extent 'degressively proportional'. Indeed, the voting ratio between the biggest and the smallest state is ten to one – a ratio that is roughly similar to the degressively proportionate system for the European Parliament. However, the voting system also represents a system of symbolic compromises. For example: the four biggest Member States of the Union are the United Kingdom, France, Germany and Italy. The remaining Member States have disagreed on a number of issues. In the past, this system of weighted votes has been attacked from two sides: namely from the smaller Member States as well as the bigger Member States. The smaller Member States have claimed that it favours the bigger Member States and have insisted that the 260 votes must be cast by a majority of the States. The bigger Member States, by contrast, have complained that the voting system strongly favours smaller Member States and have insisted on the political safeguard that the 260 votes cast in the Council correspond to 62 per cent of the total population of the Union. With these two qualifications taken into account, decision-making in the Council traditionally demands a 'majority': a majority of the weighted votes must be cast by a majority of the Member States representing a majority of the Union population.

This triple majority system has exclusively governed decision-making in the Union until 1 November 2014. From that date, a completely new system of voting applies in the Council. (However, until 31 March 2017, any Member State can insist on using the old system of voting in the Council; and until this time, both voting systems will thus co-exist.) This revolutionary change is set out in Article 16(4) TFEU, which states:

> As from 1 November 2014, a qualified majority shall be defined as at least 55 per cent of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65 per cent of the population of the Union. A blocking minority must include at least four Council members, failing which the qualified majority shall be deemed attained. The other arrangements governing the qualified majority are laid down in Article 238(2) of the Treaty on the Functioning of the European Union.

This new Lisbon voting system abolishes the system of weighted votes in favour of a system that grants each State a single vote. In a Union of 28 States, 55 per cent of the
Council members correspond to 16 States. But this majority is again qualified for two sides. The bigger Member States have insisted on a relatively high popular majority behind the State majority. The population threshold of 65 per cent of the Union population would mean that any three of the four biggest States of the Union could block a Council decision. The smaller Member States have thus insisted on a qualification of the qualification. A qualified majority will be 'deemed attained where fewer than four States try to block a Council decision.'

The new Lisbon system of qualified majority voting is designed to replace a triple majority with a simpler double majority. And yet the Member States are always fearful of abrupt changes - have agreed on two constitutional compromises that cushion the new system of qualified majority voting. First, the Member States have revived the 'Ioannina Compromise.' This was envisaged in 'Declaration on Article 16(4)', and is now codified in a Council Decision.

Table 5.7 Member State Population Sizes

<table>
<thead>
<tr>
<th>Member State</th>
<th>Population (in 1,000)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Germany</td>
<td>59,685.2</td>
</tr>
<tr>
<td>France</td>
<td>46,704.3</td>
</tr>
<tr>
<td>Poland</td>
<td>38,533.3</td>
</tr>
<tr>
<td>Romania</td>
<td>20,057.5</td>
</tr>
<tr>
<td>Netherlands</td>
<td>16,779.6</td>
</tr>
<tr>
<td>Belgium</td>
<td>11,161.6</td>
</tr>
<tr>
<td>European Union (65%)</td>
<td>328,622.1</td>
</tr>
<tr>
<td>European Union (35%)</td>
<td>176,950.4</td>
</tr>
</tbody>
</table>

The compromise was negotiated by the Member States' foreign ministers in Ioannina (Greece) - from where it takes its name. The compromise was designed to smooth the transition from the Union of 12 to a Union of 15 Member States.

Declaration No. 7 on Article 16(4) (a. 202 above) contains a draft Council Decision. A no in order to protect their voting rights, the Member States have even insisted on Protocol No. 9 on the Decision of the Council relating to the implementation of Art. 16(4) TEU and Art. 238(2) TFEU between 1 November 2014 and 31 March 2017 on the one hand, and as from 1 April 2017 on the other. The sole article of the Protocol states: 'Before the examination by the Council of any draft which would aim either at amending or abrogating the Decision or any of its provisions, or at modifying indirectly its scope or its meaning through the modification of another legal act of the Union, the European Council shall hold a preliminary deliberation on the said draft, acting by consensus in accordance with Art. 15(4) of the Treaty on European Union.'


According to the Ioannina Compromise, the Council is under an obligation - despite the formal existence of the double majority in Article 16(4) TEU - to continue deliberations, where a fourth of the States or States representing a fifth of the Union population oppose a decision. The Council is here under the procedural duty 'to do all in its power' to reach - within a reasonable time - a satisfactory solution 'to address the concerns by the blocking Member States.'

This soft mechanism is complemented by a hard mechanism to limit qualified majority voting in the Council. For the Treaties also recognise regionally limited versions of the 'Luxembourg Compromise.' A patent illustration of this can be found in the context of the Union's Common Foreign and Security Policy. This contains the following provision: '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, a vote shall not be taken.' And even if the matter may be referred to the European Council, that body will decide by unanimity.

A Member State can thus unilaterally block a Union decision on what it deems to be its vital interest.

d. Functions and Powers

The Treaties summarise the functions and powers of the Council as follows:

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.

Let us look at each of these four functions. First, traditionally, the Council has been at the core of the Union's legislative function. Prior to the rise of the European Parliament, the Council indeed was 'the' Union legislator. The Council is however today only a co-legislator, that is: a branch of the bicameral Union legislature. And like Parliament, it must exercise its legislative function in public. Secondly, Council and Parliament also share in the exercise of the...
budgetary function. Thirdly, what about the policy-making function? In that respect, the European Council has overtaken the Council. The former now decides on the general policy choices, and the role of the Council has consequently been limited to specific policy choices that implement the general ones. Yet, these choices remain significant and the Council Presidency will set its agenda. Fourthly, the Council has significant coordinating functions within the European Union. Thus, in the context of general economic policy, the Member States are required to ‘regard their economic policies as a matter of common concern and shall coordinate them within the Council.’ The idea of an ‘open method of coordination’ indeed experienced a renaissance in the last decades.

In addition to the four functions mentioned in Article 16 TEU, two additional functions must be added. First, the Council is still the dominant institution when it comes to the conclusion of international agreements between the European Union and third countries. Secondly, it can – occasionally – still act as the Union’s executive branch. The Union can delegate implementing powers to the Council ‘in duly justified specific cases’ in any area of European law. From a constitutional viewpoint, the exercise of the executive function by the Council is highly problematic. For how can a part of the Union legislature exercise executive functions? This very possibility interferes with a foundational principle of modern constitutionalism: the idea of a separation of powers.

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216 For a soft expression of this power, see Art. 241 TFEU that entitles the Council to request the Commission to undertake studies and to submit any appropriate legislative proposal.

217 Art. 121(1) TFEU.


219 On this point, see Chapter 8, section 3(b) below.

220 Art. 291(2) TFEU.