Governmental Structure
Union Institutions II

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1. The Commission

The technocratic character of the early European Union expressed itself in the name of a fourth institution: the Commission. The Commission constituted the centre of the European Coal and Steel Community, where it was 'to ensure that the objectives set out in [that] Treaty [were] attained'.1 In the European Union, the role of the Commission is, however, 'marginalised' by the Parliament and the

1 Art. 8 ECSC.
Council. With these two institutions constituting the Union legislature, the Commission is now firmly located in the executive branch. In guiding the Union, it – partly – acts like the Union’s government (in the strict sense of the term). This section analyses the composition and structure of the Commission, before looking at its internal decision-making procedures. The functions and powers of the Commission will be discussed next, before an excursus briefly presents European Agencies as auxiliary organs of the Commission.

**a. Composition and Structure**

The Commission consists of one national of each Member State. Its members are chosen on the ground of their general competence and European commitment from persons whose independence is beyond doubt. The Commission’s term of office is five years. During this term, it must be ‘completely independent’. Its members ‘shall neither seek nor take instructions from any Government or other institution, body, office or entity’. The Member States are under a duty to respect this independence. Breach of the duty of independence may lead to a Commissioner being ‘compulsorily retired’.

How is the Commission selected? Originally, the Commission was ‘appointed’. The appointment procedure has subsequently given way to an election procedure. This election procedure has two stages. In a first stage, the President of the Commission will be elected. The President will have been nominated by the European Council ‘[t]aking into account the elections to the European Parliament’, that is: in accordance with the latter’s political majority. The nominated candidate must then be ‘elected’ by the European Parliament.

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2 Art. 17(4) TEU. The Lisbon Treaty technically limits this principle in a temporal sense. It would theoretically only apply until 31 October 2014. Thereafter, Art. 17(5) TEU states: ‘As from 1 November 2014, the Commission shall consist of a number of members, including its President and the High Representative of the Union for Foreign Affairs and Security Policy, corresponding to two-thirds of the number of Member States, unless the European Council, acting unanimously, decides to alter this number.’ The reduced Commission composition would be based on ‘a system of strict rotation between the Member States, reflecting the demographic and geographical range of all the Member States’ (ibid., and see also Art. 264 TFEU). This provision had been a centrepiece of the Lisbon Treaty, as it was designed to increase the effectiveness of the Commission by decreasing its membership. However, after the failure of the first Irish ratification referendum, the European Council decided to abandon this constitutional reform in order to please the Irish electorate; see Presidency Conclusions of 11–12 December 2008 (Document 17271/1/08 Rev 1). The fate of Art. 17(5) TEU is the best illustration of the worst dependence of the Union on individual Member States.

3 Art. 17(3) TEU. 4 Ibid. 5 Ibid. 6 Art. 245 TFEU – first indent.

7 Art. 245 TFEU – second indent. See also Art. 247 TFEU: ‘If any Member of the Commission no longer fulfils the conditions required for the performance of his duties or if he has been guilty of serious misconduct, the Court of Justice may, on application by the Council acting by a simple majority or the Commission, compulsorily retire him.’ On the replacement procedure, see Art. 246 TFEU.

8 Arts. 9 and 10 ECSC.

9 The term of the Commission runs roughly in parallel with that of the Parliament.

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not confirmed by Parliament, a new candidate needs to be found by the European Council.

After the election of the Commission President begins the second stage of the selection process. By common accord with the President, the Council will adopt a list of candidate Commissioners on the basis of suggestions made by the Member States. With the list being agreed, the proposed Commission is subject to a vote by the European Parliament, and on the basis of this election, the Commission shall be appointed by the European Council. This complex and compound selection process constitutes a mixture of ‘international’ and ‘national’ elements. The Commission’s democratic legitimacy thus derives partly from the Member States, and partly from the European Parliament.

**a. The President and ‘his’ College**

Whereas the Presidents of the Parliament and the Council are selected from ‘within’ the institution, the Commission President helps in the selection of ‘his’ institution. This position as the ‘Chief’ Commissioner above ‘his’ college is clearly established by the Treaties. The Members of the Commission shall carry out the duties devolved upon them by the President under his authority. In light of this political authority, the Commission is typically called after its President.

The powers of the President are identified in Article 17(6) TEU, which reads:

The President of the Commission shall:

(a) lay down guidelines within which the Commission is to work;
(b) decide on the internal organisation of the Commission, ensuring that it acts consistently and efficiently and as a collegiate body;
(c) appoint Vice-Presidents, other than the High Representative of the Union for Foreign Affairs and Security Policy, from among the members of the Commission.

A member of the Commission shall resign if the President so requests. The High Representative of the Union for Foreign Affairs and Security Policy shall resign, in accordance with the procedure set out in Article 18(1), if the President so requests.

The three powers of the President mentioned are formidable. First, s/he can lay down the political direction of the Commission in the form of strategic guidelines. This will normally happen at the beginning of a President’s term of office.

10 Art. 17(7) TEU – first indent. 11 Art. 17(7) TEU – second indent. 12 Art. 17(7) TEU – third indent. 13 The same is true for the Court, see section 2(a) below. As regards the European Council, its President is also elected ‘by’ the institution, albeit not from ‘within’ the institution.

14 N. Nugent, *The European Commission* (Palgrave, 2000), 68: ‘The Commission President used to be thought of as *praeceptor inter pares* in the College. Now, however, he is very much *praeceptor*.

15 Art. 248 TFEU (emphasis added).

16 For example: the last Commission was called the (second) ‘Barroso Commission’.

17 On this, see Chapter 9, section 1(a) below.
The Presidential guidelines will subsequently be translated into the Commission’s Annual Work Programme.18 Secondly, the President is entitled to decide on the internal organisation of the Commission.19 In the words of the Treaties: ‘[T]he responsibilities incumbent upon the Commission shall be structured and allocated among its members by its President.’ The President is authorised to ‘reshuffle the allocation of those responsibilities during the Commission’s term of office’,20 and may even ask a Commissioner to resign. Thirdly, the President can appoint Vice-Presidents from ‘within’ the Commission. Finally, there is a fourth power not expressly mentioned in Article 17(6) TEU: ‘The President shall represent the Commission.’21

What are the ‘ministerial’ responsibilities into which the present Commission is structured? Due to the requirement of one Commissioner per Member State, the (proposed) ‘Juncker Commission’ had to divide the tasks of the European Union into 27 (!) ‘portfolios’. Reflecting the priorities of the Union’s current President, they are as set out in Table 6.1.

Each Commissioner is responsible for his or her portfolio. Members of the Commission will thereby be assisted by their own cabinet.22 And each cabinet will have an administrative head or chef de cabinet. An organisational novelty of the 2014 Commission is the idea of ‘Project Teams’, which combine various portfolios under the authority of a Vice-President of the Commission. The aim behind this administrative grouping seems to be the desire to set policy priorities from the very start, and to create more cohesion between various ministerial portfolios.23

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18 For the Commission’s Work Programme, see ibid.
19 Due to its dual constitutional role, some special rules apply to the High Representative of the Union. Not only do the Treaties determine the latter’s role within the Commission, the President will not be able unilaterally to ask for his or her resignation (see Art. 18(4) TFEU). The High Representative shall be one of the Vice-Presidents of the Commission. He shall ensure the consistency of the Union’s external action. He shall be responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union’s external action."
22 Art. 19(1) Commission Rules of Procedure: ‘Members of the Commission shall have their own cabinet to assist them in their work and in preparing Commission decisions. The rules governing the composition and operation of the cabinets shall be laid down by the President.’
23 The ‘Project Teams’ currently suggested are: ‘A Connected Digital Single Market’; ‘A Deeper and Fairer Economic and Monetary Union’; ‘A New Boost for Jobs, Growth and Investment’; and ‘A Resilient Energy Union with a Forward-looking Climate Change Policy’. In addition to these five themes, the High Representative is also to head the ‘team’ of external relations DGs. For an overview, see http://ec.europa.eu/about/juncker-commission/structure/index_en.htm.
bb. The Commission’s Administrative Organs

The Commission has, just like the Parliament and the Council, an administrative infrastructure supporting the work of the College of Commissioners.

The administrative substructure is designed to ‘assist’ the Commission ‘in the preparation and performance of its task, and in the implementation of its priorities and the political guidelines laid down by the President’. It is divided into ‘Directorates-General’ and ‘Services’. The former are specialised in specific policy areas and thus operate ‘vertically’. The latter operate ‘horizontally’ and providing specialised services across all policy areas.

The best way to understand ‘Directorates-General’ is to consider them as the Union equivalent of national ministries. Staffed with European civil servants, there are presently 33 Directorates-General. Importantly, these Directorates-General do not necessarily correspond with one ‘Commissioner portfolio’. Where there is a direct correspondence in some areas, some Commissioner portfolios overlap on the subject matter of two or even more Directorates-General. Commissioners are entitled to ‘give instructions’ to their Directorates-General, with the latter being obliged to ‘provide them with all the information on their area of activity necessary for them to exercise their responsibilities’.

What is the structure within a Directorate-General? Each Directorate-General is headed by a Director-General, who represents the main contact between the Commission administration and the respective Commissioner(s). Each Directorate-General is divided into directorates, and each directorate is divided into units. Units are headed by a Head of Unit and constitute the elementary organisational entity within the Commission administration.

b. Decision-making within the Commission

The Commission acts as a ‘collegial’, that is: as a collective body. The Treaties offer a single article on decision-making within the Commission: ‘The Commission shall act by a majority of its Members.’ This is a devilishly simple and misleading picture. It is complemented and corrected by the Commission’s Rules of Procedure, which define the various decision-making procedures and their voting arrangements. The Rules distinguish between four procedures: the ‘ordinary procedure’, the ‘written procedure’, the ‘empowerment procedure’ and the ‘delegation procedure’.

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25 This section will not look at the various services. The Commission distinguishes between ‘General Services’ (like the ‘Secretariat General’), and ‘Internal Services’ (like the ‘Legal Service’ of the Commission). The functions of the former are set out in Art. 250 Commission Rules of Procedure. The functions of the latter are defined by Art. 220 Commission Rules of Procedure.
28 Art. 4 Commission Rules of Procedure.
29 Art. 250 TFEU.
30 Art. 12(1) Commission Rules of Procedure: The agreements of the Members of the Commission to a draft text from one or more of its Members may be obtained by means of written procedure, provided that the approval of the Legal Service and the agreement of
According to this procedure, a draft text is circulated to all Members of the Commission. Each Commissioner is entitled to make known any reservations within a time limit. A decision is subsequently adopted if no Member has made or maintained a request for suspension up to the time limit set for the written procedure.

The oral and the written procedure are based on the principle of ‘collegiality’, that is: the collective decision-taking of the Commission. By contrast, the third and fourth procedures entitle the Commission to delegate power for the adoption of ‘management or administrative measures’ to individual officers. According to the ‘empowerment procedure’, the college can delegate power to one or more Commissioners. According to the ‘delegation procedure’, it can even delegate power to a Director-General. While this decentralised form of decision-taking is much more efficient, it doubtless undermines the principle of collegiality behind the Commission. The Court of Justice has therefore insisted on a constitutional balance between the theoretical principle of ‘the equal participation of the Members of the Commission in the adoption of decisions’ on the one hand, and the practical principle of preventing ‘collective deliberation from having a paralysing effect on the full Commission’ on the other. It has thus insisted on ‘procedural’ as well as ‘substantive’ guarantees for delegations of power. The former require that the decision delegating authority are adopted at meetings of the Commission. The latter insist that ‘management of administrative measures’ is not decision-making principle.

c. Functions and Powers of the Commission

What are the functions and corresponding powers of the Commission in the governmental structure of the European Union? The Treaties provide a concise constitutional overview of its tasks in Article 17 TEU:

the departments consulted in accordance with Article 23 of these Rules of Procedure have been obtained. Such approval and/or agreement may be replaced by an agreement between the Members of the Commission where a meeting of the College has decided, on a proposal from the President, to open a finalisation written procedure as provided for in the implementing rules.'

38 Art. 12(2) Commission Rules of Procedure. Moreover, according to para. 3 ‘[any Member of the Commission, may, in the course of the written procedure, request that the draft text be discussed’. 39 Ibid., Art. 12(4). 40 Ibid., Art. 13.

42 Ibid., para. 31.
43 Ibid., para. 33.
44 Ibid., para. 37. In that case the Court of Justice found that a decision ordering an undertaking to submit to an investigation was a preparatory inquiry that was a measure of management (ibid., para. 38). By contrast, in Case C-137/92P, Commission v. BASF et al. [1994] ECR 2555, the Court held that a decision finding an infringement of Art. 114 TFEU was not a management decision (ibid., para. 71).

The provision distinguishes six different functions. The first three functions constitute the Commission’s core functions.

First, the Commission is tasked to ‘promote the general interest of the Union’ through initiatives. It is thus to act as a ‘motor’ of European integration. In order to fulfil this – governmental – function, the Commission is given the (almost) exclusive right to formally propose legislative bills. ‘Union acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise.’ The Commission’s prerogative to propose legislation is a fundamental characteristic of the European constitutional order. The right of initiative extends to (multi)annual programming of the Union, and embraces the power to make proposals for law reform.

The second function of the Commission is to ‘ensure the application’ of the Treaties. This function covers a number of powers – legislative and executive in nature. The Commission may thus be entitled to apply the Treaties by adopting secondary ‘legislation’. These acts may be adopted directly under the Treaties, or, under powers delegated to the Commission from the Union legislature. In some areas the Commission may be granted the executive power to apply the Treaties itself. The direct enforcement of European law can best be seen in the

45 Art. 17(1) TUE.
46 We saw above that the Parliament or the Council can informally suggest legislative bills to the Commission. Indeed, the great majority of Commission bills originate outside the Commission (see Nuge, The European Commission (n. 14 above), 236).
47 Art. 17(2) TUE. For an exception, see Art. 76 TFEU on legislative measures in the field of police and judicial cooperation in criminal matters.
48 Under Art. 314(2) TFEU, the Commission is entitled to propose the draft budget: ‘The Commission shall submit a proposal containing the draft budget to the European Parliament and to the Council not later than 1 September of the year preceding that in which the budget is to be implemented.’
49 This is normally done through White Papers or Green Papers. For a famous White Paper, see EU Commission, Completing the Internal Market: White Paper from the Commission to the European Council (COM(85) 310). For a famous Green Paper, see EU Commission, Damages Actions for Breach of the EC Antitrust Rules (COM(2005) 672).
50 See Art. 106(3) TFEU: ‘The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.’
51 On delegated legislation, see Chapter 9, section 2 below.
context of European competition law,\(^{52}\) where the Commission enjoys significant powers to fine—private or public—wrongdoers. These administrative penalties sanction the non-application of European law.

The third function of the Commission is to act as guardian of the Union, it shall thus ‘oversee’ the application of European law. The Treaties indeed grant the Commission significant powers to act as ‘police’ and ‘prosecutor’ of the Union. The policing of European law involves the power to monitor and to investigate infringements of European law. The powers are—again—best defined in the context of European competition law.\(^{53}\) Where an infringement of European law has been identified, the Commission may bring the matter before the Court of Justice. The Treaties thus give the Commission the power to bring infringement proceedings against Member States,\(^{54}\) and other Union institutions.\(^{55}\)

The remaining three functions mentioned by Article 17 TEU are less central to the Commission. They can be characterised as budgetary, coordinating and representative functions. First, the Commission shall execute the Union budget,\(^{56}\) and thus manages most Union programmes. Secondly, the Commission is tasked—like most other institutions—to coordinate Union activities in some areas.\(^{57}\) Finally, the Commission shall ‘ensure the Union’s external representation’. This is a partial and partisan formulation. Indeed, the Commission is not the only external representative of the Union, as it must share this function with the President of the European Council as well as the High Representative of the Union for Foreign Affairs and Security Policy.\(^{58}\)

\(^{52}\) See Art. 105(1) TFEU: ‘The Commission shall ensure the application of the principles laid down in Articles 101 and 102. On application by a Member State or on its own initiative, and in cooperation with the competent authorities in the Member States, which shall give it their assistance, the Commission shall investigate cases of suspected infringement of those principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.’

\(^{53}\) See Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1, Chapter V: ‘Powers of Investigation’. For a closer look at these provisions, see Chapter 18, section 4 below.

\(^{54}\) 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. If 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.’ For an extensive discussion of this, see Chapter 10, section 3(a) below.

\(^{55}\) Art. 363 TFEU. The provision will be extensively discussed in Chapter 10, section 1 below.

\(^{56}\) Art. 317 TFEU—first indent: ‘The Commission shall implement the budget in cooperation with the Member States, in accordance with the provisions of the regulations made pursuant to Article 322, on its own responsibility and within the limits of the appropriations, having regard to the principles of sound financial management. Member States shall cooperate with the Commission to ensure that the appropriations are used in accordance with the principles of sound financial management.’

\(^{57}\) For the Commission’s powers of coordination, see for example: Art. 168(2) TFEU in the context of public health: ‘The Commission may, in close contact with the Member States, take any useful initiative to promote such coordination, in particular initiatives aiming at the establishment of guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation.’

Union. However, the Treaties do traditionally grant the Commission the power to act as external representative of the Union in the negotiation of international agreements.\(^{59}\)

\(^{58}\) On this point, see Chapter 8, section 3(b) below.


\(^{61}\) While a few agencies had already emerged in the 1970s, there has been a real ‘agencification’ of the European legal order in the 1990s. Today, almost 40 European Agencies exist in the most diverse areas of European law. For an inventory and functional typology of European Agencies, see S. Griller and A. Orator, ‘Everything under Control? The “Way Forward” for European Agencies in the Footsteps of the Meroni Doctrine’ (2010) 35 EL Rev 3 at Appendix. See also E. Madalina Busuioc, European Agencies: Law and Practices of Accountability (Oxford University Press, 2013), esp. Chapter 2. This section will only look at Commission Agencies; yet it is important to keep in mind that there are also ‘Council Agencies’, like the European Defence Agency.

\(^{62}\) Nogent, The European Commission (n. 14 above), 162: ‘[T]he Commission employs far fewer people than do the national governments of even the smallest EU member states.’ The figure is around 30,000 and compares rather favourably with the 450,000 British civil servants.

\(^{63}\) For example, Arts. 9 and 15 TEU; as well as Art. 263 TFEU.

\(^{64}\) Agencies are typically created on the basis of Arts. 114 or 352 TFEU—the Union’s most general powers, which will be discussed in Chapter 7, section 1(b) below.
**Table 6.2 (Selected) European Agencies and Decentralised Bodies**

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are severe constitutional limits to what powers can be delegated to European Agencies, the Union has created many of them in the past decades.

**aa. European Agencies: Functions**

What are the functions of European Agencies? Their primary function is to assist the Commission in its task to 'ensure' and 'oversee' the application of European law. Some Agencies are entitled to adopt binding decisions and thus apply European law directly. Other Agencies are to prepare draft legislation for the Commission. Many Agencies are simply information satellites: they are tasked to help the Commission in monitoring a policy area and to collect and coordinate information. These three functions can be combined. This can be seen in the context of the European Aviation Safety Agency established by Regulation 261/2008, which states:

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65 On this point, see Chapter 9, section 2(c) below.


67 For example: the European Medicines Agency, see Regulation 726/2004 laying down Union procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency [2004] OJ L 136/1. According to the Regulation, the Agency only conducts the preparatory stages of the decision, while the Commission is entitled to take the final decision (ibid., Art. 10(2)).


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**bb. European Agencies: Structure**

What is the internal structure of a European Agency? And in what ways is it dependent on, or subordinate to, the Commission?

The Union legal order has no single answer to these questions. With regard to the structure of Commission Agencies, it generally distinguishes between two types of European Agencies: 'executive' Agencies and 'independent' (or 'regulatory') Agencies. Executive Agencies are subordinate to the Commission and are governed by a single 'Statute'. According to this Statute, executive Agencies fall under the control and responsibility of the Commission, and will have a limited lifetime. They consist of a 'Steering Committee' and a 'Director', which are appointed by the Commission. The Commission is entitled to supervise executive Agencies, and it enjoys the power to 'review' and 'suspend' any of their acts.

By contrast, a second class of European Agencies is 'independent' from the Commission. This independence is both structural and functional. Independent Agencies will typically consist of a 'Management Board' composed of one representative of each Member State and one representative of the...
2. The Court of Justice of the European Union

'Tucked away in the fairyland Duchy of Luxembourg', and housed in its 'palace', lies the Court of Justice of the European Union. The Court constitutes the judicial branch of the European Union. It is composed of various courts that are linguistically roofed under the name 'Court of Justice of the European Union'. This includes the 'Court of Justice', the 'General Court' and 'specialised courts'.

The Court's task is to 'ensure that in the interpretation and application of the Treaties the law is observed'. The Court of Justice of the European Union is, however, not the only one to interpret and apply European law. From the very beginning, the European legal order intended to recruit national courts in the interpretation and application of European law. From a functional perspective, however, they are distinct and there is no institutional bridge from the national courts to the European Court of Justice.

In concentrating on the institution of the Court of Justice of the European Union, the following section will start out by analysing its judicial architecture. Subsections 2 and 3 look inside the judicial process and decision-making, in particular judicial interpretation. Finally, subsection 4 briefly surveys the judicial powers of the Court.

a. Judicial Architecture: The European Court System

When the European Union was born, its judicial branch consisted of a single court: the 'Court of Justice'. The (then) Court was a 'one stop shop'. All judicial affairs of the Union would need to pass through its corridors.

With its workload having risen to dizzying heights, the Court pressed the Member States to provide for a judicial 'assistant', and the Member States agreed to create a second court in the Single European Act. The latter granted the

Commission. They will be headed by an 'Executive Director', who is typically elected by the Management Board on a proposal from the Commission. The Executive Director is, however, required to 'be completely independent in the performance of his/her duties', and this independence translates into a prohibition not to 'seek nor take instructions from any government or from any other body'.

Council the power to 'attach to the Court of Justice a court with jurisdiction to hear and determine at first instance', that was 'subject to a right of appeal to the Court of Justice'. Thanks to this definition, the newly created court was baptised the 'Court of First Instance'. With the Lisbon Treaty, the court has now been renamed as the 'General Court'. The reason for this change of name lies in the fact that the court is no longer confined to first instance cases. Instead, '[t]he General Court shall have jurisdiction to hear and determine actions or proceedings brought against decisions of the specialised courts'. What are the specialised courts in the European Union? The Union has, at present, only one specialised court: the 'Civil Service Tribunal'.

The Court of Justice of the European Union has thus a three-tiered system of courts. The architecture of the Union’s judicial branch can be seen in Figure 6.3.

Figure 6.3 Structure of the Court of Justice of the European Union

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77 For the European Aviation Safety Agency, see Regulation 216/2008 (n. 66 above), Art. 34. According to its Art. 37 the Board will typically decide by a qualified majority.
78 Ibid, Art. 39. 79 Ibid., Art. 38.(1).
81 Art. 19(3) TEU. 82 Ibid. 83 On this point, see Chapter 11 below.
84 There is no appeal from national courts to the European Courts. On this point, see again ibid.
85 Art. 11(1) Single European Act.
86 The Court was set up by Council Decision 88/591 establishing a Court of First Instance of the European Communities [1988] OJ L 319/1.
87 Art. 256(2) TFEU.
89 In terms of the European Union's judicial reports, there are thus three different prefixes before a case. Cases before the Court of Justice are C-Cases, cases before the General Court are T-Cases (as the French name for the General Court is "Tribunal"), and cases before the Civil Service Tribunal are F-Cases (stemming from the French 'fonction publique' for civil service).
90 Art. 19(2) TEU. 91 Art. 253 TFEU.
Judges are, however, not unilaterally appointed by their Member State. They are appointed by ‘common accord of the governments of the Member States’, and only after a hearing of an independent advisory panel.92 Judges are indeed no representatives of their Member State and must be completely independent. Their term of appointment is for six years—a relatively short term for judges—that however can be renewed.94 During their term of office they can only be dismissed by a unanimous decision of their peers.95

The judges compose the Court, but are not identical with it. The Court as a formal institution decides as a collective body, which has its own President, in whose theory, the principle of collegiality should mean that the Court of Justice only decides in plenary session, that is: as a ‘full court’ of all judges. However, from the very beginning the Court was entitled to set up ‘chambers’. This organisational device allows the Court to multiply into a variety of ‘miniature courts’. For the Court’s chambers enjoy—unlike parliamentary committees vis-à-vis Parliament—plenary—the powers of the full Court. The division into chambers thus allows the Court to spread its workload. And indeed, the operation of the Court through chambers constitutes the norm for all categories of cases.96 In the words of the Treaties: ‘The Court of Justice shall sit in chambers or in a Grand Chamber’, but exceptionally ‘may also sit as a full Court’.97

How many judges sit in a chamber, and how are they composed? Answers to these questions are provided in the ‘Statute of the Court of Justice of the European Union’, and the ‘Rules of Procedure of the Court of Justice’. According to the former, the Court will normally sit in chambers consisting of three and five judges.98 Exceptionally, the Court can sit in a ‘Grand Chamber’ consisting of 15 judges, where a Member State or a Union institution as party to the proceedings so requests.99 Very exceptionally, the Court shall sit as a ‘full Court’ in limited categories of constitutional cases.100

**bb. The General Court: Composition and Structure**

The General Court shall include at least one judge per Member State.101 The exact number is set by the Statute of the Court of Justice of the European Union at 28,102 that is: one judge per Member State. The judges are to be chosen ‘from persons whose independence is beyond doubt and who possess the ability required for appointment to high judicial office’.103 Their (re)appointment is subject to the same rules as for the Court of Justice. The General Court also has its own President, whose election and functions are similar to his counterpart at the Court of Justice.

The General Court will—like the Court of Justice—also generally sit in chambers of three and five judges.104 And in exceptionally difficult circumstances, it may sit as a ‘full court’ or as a ‘Grand Chamber’.105 However, in exceptionally easy circumstances, the General Court can also assign cases to a single-judge chamber.106

What is the jurisdiction of the General Court? Its jurisdiction has always been smaller than that of the Court of Justice. It was originally confined to cases brought directly by natural or legal persons.107 Today, Article 256 TFEU distinguishes between three scenarios. First, the General Court will have jurisdiction to hear cases at first instance, with the exception of those cases assigned to a ‘specialised court’ or those cases reserved to the Court of Justice.108 Secondly, the General Court will have jurisdiction to hear appeals against decisions of

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92 Ibid. According to Art. 255 TFEU: ‘A panel shall be set up in order to give an opinion on each candidate’s suitability to perform the duties of judge and Advocate-General of the Court of Justice and the General Court before the governments of the Member States make their appointments referred to in Articles 253 and 254. The panel shall comprise 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, one of whom shall be proposed by the European Parliament. The Council shall adopt a decision establishing the panel’s operating rules and a decision appointing its members. It shall act on the initiative of the President of the Court of Justice.’ For a first analysis of this new form of judicial appointments see T. Dumbravová et al., ‘Judicial Appointments: The Article 255 TFEU Advisory Panel and Selection Procedures in the Member States’ (2014) 51 CML Rev 455.

93 For detailed rules, see Art. 4 Court Statute.

94 Art. 253(4) TFEU: ‘Retiring Judges and Advocates-General may be reappointed to the Court of Justice and the General Court. According to para. [2]: “[e]very three years there shall be a partial replacement of the members of the Court of Justice and the General Court.”

95 Art. 6 Court Statute.

96 The original Art. 165(2) EEC had limited the ability to set up chambers for ‘particular categories of cases’, but the Maastricht Treaty removed that constitutional limitation.

97 Art. 16(1) Court Statute.

98 Art. 16(1) Court Statute.

99 Ibid., Art. 16(2) and (3).

100 Ibid., Art. 16(4) and (5).

101 Art. 19(2) TFEU.

102 Art. 48 Court Statute. Art. 254(2) TFEU.

103 Art. 11 General Court Rules of Procedure. Art. 14(1).

104 Ibid., Art. 14(2).

105 Art. 11(1) SEA.

106 Art. 256(1) TFEU. The exceptions are such staff cases that fall within the first-instance jurisdiction of the Civil Service Tribunal. The Court of Justice is generally reserved for first-instance jurisdiction for actions brought by a Member State or an institution for failure to act (see Art. 51 Court Statute).
specialised courts. Thirdly, the General Court may have jurisdiction for preliminary references from national courts in specific cases laid down by the Statute. (However, the General Court is entitled to decline jurisdiction and refer requests for a preliminary ruling to the Court of Justice, where it 'considers that the case requires a decision of principle likely to affect the unity or consistency of Union law'.)\(^{109}\)

Decisions of the General Court can be 'appealed' or 'reviewed'. Appeals can be launched by any party that was (partly) unsuccessful.\(^{110}\) However, appeals are limited to points of law and must be on the grounds of 'lack of competence', 'breach of procedure', or infringement of European law by the General Court.\(^{111}\) If the appeal is well founded, the Court of Justice will 'quash' the decision of the General Court.\(^{112}\) It can then choose one of two options. It may act like a 'court of cassation', that is: cancel the previous judgment and refer the case back to the General Court. Alternatively, the Court of Justice can act as a 'court of revision' and give final judgment in the matter itself.\(^{113}\)

Similar – but nonetheless distinct – are reviews. The Court of Justice is entitled to review a judgment of the General Court on its own motion in two situations. First, it can review a decision of the General Court, where that court acts in its own appellate capacity. Secondly, it can review a decision by the General Court where it gives a preliminary ruling for a national court.\(^{114}\) However, in both situations, review proceedings are limited to ‘where there is a serious risk of the unity of consistency of Union law being affected’.\(^{115}\)

cc. Excursus: The Advocates General

The Court shall be assisted by Advocates General.\(^{116}\) The institution of the Advocate General is a trademark of the European judicial system.\(^{117}\) Their number is currently set at nine, but from October 2015 there will be 11 Advocates General.\(^{118}\) They are appointed as officers of the Court,\(^{119}\) but their duty is not to 'judge'. The Treaties define their function as follows: 'It shall be the duty of the Advocate General, acting with complete impartiality and independence, to make open court, reasoned submissions.'\(^{120}\) According to this definition, an Advocate General is thus neither advocate nor general.\(^{121}\) S/he is an independent advisor to the Court, who produces an 'opinion' that is not legally binding on the Court.\(^{122}\) The opinion is designed to inform the Court of ways to decide a case and, in this respect, the Advocate General acts like an academic amicus curiae.

Until recently, each case before the Court of Justice was preceded by the opinion of an Advocate General. However, according to the Court's new Statute, the Court 'may decide, after hearing the Advocate General, that the case shall be determined without a submission from the Advocate General'.\(^{123}\) For the General Court, absence is the constitutional rule. Only in exceptional cases will judgments of the General Court be preceded by the opinion of an Advocate General. The Rules of Procedure of the General Court indicate that the court 'shall' be assisted by 'an ad hoc Advocate General when in plenary session,'\(^{124}\) while it 'may' also be assisted by an Advocate General 'if it is considered that the legal difficulty or the factual complexity of the case so requires.'\(^{125}\) According to the Statute of the Court, it is the 'judges' of the General Court themselves who 'may be called to perform the task of an Advocate General'.\(^{126}\)

dd. The 'Specialised Court(s)': The Civil Service Tribunal

Courts with special jurisdictions are common phenomena in national legal orders. Judicial specialisation allows judges to develop and employ legal expertise in an area that requires special knowledge.

The Treaties do not expressly list the Union's specialised courts. However, Article 257 TFEU opens the way for specialised jurisdictions below the General Court, when it entitles the European legislator to establish 'specialised courts attached to the General Court to hear and determine at first instance certain classes of action or proceedings brought in specific areas'.\(^{127}\) The jurisdiction of such a specialised court will thereby be defined in its constituting act, and its decisions may be subject to a right of appeal on points of law or fact as defined in the constituting act.

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\(^{109}\) Art. 256(3) TFEU – second indent.

\(^{110}\) Art. 56(2) Court Statute.

\(^{111}\) Ibid., Art. 58.

\(^{112}\) Ibid., Art. 61.

\(^{113}\) Decisions of the Court of Justice in appeal cases are suffixed by a 'P' for the French 'pouvoir' (i.e. appeal).

\(^{114}\) Art. 256(2) and (3) TFEU.

\(^{115}\) Ibid. For the 'Review of Decisions of the General Court', see Title VI of the Rules of Procedure of the Court of Justice.

\(^{116}\) Art. 19(2) TFEU.


\(^{118}\) Art. 252(1) TFEU states: 'The Court of Justice shall be assisted by eight Advocates-General. Should the Court of Justice so request, the Council, acting unanimously, may increase the number of Advocates-General.' This increase has taken place through Council Decision 2013/336 [2013] OJ L 179/92.

\(^{119}\) Art. 253 TFEU applies to judges as well as Advocates General.

\(^{120}\) Art. 252(2) TFEU.

\(^{121}\) The title is thus 'a misnomer', since s/he 'is really no more an advocate than he is a general' (J. F. Warner as quoted in N. Brown and T. Kennedy, The Court of Justice of the European Communities (Sweet & Maxwell, 2000), 64).

\(^{122}\) Famous examples, where the Court went against the Advocate General are Case 26/62, Van Gend en Loos v. Nederlands Inland Revenue Administration [1963] ECR 1; as well as Case C-50/06P, Unión de Pequeños Agricultores (UPA) v. Council [2002] ECR I-6677.

\(^{123}\) Art. 20(5) of the Court Statute.

\(^{124}\) Art. 17 General Court Rules of Procedure.

\(^{125}\) Ibid., Art. 18.

\(^{126}\) Art. 49 Court Statute. According to the fourth indent of that article '[a] member called upon to perform the task of Advocate-General in a case may not take part in the judgment of the case'. And according to Art. 2 of the General Court Rules of Procedure, the President of the Court is not allowed to perform the function of the Advocate General.

\(^{127}\) Art. 257 TFEU – first indent.
Judges for specialised courts shall be chosen from persons whose independence and impartiality is beyond doubt and who possess the ability required for appointment to judicial office.\textsuperscript{128} Unlike the judges at the higher European courts, they will not be appointed by common accord of the Member States but by the (unaligned) Council.\textsuperscript{129}

What specialised jurisdictions have been created in the European legal order so far, only one specialised court has been established: the Civil Service Tribunal.\textsuperscript{130} According to the Statute of the Court of Justice of the European Union, the Tribunal shall exercise at first instance jurisdiction in disputes between the Union and its servants.\textsuperscript{131} It shall consist of seven judges,\textsuperscript{132} who are appointed for six years by the Council.\textsuperscript{133} Due to the much smaller number of judges, the Council is obliged to ensure a balanced composition of the Civil Service Tribunal on as broad a geographical basis as possible from among nations of the Member States and with respect to the national legal systems represented.\textsuperscript{134} The Tribunal itself will normally sit in chambers of three judges.\textsuperscript{135} Exceptionally, it may also sit as a full court or a chamber of five judges where the case is a hard one;\textsuperscript{136} or, it may refer the case to a chamber of a single judge where the case is an easy one.\textsuperscript{137} Appeals to the General Court are possible.\textsuperscript{138} However, they are limited to points of law and shall be confined to 'lack of jurisdiction', 'breach of procedure', and infringement of European law.\textsuperscript{139}

\textbf{b. Judicial Procedure(s)}

The procedure before the Court of Justice consists of two parts: a written part and an oral part.\textsuperscript{140} The written part precedes the oral part and dominates the judicial procedure. A case begins when brought before the Court by a written application by the applicant.\textsuperscript{141} The application will then be served on the defendant, who may lodge a defence.\textsuperscript{142} Each party has the right to reply to the other.\textsuperscript{143} Thereafter, the Court takes over the initiative. Two steps structure the written procedure. First comes the assignment of the case. The Court will assign the case to a chamber or the full court – depending on the importance of the case.\textsuperscript{144} It will also designate a 'Reporting Judge' and an Advocate General. They decide whether a preparatory enquiry needs to be held. This preparatory inquiry represents the second step. The Court may hear, on its own motion or on application by a party, hear witnesses.\textsuperscript{145} This leads to the oral part of the procedure. The hearing of the parties will normally be in public,\textsuperscript{146} where the judges are allowed to put questions to the parties. After the hearing, the Advocate General will deliver his opinion. And the final step is the judgment itself. It ends the case.\textsuperscript{147}

How will the Court make a judgment? Judicial decision-making takes place in closed secrecy. The Court, in the formation that heard the case, here deliberates in secret.\textsuperscript{148} The basis of the deliberation is not the opinion of the Advocate General, but a draft judgment prepared by the 'Reporting Judge'. Every participating judge will state his or her opinion and the reasons behind it.\textsuperscript{149} Voting will take place in reverse order of seniority – this is to prevent junior judges from being influenced by the opinion of their seniors. The final judgment will be reached by a majority of judges.\textsuperscript{150}

This 'majority' decision is the only decision of the Court. For unlike the US Supreme Court, no dissenting opinions by a minority of judges are allowed. All judicial differences must thus be settled in the (majority) decision of the Court. This often turns a judgment into an 'edited collection', since disagreements within the Court must be settled by weaving diverse threads of reasoning into a single judicial texture. And the eclectic literary result may not be easy to understand! However, the collective and secret nature of the judgment is a shield protecting the independence of the European judiciary.

In addition to 'judgments', the Court also has the power to give 'orders' and 'opinions'. The former may result from an application for interim measures.\textsuperscript{151} Interim measures are sometimes necessary, for actions brought before the Court have no suspensive effect.\textsuperscript{152} An order will thus typically precede a

\begin{footnotes}
\item[128] Ibid, – fourth indent. \textsuperscript{129} Ibid.
\item[131] Annex I of the Court Statute, Art. 1.
\item[132] Ibid, Art. 2. The number may be increased by the Council.
\item[133] Art. 257 TFEU – fourth indent. \textsuperscript{134} Annex I of the Court Statute, Art. 3.
\item[134] Art. 13 Civil Service Tribunal Rules of Procedure.
\item[135] Ibid, Art. 14(1). 'Whenever the difficulty of the questions of law raised or the importance of the case or special circumstances justify, a case may be referred to the Full Court or to the Chamber of five Judges.'
\item[136] Ibid, Art. 15. \textsuperscript{137} Ibid, Art. 9. \textsuperscript{138} Ibid, Art. 11.
\item[140] For a legal definition, see Art. 20(2) Court Statute. This section will concentrate on procedure(s) within the Court of Justice, and here in particular on direct actions.
\item[141] Art. 21 Court Statute. The provision, as well as Art. 120 of the Court Rules of Procedure, details the minimum information an application needs to contain.
\item[142] Art. 123 Court Rules of Procedure.
\item[143] Art. 126 Court Rules of Procedure. The provision defines the response by the applicant as 'reply' and the subsequent response by the defendant as 'rejoinder'.
\item[144] Ibid., Art. 60(1). The Court may also decide to 'join' cases on the ground that they concern the same subject matter (ibid., Art. 43). A famous example here is: 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 p. Factotum Ltd and others [1996] ECR I-1029.
\item[145] Art. 66 Court Rules of Procedure.
\item[146] see Art. 31 Court Statute: 'The hearing in court shall be public, unless the Court of Justice, of its own motion or on application by the parties, decides otherwise for serious reasons.'
\item[147] Art. 88 Court Rules of Procedure.
\item[148] Ibid., Art. 32(1): 'The deliberations of the Court shall be and shall remain secret.'
\item[149] Art. 32(3) Court Rules of Procedure.
\item[150] Ibid., Art. 32(4). There must always be an uneven number of voting judges. According to Art. 17(1) Court Statute, '[d]ecisions of the Court of Justice shall be valid only when an uneven number of its members is sitting in the deliberations'.
\item[151] Art. 279 TFEU: 'The Court of Justice of the European Union may in any cases before it prescribe any necessary interim measures.'
\item[152] Art. 278 TFEU.
\end{footnotes}
judgment. By contrast, ‘opinions’ of the Court can be requested in the context of international agreements. Before the Union can conclude such an agreement, '[a] Member State, the European Parliament, the Council of the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties.' The Court’s opinions are here more than advisory, for where it is adverse ‘the agreement envisaged will not enter into force unless it is amended or the Treaties are revised’. Court’s opinions have indeed shaped the external relations law of the European Union.

c. Judicial Reasoning: Methods of Interpretation

Courts are not democratic institutions. Their decision-making ought thus not be based on political expediency. And in many modern societies, courts are therefore not allowed to make law. They must only interpret and apply the law.

The Court of Justice of the European Union stands in this ‘civilian’ tradition. For according to Article 19 TEU the Court shall ‘ensure that in the interpretation and application of the Treaties the law is observed.’ The European Court here portrayed as an ‘active’ interpreter and as a ‘passive’ applier of European law. It must apply European law where its meaning is clear, and must interpret where its meaning is not clear.

The process of interpretation is a process of expressing implicit meaning. It lies between art and science. It is creative in its construction of meaning; yet, by insisting on judicial ‘rules’ of construction, it has a scientific soul. The interpretation of law is thus the creation of legal meaning according to a judicial methodology. The judicial method ‘justifies’ a decision of a court. A court must give ‘grounds’ – legal grounds – for its decisions.

There are four common methods that judges use to justify their decisions. They are: historical interpretation, literal interpretation, systematic interpretation, and teleological interpretation. There exists no hierarchy between them.


154 These ‘Opinions’ are not ‘Cases’ and consequently are numbered separately, such as ‘Opinion 1/94’. For a list of the Court’s ‘Opinions’, see Table of Cases 1(c).

155 Art. 218(11) TFEU. 156 Ibid.

157 Exceptionally, some modern States recognise the law-making function of courts. The English common law system is the best example.

158 Art. 19(1) TEU.


160 Art. 36 Court Statute: ‘Judgments shall state the reasons on which they are based.’

161 Methods in the European legal order, and their parallel use may at times lead to conflicting results. Each method of interpretation grants a different degree of ‘freedom’ to the Court in deciding a case. The first two methods are ‘conservative’ methods, while the last two methods are ‘progressive’ methods of interpretation. A judicial preference for an interpretive method will thus prejudice the result of the interpretation.

Theoretically, the smallest interpretive room is given by the historical method. Historical interpretation searches for the original meaning of a rule. However, a commitment to ‘originalism’ encounters problems. It presumes that there was a clear meaning when the norm was created – which may not be the case. And a historical reading of a norm may make it lose touch with the social reality to which it is to apply. Literal interpretation, by contrast, starts with the written text and gives it its (ordinary) contemporary meaning. The problem with the ‘textualist’ method in the European legal order is that there is not one single legal text. Systematic interpretation tries to construct the meaning of a norm by reference to its place within the general scheme of the legislative or constitutional system. Finally, teleological interpretation is the judicial method that allows a court to search for the purpose or spirit or useful effect – the telos – of a legal norm.

The European Court has used all four methods in its jurisprudence. But while occasionally using the historical method, the Court generally finds its paramount ‘to consider the spirit, the general scheme and the wording of those provisions’. Teleological and systematic consideration have indeed often trumped even the clear wording of a provision. This ‘activist’ interpretation has attracted severe criticism – from academics and politicians alike.

d. Jurisdiction and Judicial Powers

The traditional role of courts in modern societies is to act as independent arbitrators between competing interests. Their jurisdiction may be compulsory, or not. The jurisdiction of the Court of Justice of the European Union is compulsory ‘within the limits of the powers conferred on it in the Treaties’. While compulsory, the Court’s jurisdiction is thus limited. Based on the principle of conferral, the Court has no ‘inherent’ jurisdiction.

161 In the beautifully paradoxical words of G. Radbruch: ‘The interpretation is the result of its result.’ See G. Radbruch, Einführung in die Rechtswissenschaft (Meyer, 1925), 129.

162 Constitutions (as well as legislation) are often the result of compromises. They take refuge in ambiguities and leave meaning to be defined in the future.

163 Van Gend en Loos (n. 122 above), 12.


165 Art. 13(2) TEU.
The functions and powers of the Court are classified in Article 19(3) TEU:

The Court of Justice of the European Union shall, in accordance with the Treaties:
(a) rule on actions brought by a Member State, an institution or a natural or legal person;
(b) 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;
(c) rule in other cases provided for in the Treaties.

The provision classifies the judicial tasks by distinguishing between direct and indirect actions. The former are brought directly before the European Court. The latter arrive at the Court indirectly through preliminary references from national courts. The powers under the preliminary reference procedure are set out in a single article. By contrast, there exists a number of direct actions in the Treaty on the Functioning of the European Union. This Treaty distinguishes between enforcement actions brought by the Commission or a Member State, judicial review proceedings for action and inaction of the Union institutions, actions for damages for the (non-)contractual liability of the Union, as well as a few minor jurisdictional heads.

In light of its broad jurisdiction, the Court of Justice of the European Union can be characterised as a ‘constitutional’, an ‘administrative’, an ‘international’ court as well as an ‘industrial tribunal’. Its jurisdiction includes public and private matters. While the Court claims to act like a ‘continental’ civil law court, it has been fundamental in shaping the structure and powers of the European Union as well as the nature of European law. The (activist) jurisprudence of the Court will be regularly encountered in the subsequent chapters of this book. The Court is indeed much more than the ‘mouth of the law’.

Yet importantly, there are two constitutional gaps in the jurisdiction of the Court. First, the European Courts shall have no jurisdiction with respect to the Common Foreign and Security Policy. The idea behind this exclusion is the wrong belief that courts have no role to play in political questions raised in the context of foreign affairs. Secondly, the Court shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security. The exclusion of judicial review in this second instance is – perhaps – less problematic. For the provision will not exclude judicial review by national courts.

3. The European Central Bank

National central banks emerged in seventeenth-century Europe as public institutions to regulate money supply in the national market. A European central bank had originally not been provided for in the Treaties. However, with the decision to move towards monetary union, a central institution was envisaged to regulate the money market in the European Union. The European Central Bank (ECB) came into formal existence in 1998, and assumed its formal functions on 1 January 1999 when the European currency – the ‘euro’ – was introduced.

The status of the Bank within the institutional framework of the Union remained unclear for a long time. Prior to the Lisbon Treaty, it was not a formal ‘institution’ of the Union, and its ambivalent legal status gave rise to a spirited academic debate. The debate has – partly – been ended by Article 13(1) TEU, which expressly identifies the European Central Bank as an institution of the European Union. Nonetheless, the ECB is an institution with a special status that warrants a special analysis. Thereafter, we shall look at the composition and structure, decision-making procedure and functions of the ECB respectively.

a. The Special Status of the ECB

Is the European Central Bank a sui generis institution of the Union? The argument has been made by reference to two ‘special’ characteristics. First, the European Central Bank is ‘independent’. Secondly, it is embedded in the ‘European System of Central Banks’ (ESCB). This is a system composed of the European Central Bank and the National Central Banks of the Member States whose currency is the euro, and the Treaties formally assign the tasks of monetary policy to the ESCB and not directly to the ECB.

Let us start by looking at the ‘independent’ status of the ECB. The ECB shall be independent in the exercise of its powers and in the management of its finances; and the Union as well as the Member States must respect that independence. Unlike any other Union institution, the Bank indeed has its own ‘legal personality’ that is distinct from the legal personality of the Union. The Bank’s special status originally gave rise to the theory that the ECB represented an ‘independent specialised organisation of [Union] law’ – like the...
European Atomic Community. Yet the idea that the Bank was legal independent from the European Union has been thoroughly rejected by the European Court of Justice. In Commission v. European Central Bank, the Court unconditionally rejected the legal independence theory. The independence of the Bank only meant political independence. And the political independence is not a unique feature of the Bank, but is shared by other Union institutions.

What about the European Central Bank being part of a two-level structure within the European System of Central Banks? This — strange — constitution must be understood against its historical background. When the Member States decided to move towards monetary union, they had two alternatives. They could either dissolve the pre-existing National Central Banks and replace them with a — centralised — single European Central Bank; or they could create a decentralised structure within which the National Central Banks act as agents of the European Central Bank.

The Treaties have chosen the second option — an option that has many advantages. However, this second option is not a federal option. National Central Banks are not in a federal relationship with the European Central Bank. It is the European Central Bank that exclusively governs within the European System of Central Banks. It is the ECB that can — exclusively — decide whether to exercise the powers granted to it by the Treaties itself or through the national central banks. And when the ECB decides to have recourse to the national central banks, the latter ‘shall act in accordance with the guidelines and instructions of the ECB. National Central Banks are thus best seen as functionally integrated ‘organs’ of the European Central Bank. They only enjoy ‘delegated’ powers under an exclusive EU competence, and not ‘autonomous’ national powers. Within the scope of the Treaty, they are consequently agents of the European Central Bank. And the best way to characterise the ESCB is therefore to compare it to a decentralised unitary system — akin to the political system within the United Kingdom.

In conclusion, how are we to characterise the European Central Bank? Textually and functionally, the ECB is a ‘formal’ institution of the Union, albeit endowed with its own special characteristics. While the ECB is organically separate from the National Central Banks, it functionally incorporates them as decentralised agents of the ECB. From this point of view, the ESCB is nothing but the ECB writ large.

b. Organs and Administrative Structure

The European Central Bank has three central organs. Its two executive organs are the ‘Executive Board’ and the ‘Supervisory Board’. Its principal regulatory organ is the ‘Governing Council’.

180 C. Zilioli and M. Selmayr, The Law of the European Central Bank (Hart, 2001), 31. The practical consequence of this theory was that the ECB was assumed not to be directly bound by the objectives of the European Union. The sole ‘Grundnorm’ of the ‘Community’ was price stability (ibid., 35).


182 Ibid., para. 134. For a criticism of that claim, see R. Smits, ‘The European Central Bank: Independence and Its Relations with Economic Policy Makers’ (2007–8) 31 Fordham International Law Journal 1614 at 1625: ‘In a self-professed democracy, the idea of central bankers not being influenced by [Union] and State government members is absurd.’

183 Case C-11/00 (n. 181 above), para. 133: [Union] institutions such as, notably, the Parliament, the Commission or the Court itself, enjoy independence and guarantees comparable in a number of respects to those thus afforded to the ECB. In that regard, reference may, for example, be made to Article 245 TFEU, which states that the Members of the Commission are, in the general interest of the [Union], to be completely independent in the performance of their duties. That provision states, in terms quite close to those used in [Article 130 TFEU], that in the performance of their duties the Members of the Commission are neither to seek nor to take instructions from any government from any other body and, further, that each Member State undertakes not to seek in such a way to influence those Members in the performance of their tasks.

184 For an excellent overview, see Zilioli and Selmayr, The Law of the European Central Bank (n. 180 above), 54 et seq.

185 Ibid., 57: ‘The maintenance of the national central banks inside the ESCB was seen as an opportunity to found a new system on the experience, the traditions and the reputation of the national central banks.’

186 Art. 9(2) ECB Statute (emphasis added). 187 Ibid., Art. 12(1) – third indent.
Central Banks must not take instructions from their national governments, they are not representatives of the Member States. They must act in the supranational interest of the European Union as a whole. Governors of National Central Banks are thus unlike national ministers in the Council. They are representatives of the Union.

The central organs of the ECB are supported by a number of ‘work units’, and ‘committees’. Work units can be created by the Executive Board, and are ‘under the managing direction’ of the latter. Work units within the ECB presently comprise ‘Directorates-General’ (for example: Financial Stability), and self-standing Directorates (for example: Internal Audit). With regard to committees, it is the Governing Council that will ‘establish and dissolve’ committees with particular mandates. Committees are to be composed of up to two members from each of the National Central Banks (participating in the euro) and the European Central Bank.

c. Internal Divisions and Decision-making

Who governs within the European Central Bank? The Governing Council is the central policy-making organ, which is charged to ensure that the tasks of the ECB are fulfilled. It will ‘formulate the monetary policy of the Union, including, as appropriate, decisions relating to immediate monetary objectives, key interest rates and the supply of reserves in the ESCB, and shall establish the necessary guidelines for their implementation’.

In the past, decision-making within the Governing Council was pleasantly straightforward: each member had one vote. However, matters became more complex when the number of Member States that adopt the euro exceeded 18 in 2015. Here, the Statute envisages a – very – complex rotating system among national governors. The Council will meet ‘at least 10 times a year’, and decisions are normally taken by simple majority. Voting is confidential, but

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195 Art. 283(2) TFEU.
196 Art. 11 ECB Statute.
197 Ibid.
198 See Regulation 1024/2013 (n. 189 above), Art. 26(1).
199 Ibid., Art. 26(3); as well as Art. 13(3) of ECB Rules of Procedure.
200 Art. 283(1) TFEU.
the Governing Council may decide to make the outcome of its deliberations public. And if the Governing Council resolves not to decide itself, it ‘may delegate its normative powers to the Executive Board for the purpose of implementing its regulations and guidelines’. 211

What are the tasks of the Executive Board? In line with its ‘executive’ nature, it ‘shall implement monetary policy in accordance with the guidelines and decisions laid down by the Governing Council’; and, in that executive capacity, it will also be the primary instructor for National Central Banks. 212 It will generally ‘be responsible for the current business of the ECB’. 213 Decision-making in the Executive Board is done in person, with each person having one vote. Save as otherwise provided, the Executive Board will thereby act by a simple majority of the votes cast, with the President having a casting vote in the event of a tie. 214

While the Executive Board thus primarily implements the Governing Council’s monetary policy, the specific task of the ‘Supervisory Board’ is to assist the ECB in the prudential supervision of banks so as to guarantee ‘the safety and soundness of credit institutions and the stability of the financial system within the Union’. 215 This second essential task – after monetary policy – is discharged in liaison with the Governing Council; yet the Union legal order here insists on a complete separation between the monetary and the supervisory functions of the ECB. 216 Decisions by the Supervisory Board will in general be taken by a simple majority of its members, but qualified majority voting also exists for certain areas. 217

Finally, what are the tasks of the ECB President? S/he will have to chair the Governing Council and the Executive Board, and will represent the ECB externally. 218 External representation includes participation in Council meetings that discuss matters falling within the competences of the Bank. 219

### d. Functions and Powers

The European Central Bank does not have the constitutional honour of its own article in the Treaty on European Union. This ‘systemic’ break in the arrangement of the institutional provisions is regrettable. In order to draw a picture of the functions and powers of the ECB, we must therefore look straight into the Treaty on the Functioning of the European Union.

The Treaties define the ‘principle objective’ of the European Central Bank as the maintenance of price stability. 220 This primary objective is not just a primus

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210 Art. 10(4) ECB Statute.
211 Art. 17(3) ECB Rules of Procedure.
212 Art. 12(1) ECB Statute.
213 Ibid., Art. 11(6).
214 Ibid., Art. 11(5).
215 Regulation, 1024/2013 (n. 189 above), Arts. 1 and 26.
216 Ibid., Art. 25(4): ‘The ECB shall ensure that the operation of the Governing Council is completely differentiated as regards monetary and supervisory functions. Such differentiation shall include strictly separated meetings and agendas.’
217 Ibid., Art. 26(6) and (7).
218 Ibid., Art. 13 ECB Statute.
219 Art. 284(2) TFEU.
220 Art. 127(1) TFEU, as well as Art. 282(2) TFEU. For a more extensive discussion of the powers of the ECB within the Economic and Monetary Union title of the TFEU, see Chapter 19, section 1 below.

221 Scheller, *The European Central Bank* (n. 202 above), 45. But of course, economic thinking is cyclical: what is ‘orthodoxy’ today may sooner or later become heterodoxy.
222 Art. 127(2) TFEU.
223 Ibid., Art. 128(1) (emphasis added). The Member States may, however, issue euro coins, but the volume of the issue of euro coins is still subject to the approval of the European Central Bank.
224 That is the name for the Member States participating in monetary union. The status of the so-called ‘Euro Group’ is clarified in Protocol No. 14 on the Euro Group. According to Art. 1, ‘[t]he Ministers of the Member States whose currency is the euro shall meet informally’. According to Art. 2, the Euro Group shall elect a president for two and a half years.
225 On this point, see Chapter 8, section 3(b) below.
226 Ibid., Art. 29(3).
227 Art. 219(1) TFEU.
228 Ibid., Art. 138(1).
229 Ibid., Art. 282(5): ‘within the area within its responsibilities, the European Central Bank shall be consulted on all proposed Union acts, and all proposals for regulation at national level, and may give an opinion.’
4. The Court of Auditors

Many constitutional orders subject public finances to an external audit. In the Union legal order, the Court of Auditors was established by the 1975 Budget Treaty, and was elevated to a formal institution of the Union in the wake of the Maastricht Treaty. The name of this particular institution is partly misleading. The Court of Auditors is not a court in a judicial sense. It neither exercises judicial functions, nor is it staffed with lawyers. The Court of Auditors is staffed with accountants, whose primary task is to ‘carry out the Union’s audit’. Audit here means ‘external audit’, for each institution must internally audit itself.

What is the structure and decision-making procedure of the Court? The Court consists of one national from each Member State. Members must be completely ‘independent’ and act ‘in the Union’s general interest’. Membership is limited to persons who ‘have belonged in their respective States to external audit bodies or who are especially qualified for this office’. The Council – not the Member States – appoints members for a (renewable) term of six years. The Court will – internally – elect its President. The latter will ‘call and chair the meetings of the Court’, and ‘represent the Court in its external relations’. While the Court is divided into chambers, it will normally act as a collegial body by a simple majority of its members. Decisions of the Court shall be taken ‘in formal session’, but a written procedure may exceptionally apply. However, for certain categories of reports the decision of a chamber might be sufficient. Yet, all important reports must be adopted by the full Court.

What are the functions and powers of the Court of Auditors? According to Article 287 TFEU, the Court of Auditors ‘shall examine the accounts of all revenue and expenditure of the Union’. And it shall additionally ‘provide the European Parliament and the Council with a statement of assurance as to the reliability of the accounts and the legality and regularity of the underlying transactions’. To fulfil its task, the Court will primarily audit the financial records of the Union. However, it is also entitled to perform ‘on the spot’ investigations ‘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’. This wide investigative power includes the Member States – in their function of Union executive – as well as any individual recipient of Union funds. Yet the audit must here be carried out ‘in liaison’ with the competent national authorities.

In examining the accounts, what standard is the Court to apply? Two constitutional options exist. A formal review will solely require an examination of the ‘legality’ of the Union’s financing, that is: whether the accounts reflect all the revenue received and all expenditure incurred. By contrast, a substantial review will additionally examine the ‘soundness’ of public spending decisions, that is: whether the financial priorities of the Union guarantee ‘value for money’. Substantive review is more intrusive, as it involves questioning the underlying political choices behind the budget.

The Union constitutional order has chosen this second option. The Court of Auditors must thus review whether the revenue and expenditure of the Union was ‘lawful and regular’, ‘and examine whether the financial management has been sound’. The soundness of the Union’s finances is thereby determined ‘by reference to the principles of economy, efficiency and effectiveness’.

The result of the audit will be published in an ‘annual report’ after the close of each financial year. This annual report may be complemented by ‘special reports’ dealing with particular aspects of the Union budget. The reports are designed to assist the European Parliament and the Council in exercising their powers of control over the implementation of the budget.
Commission is primarily charged with the implementation of the Union budget, and the reports will be primarily addressed to this Union institution. They constitute a ‘declaration of good conduct’, which – if missing – may lead to the dissolution of the Commission.

Conclusion

This chapter, and the previous chapter, analysed the governmental structure of the European Union. We saw above that the Union is not based on the classic tripartite structure that became famous in the eighteenth century. The Union has seven ‘institutions’: the European Parliament, the European Council, the Council, the Commission, the Court of Justice of the European Union, the European Central Bank, and the Court of Auditors. Each of these institutions is characterised by its distinct composition and its decision-making mode. According to these two dimensions, the Parliament, the Commission, the Court, the European Central Bank, and the Court of Auditors are closer to the ‘national’ end of the spectrum, whereas the European Council and the Council are closer to its ‘international’ end.

Importantly, since the Union is based on the ‘checks-and-balances’ version of the separation-of-powers principle, each of the Union institutions shares in various governmental functions. This institutional power-sharing is indeed the very basis of the Union’s system of checks and balances. What types of governmental ‘powers’ or ‘functions’ may be identified for the European Union? Chapter 5 identified five governmental functions: legislative, executive, judicial, external and financial functions. The legislative power 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. A separate ‘fourth power’ relates to the external actions of a body politic. Finally, a ‘fifth power’ relates to the governmental control of monetary markets.

Part II of this book will analyse the first four of these functions. What is the scope of the Union’s powers and what legal procedures combine the various institutions into the exercise of these powers? Let us explore these questions by looking at each governmental power in turn.

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254 According to Art. 145(1) Financial Regulation (n. 234 above), if the accounts are regular and sound, the Parliament shall, upon recommendation by the Council and before 15 May of year n+2, give a discharge to the Commission in respect for the implementation of the budget of year n.


256 It was the Court of Auditor’s Report on the 1996 Union budget that led to the fall of the Santer Commission.