

INTRODUCTION
TO EUROPEAN UNION
INSTITUTIONAL LAW

Publications of the Faculty of Law, Canon Law and Administration
of the John Paul II Catholic University of Lublin

Volume 8

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Wydawnictwo KUL
Lublin 2013

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ISBN 978-83-7702-728-8

Layout by
Agencja Wydawnicza PAJ-Press
www.pajpress.pl
Proofreading by Anna Pająk

The publication is distributed free of charge



HUMAN CAPITAL
NATIONAL COHESION STRATEGY

EUROPEAN UNION
EUROPEAN
SOCIAL FUND



Project „Best Practices” in Strategic Transformation of the KUL is co-financed
by the European Union under the European Social Fund

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elpil
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LIST OF ABBREVIATIONS

AFSJ	- Area of Freedom, Security and Justice
AG	- Advocate General
BOI	- Binding Origin Information
BTI	- Binding Tariff Information
CAP	- Common Agricultural Policy
CCT	- Common Customs Tariff
CCP	- Common Commercial Policy
CEU	- The Council of the European Union
CFI	- Court of First Instance
CFR	- Charter of Fundamental Rights
CFSP	- Common Foreign and Security Policy
CJ	- The Court of Justice
CJEU	- The Court of Justice of the European Union
CL	- Chamber Litigation
Coreper	- The Permanent Representatives Committee
CR	- The Committee of the Regions
CST	- The Civil Service Tribunal
CTP	- Common Transport Policy
EAEC	- European Atomic Energy Community
EAFRD	- European Agricultural Fund for Rural Development
EC	- European Commission
EC	- European Community
ECB	- European Central Bank
ECHR	- European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	- European Court of Human Rights
ECSC	- European Coal and Steel Community
EC Treaty	- the Treaty establishing the European Community
EDC	- European Defence Community
EEA	- European Economic Area
EEC	- European Economic Community
EFTA	- European Free Trade Association

List of abbreviations

EIB	- European Investment Bank
EMU	- Economic and Monetary Union
EP	- European Parliament
EPC	- European Political Community
ESC	- Economic and Social Committee
UN	- UN Charter - Charter of the United Nations
EU	- European Union
Euratom	- the European Atomic Energy Community
EU Treaty	- the Treaty on the European Union
FAG	- First Advocate General
GATT	- General Agreement on Tariffs and Trade
NATO	- North Atlantic Treaty Organization
JHA	- Cooperation in the field of Justice and Home Affairs
OECD	- Organisation for Economic Co-operation and Development
OJ EU	- Official Journal of the European
Op. cit	- citatum opus, a work already cited
SC	- specialized courts
SEA	- The Single European Act
SIS	- Schengen Information System
TA	- The Treaty of Amsterdam
TARIC	- Integrated Tariff of the European Communities
TEAEC	- the Treaty establishing the European Atomic Energy Community
TEWWiS	- the Treaty establishing the European Coal and Steel Community
TL	- Treaty of Lisbon
TN	- The Treaty of Nice
UN	- United Nations
USSR	- Union of Soviet Socialist Republics
VC	- Vienna Convention
VIS	- Visa Information System
WEU	- Western European Union

INTRODUCTION

The handbook “Introduction to European Union Institutional Law” is an academic textbook. It has been prepared by researchers from the Department of European Union Law of The John Paul II Catholic University of Lublin. It is a continuation, supplement and update of previously released handbooks¹. This publication is a compendium of knowledge on the European Union institutional law indicating issues related to substantive law. It is designed for a 30-hour basic course of the European Union law included in university programs, primarily in the fields of law, administration, European studies, mostly under the names “*Introduction to European Union Law*” or “*Institutional Law of the European Union*”. It can also be a teaching aid in other fields of studies (e.g. economics, international relations), and serve those interested in the European Union, including practitioners and graduate students on topics related to European integration.

The handbook is to, as the Authors intended, allow students to experience the European Union law issues for the first time, deal with basic knowledge in this area by self-study, serve as a base material for preparation for classes as well as provide a knowledge base before an exam. For this purpose, the Authors adopted brevity, clarity and systematic consideration of the presented issues, as well as a comprehensive presentation of the contents as their main objective. In the handbook, the included footnotes are primarily of educational nature and bibliographies advise on further sources of self-study. At the end of each of the chapters lists of main literature, judgments of the Court of Justice of the European Union and other courts, and main study questions on the issues contained in the chapters presented have been included. Ac-

¹ See: A. Kuś (ed.), P. Gilowski, E. Krzysztofik, T. Sieniow, , A. Szachoń, P. Wojtasik, *Zarys prawa instytucjonalnego Unii Europejskiej*, Wydawnictwo KUL, Lublin 2009; A. Kuś (ed.), P. Gilowski, E. Krzysztofik, K. Miaskowska-Daszkiewicz, T. Sieniow, A. Szachoń, P. Wojtasik, *Prawo Unii Europejskiej z uwzględnieniem Traktatu z Lizbony*, Wydawnictwo KUL, Lublin 2010; A. Kuś (ed.), E. Krzysztofik, K. Miaskowska-Daszkiewicz, R. Pal, A. Szachoń-Pszenny, T. Sieniow, K. Woch, P. Wojtasik, *Prawo materialne Unii Europejskiej w zarysie*, Wydawnictwo KUL, Lublin 2011; the handbook is the English version of: A. Kuś (ed.), E. Krzysztofik, K. Miaskowska-Daszkiewicz, T. Sieniow, A. Szachoń, P. Wojtasik, K. Woch, A. Parol, R.M. Pal, *Prawo instytucjonalne Unii Europejskiej w zarysie*, Wydawnictwo KUL, Lublin 2012.

According to the Authors, the handbook contains material necessary to master the basic course of the European Union law, leaving the additions at the teachers' discretion. The handbook includes theoretical considerations only to the extent necessary and essential to understand the presented issues. The adopted nature and development of the publication (a textbook) indicates that this is not a publication aspiring to be a full (comprehensive) presentation of theory and practice relating to the European Union Law². For a full understanding of the complex issues of EU law, it is necessary to complete the basic knowledge with other publications available on the market. This handbook provides basic considerations of European Union law taking into account a number of changes introduced by the Lisbon Treaty³ and accession of Croatia.

The publishing market offers numerous publications in the field of European Union law. This state of affairs cannot surprise anyone, because EU law enters into almost every area of law and socio-economic development. Those publications are in-depth studies, comments or academic textbooks. Many of them concern piecemeal issues related to the European Union law. The wealth of literature on European Union law is not always helpful to the students. It sometimes causes confusion and disorientation in selecting the correct publication.

We hope that the clear layout and accessible language of the handbook will make it easier for all readers - and first of all the students of *European Studies* - to move in the complicated matter of EU law.

On behalf of Authors
Artur Kuś, Hab. PhD, University Professor, KUL
Lublin, July 2013

² Some considerations are only indicated (e.g., the constitutional basis of the European Union membership) or completely omitted (e.g. the ones related to the monetary policy of the Union - because of the Polish derogations in this regard).

³ The text of the Lisbon Treaty was published in the Official Journal of the EU 2007 C 306/1. Promulgation of the text of the Lisbon Treaty in the Polish Official Journal took place on 2 December 2009 (Journal of Laws of 2009, No. 203, item. 1569).

CHAPTER I

THE ORIGIN AND DEVELOPMENT OF INTEGRATION PROCESSES IN EUROPE AFTER WORLD WAR II

§1. Introduction

1. The European Union is an international organization in a process of continuous evolution. Its purpose, according to the Treaty on European Union, is **creating an ever closer union among the peoples of Europe**¹. The European Union is at the same time a successor to the European Communities and the next stage of European integration. In a legal sense, **the European Union is neither a state nor a federation of states**. However, the achieved level of cooperation and economic interdependence, and the gradual introduction of elements typical of sovereign states (citizenship, common currency, the abolition of controls at internal borders, or the creation of the European Union diplomatic service), contributes to the growth of European identity and the perception of the EU as an entity in its international relations.

¹ The preamble to the Treaty on European Union signed in Maastricht on 7 February 1992, consolidated version, taking into account the changes introduced by the Treaty of Lisbon, published in the Official Journal of the EU 30.03.2010, C-83/1

2. Integration of European countries took place at various levels. Basically, **political and military (intergovernmental) path** and **economic (Community) path**, regulated in the founding treaties signed by France, Germany, Italy, Belgium, the Netherlands and Luxembourg in Paris (1951) and Rome (1957) should be highlighted. The Communities established in the Treaties have become an essential pillar of the European Union having joined the two paths of integration in its structure since the Treaty of Maastricht. There is no doubt, however, that the economic integration of the Member States of the European Union was much ahead of integration achievements in the field of foreign policy, defense policy, or even justice and home affairs. So it will take some time before political integration reaches the level similar to the one of economic integration. Although the European Union constitutes a single economic market, in the field of foreign policy (except for trade policy), despite the changes introduced by the Treaty of Lisbon, the states remain sovereign.

3. European integration has progressed at various levels. According to the prophetic view expressed by Robert Schuman *Europe will not be made all at once or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity*². Progress in European integration is therefore measured by two processes: deepening and broadening. They set the next steps in the creation of an ever closer union among the peoples of Europe.

§2. THE BACKGROUND OF INTEGRATION PROCESSES IN EUROPE AFTER WORLD WAR II

1. Two world wars that devastated Europe in the first half of the twentieth century left Europeans with no illusions that peace could be maintained by competition (including military) between nation states susceptible to nationalism. An additional incentive favouring the birth of solidarity between the peoples of Western Europe was a threat of the spread of communism and the beginning of the Cold War.

2. The idea of integration as a way of maintaining lasting peace in Europe and rebuilding economies destroyed during the war received the recognition of contemporary statesmen. In 1946, at the University of Zurich, British Prime Minister Winston Churchill called for the creation of a **kind of United States of Europe**³. Soon after

² Schuman Declaration, delivered before the French National Assembly on May 9, 1950

³ English *a kind of United States of Europe*.

this speech, in 1948, the Organization for European Economic Cooperation (OEEC) was established, which managed the distribution of allocations provided by the United States under the Marshall Plan⁴. Churchill's defeat in elections in the UK somewhat diminished the British integration trend of integration, however, among the leaders of western European states on the continent the awareness of the need of European unity was great. The main builders of the European project in that period became known as **The Founding Fathers of the European Union**. Among them, the most important role was played by:

- a) **Robert Schuman** – French politician, born in Luxembourg, family coming from Lorraine. Before World War I educated in Germany (he studied law in Berlin) and after the acquisition of Lorraine by France after World War I he was a deputy of the French National Assembly. During World War II, the Vichy government opponent and a member of the resistance. After the war, he became one of the leading proponents of the Franco-German reconciliation. As Prime Minister of the French government, then Minister of Foreign Affairs he led to the creation of the European Coal and Steel Community (cf. the so-called Schuman Declaration of 1950). In 2004, the Catholic Church began his process of beatification.
- b) **Jean Monnet** – French politician and economist. In the years 1919-1923 he was Secretary General of the League of Nations. During World War II he organized a Franco-British military and economic cooperation and supported the U.S. commitment to help Europe. After the war, he became one of initiators of the creation of federal Europe, which resulted in the creation of the ECSC, where he served as the first President of the High Authority.
- c) **Konrad Adenauer** – German politician and lawyer. He retired from political life during the Nazi period. After the war, he was a co-founder of the German Christian Democracy and in 1949 the Chancellor of Germany. He was a supporter of European integration, accepting the Marshall Plan by Germany, and NATO entry.
- d) **Alcide de Gasperi** – Italian Christian Democratic politician, opponent of fascism, imprisoned during the dictatorship of Mussolini. After World War II, as Prime Minister of the Italian Government he became an advocate of the unification of Europe in political (Council of Europe) and economic terms (the ECSC) and of the transatlantic cooperation (NATO). Since 1993 his beatification process has been taking place.
- e) **Paul-Henri Spaak** – Belgian lawyer and politician, a member of the Belgian Socialist Labour Party. During World War II, Minister of Foreign Affairs of the Belgian government in London, where he tried to form an alliance of

⁴ P. Craig, G. de Búrca, *EU Law. Text, Cases and Materials*, 4th Ed., Oxford 2008, p. 4.

Benelux countries. After the war, he was, among others, the prime minister and foreign minister of Belgium. He was the president of the Parliamentary Assembly of the Council of Europe and the Common Assembly of the ECSC. The report, presented by him in 1955 at a conference in Messina, became the basis for the creation of a common market within the European Economic Community.

3. The main factors affecting the acceptance of integration processes in Europe were: **desire to maintain peace**, threat of war, fear of the growing power of the Soviet Union and the rise of the bloc of satellite states of Moscow in the region of Central and Eastern Europe. At the same time the ongoing process of economic recovery in Europe required coordination and effective use of the aid offered by the United States under the Marshall Plan. The primary task of maintaining peace was to find in the post-war balance of powers the right place for occupied Germany that with no reconstruction would become a potential field of revolutionary ideas expansion stimulated by the Soviets. On the other hand, the reconstruction of German economy could not lead to the revival of the military power of the state. Thus, carbon-steel industry was the primary sector of integration in the first phase. It was closely linked to the production of conventional weapons and a key to the reconstruction of Europe.

4. The post-war cooperation between the states took different forms and involved many disciplines. Essentially it consisted of two areas: the politico-military and economic. The expression of will to ensure a peaceful coexistence of nations was the establishment of **the United Nations** (1945). At the regional level establishing the Council of Europe on 5 May 1949, an organization for political and socio-economic purposes was essential. The most important instrument of the Council of Europe was **the European Convention for the Protection of Human Rights and Fundamental Freedoms** of 4 November 1950 (ECHR)⁵. Its ratification was a condition of countries' accession to the Council of Europe, and **the European Court of Human Rights** based in Strasbourg was to guard the observance of its provisions. Currently, the number of members of the Council of Europe reaches 47 countries (including all EU Member States). Therefore, the Strasbourg system of protection of human rights was and is of fundamental importance for the shape of human rights protection in the European Union⁶.

5. Other examples of contemporary Western European **countries** closer **cooperation** were:

- a) Benelux Customs Union (1944);

⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 (Journal of Laws of 1993, No. 61, item. 284, as amended.).

⁶ The Council of Europe is not part of the European integration in the strict sense, but it is generally erroneously qualified as one of the institutions of the European Union.

- b) Organisation for European Economic Co-operation OEEC (1948), later re-named the Organization for Economic Cooperation and Development - OECD (1960);
- c) North Atlantic Treaty Organization - NATO (1949);
- d) Western European Union - WEU (1954);
- e) European Free Trade Association- EFTA (1960).

6. Initially two philosophies of economic integration competed in Western Europe: EEC - involving the creation of a common market based on the Customs Union and **European Free Trade Association (EFTA)**, in which co-operation was looser with the aim of creating "just" a free trade area. Agreement on the establishment of EFTA was signed in 1960 by Austria, Denmark, Norway, Portugal, Sweden, Switzerland and the United Kingdom. From the beginning, it was an alternative to the EEC, bringing together countries that had not chosen deep economic integration. Currently, five of the seven founding members of the EFTA joined the European Union. Similarly, Finland, having been a full member of the Association in the years 1986-1994, has done that. The remaining EFTA members were Switzerland, Liechtenstein, Iceland and Norway. The last three are connected to the EU by a 1992 agreement on the establishment of **the European Economic Area**⁷.

7. In parallel, in the countries of Central and Eastern Europe gradual taking over democratic institutions by puppet regime governments following orders of the Communist Party or the conversion of the sovereign before World War II Soviet republic countries (Lithuania, Latvia, Estonia) was progressing. In contrast to the voluntary unification of the sovereign states of Western Europe, in this case the basic "integration tool" was multimillion Red Army stationed outside the Soviet Union and special forces obedient to Moscow. The result of Soviet domination was the appointment of **the Council for Mutual Economic Assistance** (1949) and signing the Warsaw Treaty of Friendship, Cooperation and Mutual Assistance (known as **the Warsaw Pact**) in 1955. Both organizations based in Moscow became a democratic façade for economic and military intervention of the Soviet Union in the region and reducing sovereignty of the so-called People's Democracy countries (Poland, Czechoslovakia, Hungary, Romania, Bulgaria, the German Democratic Republic and Albania⁸). Dissolution of the Council for Mutual Economic Assistance and the Warsaw Pact in 1991 became a symbol of the recovery of economic independence and political sovereignty at the same

⁷ Agreement of 2 May 1992 on the establishment of the European Economic Area, as amended by the Protocol of 17 March 1993 (OJ. EC, No. L-1 of 3 January 1994, p 3).

⁸ With time Mongolia, Cuba and Vietnam became members of The Council for Mutual Economic Assistance. In addition, Yugoslavia received special status in it, and Finland concluded cooperation agreement. Albania withdrew from participation in the CMEA in 1962 and in 1968 withdrew from the Warsaw Pact.

time opening the way of the countries of Central and Eastern Europe to free and full integration with the European Communities and NATO.

§3. FOUNDING TREATIES

1. The Treaty establishing the European Coal and Steel Community

1. Robert Schuman proposed a plan to integrate the coal and steel industry supported by six countries (Belgium, France, Luxembourg, the Netherlands, Germany and Italy) which became founders of the first Community. On 18 April 1951 in Paris, they signed **the Treaty establishing the European Coal and Steel Community**⁹, an international organization equipped with its own bodies and with international legal personality. Under the terms of the Treaty coal and steel sectors of the Member States were subject to joint control, exercised by supranational bodies. The creation of a common market for coal and steel was to contribute to economic growth and a significant decline in unemployment. The Treaty introduced free competition in the market for coal and steel, prohibited cartels or other forms of state aid and any practices discriminating producers, consumers and buyers from other countries making up the Community. The Treaty also abolished import and export duties and quantitative restrictions on coal and steel trade. Community based on free movement of workers in the coal and steel sectors was also to prevent lowering the level of labour and wages. In the Treaty Member States provided the Community with competence to supervise prices, set maximum and minimum prices.

2. Member States equipped European Coal and Steel Community in a **system of institutions**: the High Authority, the Special Council of Ministers, the Common Assembly and the Court of Justice. Treaty regulation of the High Authority, composed of nine independent international officials (headed by Jean Monnet), allowed it to pursue a policy independent of any government. Decisions taken by majority of votes were binding on Member States. This demonstrates the **supranational character of the Community**. Coordination of relations between the High Authority and the Member States was taken care of by a special Council of Ministers. Common Assembly was in power to control being able to vote on a motion of censure against the High Authority. The Court's role was to ensure compliance with Community law.

⁹ Treaty establishing the European Coal and Steel Community, signed in Paris on 18 April 1951 (hereinafter referred to as the Treaty of Paris or ECSC Treaty).

1. Treaty of Paris came into force on 23 July 1952, the European Coal and Steel Community was established for a specified period. After 50 years since its entry into force (23 July 2002) The ECSC Treaty expired¹⁰. Assets accumulated by the Community have been used to support research in the sectors related to coal and steel industry, and the previous powers were assumed by the European Community.

2. The Treaty establishing the European Economic Community

1. 1. The success of establishing the common coal and steel market under the ECSC led to the creation of new integration initiatives. Although plans for a European Political and Defence Community failed, Member States took further attempts. At a conference in Messina (1955), Paul-Henri Spaak presented a report with proposals for the creation of a common market covering all the sectors of the economy¹¹. **Treaty establishing the European Economic Community** was signed on 25 March 1957 and entered into force on 1 January 1958. There were six signatories of the Treaty, the same countries that formed the ECSC.

2. The main objective of the EEC was to **establish a common market and progressively approximate the economic policies** of the Member States. To achieve this purpose it was decided to ensure free movement of goods, workers, services and capital. In addition, integration would be helped by approximating the laws of Member States to the extent necessary to ensure the proper functioning of the common market, as well as establishing a common customs tariff and maintaining a common commercial policy towards third countries. Additionally TEEC established common competition policy, common agricultural and transport policy.

3. **EEC institutional structure** was similar to the one functioning within the ECSC. The Community institutions were: the Commission, the Council, the Parliamentary Assembly and the Court of Justice. An auxiliary body was the Economic and Social Committee. Despite the similarities in comparison with the ECSC in EEC there was a shift of lawmaking powers of the independent High Authority counterpart - the Commission to the Council composed of the Governments of the Member States representatives. This was a step backwards on the road to building federal Europe, strengthening the position of members of the community. The Commission's role was limited to submitting draft legislation, formulating Community policy, managing the budget of the Community and ensuring compliance with Community law.

¹⁰ It happened under Article 97 of the ECSC Treaty.

¹¹ Treaty establishing the European Economic Community of 25 March 1957 (hereinafter referred to as the Treaty of Rome, the EEC Treaty, TEC and finally - after the Treaty of Lisbon - TFEU).

3. The Treaty establishing the European Atomic Energy Community

The second treaty, signed on 25 March 1957 in Rome was **the Treaty establishing the European Atomic Energy Community** (EAEC or EURATOM)¹². The Community, in accordance with the provisions of the Treaty, was to ensure the development of the nuclear industry and the introduction of common control over it to be used only for peaceful purposes. Achievement of these goals was to be served by research, establishing uniform safety standards and dissemination of technical knowledge. The community was also to facilitate investment, ensure regular supply of nuclear fuel to all customers. The structure of the EAEC bodies corresponded to institutional architecture established in the EEC. Actions taken under the Euratom Treaty were integrated within the European Commission (Directorate-General for Energy) and established in 1960, the European Supply Agency. However, the Treaty itself has been the European Supply Agency established in 1960. Despite the Treaty in force and EAEC being an international organization separate from the Union, it is institutionally associated with it.

§4. THEORIES OF EUROPEAN INTEGRATION

1. European integration started after World War II lived to see many theories devoted to it. They were created to help understand the processes taking place in Europe. These concepts are often interpenetrable and operate in many different theoretical aspects, functioning essentially in parallel. Differently distributed accents decide whether the key role in the integration is to be played by merging economies through a market mechanism (the liberal view), or by the institutional method (concerted state action). Finally, political scientists and lawyers look at integration in different ways. However, the most frequently mentioned ones among the traditional theories of European integration are: functionalism, federalism, confederalism, supranationalism and the so-called *intergovernmentalism*. Newer theories refer to the concept of multi-level governance.

2. At the beginning of the Communities' existence **functionalism** was a dominant concept, according to which European integration should focus on specific sectors of economy, which are easier to be managed by independent international staff officers

¹² Treaty establishing the European Atomic Energy Community signed on 25 March 1957 in Rome (hereinafter referred to as TEAEC).

(technocrats). Functionalists (Jean Monnet, Robert Schuman) were very pragmatic, recognizing that economic integration in individual areas will provide peaceful growth in Europe. Those specific integration projects (following stages) were to lead to the creation of supranational structures, taking over the functions of the state in the areas transferred to the Communities. Neofunctionalists stand out in this trend. In their opinion integration should start from non-controversial areas, and its positive effects would **spill-over** sectors with greater political significance. This would lead to a gradual reduction in the actual competence of national governments and the accompanying increase in the competence of the transnational powers, able to deal with politically delicate areas.

3. **Federalism** envisaged creation of a federal state in Western Europe, similar to the United States. According to the proponents of federalism strong nation-states were responsible for the outbreak of two world wars in Europe, which is why they advocated limiting the independence of countries for the benefit of a supranational organization. In practice, power in a federal structure is centralized in selected areas only (the key ones to the unity of the federation, such as the army, currency, external relations), while most areas are decentralized in accordance with the principle of subsidiarity.

4. **Confederalism** sought to base the European integration on the agreement of independent countries (Europe of homelands). In line with this trend sovereign states should retain their powers and integration should be developed through intergovernmental cooperation. In contrast to functionalism, especially federalism, confederalists ruled out moving the decision-making centre to supranational bodies (**supranationalism**). In their view, the development of integration should be under the direct influence of governments and be the result of their collaboration (i.e. *intergovernmentalism*).

4. One of the newer perspectives on the process of European integration is a **multi-level governance**¹³ **model**. In contrast to the other theories, advocates of multi-level governance model drew attention to the wide range of actors and institutions involved at different levels in policy-making and law-making in the European Union. This approach is not based on a dichotomous model (domestic and transnational), pointing to the role of regional, domestic, public and private institutions, that are involved in the governance of the European Union¹⁴.

¹³ Cf. L. Hooghe, G. Marks, *Multi-level Governance in the European Union*, [in:] B. F. Nelsen & A. Stubb, *The European Union. Readings on the Theory and Practice of European Integration*, Palgrave Macmillan 2003, pp. 281-311.

¹⁴ P. Craig, G. de Búrca, *op.cit.*, pp. 2-3.

§5. FUNDAMENTALS OF ECONOMIC INTEGRATION IN THE EUROPEAN COMMUNITIES

1. Economic integration in Europe lasting from the early fifties of the twentieth century is a dynamic process. Its development can be exemplified by the evolution of the EEC and the European Union. EEC Treaty envisaged a phased creation of a common European market through the progressive elimination of customs duties and quantitative restrictions on intra-Community trade.

2. In the first stage of the integration a *stand-still* principle was applied, according to which placing new duties was forbidden with gradual reduction of current rates. The aim was to establish a **customs union** on the territory of the Member States. A practical consequence of its establishment was using a general tariff in external relations by the Member States of the EEC since 1968.

3. Customs union itself is not enough to define the territory of the Member States as a **common market**. The unique approach adopted within the EEC was basing common market not only on the free movement of goods, but also the free movement of labour, services, capital and payments, the prohibition of discriminatory or protectionist taxation and common rules on competition, state aid to enterprises, joint trade agriculture and transport policy.

4. Implementation of the EEC aim, which was to create a common market, did not follow without difficulties. The most comprehensive integration applied to trade in goods. However, for many years technical (different norms, standards, rules), fiscal (different tax systems) and physical barriers (border control) existed in the Community within the free movement of services, capital, people (including freedom of establishment). Therefore, in 1985, European Commission President **Jacques Delors** presented a programme of establishing European single market. The strategy was specified by the Commission in the "**White Paper**". In order to achieve it, the Single European Act signed in 1986 changed the Treaty establishing the EEC. Member States were committed to the creation of a **single internal market** up to 31 December 1992, it was defined as an area without internal borders in which free movement of goods, people, services and capital was guaranteed. The Commission believed that achieving this level of economic rules unification was a condition for establishing the European Union. Delors initiative had a significant impact on accelerating the process of economic integration, but it was rather a more consistent implementation of the purposes already present in the Treaty of Rome, not the next stage of economic integration of the countries. The concept of the single internal market is included in the

broader concept of a common market and relates to harmonizing the rules governing the four fundamental freedoms of the Community.

5. The next stage of economic integration among countries was establishing **Economic and Monetary Union** in the Treaty of Maastricht. It assumed the introduction of euro and the establishment of the European Central Bank. These plans were based on earlier attempts to stabilize the European currency. Member States recognized the stability to be their goal already in 1969 at the European Summit in The Hague. However, the Werner plan of 1970 prepared as a result of the summit was never implemented because of the oil-currency crisis. Another attempt was to create in 1979 - at the initiative of Germany and France - the European Monetary System, based on stable exchange rates, which could vary substantially up to 2.25% (6% for the Italian lira) in the so-called currency snake. That allowed to define the **ECU - European Currency Unit** based on a basket of currencies of countries taking part in the system. **Euro** introduction was preceded by the operation of fixed exchange rates on 31 December 1998 and a three-year transition period in which euro became the currency for inter-bank settlements. The introduction of euro notes and coins took place in January 2002. Since 1 January 2011, the currency has been valid in 17 Member States (Austria, Belgium, Cyprus, Estonia, Finland, France, Greece, Spain, Ireland, Luxembourg, Malta, the Netherlands, Germany, Portugal, Slovenia, Slovakia, Italy). Taking more countries to the EMU depends on the fulfillment of the so-called **convergence criteria**¹⁵.

6. The obligation to adopt euro by the countries acceding to the EU in 2004 was added to the accession treaties. However, the point at which this happens depends not only on the fulfillment of the convergence criteria, but mainly on the strategies of individual Member States. The financial crisis that hit the Euro Zone countries in the period 2008-2012 not only moves away the prospect of adopting common currency by subsequent countries, but constitutes a real test of unity and solidarity in Europe as well¹⁶.

¹⁵ It is worth remembering that the crisis of the years 2008-2012 showed that individual countries of the Euro Zone (including France, Spain and Greece), ignoring the constraints of participation in the common currency system, exceeded the limit of the budget deficit trying to stimulate economic growth in their countries.

¹⁶ At the time of this handbook going to print the future of the common European currency is still uncertain. However, the restoration of national currencies by some (or even all) of the Euro Zone countries does not necessarily mean the end of the European integration process, in which the introduction of euro is just one of the symbols combining the given EU countries.

§6. ATTEMPTS OF POLITICAL AND MILITARY INTEGRATION OF WESTERN EUROPEAN COUNTRIES

1. In the original plans presented by the “founding fathers” economy was supposed to be one of many areas of European integration. For obvious reasons (cold war) a number of projects were related to political and military cooperation. Integration processes accelerated by the need for cooperation in the use of the U.S. aid under the Marshall Plan. In May 1948, The Hague “Congress of Europe” adopted resolutions calling for enhanced cooperation in political and economic area. First of all, the Congress called for the creation of an organization responsible for ensuring democracy in Europe by the conclusion of a multilateral agreement guaranteeing the protection of human rights. Economy was to become another area of cooperation. Direct result of the Hague initiatives was the creation of **the Council of Europe**, and then signing the European Convention for the Protection of Human Rights and Fundamental Freedoms in Rome. Although further development of the Council of Europe proceeded in a way in parallel with the integration of the Communities, the formation of this organization should be regarded as a very important moment for political cooperation of European countries.

2. After the success of the creation of the ECSC the founding countries intended to enter into a closer cooperation in other areas. Implementing the plan of the French Defence Minister René Pleven they signed the Treaty establishing the **European Defence Community** (EDC) on 27 May 1952. Under the provisions of the Treaty, Member States agreed to give the joint command of the military units (European Commissariat of Defense) forming the European Armed Forces, possessing its own budget. The direction taken in the Treaty assumed federalization of Europe endangered with the development of communism. At the same time, it was considered that the creation of a joint army without a common foreign policy would be impossible. This resulted in the adoption of the Treaty establishing **the European Political Community** (combining the ECSC and the future EDC) by the Common Assembly of the ECSC in 1953. An attempt to establish the existence of the two Communities was discontinued in mid-1954, when the French National Assembly with Gaullist and communist votes had not given consent to the ratification of the Treaty establishing the EDC for fear of losing (by France) sovereignty and the rearmament of Germany¹⁷. Therefore, further work on the EPC was also suspended. With the decision France

¹⁷ Perhaps under the influence of Stalin as well.

blocked the merger plans of economic, political and military power paths in one organization for many decades (until the Treaty of Maastricht).

3. The failure of supranational integration attempts of supranational integration in the field of defense policy did not preclude military cooperation in Western Europe. Since 1948, France, the United Kingdom and the Benelux countries were bound by the Brussels Treaty¹⁸. This treaty was amended by the Paris Protocol of 23 October 1954, becoming the basis for the **Western European Union**, which joined Italy and Germany¹⁹. It happened in parallel with the Germany's acceptance into NATO. The main stipulation of the Brussels Treaty is a provision ensuring (in case the State has become a victim of armed aggression) all military and other assistance being in the power of the States Parties to the Treaty in accordance with the provisions of Article 51 of the Charter of the United Nations. In addition, each member of the WEU may request an immediate convening of the Council in an emergency for peace or economic stability²⁰. For a long time the Western European Union was an important forum where, apart from Member States, the United Kingdom was active as well. Under the Amsterdam Treaty, the WEU was included in the framework of the second pillar of the European Union. As a result, the WEU ministers meeting in Marseille (13 November 2000) decided to start the transfer of WEU's tasks under the formula of **the Common Foreign and Security Policy (CFSP)** and the emerging **European Security and Defence Policy**. The last one combines defense cooperation of NATO member countries with those that remain outside NATO within the developed European Security Strategy²¹. Integration of EU defense policy would also be served by creating a personal union between the WEU and CFSP²².

4. An attempt to create an alternative to transnational cooperation structure (the Communities) was **the Fouchet plan** prepared in the era of President de Gaulle. It assumed intergovernmental political cooperation. The plan was implemented in 1970, when the so-called **European Political Cooperation** was established. This cooperation was to be based on regular (twice a year) meetings of Foreign Ministers of the Member States of the EC. With time they began to be linked with the meetings of the Council of Ministers of the EEC. The Single European Act gave the EPC treaty basis,

¹⁸ Treaty between Belgium, France, Luxembourg, the Netherlands and the United Kingdom of 17 March 1948, (1949) UNTS 1, Cmd. 7599, contained provisions on cultural, social and defense cooperation.

¹⁹ WEU currently consists of 10 Member States (except those mentioned in the main text also Portugal, Spain and Greece) and 6 associate countries (Turkey, Norway, Iceland, Poland, Czech Republic and Hungary). In addition Bulgaria, Estonia, Latvia, Lithuania, Romania, Slovenia and Slovakia have become associate partner countries. Other EU Member States have observer status in the WEU.

²⁰ Article VIII (3) of the Brussels Treaty.

²¹ Adopted at the summit in Brussels 12 December 2003.

²² Javier Solana (former Secretary General of NATO) served the functions of the High Representative for the CFSP and Secretary General of the WEU until 2009.

and in Maastricht it became the nucleus of the CFSP established within the second pillar.

§7. DEEPENING EUROPEAN INTEGRATION IN THE PERIOD 1957-1992

1. General remarks

The European integration process was formally initiated with the signing of the founding treaties, according to the visions of functionalists, it proceeded gradually embracing ever wider range of areas. It was taking place by the transfer of subsequent competences of the Member States in the areas identified in the amending treaties (material change). In addition, the deepening integration was served by the evolution of institutional law strengthening transnational nature of the Communities (institutional changes). In the first period it was essential to perform the treaties' objectives that constituted common market. The process of gradual economic integration was crucial for building political integration. Economic successes undoubtedly influenced both the willingness of Member States to transfer their subsequent powers to the Communities, and was a key factor contributing to the process of expanding integration with new members seeing the process as an opportunity for faster economic growth.

2. Merger Treaty

1. Communities established under the Treaty of Paris and the Treaty of Rome were independent international organizations (legal entities) equipped with separate authority. The first attempt to organize their institutional structure took place with the signing of the Treaties of Rome. In order to reduce the bureaucracy associated with the coexistence of three independent institutional structures and better coordinate their work on 25 March 1957 **the Rome Convention on certain institutions common to the European Communities** was adopted. It provided that the Parliamentary Assembly and the European Court of Justice will serve three Communities. It was found that the Parliamentary Assembly²³ will replace the Common Assembly acting under the ECSC, and will be a joint institution of the EEC and EAEC. The Economic and Social Committee was also given the nature of a joint advisory body.

²³ The name of the institution was changed on 30 March 1962 to become the European Parliament.

2. Combining the other bodies of the Communities constituted complementing institutional changes. On 8 April 1965 the Treaty establishing a single Council and the Commission of the European Communities (the so-called Merger Treaty) was signed. The established Council (of Ministers) replaced the separate Councils acting in the EEC and EAEC, the ECSC Special Council of Ministers. The new Commission took place of the two Commissions functioning in the EEC and EAEC and the ECSC High Authority. Since its entry into force (1 July 1967) The European Communities have had four joint bodies: a Council, a Commission, a European Parliament and a European Court of Justice, conducting their tasks on the basis of three separate treaties.

3. Development of political integration in the 60s and 70s of the twentieth century

1. The 60s and the 70s of the twentieth century are sometimes perceived as a period of stagnation in the European integration. It was characterized by a gradual reduction of barriers to the free movement of goods and a successful establishment of the customs union. Economic integration, however, did not proceed smoothly. Member States were not yet ready for further political integration. The economic crisis caused by significant increase of oil prices in the 70s also influenced political stagnation.

2. A serious political crisis in the European Communities took place in 1965 in connection with the Commission's proposal to revise funding rules of the Common Agricultural Policy. Unable to otherwise block the decision in this case (under the provisions of the Treaty of Rome the principle of majority voting in the Council at that time replaced the unanimous vote), France left the deliberations of the Council. For the next seven months France blocked the work, using the so called **empty chair policy**. The political impasse was broken in 1966 in Luxembourg, where the **Luxembourg compromise** was reached. The compromise, not having formal basis in the provisions of the Treaty, was a departure from the previously established rules of voting. It allowed for a return to unanimous voting, at the request of a Member State invoking their vital national interests. Reaching the compromise allowed blocking the decision-making process in the EEC by individual Member States, despite (existing in the Treaty) the opportunity to make a decision with the opposition of countries in the minority.

3. For the development of political cooperation of EEC countries meetings of Heads of States or Governments of the Member States began to be of great importance. Since 1961, such meetings were organized *ad hoc*²⁴. However, since the Paris

²⁴ Lenaerts and Van Nuffel report six meetings in the years 1961-1973 convened at the initiative of the President of France. See K. Lenaerts, P. Van Nuffel, *Constitutional Law of the European Union*, 2nd Ed., Thomson, Sweet & Maxwell, 2005, p 39.

Summit (9-10 December 1974) it became a rule to organize the so-called **European Council** meeting at least three times a year. Apart from the heads of states and heads of governments foreign ministers of the Member States were also to take part in the summits. The role of the European Council, in addition to stimulating political cooperation, is to make strategic policy decisions of powers delegated to the Communities. However, these are not decisions constituting a formal part of the Community legal process, as the European Council is not an institution involved in this process. The practice of European summits was formally confirmed by the Single European Act. The treaty of Maastricht gave the European Council formal activities in the decision making process in the second pillar of the European Union (CFSP). And the Lisbon Treaty confirmed its status as one of the main bodies (institutions) of the Union.

4. Deepening European integration was also reflected in the evolution of the competence of the European Parliament²⁵. As a successor to the Common Assembly and then the European Communities' Parliamentary Assembly, the European Parliament held a consultative and control function. Initially its members consisted of members of national parliaments seconded to work at Community level. In the 70s EP gained wider powers to establish the budget of the Community. The first direct elections to the European Parliament²⁶ carried out in 1979 were essential for the growth of that institution's role in relation to other organs. Since then, Parliament has become the only directly legitimated Community body, essentially reducing the democratic deficit in the European institutions. The consequence of these elections was progressive extension of the Parliament's competence in subsequent revisions of the Treaties, to the extent that currently EP, in co-decision procedure, may be considered an equal participant in the Community decision-making process.

4. The role of the Court of Justice in the development of the principles of the legal system of the European Union

1. In the absence of political willingness of States to deepen integration the **Court of Justice (ECJ)** played the key role in the process, as a result it became known as "the motor of integration". The key step in its development was determining **direct effect and primacy of Community law** in the national legal order. These principles are of paramount importance in determining the relationship between EU law and

²⁵ Such a name was adopted by the Parliamentary Assembly of the European Communities under its own resolution of 30 March 1962.

²⁶ They were held up by the Council Decision 76/787 of 20 September 1976 and the attached Act on elections to the European Parliament by direct and universal suffrage.

national law that have not been clearly defined in the founding treaties. The most important decision to determine the nature of the considered judgments was taken in *Van Gend & Loos*²⁷ and *Flaminio Costa v. ENEL*²⁸ cases. In both of them, the Court went beyond the usual interpretation of the language (neither direct effect nor primacy of Community law result from any of the provisions of the Treaty), referring to the spirit, system and objectives of the Treaty. In this way the foundations of the Community legal order were laid, which was crucial for the deepening of European integration.

2. In *Van Gend & Loos* case ECJ concluded that the European Economic Community constitutes a **new order of international law** for which the Member States have transferred some of their sovereign rights, and its provisions are related not only to Member States but to their nationals as well (**direct effect**).

3. In the case of *Flaminio Costa v ENEL*, answering the preliminary ruling of the Italian court, the Court held that: *by contrast with ordinary international treaties, the EEC Treaty has created its own legal system which [...] became an integral part of the legal systems of the Member States and which their courts are bound to apply*. It added: *The integration into the laws of each Member State of provisions which derive from the Community and more generally the terms and the spirit of the Treaty make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity (primacy of Community law)*.

5. The Single European Act

1. The first significant change to the founding treaties was signed on 17 February 1986 in Luxembourg, by representatives of nine Member States, and on 28 February 1986 in The Hague by representatives of the other three countries (Italy, Greece, Denmark) – it was The Single European Act. It entered into force on 1 July 1987. It was a result of a number of initiatives aimed at establishing the European Union (e.g. Tin-demans report of 1976, Genscher-Colombo Act of 1981, a solemn declaration on European Union adopted in Stuttgart on 19 June 1993). Member States made an essential attempt to extend the scope of joint competence of the European Political Cooperation, functioning until then outside of the Communities.

2. The most important provisions of the Single European Act were related to the creation of conditions for the functioning of an internal market. When preparing the foundation for the establishment of the European Union, SEA predicted that up to 31

²⁷ 26/62 NV *Algemene Transport en Expeditie Onderneming van Gend & Loos* p. Netherlands Inland Revenue Administration.

²⁸ 6/64 *Flaminio Costa v. ENEL*.

December 1992 an area without internal borders, ensuring free movement of goods, persons, services and capital will be established. In addition, Member States agreed to make a further transfer of their powers to the joint bodies through the inclusion of selected areas of cooperation into the EEC Treaty. Among the included areas were: the field of social policy, environment and research.

3. The Single European Act also introduced significant **institutional changes**. The most important are:

- a) extension of areas in respect of which **the Council could enact legislation by qualified majority** (including matters relating to internal market, sea and air transport as well as new areas of cooperation), while reducing the list of matters requiring unanimity;
- b) increase of powers of the European Parliament in the legislative process through the introduction of the **cooperation procedure** of the Parliament and the Council; the Single European Act also expanded the number of cases in which it was required to consult the EP. It also made the decision on the admission of new states to the EC dependent on its consent;
- c) **strengthening the position of the European Commission** in the exercise of executive power by the Council's commitment to provide the Commission with executive powers under legislation passed by the Council;
- d) providing a basis for the establishment of **the Court of First Instance** - CFI (eventually established by the Council's Decision of 24 October 1988);
- e) providing a treaty basis for the functioning of **the European Political Cooperation**, consisting of the foreign ministers of Member States and the European Commission members, meeting at least four times a year. The Act provided coordination of the cooperation with the activities of the European Parliament.

6. Cooperation within the Schengen area

1. Integration that began with signing **the Schengen Agreement** was of great importance to strengthening relations between the Member States of the EC and building the European identity. The Agreement of 14 June 1985 introduced gradual abolition of checks at common (internal) borders within five EEC countries (Belgium, the Netherlands, Luxembourg, Germany and France). The beginning of cooperation was limited to a visual inspection of cars on internal borders, the introduction of additional facilities at border crossings and strengthening cooperation between police and customs in the fight against drug trafficking, arms trafficking and other forms of crime. Parties to the Treaty pledged to make efforts to harmonize visa and immigration policy

2. The provisions of the Schengen Agreement were clarified in the Convention Implementing the Schengen Agreement (**Schengen II**) signed on 19 June 1990. It contained provisions for the abolition of controls at internal borders and movement of persons, police and security cooperation, **the Schengen Information System (SIS)**, transport and movement of goods and the protection of personal data. Police services cooperation plays a special role in combating cross-border crime in the Schengen area. Police cooperation is regarded as an essential element in the process of unification of the Area of Freedom, Security and Justice. Schengen *acquis* provides assistance in preventing and detecting crime, cross-border surveillance and hot pursuit, controlled shipment, use of coercive measures (arrest, detention), search. Forming common visa and immigration policy and judicial cooperation in criminal matters is also essential for the countries of the Schengen group. Currently a difficult work on SIS II²⁹ and **the Visa Information System (VIS)** implementation is underway in Member States. The aim of the process is to facilitate the issuing of a common Schengen visa by all EU Member.

3. The territorial scope of the Schengen *acquis* covers 22 countries of the European Union (except for the United Kingdom, Ireland, Bulgaria, Romania and Cyprus) as well as Iceland, Norway (part of the Nordic Passport Union), Switzerland and Liechtenstein. The latter joined the Schengen zone on 19 December 2011 as the 26th state.

4. Although the Schengen *acquis* is the result of an initiative born outside the European Community, with time “**communitisation**” took place. Under the provisions of the Amsterdam Treaty, the EU gained expanded powers in the area of immigration, visas and asylum, and **the Schengen *acquis*** has become the nucleus of a new EU policy.

5. Parallel to joining Schengen on 27 May 2005, seven European Union countries³⁰ (Austria, Belgium, France, Italy, Luxembourg, the Netherlands and Germany) signed the Prüm Convention on the deepening of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal immigration. This initiative (from the very beginning known as **the Schengen III**) can be seen as a sign of dissatisfaction with the slow progress of work on the implementation of the Schengen *acquis* by the other Member States as well as an attempt to “escape forward”. In 2008, certain provisions of the **Prüm Convention** (concerning exchange of biometric and DNA

²⁹ IT Projects Center of the Ministry of Interior and Administration has announced that the implementation of the SIS II should take place by the end of 2013 See www.cpi.mswia.gov.pl (page checked on 15 January 2012).

³⁰ By 2009, the convention was also ratified by Finland, Slovenia and Estonia, Bulgaria, Romania and Slovakia (the data of the Ministry of Foreign Affairs of the Kingdom of the Netherlands www.minbuza.nl - page checked on 01/27/2012).

data and access to databases of vehicles) were on the initiative of Member States adopted as a decision of the EU being the output of the third pillar of the Union³¹. It is likely that in the future the Convention as a whole (and not only selected provisions) will become a part of the Union acquis³².

§8. THE TREATY OF MAASTRICHT

1. Union as the next step of creating an ever closer union among the peoples of Europe

1. Following the adoption of the Single European Act the European Commission's goal under the Presidency of Jacques Delors became to connect the economic and political mainstream of European integration. In June 1990 the European Council decided to convene an intergovernmental conference for the establishment of the Economic and Monetary Union and the Political Union. At the European Council summit in Maastricht in December 1991, the provisions of the Political Union and the EMU were combined into one **Treaty on European Union**. It was signed in **Maastricht on 7 February 1992** and entered into force on **1 November 1993** after a difficult ratification procedure in twelve Member States³³. The European Union established by the Treaty, however, was not a new organization but another step in the integration of the Member States of the European Communities. The Union did not in any way substitute the EC and was not equipped with legal personality. Subjects of international law were still only three European Communities.

2. The Treaty³⁴ set the Union the following **objectives**:

- a) to ensure sustainable economic and social progress through the creation of internal market and economic and monetary union,
- b) to confirm its identity on the international stage by establishing common foreign and security policy and common determining defense policy,

³¹ Decision 2008/615/JHA.

³² This method of law-making omitting decision-making procedures is criticized in the doctrine as dangerous to the cohesion of the Union. Application of intergovernmental method and only *post factum* legitimization of it by necessary secondary legislation can lead to the Union fragmentation (and in any case alienation of the "hard core"). See J. Barcz, W sprawie formuły prawnej wprowadzenia do prawa UE Europejskiego Mechanizmu Stabilizacyjnego, Europejski Przegląd Sądowy, No. 1/2011, pp. 4-14.

³³ Denmark ratified the Treaty after the second referendum on 18 May 1993, the positive result of which might have been affected by numerous additional statements added to the Treaty by the European Council and Denmark

³⁴ Article 2 of the Treaty on European Union.

- c) to strengthen the protection of the rights and interests of the nationals of the Member States through the introduction of citizenship of the Union,
- d) to cooperate in the field of justice and home affairs in the EU to ensure freedom and security of citizens,
- e) to ensure compliance with the law (*the acquis communautaire*).

2. The structure of the European Union

1. For the effective implementation of the objectives assigned to it, the European Union is based on **three pillars** with different kind of competence and character. It was established on the foundation of the European Communities (first pillar) supplemented with common policies (Common Foreign and Security Policy – second pillar and Treaty additional areas of responsibility of the EC included in the EC) and forms of cooperation (cooperation in the field of Justice and Home Affairs – third pillar).

2. Three former Communities constituted the first pillar: the European Community (the Treaty of Maastricht changed the name of the EEC to the EC in a symbolic way confirming that the scope of the Community activities is not limited to economic affairs only); the ECSC and the EAEC (since the ECSC Treaty expiry on 23 July 2002, there are only the EAEC and the EC left in the first pillar). The areas falling in the scope of integration within the first pillar became the freedoms of internal market, the Economic and Monetary Union and the common policy implemented within the EC and Euratom, including: agricultural, trade, regional, social, transport, competition and consumer protection, environment, health policy, and education, culture, scientific research, the rights of citizens with asylum and immigration policy (incorporated in the scope of the first pillar by the Treaty of Amsterdam). Because of the nature of the Communities referred to by the Court of Justice in *Van Gend & Loos* and *Flaminio Costa v. ENEL* cases the first pillar was **transnational in character**³⁵. It resulted from the coexistence of several components³⁶:

- a) Communities had their own institutions (authorities), acting independently of the Member States
- b) Communities were given great exclusive competences in respect of which the set up authorities may operate,
- c) the authorities of the powers allocated to the Communities make laws binding on Member States,

³⁵ More on the transnational character of Communities in Chapter II.

³⁶ Cf K. Lenaerts, P. Van Nuffel, *op. cit.*, pp. 12-17.

- d) the law, as a rule, is created by majority vote, and the outvoted Member State cannot evade application of a law adopted in such a way,
- e) Community law takes precedence over national law and may form the basis of rights and obligations for individuals who can rely on them before national courts,
- f) to guard the observance of Community law, the Court of Justice is the only body empowered to make its interpretation and rule on its validity.

1. The second pillar of the European Union included **the Common Foreign and Security Policy**³⁷. The main objective pursued under the second pillar was to strengthen the European identity in international relations. The implementation of this policy amounted to improving the security of the Union and its Member States, the strengthening of international security, taking measures to facilitate the maintenance of world peace, abiding common values, independence of the Union, promoting international cooperation and democracy and the rule of law, respect for human rights. The demand for mutual information and the reconciliation of all the important issues of foreign policy and the determination of the Member States' common position were significant as well. In contrast to the first pillar integration of countries in the second pillar was not transnational and was based on intergovernmental cooperation, with full respect for the sovereignty of Member States. Decisions binding on all states were to be taken unanimously.

2. The third pillar of the EU included **cooperation in the field of Justice and Home Affairs (JHA)**. The main objective of JHA had become to provide citizens with a high level of safety within the **Area of Freedom, Security and Justice**. It originally included matters related to immigration, asylum policy, they were however "communitarised" (included in the TEC) - transferred by the Treaty of Amsterdam to the first pillar. The third pillar (as the second one) was based on intergovernmental cooperation and had no transnational character. Over time, the nature of this collaboration had changed, gaining more and more features of the Community method.

3. Changes in substantive law

1. In addition to the creation of new levels of cooperation in the framework of the second and third pillar (in a sense, continuing the trend of political integration began in the 50s with the creation of EDC, EPC and the WEU), **TEC has also increased the competence of the Communities** under the first pillar including issues of social policy, consumer protection, health, culture, education, research issues, technological development and environmental protection.

³⁷ Articles 11-28 TEU.

2. In terms of individual rights' protection it was essential to establish the **citizenship of the European Union**, in a symbolic way emphasizing European identity of the citizens of EU Member States. Specific rights were related to the citizenship of the Union: the right of movement and residence within the EU, active and passive right to vote in elections to the European Parliament and local authorities throughout the Union, the right to diplomatic and consular protection by authorities on the territory of the countries in which an EU citizen cannot seek protection from national diplomatic or consular authorities, the rights when dealing with the institutions of the European Union. The main turning point in the history of European integration was also an introduction of **human rights standards** to the TEC already developed by the Court of Justice³⁸.

3. A significant increase in the competence of the European Union was to be limited by **the principle of subsidiarity** introduced to the Treaty. It was a kind of a "safety valve" to protect against the abuse of powers by the EU in areas where the intervention was not necessary. According to the principle, the EU was to take actions in areas that do not fall within its exclusive competence, only if and to the extent to which the objectives of the proposed actions could not be sufficiently achieved by the Member States, by reason of the scale or effects of proposed actions they would be better achieved at the Union level³⁹.

4. Institutional changes

1. The Treaty of Maastricht revised many institutional provisions of the original Treaties:

- a) strengthened the position of the European Parliament; increasing its powers in the legislative process through the introduction of co-decision procedure; the Parliament's task was henceforth approving the members of the European Commission and its President;
- b) extended the term of office of members of the European Commission (from four to five years);
- c) extended the scope of cases in which the Council makes decisions by qualified majority;
- d) created a legal basis for the functioning of the Court of Auditors - placing it among the major institutions of the Communities;
- e) re-defined the scope of the jurisdiction of the Community Courts;
- f) provided for the creation of new bodies: the EU Ombudsman, Committee of the Regions, Economic and Financial Committee and the European Central Bank.

³⁸ Cf. Article F TEU in the version introduced by the Treaty of Maastricht.

³⁹ Cf. Article 5 TEC

2. Despite the introduction of the three-pillar structure by the Maastricht Treaty on European Union, apart from the formal acknowledgment of the role of the European Council in coordinating the activities of the Union, no additional institutions were set up. The Maastricht Treaty based EU on a **single institutional framework**, using its existing authorities of the Communities. According to the introductory provisions of the EU Treaty the aim of maintaining the single institutional framework was to ensure consistency and continuity of actions taken to achieve the Union's objectives while respecting and building upon the *acquis communautaire*⁴⁰. Since then, the specific role of the EC institutions has depended on the legal basis in each of TEU titles. The Commission (other than in the transnational first pillar) was neither entitled under the intergovernmental pillars to the exclusive right of legislative initiative, nor did it guard the performance of the obligations of the Member States resulting therefrom. The European Parliament has not gained the position of co-legislator in the two pillars. The interpretive role of the Court of Justice has also been severely limited and made dependent on the formal recognition of the Member States.

§9. THE TREATY OF AMSTERDAM

1. General remarks

The Maastricht Treaty provided for **the need for further reform of the European Union**. The forthcoming accession of the countries of Central and Eastern Europe and the desire to simplify the complex structure of the Union were the main reasons for the convening of the Intergovernmental Conference aiming at preparing a revision of the existing treaties. The main tasks for the Conference were to bring the European Union closer to its citizens, improve the institutional system of the EU in the context of future enlargement and increase the effectiveness of measures taken outside the EU, granting EU greater mandate in the area of common foreign and security policy and cooperation in the field of justice and home affairs. The result of the IGC was the text of the new amending Treaty, which was signed on **2 October 1997 in Amsterdam** (Treaty of Amsterdam, TA) and entered into force on **1 May 1999**.

2. Changes in substantive law

1. Goals set out before the Intergovernmental Conference had not included many of the ambitious changes in substantive law. Substantial expansion of powers of the

⁴⁰ See the current Article 3 TEU.

Union took place only in connection with “**communitisation**” of the **Schengen acquis** (including it into the first pillar of the EU). Thus, visa, immigration and asylum policy were excluded from the scope of the third pillar, which gained a new name - **police and judicial cooperation in criminal matters**.

2. The Treaty reinforced the importance of the protection of fundamental rights in the EU. First Member States declared that the Union is founded on the principles of respect for human rights, democracy and the rule of law⁴¹. Respect for these principles has become a prerequisite to apply for EU membership. In addition, for the first time sanctions for serious and persistent violations of the principles contained in Articles 6 of TEU were introduced. The Treaty has enabled the Council to suspend certain powers (including the right to vote in the Council) of Member States guilty of such a breach⁴². The introduction of new extended provisions prohibiting discrimination and empowering communities to adopt secondary legislation in this respect constituted complementing strengthening the rights⁴³.

3. Although the TA did not give the European Union legal personality, its provisions slightly strengthened EU identity on the international stage. That was due to naming the Secretary-General of the Council the **High Representative for the CFSP** who would support the Presidency of the Council in the Union’s external representation. The Amsterdam Treaty also introduced new regulations on employment policy, social policy, the environment, health and consumer protection. Changes in substantive law did not have a revolutionary character. At the opportune moment, however, a bold change in the numbering of individual provisions of the TEU and the TEC was made, which was unlikely to bring the assumed effect of simplifying the structure of the Union.

3. Institutional changes

1. Institutional changes introduced by the TA were also not significant. The reform of the EU institutions, preparing them to broaden the structure was postponed until the actual extension. Once again, the role of the European Parliament in the appointment of the European Commission was increased. A multi-step codecision procedure was simplified. However, the cooperation procedure was to be henceforth used only in the Economic and Monetary Union. In parallel with the **transfer of the Schengen acquis into the Community pillar** a remarkable convergence of the first

⁴¹ Article 6 TUE.

⁴² Article 7 TUE.

⁴³ Former article 13 TEC.

and the second pillar on how to make decisions took place. Parliament gained the right to express opinions on the legislation proposed by the Commission or a Member State. The jurisdiction of the European Court of Justice took over some of the legal instruments of the third pillar⁴⁴.

2. The Amsterdam Treaty also contained new provisions providing for the possibility of using the formula of “**closer cooperation**” by the states, which can be taken when
 - a) the objectives of the Treaty fail to be otherwise achieved;
 - b) most of the countries engage in it;
 - c) *the acquis communautaire* is not violated;
 - d) the rights, obligations, or interests of other Member States are not violated⁴⁵.

§10. THE TREATY OF NICE

1. General remarks

Due to the TA failure to create institutional arrangements necessary for the admission of new members, the Member States convened the next Intergovernmental Conference. It started less than a year after the entry into force of the Treaty of Amsterdam⁴⁶. For the first time the work of diplomacy took place with greater transparency than ever before, and many of the proposals submitted for the conference were published on websites. The main aim of the meeting was to prepare a proposal which would guarantee the effectiveness of the institutions of the European Union after the enlargement of the EU. The work of the IGC was completed on 10 December, 2000, in Nice, when the reached compromise was approved by the Heads of State or Heads of Governments (including the candidate countries). The treaty was formally signed on **26 February 2001** and entered into force on **1 February 2003**. The reason for the delay was having trouble with ratification in Ireland, where the public accepted the Treaty only in the second referendum.

2. The main changes

1. The changes introduced by the Treaty of Nice, focused mainly on **institutional issues**. First of all, the Protocol to the Treaty referred to the way the Member States

⁴⁴ Article 35 of the TUE.

⁴⁵ Cf. 43 TUE, setting out this type of collaboration as “enhanced”.

⁴⁶ Literature emphasizes that in the period 1957-1985 Member States did not convene a single IGC to amend the treaties. However, since the SEA a constant revision process has been taking place. See P. Craig, G. de Burca, *op. cit.*, p. 25.

would be represented in the EU institutions after enlargement with 12 candidate countries. These changes were accompanied by the adoption of a new system of weighting votes in the EU Council. Once again the scope of matters in relation to which decisions are taken by a qualified majority was expanded. Since 2005, each Member State would have only one representative in the Commission⁴⁷. However, after the accession of the 27th member to the EU **the number of Commissioners was to be limited**, and the right to nominate a candidate Commissioner by the Member State - rotated. Fundamental changes also affected the CJ and CFI. The scope of their jurisdiction was redefined and the ability to create specialized judicial panels was provided. The Treaty formed the basis for the establishment of new specialized bodies and agencies: the Political and Security Committee, the European Judicial Cooperation Department, the European Judicial Network and the Social Protection Committee.

2. In addition, **enhanced cooperation** (so far called “closer cooperation”) was to be established with the increased role of the European Commission and the European Parliament. Despite the increase in the number of EU members, to establish enhanced cooperation the decision of only eight countries concerned was required. The possibility of blocking a decision to be made by one country claiming an important national interest was also reduced.

§11. CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

1. At the summit in Nice in December 2000 the Charter of Fundamental Rights of the EU⁴⁸ (hereinafter: the CFR or the Charter) containing a catalogue of rights to be protected in the European Union was also adopted. The adoption of the CFR proved an increasingly strong interest of the EU in human rights. That does not mean that fundamental rights had not previously been protected by Community law. Bodies, despite the initial focus on the economic aspects of integration, over time began to refer to the protection of fundamental rights. In *Stauder case*⁴⁹ the Court declared them to be part of the general principles of the Community law.

2. Protection of these rights was reaffirmed and strengthened by the Treaty of Maastricht, which stated that *the Union is founded on the principles of liberty, democracy,*

⁴⁷ By that time the five largest countries of the “old EU” had nominated two candidates for commissioners.

⁴⁸ Charter of Fundamental Rights of the European Union of 7 December 2000

⁴⁹ 26/69 *Stauder v. City of Ulm*.

*respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States*⁵⁰. In addition, the EU has committed itself to respect the fundamental rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms as resulting from the constitutional traditions common to the Member States as general principles of Community law⁵¹. The Charter of Fundamental Rights for the first time defined the rights and freedoms protected by the EU, creating a catalogue that went beyond the existing case law of the Court of Justice. It consists of seven chapters: *Dignity, Freedom, Equality, Solidarity, Citizens' Rights, Justice and General provisions*.

3. Although the Charter was solemnly signed at the EU summit in Nice by the Presidents of the European Parliament, the European Commission and the Council of the European Union and proclaimed in the presence of heads of states and heads of governments, it was not a legal act binding on the Member States of the Community. It was, however, a substantial political declaration, interinstitutional agreement, significant for its signatories. **Despite its non-binding nature the charter did have an effect.** It was expected that the charter could be considered an expression of the common constitutional traditions of the Member States and be used by the Court as a source of inspiration for its activities in the field of protection of fundamental rights. Before the entry into force of the Treaty of Lisbon, the Court repeatedly referred to its provisions, recognizing that it emphasized the importance of the legal orders included in it to the Community⁵³. The CFR status changed with the entry into force of the Treaty of Lisbon, which (subject to the so-called British protocol) gave it a binding force⁵⁴.

§12. TREATY ESTABLISHING A CONSTITUTION FOR EUROPE

1. The Treaty of Nice was just another step in the process of European integration. It foresaw the need for further reform of the Union. Discussion on it took the form of constitutional debate⁵⁵. In December 2001, French President Jacques Chirac

⁵⁰ See the current Article 2 TEU.

⁵¹ Article 6 paragraph 3 TEU.

⁵² A. Wyrozumska, *Jednostka w Unii Europejskiej*, [in:] *Prawo Unii Europejskiej. Zagadnienia systemowe*, edited by J. Barcza, Warsaw 2003, p. 378.

⁵³ See C-131/03 *P.R.J. Reynolds Tobacco Holdings v. Commission* and C-540/03 *European Parliament v. Council*.

⁵⁴ More on the Charter in Chapter VIII.

⁵⁵ In May 2000, Joschka Fischer, the German foreign minister, in his speech at the Humboldt University called on the EU to take a constitutional debate over the future of Europe

and German Chancellor Gerhard Schroeder issued a joint statement in which they acknowledged the need to adopt an EU Constitution. Then the European Council in Laeken in December 2001, adopted a declaration to work towards the adoption of the European Constitution. At the summit it was decided to convene the European Convention⁵⁶, the composition of which (taking into account the representatives of the candidate countries as well) would increase the legitimacy of this body to decide on the future of Europe.

2. The Convention worked under the leadership of Valéry Giscard d'Estaing and his deputies Giuliano Amato and Jean-Luc Dehaene. Its job was to hold a European level debate (with the participation of representatives of national parliaments and governments, the European Parliament and the Commission) on the future shape of the Union and present recommendations for the next IGC. But to the surprise of many, former French President d'Estaing, during the opening of the European Convention, announced his willingness to prepare a Constitutional Treaty for Europe⁵⁷. In view of the difficulty in preparing a joint text by so many participants attending the debates, the convention bureau has had a major impact on the final form of the draft **Treaty establishing a Constitution for Europe**. It was adopted by the convention in June, and submitted to the European Council in July 2003.

3. Draft Treaty was actually the beginning of the further work of the IGC. Consensus did not come easily. It was reached at the European Council in Brussels on 18 June 2004. The signing of the Constitutional Treaty by the representatives of the Member States gave a signal that the European Union was a viable political community. **The Charter of Fundamental Rights of the European Union** became part of the Treaty. The treaty listed values on which the Union was based, as well as its goals and competencies. It emphasized respect for national identities making up the Union of the countries and the idea of solidarity. Despite the efforts of Member States to include a reference to **“the Christian roots of Europe”** in the preamble, the text approved by the European Council talked about “cultural, religious and humanist inheritance of Europe” only⁵⁸.

4. The treaty provided a base for **giving a legal personality to the Union**. It also included a procedure of a state **withdrawal from the EU**. One of the effective methods to improve the Union's work was to replace the rule of unanimity in the Council of the EU (i.e. the abolition of the right of veto of individual countries) in over 40

⁵⁶ Details on the progress and results of the work of the Convention are described by A. Podraza, *Unia Europejska w procesie reform traktatowych*, Lublin 2007, p 472-579.

⁵⁷ P. Craig, G. de Burca, *EU Law. Text, Cases and Materials*, 4th Ed., Oxford 2008, p. 32.

⁵⁸ Discussion on the shape of the preamble, [in] JHH Weiller, *Chrześcijańska Europa. Konstytucyjny imperializm czy wielokulturowość*, Poznań 2003. The solution approved by the Constitutional Treaty was also found in the preamble to the Treaty on European Union, as adopted in the Treaty of Lisbon.

cases. However, the right of veto was retained in such critical areas as: changes in the Treaty, EU enlargement, foreign policy and defense, social security, taxation and culture. EU leaders approved a new system of decision-making in the Council by a **double qualified majority of EU states and citizens**, defined as at least 55% of the states (not less than 15) representing at least 65% of the population. This was appropriate for cases in which unanimous voting did not apply.

§13. THE TREATY OF LISBON

1. General remarks

1. After signing the Treaty establishing a Constitution for Europe by the representatives of the Member States it has been put up for ratification in the 25 EU Member States. Despite being ratified by 15 countries, it was rejected in a referendum in France and the Netherlands. That resulted in a serious political deadlock, which ended on 22 June 2007 by agreeing a “devoid of constitutional aspirations”⁵⁹ text of the EU Reform Treaty signed at a summit **in Lisbon on 13 December 2007**⁶⁰.

2. The Treaty of Lisbon took over major part of the Constitutional Treaty. IGC agreed that it would modify only the TEU and the TEC. The name of the first Treaty remained the same, and the TEC was renamed the Treaty on the Functioning of the European Union (TFEU). The Lisbon Treaty has given the EU a single legal personality. Most of the institutional provisions of the Constitutional Treaty have been preserved intact or with only minor modifications. The basic direction of reforms remained the same, but state symbols were abandoned⁶¹. The future of the Lisbon Treaty remained uncertain due to the suspended ratification process after the rejection of the treaty in a referendum by the people of Ireland and procedural difficulties in Germany and the Czech Republic. Finally, after a re-vote in Ireland, positive verdict of the Federal Constitutional Court in Germany, withdrawal of his opposition to the Treaty by President Vaclav Klaus and after stating by the Czech Constitutional

⁵⁹ J. Barcz writes about “deconstitutionalization” of the reform of the Union, J. Barcz, *Wstęp*, [in] *Ochrona praw podstawowych w Unii Europejskiej*, edited by J. Barcz, Warsaw 2008, p.1.

⁶⁰ The content of both consolidated in Lisbon Treaties: Treaty on the Functioning of the European Union and the Treaty on European Union was published on 9 May 2008 (Official Journal EU 2008, C-115) and published in the Official Gazette of the Government of the Republic of Poland on 12/2/2009 (Journal. Laws of 2009, No. 2003, pos. 1569), though the Treaty of Lisbon entered into force on 1 December 2009. In 2010 TEU and TFEU texts were published once again after making the necessary adjustments to editorial (OJ EU March 30, 2010, C-83/1).

⁶¹ Including abandoning the idea of the flag and the European anthem.

Court compatibility of the Treaty with the Czech constitution, the Treaty of Lisbon⁶² entered into force on 1 December 2009.

2. The main changes

1. Fundamental institutional change introduced by the Lisbon Treaty to the TEU and the TFEU was moving away from the three-pillar structure of the European Union. Reconstruction was accompanied by the strengthening of the Common Foreign Policy and integrating the provisions relating to the Area of Freedom, Security and Justice with the TFEU. In accordance with Article 1 of the TEU Union replaced the European Community and became its legal successor. All references to the European Community were changed in the Treaties to the European Union, the TEU granted it legal personality (Article 47). Major changes affected the institutional system of the Union. Article 13 of the Treaty on European Union in addition to the Council, the Commission, the European Parliament, the Court of Justice of the European Union and the Court of Auditors now also listed the European Council and the European Central Bank. In addition, cadential office of the President of the European Council was introduced and the rules of **the High Representative of the Union for Foreign Affairs and Security Policy** were significantly changed. The treaty re-defined the jurisdiction of the courts of the European Union (collectively referred to as **the Court of Justice of the European Union**), dividing it into the Court of Justice, the General Court (formerly the Court of First Instance) and specialized courts.

2. The Treaty on the Functioning of the European Union rather clearly defined the scope of competence of the European Union. It can be exclusive, shared and supporting (the Union, under the provisions of the Treaty, will be able to take actions in other areas, reserved for the Member States to support, coordinate or supplement their activities)⁶³. The Treaty on European Union gave binding powers to the Charter of Fundamental Rights of the European Union and the changes introduced within the sources of human rights protection allow the Union to accede to the ECHR.

3. New developments affected the legislative process as well. Current (Nice) voting system in the Council has been maintained at least until 31 October 2014 (up to 31 March 2017, because until that time a member of the Council may request the

⁶² Poland ratified the Lisbon Treaty under Article 90 of the Constitution of Poland and the Polish Parliament resolution of 28 December 2008 selecting a statutory mode of the Polish President's consent to the ratification of the Treaty. On 1 April 2008, the parliament passed a law on the ratification of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, prepared in Lisbon on 13 December 2007 (Journal of Laws of 2008, No. 62, item. 188), which authorized the President of the Republic to ratify. The instruments of ratification, after being signed by President Lech Kaczyński on October 10, 2009, they were deposited with the Government of the Italian Republic on 12 October 2009.

⁶³ Article 6 of the TFEU.

adoption of an act in accordance with the Nice system). From 1 April 2014 double majority system will apply (55% of countries representing 65% of the population of the Union). In addition, TFEU systematized the hierarchy of European Union sources of law. An important change was the introduction of the participation of national parliaments and civil society in the EU law-making process (a group of 1 million people gained the right to initiate the legislative process⁶⁴). The fact of the introduction of a simplified procedure for amendment of the Treaty⁶⁵ and the procedure of a Member State withdrawal from the European Union⁶⁶ should also be noted.

§14. THE EUROPEAN UNION IN A TIME OF FINANCIAL CRISIS

1. In 2008-2012, the entire world was struggling with the effects of the collapse of the speculative market debt instruments. In addition to U.S. banks European financial institutions were active players in this market. Bankruptcy of banks, excessive borrowing in the EU Member States and recession in Europe led to the financial crisis in the Euro Zone, which has had negative consequences for the entire European Union. During the Polish Presidency of the Council of the European Union (July-December 2011) attempts were made to avoid the exclusion of other EU countries' representatives from the meetings of finance ministers of states belonging to the Euro Zone. Despite the announced success of the government of Prime Minister Donald Tusk, the beginning of 2012 brought a turning point in the discussion on this issue. All indications are that an international agreement (**fiscal pact**) signed by representatives of 25 EU Member States⁶⁷, by imposing strict rules on stabilizing the economic situation in each EU Member State, will at the same time prevent our participation in all meetings of the finance ministers of the Euro Zone countries. There is therefore a risk that in the EU the **concept of two-speed Europe** will be carried out, in which closer integration will concern the states of the Euro Zone, and in its periphery, (usually poorer) countries outside the zone (e.g. Poland) with their national currency still in use will operate⁶⁸.

⁶⁴ Article 11 of the EU Treaty.

⁶⁵ Article 48 paragraph. 6 of the EU Treaty.

⁶⁶ Article 50 of the EU Treaty.

⁶⁷ The agreement signed on 2 March 2012, was not acceded by the United Kingdom and the Czech Republic.

⁶⁸ The Minister's of Foreign Affairs Radosław Sikorski speech in Berlin has not helped, he - without consulting the constitutional authorities of the Member States - called for further and faster federalisation the European Union (at the expense of sovereignty) as a response to the crisis in the Euro Zone. See R. Sikorski, *Polska a przyszłość Unii Europejskiej*, Berlin 28 November 2011. The speech available on www.msz.gov.pl (page checked on 20 January 2012).

2. At the same time economic situation in the Euro Zone itself is uncertain. Other states with credit ratings lowered by rating agencies may join Greece, Italy, Ireland, Portugal and Spain and immerse in crisis. The debt of the public finances in the EU Member States has increased dramatically in recent years. Adopted measures appear to be aimed at the rescue of European banks. All this affects the overall view on deepening European integration. Although there is an opposite trend as well, where the crisis comprises the crowning argument for even greater integration in the area of fiscal policy of the Union. The new intergovernmental agreement called the fiscal pact includes provisions that provide for real sanctions for breach of the economic rules set for the Euro Zone countries.

§15. EXPANDING EUROPEAN INTEGRATION

1. General remarks

Expanding European integration takes place by accepting new members to the European Communities, now the European Union, and the expansion of the scope of the *acquis communautaire* to other European countries. This process takes place in stages in parallel with the deepening of European integration. The founders of all three Communities were six western European states: Belgium, France, the Netherlands, Luxembourg, Germany and Italy. In the following years, in the next stages of enlargement, other countries of Western Europe accessed the Communities. However, after the collapse of the Soviet Union the EU opened to the East as well. Currently, the European Union consists of 28 countries with a population of 507 million inhabitants.

2. Stages of the development of European integration

1. Chronologically, there are several key dates that determine the key stages in the development of European integration. Those are essentially moments of the accession of new members to the EU, which followed in the years:

1973 – 1 January 1973 the Treaty of Accession of new members to the EC comes into force: Denmark, Ireland and the United Kingdom. Norway was also to access, but the Norwegian society, in a referendum, had not consented to the ratification of the accession treaty.

1981 – 1 January 1981 Greece is included in the circle of the EC Member States.

- 1986 – 1 January 1986 Spain and Portugal become full-fledged members of the EC.
- 1990 – After the fall of the Berlin Wall in Germany the rules of membership in the EC were extended to the eastern federal states (former GDR). Despite maintaining the same number of members the next territorial expansion of the integration took place.
- 1995 – 1 January 1995 Austria, Finland and Sweden become members of the EU. Once again, in Norway a referendum on the ratification of the accession treaty failed - 52.8% of the population opposed accession to the EU.
- 2004 – 1 May 2004 10 new countries become members of the EU: Cyprus, Czech Republic, Estonia, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia and Hungary.
- 2007 – 1 January 2007 Romania and Bulgaria joined the European Union.
- 2013 – 1 July 2013 - Croatia joined the European Union, becoming a 28th Member State.

2. **Other forms** of increasing the extent of the impact of European law can also be specified. In designating the territorial scope of European integration, one should be aware of three points.

First of all, under the provisions of the TFEU **the countries and oversea territories** of Denmark, France, the Netherlands and the United Kingdom have special status in trade relations with the EU. In trade relations between these countries and territories, and EU Member States rules that apply in the common market are generally applicable⁶⁹.

*Secondly, on 2 May 1992, an agreement was concluded between the European Economic Community and EFTA countries (except Switzerland, which has not ratified the agreement, the group was joined by Norway, Liechtenstein and Iceland), concerning the creation of the **European Economic Area (EEA)**. It has helped to expand the application of the *acquis communautaire* in relation to the entire EEA.*

*Thirdly, **association agreements** govern the relations of many countries with the European Union. The result of their conclusion is usually approximating the laws and making efforts to establish a free trade area between that country and the EU. Association agreement is often a stage of transition, leading to a full membership.*

3. The prospect of further territorial development of the European Union

There is no indication that the financial crisis in the European Union halted the process of accepting new members. The Treaty on European Union states that the

⁶⁹ See the provisions of the Article. 198-204 TFEU.

Union member may be any European State which respects the values referred to in Article 2 of TEU. After the accession of Croatia, the European Commission continues to evaluate the progress of **other candidate countries** (Montenegro, the former Yugoslav Republic of Macedonia, Iceland and Turkey). In addition, the group of Balkan countries (Albania, Bosnia and Herzegovina and Kosovo) having signed **stabilization and association agreements with the European Union is also seeking membership**. Currently, it is difficult to speculate how the EU cooperation with Ukraine and Moldova will run, the European choice of which is yet to be confirmed by carrying out a number of reforms.

§16. POLISH ROAD TO EU MEMBERSHIP

1. General remarks

1. One consequence of the collapse of communism in Central and Eastern Europe in the late 80s of the twentieth century was the turn of the countries of the former Eastern Bloc towards the European Communities. Polish integration with EU structures generally appeared as participation in the mainstream of an inevitable and irreversible processes taking place in Europe⁷⁰. Nevertheless, the Polish approach to membership in the Communities was an evolutionary process, and proceeded in stages.

2. Signing a statement normalizing relations between the European Communities and the Council for Mutual Economic Cooperation in June 1988 became the basis for the establishment of official diplomatic relations between Poland and the Communities. As a result of these developments the establishment of diplomatic relations between the Polish People's Republic and the EC **in September 1988** took place. **In July 1989, the People's Republic opened a Diplomatic Mission at the Communities.**

1. Agreement on Trade and Commercial and Economic Cooperation

1. Agreement on trade and economic cooperation between the Polish People's Republic and the EEC was signed on **19 September 1989**. The two parties committed themselves to facilitate and promote bilateral trade and economic cooperation. In the area of trade and commercial cooperation the agreement primarily provided the

⁷⁰ R. Willa, *Droga do członkostwa w Unii Europejskiej – przykład Polski*, Dialogi polityczne 8/2007, p. 83.

highest degree of liberalization in the import of products from the other party. Community declared elimination of quantitative restrictions applicable to the importation of goods into the EEC. It meant increasing access to the Polish market for EU companies, as well as facilitating access to Member states' markets for Polish producers. Polish state-owned enterprises were not able to compete with private companies in the EEC.

2. **The established economic cooperation** particularly aimed at:

- a) strengthening and diversifying the economic ties between Poland and the EEC;
- b) contributing to the development of the economies and standards of living of the Polish and the EEC population;
- c) opening up new sources of supply and new markets;
- d) promoting cooperation between business enterprises in order to promote joint enterprises, licensing agreements and other forms of industrial cooperation promoting the development of Polish and the EEC industries;
- e) promoting scientific and technical progress;
- f) supporting structural changes in Polish economy to increase and diversify the exchange of goods and services with the Community⁷¹.

The proper functioning of the Agreement was observed by the Joint Committee, composed of representatives of the Polish state and representatives of the Community.

a) Polish Association with the European Communities

1. In **May 1990** in Brussels, the Republic of Poland⁷² made a **formal request to commence negotiations on an association agreement with the European Communities**. Preparations for the negotiations on the association of the Polish party began on 26 January 1991, through the creation of a position of the Government Plenipotentiary for European integration and foreign aid at the Council of Ministers. From February to November 1991 eight rounds of negotiations were held, which led to signing **the Europe Agreement**⁷³ on **16 December 1991**. It was ratified on 20 October 1992, and entered into force on 1 February 1994. The agreement shaped the **legal**

⁷¹ Article 18 para. 1 of the Agreement between the Polish People's Republic and the European Economic Community on trade and commercial and economic cooperation signed in Warsaw on 19 September 1989 (Journal of Laws of 1990, No. 38, item. 214).

⁷² The name of the state of the Polish People's Republic to the Republic of Poland was changed by the Parliament on the basis of the Act of 29 December 1989 amending the Constitution of the Polish People's Republic, called the December novella (Journal of Laws of 1989, No. 75, item. 444).

⁷³ Europe Agreement establishing an association between the Polish Republic, as one party, and the European Communities and their Member States, as the other, signed in Brussels on 16 December 1991, hereinafter referred to as the Europe Agreement (Journal of Laws of 1994, No. 11 item. 38).

framework for relations between the Poland and the European Union from its entry into force to Poland's EU member state status. This agreement posed a basis for the development of trade and economic relations between Poland and the EU. In the preamble to the Agreement it has been stated that the association is not an "end in itself", it is only to help Poland achieve the ultimate goal of full membership in the EEC.

2. During the transitional period between the date of the signature and the date of its entry into force, between Poland and the European Community **Interim Agreement** on trade and trade-related matters was in force⁷⁴

Among the objectives to be achieved by signing the agreement were:

- a) establishment of an appropriate framework for political dialogue, allowing the development of close political relations between Poland and the Community;
- b) promotion of the development of trade and harmonious economic relations between the parties, in order to foster dynamic economic development and prosperity in Poland;
- c) providing a basis for financial and technical assistance of the Community for Poland;
- d) providing an appropriate framework for the gradual integration of Poland with the Community;
- e) promotion of cooperation in the field of culture⁷⁵.

The Europe Agreement consisted of nine parts, which covered the following issues:

- a) political dialogue between Poland and the Community;
- b) free movement of goods;
- c) movement of workers, establishment of enterprises, supply of services;
- d) flow of payments, capital, competition and other economic provisions;
- e) approximation of Polish legislation to the regulations in force in the Community;
- f) economic cooperation;
- g) cultural cooperation.

3. Control over the implementation of the provisions of the Agreement was assigned to the Council of the Association, which was supported by the Association Committee. The Association Parliamentary Committee was also established, being a forum to meet and exchange views of members of the Polish Parliament and the European Parliament.

⁷⁴ Interim Agreement on trade and trade-related matters between the Polish Republic and the European Economic Community and the European Coal and Steel Community signed in Brussels on 16 December 1991 (Journal of Laws of 1992, No. 17, item. 69).

⁷⁵ Article 1 paragraph 2 of the Europe Agreement.

4. Since the **date of Poland's application for membership** in the European Union (**8 April 8 1994**, at the European Council meeting in Athens) the Europe Agreement began to be seen both in the Union and in Poland as a pre-accession treaty. This meant recognizing it as the basis for adjustment activities directly leading towards Poland's accession to the European Union⁷⁶.

4. Polish accession to the European Union

A. Negotiating terms of Polish accession to the European Union

1. On **16 July 1997** at the European Parliament **the Commission** presented its views (called *avis*) on applications for membership in the European Union that had been made by the associated countries from Central and Eastern Europe. It recommended **opening negotiations with six candidates: the Czech Republic, Estonia, Poland, Slovenia and Hungary and Cyprus** (the so-called Luxembourg group)⁷⁷.

The decision to start the process of EU enlargement and to convene bilateral Intergovernmental Conferences on 31 March 1998, during which accession negotiations would happen in the first place with the Czech Republic, Estonia, Poland, Slovenia, Hungary and Cyprus, was taken at **the meeting of the European Council in Luxembourg on 12-13 December 1997**.

Political leadership during the Polish negotiations with the European Union was held by the Prime Minister, supported by the Minister of Foreign Affairs, the Secretary of the Committee for European Integration and the Government Plenipotentiary for the Polish negotiations for membership in the EU (chief negotiator)⁷⁸. However, the European Integration Committee was responsible for coordinating and programming activities for the preparation and negotiation of Polish accession to the EU⁷⁹.

The European Union was represented by the EU Commissioner for Enlargement, the Director General of the Directorate for Enlargement, the director of the Polish Group in the General Directorate for Enlargement and the Chief Negotiator of Poland.

Polish accession negotiations, just like in case of the other countries applying for EU membership had two stages. **The first stage** - a review (i.e. screening) of national law in terms of its compliance with EU regulations - **was launched on 27 April 1998 and lasted until November 5, 1999**. **The second stage** - actual negotiations - were

⁷⁶A. Nowak-Far, *Droga Polski do Unii Europejskiej* [in:] J. Barcz (edited by) *Prawne aspekty członkostwa Polski w Unii Europejskiej*, Warsaw 2011, p. 7.

⁷⁷ The second group of candidate countries to the European Union (known as the Helsinki group) were: Bulgaria, Lithuania, Latvia, Malta, Romania, Slovakia and Turkey. Despite Turkey being granted candidate status accession negotiations were not started with it. Negotiations with the other countries of the Helsinki group started on 14 February 2000.

⁷⁸E. Latoszek, *Integracja europejska. Mechanizmy i wyzwania*, Warsaw 2007, p. 107.

⁷⁹ One of the chief organs of government, established by the Law of 8 August 1996 on the Committee for European Integration (Journal of Laws of 1996, No. 106, item. 555, as amended).

launched on **10 November 1998**. Opening of the actual negotiations in specific areas was possible only when the Polish party had prepared and submitted the EU negotiating position in a given area and the EU party in response presented the EU position to Polish negotiators. When both parties were familiar with negotiating positions, the starting positions, the opening of the negotiation area followed.

Polish stages of negotiations for European Union membership

Stages	European Union	Place of negotiations	Poland
<p>Stage 1 (April 1998-November 1999): review of the law Review of Polish legislation for compliance with the EC acquis takes place in 29 of 31 negotiation areas (two areas: “Institutions” and “Other” are not subject to the process)</p>	<p>The European Commission (The Task Force for Accession Negotiations - TFAN)</p>	<p>Screening sessions in Brussels</p>	<p>Interdepartmental team preparing accession negotiations with the EU, the Negotiation Team</p>
<p>Stage 2 (June 1998-June 2000): developing negotiating positions On Polish side the Negotiation Team develops, and the Council of Ministers accepts the negotiating positions in all areas of negotiation, the EU common positions are developed by the Council in cooperation with EU Member States on the basis of proposals from the European Commission</p>	<p>Council of the European Union (MS)</p>	<p>Meetings of Intergovernmental Accession Conference in Brussels or Luxembourg</p>	<p>Council of Ministers, Negotiation Team</p>
<p>Stage 3 (October 1998-December 2002): negotiations on the basis of negotiation positions Negotiations take place through hearings and expert meetings and written exchange of information and explanations (for negotiation problems and interpretation of the EC acquis and candidate progress in adapting to the requirements of the EU). The result is approximating positions of the negotiating parties to reaching an agreement</p>	<p>Council of the European Union (MS)</p>	<p>Meetings of Intergovernmental Accession Conference in Brussels or Luxembourg</p>	<p>Council of Ministers, Negotiation Team</p>

Stages	European Union	Place of negotiations	Poland
Stage 4: agreeing on the content of the Accession Treaty Reconciliation of the most difficult issues constituting final negotiating package and approving the results of accession negotiations in the form of the Accession Treaty	Council of the European Union (MS)	Last meetings of the Intergovernmental Accession Conference	Council of Ministers, Negotiation Team
Stage 5: ratification of the Accession Treaty	The national parliaments of EU Member States, The European Parliament		Sejm, the Polish community in the referendum

Source: E. Latoszek, *Integracja europejska...*, Warsaw 2007, p. 110.

“Negotiation matter” covered a total of 31 areas: science and research, telecommunications and information technology, education, training and youth, culture and audiovisual policy, industrial policy, small and medium-sized enterprises, common foreign and security policy, consumer protection and health, statistics, external relations, customs union, economic and monetary union, energy, social policy and employment, freedom to provide services, financial control, free movement of goods, environment, corporate law, free movement of persons, free movement of capital, taxes, institutions, fisheries, transport policy, justice and home affairs, regional policy and coordination of structural instruments, competition policy, agriculture, finance budgeting, and more. Poland **asked for a transitional period in 11 areas**, including agriculture, taxation, corporate law, energy and environment.

Closing the negotiations took place at the European Council summit, in Copenhagen on 12-13 December 2002

B. The Treaty of Accession and its ratification

1. The Prime Minister and Minister of Foreign Affairs were authorized to sign the treaty on behalf of Poland. The Treaty of Accession was signed on 16 April 2003 in Athens. In the Treaty of Accession the following parts can be distinguished:

- a) **The Treaty of Accession to the European Union**⁸⁰. The Treaty of Accession in the strict sense, under which Poland joined the EU, is common for all ten

⁸⁰ Full name: Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese

countries becoming members of the EU on 1 May 2004. In accordance with past practice it consisted of a preamble and three articles. In this part the treaty says that membership in the European Union of the 10 acceding countries is established, refers to the “accompanying Act” being an integral part thereof, it specifies the date of entry into force as on 1 May 2004, emphasizes the obligation to deposit ratification documents with the depositary till 30 April 2004, indicates languages in which it has been prepared.

- b) **Act concerning the conditions of accession**⁸¹. The treaty of 16 April 2003 consists of 62 articles, divided into five parts. The Act also included 18 attachments and 10 minutes being its integral part.
- c) **Final Act**. It contains 44 different political declarations of the present and acceding Member States of the Union and agreements in the form of notes signed between the European Union and the new members of the group. Poland reported three individual declarations: on the competitiveness of the Polish production of a number of fruit varieties, on public morals and on the interpretation of derogatory period for pharmaceuticals.

2. The final stage of the accession process was **the ratification of the treaty of accession** by all States in accordance with their respective constitutional requirements and **the deposit of instruments of ratification with the depositary till 30 April 2003**. In the case of Poland, consent to the ratification of this international agreement was expressed in a nationwide referendum⁸².

Nationwide referendum on Polish accession to the European Union was held on 7-8 June 2003. It was attended by 58.85% of those eligible to vote, and the results were binding⁸³. To the question *“Do you express your consent to Polish accession to the European Union?”* 77.45% voting said Yes. The greatest support for Polish member-

Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom Great Britain and Northern Ireland (Member States of the European Union) and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Slovak Republic, concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union (Journal of Laws of 2004 No 90, item. 864).

⁸¹ Full name: Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments in the Treaties on which the European Union is based.

⁸² The procedure for granting consent to ratification of an international agreement, under which the Republic of Poland may delegate to an international organization or international institution the competence of organs of state power, is defined in art. 90 of the Constitution of Poland (Journal of Laws of 1997, No. 78, item. 483).

⁸³ Article 73 paragraph 1 of The Nationwide Referendum Law of 14 March 2003 (Journal of Laws of 2003, No. 57, item. 507).

ship in the European Union was found in Silesia, Lower Silesia, Lubuskie and Zachodniopomorskie Voivodeships, and the smallest in the Lublin area.

3. **Polish President**, subject to the approval of citizens, made a solemn ratification of the Treaty on **23 July 2003**. The instruments of ratification were deposited with the depositary, i.e. the Government of the Italian Republic on 6 August 2003.

4. Poland became a **Member State of the European Union** with the entry into force of the Treaty of Accession on **1 May 2004**.

5. Poland in the Schengen area

1. One of the consequences resulting from the accession of Poland to the European Union is being bound by **all the Schengen acquis and the duty of its use**⁸⁴. In order to achieve this commitment, Poland undertook a number of activities, which involved, among others: expansion of infrastructure for border protection, preparing Polish administration for the effective enforcement of EU law, introduction of legislative solutions that would make it possible and computerization of the bodies involved in the process of ensuring public safety and order in respect of crossing external borders. One of the strategic documents, which concerned the implementation of the Schengen acquis was adopted on 15 August 2001 by the Committee for European Integration, "*Action Plan for the implementation of Schengen acquis in Poland (Poland - Schengen Action Plan)*."

2. On the basis of the Council's decision of 6 December 2007⁸⁵, Poland, along with eight (except for Cyprus) new Member States, began to apply the Schengen acquis.

On **21 December 2007**, **border controls at internal land and sea borders were abolished**, and on **30 March 2008** with a change in the flight schedule for the summer they were **abolished at air borders**.

Together with the Polish accession to the Schengen area the Polish-Russian, Polish-Ukrainian and Polish-Belarusian borders, representing the external borders of the EU, have also become the external border of the Schengen area.

⁸⁴ Article 3 of the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments in the Treaties on which the European Union is based.

⁸⁵ Council's Decision of 6 December 2007 on the full application of the Schengen acquis in the Czech Republic, the Republic of Estonia, the Republic of Latvia, Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic.

6. Polish Presidency of the Council of the European Union

1. In the period **from July to December 2011** Poland held the Presidency of the EU Council. The main task was putting European Union on the track of fast economic growth and strengthen its political power. This was to be achieved by following the three priorities: European integration as the source of growth, Secure Europe and Europe benefiting from openness. Under the first priority of tasks strengthening economic growth through the development of the internal market (including electronic) and the use of the EU budget to build competitive Europe were envisaged. Actions taken under the second priority were geared towards strengthening macro-economic, food, energy and border security. Meanwhile, under the third priority, primarily progress of enlargement was established as well as the development of cooperation with the countries of the Eastern Partnership and supporting democratic transition in the countries of the Southern Neighbourhood.

2. During Polish presidency the following took place, among others:

- a) completion of accession negotiations with Croatia and signing a treaty of accession in Brussels on 9 December 2011;
- b) completion of negotiations on an association agreement with Ukraine;
- c) arrangements for the EU budget for 2012;
- d) two-year extension of the EU's food aid programme serving the poorest of the Union;
- e) progress in negotiations on a single European patent;
- f) adoption of a European protection order for victims of violence (domestic, stalking, threats, kidnapping and attempted murder) providing special measures to protect victims of domestic violence valid throughout the Union, and not only in their home country;
- g) adoption of the so-called „Six Pack“, a set of regulations and directives designed to strengthen financial supervision over the Member States of the Euro Zone. Adopted regulations, among others, impose rules for national budgets of the Member States, forcing Member States with high levels of public debt to reduce expenditure, and in the case of the debt being in excess of the 60% of GDP, they impose an obligation to maintain a certain pace of debt reduction.

3. Polish Presidency of the EU Council lasted 184 days. During that period 452 meetings, including 20 informal meetings of the EU Council and the EU ministerial meetings, 30 conference at the ministerial level, and more than 300 expert meetings were organized in Poland. As part of the activities connected to. On the occasion of the presidency a wide cultural offer was prepared, including almost 4,000 concerts, exhibitions and other cultural events at home and abroad. Unfortunately, Polish presidency of the EU Council was negatively influenced by the crisis in the Euro Zone,

preventing the realization of all goals. The activities of the Presidency were efficient in administrative terms, but taken under post-Lisbon circumstances, i.e. the limited role of the presidency.

7. The most important events in the Polish integration with the European Union:

Among the most important events in the Polish integration with the European Union the following can be pointed out:

- September 1988**, establishing diplomatic relations between the Polish People's Republic and the EEC;
- July 1989** - opening the Diplomatic Mission of the Polish People's Republic by the Communities;
- 19 September 1989** - signing an agreement on trade and commercial and economic cooperation;
- 16 December 1991** - signing an Association Agreement between the Republic of Poland and the European Communities and their Member States (the so-called Europe Agreement);
- 8 April 1994** - submitting an official application for admission to the European Union;
- 31 March 1998 - 13 December 2002** - the period of negotiations on Polish acceptance into the European Union;
- 16 April 2003** - signing the Accession Treaty in Athens;
- 7-8 June 2003** - a referendum on Polish accession to the European Union;
- 23 July 2003** - Ratification of the Accession Treaty by the President;
- 1 May 2004** - Polish accession to the European Union;
- 21 December 2007** - adopting the Schengen acquis by Poland;
- July-December 2011** - the presidency of the Council.

Study Questions

1. Name the causes of European countries integration after World War II.
2. What were the main theories of European integration?
3. Name the main stages of the deepening of European integration.
4. Present the process of the expansion of the territorial scope of European integration.
5. What does the transnational nature of European integration signifies?
6. Why was the creation of the European Union a turning point in the process of European integration?

7. Assess changes to the Treaties under the Treaty of Amsterdam.
8. What was the significance of the adoption of the Nice Treaty?
9. Present the process of Polish integration with the EC/EU.
10. In which direction should the European integration go?
11. Have the objectives of the *Founding Fathers* of the European Communities been achieved?
12. What do you think about the prospect of transforming the European Union into a federal state?
13. Name the areas where the need for stronger cooperation between the Member States of the EU exists, and the ones you think should always remain within the competence of the Member States. Justify your choice.
14. What were the circumstances of the signing and entry into force of the Treaty of Lisbon?
15. What are the basic assumptions and changes made to the Treaties by the Treaty of Lisbon?
16. Indicate the most important events in Polish integration with the European Union.

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3. D. Chalmers, G. Davies & G. Monti, *European Union Law*, 2nd Ed., Cambridge 2010.
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18. J.H.H. Weiller, *Chrześcijańska Europa. Konstytucyjny imperializm czy wielokulturowość*, Poznań 2003.

List of main decisions:

1. 26/62 judgment of 5 February 1963, on *NV Algemene Transport en Expeditie Onderneming Van Gend & Loos v. Netherlands Inland Revenue Administration*.
2. 6/64 judgment of 15 July 1964, on *Flaminio Costa v. ENEL*.
3. 26/69 judgment of 12 November 1969 on *Stauder v. City of Ulm*.
4. C-131/03 judgement of 12 September 2006 on *P.R.J. Reynolds Tobacco Holdings v. Commission*.
5. C-540/03 judgement of 27 June 2006 on *the European Parliament v. Council*.

CHAPTER II

THE LEGAL BASIS OF THE EUROPEAN UNION

§1. THE LEGAL NATURE OF THE EUROPEAN UNION

1. General Remarks

1. Before the entry into force of the Treaty of Lisbon, the European Union was defined as “*a specific, original structure without legal personality, at the stage of development*”.¹ It had no international legal subjectivity attributes, its own institutions and its own competences. Those were attributed to the European Community. This state of affairs resulted in difficulty with clearly clear defining the legal nature of the European Union.

2. The Treaty of Lisbon primarily defined relations between the European Union and the European Community. It resulted in the removal of the existing pillar structure of the Union. Since the entry into force of the Treaty of Lisbon, **the Union replaced the European Community, as its legal successor**². This means the liquidation of the European Community and the former Union in their onetime form³. The doctrine even says about the “absorption” of the Community and the Union by a new organization⁴. The European Union established by the Treaty of Lisbon is in fact distinct

¹ C. Herma, *Likwidacja „struktury filarowej” Unii – podmiotowość prawnomiędzynarodowa UE oraz reforma systemu aktów prawa pierwotnego i wtórnego* [in:] J. Barcz (ed.) *Traktat z Lizbony, Główne reformy ustrojowe Unii Europejskiej*, Warsaw 2008, p. 113.

² See Article 1 of the TEU.

³ J. Maliszewska-Nienartowicz, *System instytucjonalny i prawny Unii Europejskiej*, Toruń 2010, p. 32.

⁴ Among others. C. Herma, *Likwidacja...*, p 121.

in terms of competence, institutional framework, objectives and tasks from the Community and the Union before the reform. The consequence of the changes is the creation of formally merged legal body in the form of a single international organization, which has legal personality under international law and subjectivity. The EAEC remains outside the structures of the European Union, it is a separate international organization institutionally associated with the EU.

3. The changes were designed to simplify the functioning of the Union and to increase the transparency of its activities through the elimination of the pillar structure and strengthening the identity of the EU in the international arena.

2. The European Union as a special kind of international organization

1. The provisions of Article 1 of the TEU define the Union as a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken openly and as close as possible to the citizens. From this it follows that the Union is a close relationship between the nations of Europe, but the nature of this relationship is not defined by the treaties⁵.

2. There is no doubt that **the European Union is neither a federation nor a confederation**. This statement is justified by the fact that the EU does not have population in the sense of being one of the characteristics of a state. Functional and not territorial nature should be attributed to the Union. Above all, the European Union in its present state does not have a legal presumption of competence, it cannot in itself grant new powers. It has just as many powers as the Member States conferred at the time of creation. Only Member States can alter the scope of EU competence⁶.

3. The European Union has attributes that allow to define it as an **international organization**⁷. Firstly, the Union has a legal personality, which is characteristic of international organizations. Secondly, it is an inherently stable relationship of subjects of international law. Thirdly, the functioning of the Union is based on an international agreement. The Union is an organization called into existence and formed by the European countries, which are parties to international agreements. Those treaties,

⁵ J. Maliszewska-Nienartowicz, *System...*, p. 21.

⁶ In accordance with Article 1 of the TEU Member States confer competences to the European Union to achieve their common goals.

⁷ See more in, for example A. Przyborowska-Klimczak (ed.), D. Pyc (ed.), *Leksykon prawa międzynarodowego publicznego. 100 podstawowych pojęć*, Warsaw 2012, A. Łazowski, A. Zawidzka-Łojek, *Prawo międzynarodowe publiczne*, Warsaw 2011.

known as the founding treaties have equal legal force⁸. Fourthly, the EU has solid bodies, which on the basis of the founding treaties have been equipped with certain powers⁹. Fifthly, the organization is taking steps to meet its targets both in internal areas as well as international relations¹⁰.

4. The European Union is considered a particular kind of international organization. This is because it has a certain constitutional and legal autonomy in relation to the classical model of international organizations, such as intergovernmental organizations. Calling European Union a supranational organization is pointing to its legal nature¹¹.

Among the most important qualities that indicate the **supranational nature of the European Union** are:

- a) conferring decision-making competence in the area of law and political leadership to supranational bodies - the European Commission, the European Parliament and the Court of Justice of the EU are supposed to represent and protect the interests of the Union as a whole, they are to maintain independence and not to be influenced by the Member States;
- b) the creation of an independent, autonomous legal order, which is different from both international law and the national law of the Member States, as a result of the extent and growth of competence - in accordance with the judgment in *Van Gend & Loos Case* EEC was a *new legal order of international law for the benefit of which the States have limited although only in narrow areas, their sovereign rights and the standards of which apply not only to the Member States, but their units as well*¹².
- c) making derivative law, the specific nature of which is determined by the rules for its use - *as opposed to ordinary international agreements, the Treaty establishing the European Economic Community established its own legal system, which on the date of entry into force of the Treaty, became an integral part of the legal system of the Member States and which the courts are obliged to apply*¹³. European Union law is a new legal order, distinct from both international law and domestic law, which is why it should be uniformly and effectively applied in all Member States to ensure the specific nature of these rules.

⁸ Since the entry into force of the Treaty of Lisbon, the EU founding treaties are: the Treaty on European Union and the Treaty on the Functioning of the European Union. On this topic see more in Chapter IV of this handbook.

⁹ On the institutions and bodies of the European Union see Chapter III of the handbook.

¹⁰ See Article 3 of the TEU and section 4 of this chapter.

¹¹ The term "supranational" does not appear in any piece of the existing European Union legislation. The European Court of Justice in its case does not use it as well.

¹² 26/62 *Van Gend & Loos*.

¹³ 6/64 *Costa v. ENEL*.

- d) judicial autonomy - any disputes concerning the interpretation and application of Union law (including enforcement of treaty obligations by Member States) can be resolved only before a special judicial body organization, such as the Court of Justice of the European Union;
- e) financial autonomy - since 1970 the Union's activities are funded by the so-called own resources rather than contributions from Member States, as it is the case in most international organizations. The way of collecting and determining the amount transferred to the budget of the EU takes place at the level of EU tax administration¹⁴.

5. The European Union is an international organization of special kind primarily due to the occurrence of different methods of cooperation and inclusive nature of the group.

3. Methods of cooperation in the European Union

1. European Union since the inception till the entry into force of the Lisbon Treaty has had a complex internal structure. It was presented as a temple based on three pillars differing from each other by the method of cooperation. The first of these (European Community) was characterized by a supranational cooperation. Meanwhile, in the two other pillars (Common Foreign and Security Policy and Police and Judicial Cooperation in Criminal Matters¹⁵) cooperation was of intergovernmental nature. The Treaty of Lisbon abolished the pillar structure of the Union, and as a consequence the former second and third pillar's activities were connected with the activities of the Community. However, the elimination of the three pillar structure, the complex structure of the Union, did not alter the specific nature of some areas, mainly the Common Foreign and Security Policy. Currently, mainly because of the specific nature of the matter and the lack of controlled readiness of Member States to the far-reaching changes, it is not possible to completely unify methods of operation in all areas of EU integration. Various areas of cooperation, in which there are different procedures, instruments or positions of supranational institutions are the consequence of this state of affairs.

2. The main way of cooperation that occurs in the EU is known as **the Community method** (or **the Community mechanism**), the essence of which is the independence of decision-making from the influence of national governments to supranational institutions such as the Commission, the Parliament and the Court of Justice.

¹⁴ Article 311 of the TFEU.

¹⁵ Originally: Cooperation in the Field of Justice and Home Affairs.

Among the most important elements that characterize the Community mechanism the following should be specified:

- a) conferring on the Commission, as a general rule, the exclusive legislative initiative in the general interest of the Union;
- b) decision-making by the Council, as a rule, by a qualified majority;
- c) granting the European Parliament (representing the interests of EU citizens) beside the Council (representing the interests of the Member States) the status of co-legislator in the process of making derivative legislation;
- d) ensuring respect for the rule of law by the Court of Justice of the European Union through the possibility of action by EU institutions, Member States and interested parties;
- e) independence of the Commission in the implementation of EU policies and the performance of its function of the “guardian of the treaties”.

Among the benefits of the Community method the following should be mentioned:

- a) balance in the interests of the Member States, the citizens of the Union and the Union as a whole;
- b) validity of clearly defined principles of law in the decision making process;
- c) institutional collaboration, which aims to find solutions in line with the general interest of the EU, including the protection of the interests of the smaller states and the minorities;
- d) guarantee of the jurisdiction of the Court of Justice of the European Union in the event of a breach of EU law.

The Community method is to guarantee both the diversity and effectiveness of the Union, to ensure fair treatment of all Member States from the largest to the smallest, and allow reaching an agreement between the various interests¹⁶.

3. The area, which is still subject to specific rules and procedures is **the Common Foreign and Security Policy**. The method of cooperation in this area of integration is based on cooperation between the countries represented by governments. This specificity is due to the specific nature of the competences conferred on the Union in this matter. In accordance with applicable regulations the Union has a competence to define and implement a common foreign and security policy, including the progressive framing of a common defense policy¹⁷. In this case, therefore, the area is indicated where the EU has competence, but does not specify in what kind of powers¹⁸. It can be assumed that it is a specific type of coordination of the policies of Member States,

¹⁶ P. Gilowski, *Podstawy prawne Unii Europejskiej* [in:] A. Kuś (ed.) *Prawo Unii Europejskiej z uwzględnieniem Traktatu z Lizbony*, Lublin 2010, p. 73.

¹⁷ Article 2 paragraph.4 of the TFEU.

¹⁸ The kinds of competencies in more detail in section 2 of this chapter.

conducted in the public interest and in order to achieve ever-increasing degree of convergence of the Member States' actions¹⁹.

In addition, under the Common Foreign and Security Policy separateness of legal instruments, procedures of law-making and the role of European institutions is maintained²⁰. In this area, integrating the importance of supranational institutions is subject to a significant limitation, since they do not play any independent role in the lawmaking process or its implementation. Among the **major differences** the following should be noted:

- a) adoption of legal instruments that are specific only to this area, such as general guidelines, decisions on the actions or decisions laying down position instead of adopting legislative and non-legislative acts (regulations, directives, decisions);
- b) adoption of legal instruments by the European Council and the Council acting unanimously, instead of using ordinary or special legislative procedure;
- c) limiting the role of the European Parliament for consultation only on the main aspects and the basic choices of the Common Foreign and Security Policy and the Common Security and Defense Policy;
- d) limiting the legislative and representative powers of the Commission for the benefit of the High Representative of the Union for Foreign Affairs and Security Policy;
- e) exclusion of the Common Foreign and Security Policy from the jurisdiction of the Court of Justice of the European Union²¹.

4. However, in the case of **police and judicial cooperation in criminal matters (the former third pillar)** The Treaty of Lisbon does not cause the total abolition of the specific nature of intergovernmental cooperation in this area. However, integration **differences** occurring in this area **are not as significant** as in the case of the Common Foreign and Security Policy. Firstly, within five years of the entry into force of the Lisbon Treaty the legal instruments of the former third pillar were to be replaced by the "new" legislative and non-legislative acts²². Secondly, the role of national parliaments is emphasized to ensure that the proposals and legislative initiatives submitted under judicial cooperation in criminal matters and police cooperation are

¹⁹ C. Mik, *Unia Europejska i źródła jej prawa w świetle projektu Traktatu Konstytucyjnego* [in:] C. Mik (ed.) *Unia Europejska w dobie reform. Konwent Europejski-Traktat Konstytucyjny-Biała Księga w sprawie rządzenia Europą*, Toruń 2010, p. 42.

²⁰ J. Maliszewska-Nienartowicz, *System instytucjonalny...*, p. 34.

²¹ Among the exceptions there is the Court's jurisdiction to ensure compliance with Article 40 of the TEU and to control the legality of certain decisions as provided for in Article 275 of the TFEU.

²² For more information on the legislative and non-legislative acts and instruments in the Area of Freedom, Security and Justice see Chapter IV of the handbook.

consistent with the principle of subsidiarity²³. Thirdly, the matter is partially exempt from the jurisdiction of the Court of Justice²⁴.

4. Legal Personality of the European Union

1. Entry into force of the Lisbon Treaty ended disputes about the **legal personality** of the Union thus far appearing in the doctrine. Indeed, the European Union was granted a full legal personality both in international relations and in relation to the Member States. The provision of Article 47 of the TEU explicitly provides that the Union shall have legal personality.

2. Among **the attributes of international legal subjectivity of the Union** there are:

- a) ability to enter into international agreements (*ius contrahendi*) with third countries and international organizations²⁵;
- b) legation law (*ius legationis*)²⁶;
- c) entitlement to the privileges and immunities of international relations;²⁷
- d) possibility to obtain membership in international organizations²⁸;
- e) possibility to lodge complaints and to act as a party before international courts²⁹.

3. Whereas, **in each of the Member States** the Union has the legal capacity and the most extensive capacity to perform accorded to legal persons under national legislation; it may in particular, acquire or dispose of movable and immovable property and to appear before the court³⁰. In addition, on the territory of the Member States, the Union shall enjoy the privileges and immunities necessary for the performance of its tasks, under the conditions laid down by EU legislation³¹.

²³ Article 69 of the TFEU.

²⁴ Article 276 of the TFEU.

²⁵ For more information on the possibility of concluding international agreements by the European Union see Chapter V of this handbook.

²⁶ Article 221 of the TFEU.

²⁷ See *Protocol on the Privileges and Immunities of the European Union* of 1965

²⁸ The European Union (replacing the European Community) is a member or an observer, among others: in the WHO, FAO, OECD, the Council of Europe, the UN and the WTO.

²⁹ Article 340 of the TFEU.

³⁰ Article 335 of the TFEU.

³¹ Article 343 of the TFEU.

4. It should be emphasized that the acquisition by the Union of a full legal personality in no way authorizes the Union to legislate or to act beyond the competences conferred upon it by the Member States in the Treaties³².

§2. THE COMPETENCES OF THE EUROPEAN UNION

1. General Remarks

1. The Member States of the Union transferring certain powers are the creators of integration processes in the European Union³³. The limits of competences conferred on the Union are limited by **the principle of the powers conferred**³⁴ otherwise known as the principle of conferral, the powers delegated or assigned. Competences not conferred upon the Union in the Treaties remain with the Member States³⁵.

2. The European Union has three categories of competences:

- **exclusive** competences,
- competence **shared** with the Member States,
- **supporting, complementing and harmonizing** competences.

3. The design of **flexibility clause**³⁶ is based on the principle of conferral. According to the Clause the Union may also take action to make up for the lack of the necessary powers conferred on the institutions of the European Union, in particular provisions of the Treaties, when these powers appear to be necessary for the Union to fulfill its tasks and achieve goals.

4. Regardless of the above three categories of competences, there are areas where the Union has certain powers, and the Member States are required to take certain actions on the principles set out in the Treaties³⁷. Such areas include: coordination of economic policies, employment policies and social policies of Member States and the Common Foreign and Security Policy.

³² See the declaration attached to the TL (No. 24) concerning the legal personality of the European Union.

³³ Article 1 of the EU Treaty.

³⁴ Article 5 paragraph 2 of the TEU.

³⁵ Article 4 of the TEU.

³⁶ Opinion 2/94.

³⁷ See J. Barcz, *Zasadnicze reformy strukturalne ustroju Unii Europejskiej*, [in:] J. Barcz (ed.), *Traktat z Lizbony. Główne reformy ustrojowe Unii Europejskiej*, Warsaw 2008, p. 80.

At the the European Union level the following policies are coordinated: economic policy, employment policy and social policy of the Member States. In the field of employment policy the Union **is committed** to take specific measures of coordination, in particular the guidelines for these policies. In the area of coordination of social policies, the European Union **may** adopt initiatives. Member States are responsible for the coordination of their economic policies within the Union. To achieve this, the Council, as an intergovernmental body, shall adopt measures, in particular broad guidelines for these policies. When discussing the issues of coordination of economic policies, it is worth to remember that monetary policy of the euro area Member States is one of the exclusive competence of the European Union.

Common foreign and security policy is subject to specific rules and procedures. It is defined and implemented by the European Council. The Council acts unanimously, as an area of intergovernmental cooperation. The adoption of legislative acts is excluded.

5. The primary symptom of implementing powers conferred is the EU regulation within the legislative procedures. In the area of the Common Foreign and Security Policy, the European Union carries out the conferred powers by: defining the general guidelines, taking decisions and strengthening systematic cooperation between the Member States in the conduct of policy³⁸. The Union carries out its tasks using other means as well. For example, the Union's action may include the issuing of other non-legislative acts, undertaking research, studies, publication of results, the collection and sharing information, negotiation and conclusion of a contract, the issuance of documents, publications, positions, issuing statements, declarations, protests, acts of recognition of revenue and expenditure, lodging complaints, the issuance of judgments, opinions and other decisions by court institutions, the acquisition of any rights, using them or disposing of them, making actual actions³⁹.

2. Exclusive competences

1. Member States granting exclusive competence to the European Union, provided it with the power to legislate and adopt legally binding acts in certain areas. Member States may adopt legislative acts solely under the authority of the Union or for the implementation of its acts⁴⁰.

³⁸ Article 25 of the EU Treaty.

³⁹ P. Saganek, *Article 5*, [in:], A. Wróbel (ed.), *Traktat ustanawiający Wspólnotę Europejską. Komentarz. Volume I (Article 1-60)*, Warsaw 2008, p. 176.

⁴⁰ Article 2 paragraph 1 of the TFEU.

2. The Union shall have exclusive competences in **five areas**⁴¹:

- the customs union;
- the establishment of competition rules necessary for the functioning of the internal market;
- monetary policy for the Member States whose currency is the euro;
- the conservation of marine biological resources under the common fisheries policy;
- Common Commercial Policy.

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

3. Exclusive competence of the European Union is characterized by two elements: the functional one and the material one. The functional element includes the duty of the Union to act as a result of considering it the sole entity responsible for the execution of certain tasks. The material element involves loss of the possibility of independent action by the states⁴².

3. Shared competences

1. Shared competence includes the areas in which the European Union shall share competences with the Member States. Both the Union and the Member States may legislate and adopt legally binding acts⁴³, whereas the Member States have competence to act where the Union has not exercised its right, or has decided to cease their execution⁴⁴. Cessation of competence occurs when the relevant EU institutions decide to repeal a legislative act, in particular to ensure better constant respect for the principles of subsidiarity and proportionality. In such case, at the initiative of one or several of its members, the Council may request the Commission to submit proposals for repealing a legislative act. If the Union has taken action in a certain area, the scope of the exercise of shared competence only covers those elements governed by the Union's adopted act, rather than the whole area⁴⁵.

2. The EU has shared competences in areas that are not areas of exclusive competences or supporting, complementing and coordinating competences⁴⁶. The principle of **the presumption of shared competences** results from the above.

⁴¹ Article 3 of the TFEU.

⁴² Citing P. Saganek, *Artykuł 5...*, p.208.

⁴³ Article 2 paragraph 2 of the TFEU.

⁴⁴ Declaration No 18 concerning the delimitation of competences.

⁴⁵ Protocol No 25 to the Treaty of Lisbon on the exercise of shared competence.

3. The main areas of competence shared between the Union and the Member States are:⁴⁷ the internal market, social policy, economic, social and territorial cohesion, agriculture and fisheries, excluding the conservation of marine biological resources, the environment, consumer protection, transport, trans-European networks, energy, Area of Freedom, Security and Justice; common safety concerns in public health.

4. Shared competences are designed in the form of **competitive competence**. They can compete as an **alternative or cumulatively**⁴⁸. Competitive competences occur alternatively when an area is covered by a shared competence, but the EU has not taken action. In this case, the state may take action as long as the EU does not start acting. So the circumstance justifying the competence of the Member is the lack of the Union's activities. However, when the European Union legislature has already taken action the state cannot impose its own measures, as the matter is already settled - *seized* by the EU regulation. In this context, imaging is used to determine the *doctrine of occupied field*. However, within the cumulative competitive competence of the Member States a legal area is left, where they may still act. We are dealing with such powers for example in the case of partial harmonization because it leaves states the option of taking action not covered in the area.

5. As part of the above areas, there are some **exclusions**.

First of all, while in the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programs, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

Secondly, in the areas of development cooperation and humanitarian aid, the Union actions shall not result in Member States being prevented from exercising theirs.

Thirdly, within the area of the Area of Freedom, Security and Justice the Member States retain exclusive powers in the performance of duties relating to the maintenance of public order and internal security⁴⁹.

⁴⁶ Article 4 paragraph 1 of the TFEU.

⁴⁷ Article 4 paragraph 2 of the TFEU.

⁴⁸ See P. Saganek, *Podział kompetencji pomiędzy Wspólnoty Europejskie a państwa członkowskie*, Warsaw 2004, p. 24.

⁴⁹ Article 72 of the TFEU.

4. Supporting, complementing and harmonizing competences

1. In certain areas and under the conditions laid down in the Treaties, the Union shall have competence to support, complement and harmonize the actions of Member States, without thereby superseding the competence of the Member States in these areas⁵⁰. Legally binding acts of the Union adopted on the basis of the provisions of the Treaties relating to these areas shall not entail harmonization of legislative provisions and regulations of the Member States.

The basic areas of competences to support, complement and harmonize include⁵¹:

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

2. These areas are covered by the competence of the European Union if they have a **European dimension**, that is, when the action is carried out jointly between the Member States. Collaboration can occur at the Member States level, but also concern cooperation between national institutions and individuals. Additionally, in the areas of education and sports the TFEU⁵² extends the catalog of measures of the European dimension, to include the actions, where it is not necessary to have cooperation between Member States. In education, the European dimension is implemented particularly through teaching and dissemination of the languages of the Member States. The European dimension of sport involves promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, as well as protecting physical and moral integrity of sportsmen and sportswomen, especially the youngest.

5. The flexibility clause

1. The use of the flexibility clause, otherwise known as the principle of *implied powers*, is intended to complement the lack of the necessary powers conferred on the institutions of the European Union explicitly or implicitly in the Treaties, in a situation where the powers prove to be necessary for the Union to fulfill its tasks and

⁵⁰ Article 2 paragraph 5 of the TFEU.

⁵¹ Article 6 of the TFEU.

⁵² Article 165 paragraph 2 of the TFEU.

objectives. The flexibility clause is part of an institutional system based on the principle of conferral⁵³.

According to the flexibility clause if the action taken by the Union should prove necessary to achieve one of the objectives of the EU, and the Treaties have not provided the necessary powers, the Council shall adopt the appropriate measures⁵⁴. The Council shall act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament. These measures may not lead to the harmonization of the laws and regulations of the Member States where the Treaties exclude such harmonization.

Implied powers are kind of silent, default transfer of powers under **the context of property**, if it is necessary to take action in the matter by the EU needed to achieve one of its objectives, and the Treaties have not provided the necessary powers.

2. For the first time the concept of implied powers was used by the Court of Justice in *8/55 Fédération Charbonniere Case*). The Court of Justice held that the *provisions of a treaty or domestic legislation generally assume rules, without which such a treaty or an act would be devoid of meaning or could not be applied in a reasonable and useful way*. The concept of the implied powers of the EU to conclude international agreements has been particularly strongly established⁵⁵. Currently the flexibility clause is expressed in the TFEU.

3. According to the Polish Constitutional Court flexibility clause is a subsidiary to the other provisions of the Treaty establishing the powers of the Union. Its use as a basis for legal action is justified only where no other provision of the Treaty gives the EU institutions the competence required to adopt the measure⁵⁶. It is essential that the Council is required to act on the basis of unanimity, which prevents the adoption of an act contrary to the will of one of the Member States⁵⁷.

4. Exercising the implied powers in compliance with the principle of subsidiarity is subject to control by national parliaments. The flexibility clause cannot be used as a basis for extending the scope of Union powers beyond the general European framework created by the provisions of the Treaties, in particular, defining the tasks and activities of the Union. Neither can it be used as a basis for legislation that would in fact amend the Treaties without following the procedures laid down for that purpose⁵⁸.

⁵³ Opinion 2/94.

⁵⁴ Article 352 of the TFUE. See 22/70 *The commission v. The Council* ("ERTA").

⁵⁵ Case 22/70 *The Commission v. The Council* (ERTA)

⁵⁶ Constitutional Court's judgment of 24 November 2010, ref. No K 32/09.

⁵⁷ Constitutional Court's judgment of 11 May 2005, ref. No K 18/04.

⁵⁸ Declaration No 42 on Article 352 of the TFEU.

5. The flexibility clause does not apply to the Common Foreign and Security Policy. Special rules also apply to the Area of Freedom, Security and Justice, where the implied powers apply only to the prevention of terrorism and related activities, and to combat these phenomena⁵⁹. In such cases, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall define a framework for administrative measures with regard to capital movements and payments, such as the freezing funds, financial assets or economic gains belonging to natural or legal persons, groups or other non-State entities.

§3. MEMBERSHIP IN THE EUROPEAN UNION

1. General Remarks

1. Since the beginning of the three Communities accepting new Member States is part of the development of European integration. This process is gradual, so as to bring benefits to all parties. Currently, the policy leading to the expansion of the European Union is based on three principles: compliance with certain conditions, debt consolidation and communication. The first rule is that the gradual convergence of the candidate depends on its individual progress in meeting the conditions at each stage of the accession procedure. The latter refers to the commitments undertaken by the EU in relation to the countries applying for membership in the EU and means that the EU makes new promises carefully, keeping at the same time all commitments towards countries already involved in the integration process. The third of the principles puts emphasis on the need for democratic legitimacy of the EU accession process by providing public support for enlargement. In order to maintain the Union's capacity to integrate new members, acceding countries must be fully prepared to accept the obligations of membership in the EU, which in turn must be able to function effectively and to develop.

2. Currently, the European Union is the world's largest economic zone, which is formed by **28 Member States**⁶⁰ and a population of over **500 million inhabitants**.

⁵⁹ Article 75 of the TFEU.

⁶⁰ On 9 December 2011 the accession treaty with Croatia was signed. If the treaty is ratified by all EU Member States and Croatia, it will be the 28th EU member with effect from 1 July 2013.

2. Terms of the acquisition of the European Union membership

1. Basic conditions for the acquisition of the membership by a State are set out in the Treaty on European Union⁶¹. According to Article 49 of the TEU any European State which respects the principles based on respect for human dignity, respect for human rights, including the rights of persons belonging to minorities, freedom, democracy, equality and the rule of law may apply for membership in the European Union. First of all, only **an entity being a state** within the meaning of public international law may **apply** for membership in the European Union⁶².

2. It should be emphasized that the **feature of “Europeanness”** of a state has been defined on the basis of previous experience in accession in two ways. On the one hand, attention is drawn to the aspect of geographical location - at least part of the territory of such a state should be on the European continent⁶³. On the other hand, it is emphasized that not only purely geographical criteria determine the nature of the European countries. History, political system and culture shaping the European identity of the applicant for membership are important components of the concept of “Europeanness” as well. “Europeanness” should be understood as both a geographical criterion and belonging to a specific political - cultural group⁶⁴.

3. Treaty provisions also confirmed the practice of using additional selection criteria which are developed by the European Council. The so-called **Copenhagen criteria** are of particular importance. They were adopted at the European Council summit in Copenhagen in 1993. In the light of the requirements agreed, a European state applying for membership in the European Union should have:

1. stability of democratic institutions, the legal system, human rights and national minorities (**political criterion**);
2. ability to cope with competition and market forces within the Union and well-functioning market economy (**economic criteria**);
3. will and ability to assume the obligations of membership, and in particular to respect the aims of political, economic and monetary union (**volitional criterion**).

⁶¹ Article 49 of the TEU.

⁶² In the theory of law, a state as a subject of international law should possess the following attributes: permanent population, defined territory separated from others by borders, sovereign power and the ability to enter into international relations.

⁶³ It is not necessary that the State applying for membership in the European Union lay entirely within Europe, it is enough to have at least some part in Europe (e.g. Turkey). What's more, the state does not have to join the Union in all its territory, for example, in the case of Denmark, EU law does not apply to the Faroe Islands, as is the case Antilles and Aruba belonging to the Netherlands.

⁶⁴ In current practice, the only candidate rejected was Morocco in 1987

Among those criteria a stipulation regarding a condition of **the EU itself** has also been taken into account. It indicates that each decision to expand will depend on the ability of the Union to absorb new members, because maintaining the pace of development of the European Union is of interest both to the Union and the candidate countries. Institutions and decision-making processes in the EU must continue to be effective and transparent so that while receiving more countries, the EU is able to continue the development and implementation of common policies and to ensure continuity of funding its ongoing actions.

4. At the European Council meeting in Madrid in 1995, in turn, the so-called **Madrid criteria** were developed. It was then established that the country applying for membership must be in a position to implement EU rules and procedures, **have the administrative capacity** to guarantee the effective adoption and implementation of the *acquis communautaire*. The Member State is obliged to adjust their administrative structures, because it is important not only to transfer the EU legislation into national law, but also for the provisions to be effectively implemented and enforced through appropriate administrative and judicial structures.
5. The European Council also emphasizes **the principle of peaceful settlement of disputes** in accordance with the Charter of the United Nations as an eligibility criterion. Candidate Countries are encouraged to make every effort to peacefully resolve border disputes and other related issues⁶⁵.
6. **Political willingness** of the applicant for membership, as well as countries already belonging to the Union is with no doubt an important factor. Meeting the conditions for the acquisition of membership is a prerequisite for starting and running the next steps in the accession process.
7. In addition to the requirements relating to countries applying for membership in the Union, condition relating to the Union is also formulated. It is the so-called **absorption capacity**, or in other words **the readiness of the EU to expand**⁶⁶. The pace of enlargement must be adjusted to the Union's capacity to absorb new members, because it must be able to simultaneously maintain its development and make further progress.

In the catalog of absorption capacity criteria of the Union the following should be indicated:

- a) effective operation of the EU institutions;
- b) achievement of objectives within the framework of EU policies;
- c) compliance with the objectives of the budget and available resources.

⁶⁵ See more in: Conclusions of the European Council Summit in Helsinki, which took place on 10 - 11 December 1999

⁶⁶ Absorption capacity criterion was defined in the Communication from the Commission to the European Parliament and of the Council of 8 November 2006 - Enlargement Strategy and Main Challenges 2006-2007, including special report on the EU's capacity to integrate new members.

The EU's ability to accept new members, or rather to integrate them, is derived from the development of EU policies and institutions and the transformation of the candidate countries into well prepared Member States of the Union.

3. The accession procedure

1. The European Union uses comprehensive procedures by which new members are accepted only after meeting all eligibility criteria and after approval by the EU institutions, the governments of the "old" EU member states and governments of the applicant member. The **accession regulations** laid down by the EU combine both **intergovernmental** (for example, states are parties to the treaty) and **supranational nature** (participation in the process of accession of such EU institutions as the Commission or the European Parliament). It is not surprising that the procedure is complicated and long-lasting.

2. The following stages can be distinguished:

- f) preparation of the State concerned for future membership in the European Union with the pre-accession strategy⁶⁷;
- g) submission of a formal application for membership to the Council (into the hands of the Presidency), which is a reflection of the political willingness of the State concerned; the transmission of information on the application to the European Parliament and national parliaments;
- h) asking the Commission by the Council to assess the applicant's ability to meet the conditions of membership;
- i) the official beginning of negotiations between the candidate state and all the member states after granting the negotiating mandate by the Council⁶⁸;
- j) planning the calendar of the accession negotiations of the country concerned;
- k) for each of the candidate countries negotiating framework is determined separately. Negotiations are preceded by the so-called *screening*, a detailed analysis of individual subject areas with the participation of the State concerned. The purpose of this stage is to determine the level of preparedness of the candidate for membership in the Union. Negotiations are conducted individually with any country applying for membership.

⁶⁷ Pre-accession strategy sets out a framework that the country wishing to obtain the status of a member must observe in the process of applying for membership. It is adapted individually to the political and economic situation of each of the countries concerned. Pre-accession strategy consists of the following structures and mechanisms: bilateral agreement, political dialogue, partnership for membership, participation in programs, agencies and committees of the Union, a national program for the adoption of the *acquis communautaire*, pre-accession financial assistance.

⁶⁸ The negotiating mandate is given to the State concerned on the basis of unanimous decision after receiving a favorable opinion from the Commission.

Currently EU legislation is subject to negotiation divided into 35 thematic areas: free movement of goods, free movement of workers, freedom of movement of capital, freedom of establishment and freedom to provide services, public procurement, company law, intellectual property law, competition policy, financial services, information society and media, agriculture, food safety, veterinary and phytosanitary policy, fisheries, transport policy, energy, taxation, economic and monetary policy, statistics, social policy and employment policy and industrial enterprises, trans-European networks, regional policy and coordination of structural elements, justice and fundamental rights, justice, freedom and security, science and research, education and culture, the environment, consumer protection and health, customs union, external relations, foreign policy, security and defense, financial control, financial and budgetary provisions, institutions and other issues. The first mandatory step of both parties (the “Union” represented by all EU Member States and candidate countries) accessing negotiations is to develop negotiating positions. Negotiations are conducted on the basis of *nothing is agreed until everything is agreed*, therefore, the final conclusion of the negotiations takes place only after completion of the stage. It is possible, however, to temporarily close negotiations in a specific area. Conclusion of the negotiations, stated by the European Council, results in the country’s being subject to information and consultation procedure⁶⁹;

- l) submission of an agreed draft of accession agreement to the Council, which is required to consult the Commission and obtain the consent of the European Parliament on the proposed draft⁷⁰, deciding on the State’s accession to the Union the Council shall act unanimously;
- m) ceremonial signing of the Treaty on the final intergovernmental accession conference both by the representatives of all Member States and acceding countries; obtaining an active observer status⁷¹ by the acceding countries with the signing of the Treaty;
- n) the ratification of the accession agreement by all the “old” EU Member States and acceding countries in accordance with the constitutional provisions in

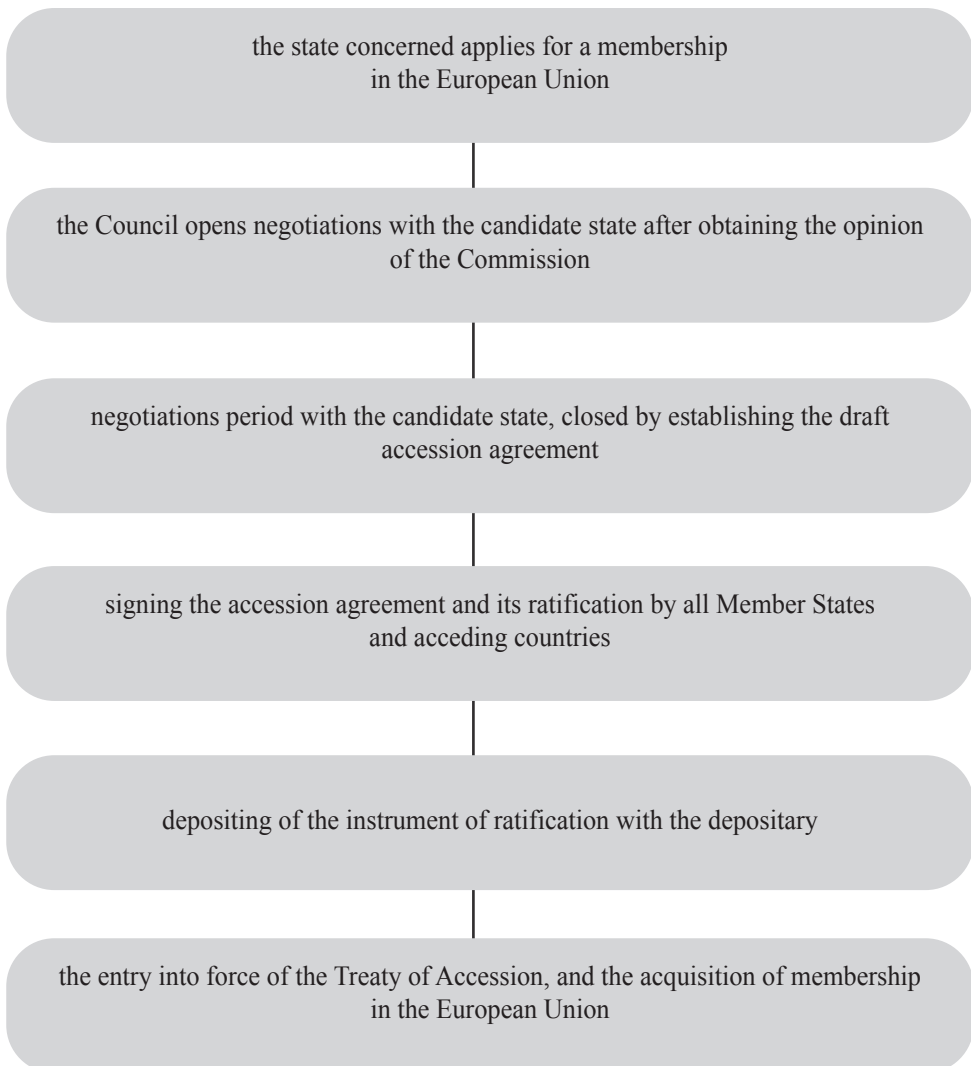
⁶⁹ Information and consultation procedure is applied to the states in relation to which a decision on their admission to the European Union has already been taken. It is based on the fact that these countries receive EU working documents, may present their views on specific issues or made legitimate requests for modification of the measures proposed by the Union.

⁷⁰ In accordance with Article 49 of the TEU, the European Parliament by a majority agrees - a positive vote in Parliament is a condition for the adoption of the treaty by the Council. However, the Commission’s opinion is not binding to the Council.

⁷¹ Active observer status gives countries the possibility, among others, to participate in working groups and committees of the Council, as well as meetings of the EU Council and the European Council, in the work of COREPER II and COREPER I meetings, in the transitional period between the signing of the accession treaty and its entry into force. Acceding country is given the opportunity to speak on the forum of the EU institutions and agencies, however, is not entitled to vote.

- force in each of them, the deposit of instruments of ratification by the deadline with the depositary, the Government of the Italian Republic;
- o) obtaining by the Member State concerned the European Union membership on the date of entry into force of the Treaty of Accession.

3. Schematic presentation of the accession procedure



4. The Treaty of Accession

1. In accordance with the terms of the EU Treaty the adoption conditions and the resulting adjustments to the Treaties on which the Union is based are the subject of the agreement between the Member States and the applicant for membership. This agreement is subject to ratification by all the contracting States in accordance with their respective constitutional requirements⁷². It provides a **unified legal basis for the state's accession to the European Union**, with the result that the State concerned shall at once proceed to the two founding treaties, the TEU and the TFEU. Acceding State that enters the appropriate rights and obligations, is committed primarily to the adoption of the EU *acquis*.

Accession agreement is **an international agreement amending the founding treaties** - on the side of the Union the party to the agreement are "old" Member States and the other party of the agreement is the state concerned. The Treaty of Accession adapts the founding treaties to the situation that arises as a result accepting the new member.

2. In the Accession Treaty the following sections can be distinguished:

- a) **Treaty of Accession to the European Union-accession treaty in the strict sense**. This document is very concise. In practice it consists of a preamble and three articles. These articles set up the membership of the country, indicate conditions for admission, confirm that the Treaty should be the primary law of the Union, stress the obligation of ratification and submission of documents to the depositary, pointed the language in which the Treaty was drawn up, and the date of its entry into force.
- b) **The act concerning the conditions of accession and the adjustments to the Treaties on which the European Union is based** - form, together with the so-called **Treaty of Accession the Accession Treaty in the broad sense**. This is a very comprehensive document, which is an integral part of the Treaty *in the strict sense*. Five basic parts can be distinguished: Principles, Changes in the Treaties, Permanent provisions, Temporary provisions, Provisions relating to the implementation of the Act into force. The so-called transitional periods, transitional provisions and provisions for implementation of the Act negotiated by the acceding country are relevant provisions of this part of the treaty. As a rule, the Act includes numerous annexes and protocols, which are an integral part of it.
- c) **The Final Act** - which includes various types of joint declarations, both multilateral and individual ones. **It is not part of the accession treaty**, but the statements in it are relevant to the interpretation of the treaty *in the broad sense*⁷³.

⁷² Article 49 of the TEU.

⁷³ Article 31 paragraph 2 *Vienna Convention on the Law of Treaties*, from Vienna on 23 May 1969 (Journal of Laws of 1990 No 74, item 439), hereinafter referred to as the *Vienna Convention*.

3. The overall conclusion is that the Accession Treaty is an international agreement which states:

- e) rights and obligations of the new Member States of the Union;
- f) rules of changes in the composition of the EU institutions and bodies of the representatives of the new members and new rules for the functioning of these institutions and bodies;
- g) detailed description of the findings made as a consequence of membership negotiations in the specific areas of socio-economic development;
- h) list of instruments including the new member states, together with the changes to be made to those measures as a result of EU enlargement;
- i) decision making process during the period from the signing of the Treaty to the acquisition of membership by the state.

5. The rights and obligations of a Member State

1. With the accession to the European Union the State gains certain rights and obligations. In the catalog of **basic rights** enjoyed by the Member States are:

- f) participation in the decision-making process in the European Union by the right of legislative initiative and participation in the lawmaking procedure;
- g) possession of representatives of local governments, nations or groups of interest in all the institutions, bodies, offices and agencies of EU;
- h) using the EU funds;
- i) bringing actions before the Court of Justice of the European Union (e.g. failure to act by an institution, the invalidity of an act, the failure to perform its treaty obligations by a Member State).

2. Whereas, among the **most important obligations** resulting from membership in the Union as an organization, the following should be noted:

- b) respect for the values and principles on which the Union is founded;
- c) the acquisition and application of the EU law;
- d) facilitating the Union achievement of its goals and taking action to achieve common policies;
- e) depositing set membership fees into the EU budget;
- f) submitting to the jurisdiction of the Court of Justice of the European Union;
- g) performing other obligations imposed on the Member State.

6. Suspension of Member State laws

1. In the case of a serious and persistent breach by a Member State belonging to the European Union of such values as human dignity, freedom, democracy, equality and human rights, including the rights minorities, the EU Treaty provides the possibility of suspending the laws of the Member States⁷⁴. The treaties **do not provide for the general suspension of membership** in the Union, but **only the suspension of the state in some of the rights** deriving from the application of the Treaties. It should be emphasized, however that the institution of the suspension of the rights of states is applied only after the exhaustion of complex and harsh warning procedures.

2. An essential step in this proceeding is the prior **statement of a clear risk of a serious breach of the values on which the Union is founded**⁷⁵. The proceedings can be initiated on a reasoned proposal by one third of the Member States, the European Parliament or the European Commission. The decision on the existence of a clear risk of a serious breach of the values on which the Union is founded is taken by the Council, and based on a pronouncement of a majority of four fifths of its members after obtaining the assent of the European Parliament. Before making this decision it is mandatory for the Council to listen to the country, and in appropriate circumstances, it may also refer to the recommendations. The Council is also committed to regularly examine whether the reasons for the decision on the existence of a clear risk of a serious breach of indicated values remain valid.

3. Whereas **finding a permanent and serious breach by a Member State of the values mentioned in art. 2 of the TEU** is stated by the European Council shall, acting unanimously on a proposal by one third of the Member States or the European Commission, with the approval of the European Parliament and the calling of the State concerned to submit their comments. As a result, the Council may decide to suspend certain of the rights of the State deriving from the application of the Treaties, including the right to vote of the representatives of the government of the State in the Council. Suspension of rights, however, does not exempt the state from the obligations imposed upon it by the Treaties.

4. It should be also remembered that the suspension of rights of a member state in the EU is always **temporary in nature**, as in the case of changes in the situation, that is, if the state returned to respecting the values, the Council, acting by a qualified majority, may decide to amend or repeal the measure.

⁷⁴ Article 7 of the TEU.

⁷⁵ Article 2 of the TEU.

7. A Member State withdrawal from the European Union

1. Against the background of the legal status before the entry into force of the Treaty of Lisbon, in the light of the *Vienna Convention*, specific integration nature of the EU in principle ruled out basing the possibility of a state withdrawal from the Union on the implied or intended plan of the parties or the nature of the treaty⁷⁶. The Lisbon Treaty was the first reform treaty, it introduced the procedure of a Member State withdrawal from the European Union⁷⁷.

For the initiation of the discussed procedure, the country concerned has to make a decision according to the constitutional requirements appropriate for the state. The intention shall be communicated to European Council. Having received such notification, the European Council shall develop guidelines under which the EU is negotiating with the state the agreement setting out the terms and conditions of withdrawal.

Among the articles of this type there should primarily be those governing framework for the future relations of the State with the Union⁷⁸. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament, as opposed to the accession agreement, the parties of which are the EU Member States and the applicant for membership.

In the cases referred to the European Council a member of the Council representing the withdrawing Member State shall not participate in both sessions, as well as make decisions relating to the state.

2. **Withdrawal** is a **unilateral act**, and therefore the conclusion of the agreement is a necessary condition. In the absence of the agreement, treaties cease to apply to the state after the expiration of two years from the notification of the intent. The indicated period of two years may be extended by a unanimous European Council decision taken in consultation with the Member State concerned.

Withdrawal from the European Union does not close the way to re-establish the country as a member of the European Union⁷⁹.

8. Exclusion of a Member State from the European Union

Both the Treaty on European Union and the Treaty on the Functioning of the European Union do not contain provisions governing the exclusion of countries from

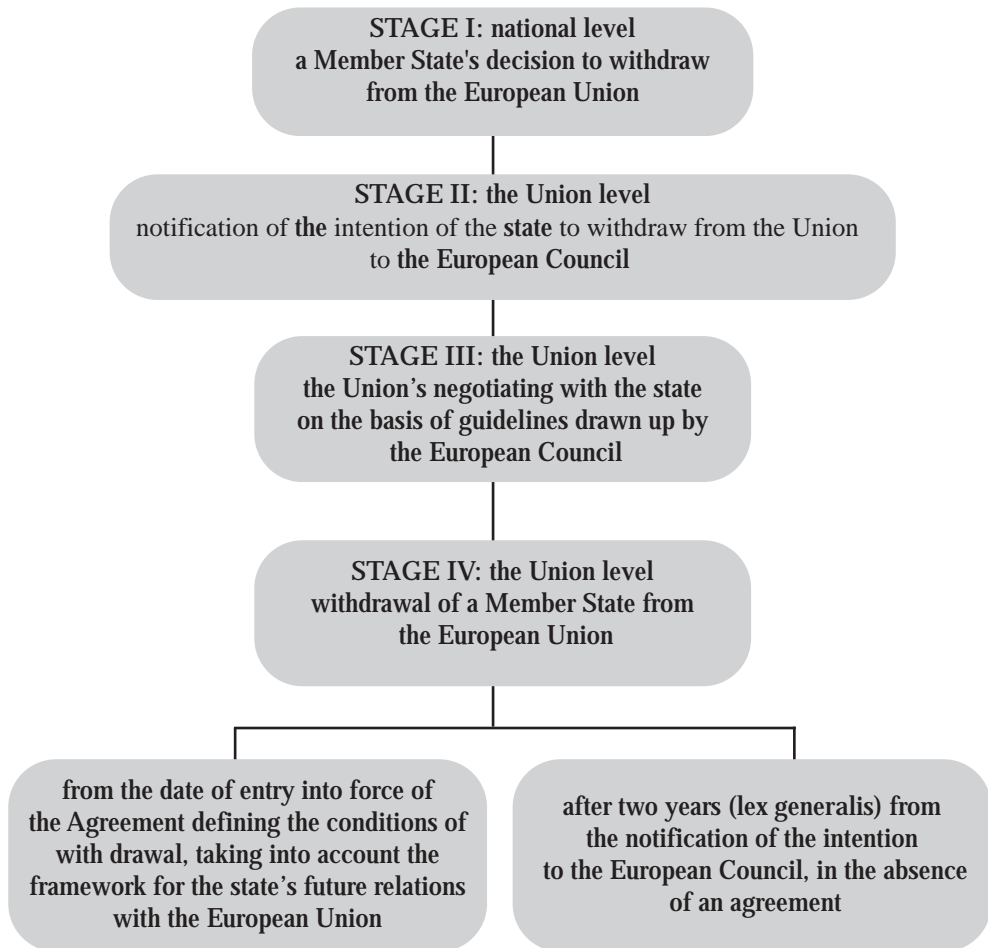
⁷⁶ P. Gilowski, *Podstawy prawne...*, p. 79.

⁷⁷ See Article 50 of the TEU.

⁷⁸ That agreement shall be negotiated in accordance with Article 218 paragraph 3 of the TFEU.

⁷⁹ In accordance with Article 50 paragraph 5 of the TEU, if the State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49 of the TEU.

3. Schematic presentation of a Member State withdrawal from the European Union



the European Union. It is therefore considered that such exclusion is unacceptable, although, treaties are subject to the general rules of the Treaties' implementation, adopted in public international law. *The Vienna Convention*⁸⁰, which provides for the right of revocation or suspension of operation of the treaty in relation to the State which has committed a material breach of its provisions, however, applying these

⁸⁰ Article 60 of the *Vienna Convention*.

rules in the context of the European Union seems to be limited due to the specific nature of the organization and the applicable loyalty rule. Moreover, it is impossible to exclude from the EU the countries that carry out their treaty obligations and do not allow for any violations of the treaties.

§4. THE OBJECTIVES AND TASKS OF THE EUROPEAN UNION

1. General Remarks

1. The European Union was created in order to foster **peace and prosperity of its peoples, based on common values**. In accordance with the Treaties⁸¹, peace and prosperity of its peoples can be achieved only in the context of integration covering both the integration of the economies of the Member States as well as the integration of the nations. Joint action of removing the barriers which divide Europe, in accordance with the Treaties, is the only way to achieve economic and social progress. Due to such general targets European Union integration processes take place on many levels.

2. There are three basic areas of integration processes: economic, social and external actions.

Economic level of integration includes the strengthening of European integration and ultimately a convergence of the economies of the Member States and adoption by all the states one and stable currency. **Convergence** means achieving a uniform level of development. It is achieved by performing a number of tasks, not only in the integration of economies, but also aimed at “catching up” in the areas dependent on economic growth. In particular, among the dependent areas the Treaties indicate reinforced cohesion in the area of environmental protection, taking into account the principle of sustainable development. Reducing the differences existing between the various regions and the delay of the less privileged are considered to be key issues. This approach to an economic integration should guarantee a steady expansion, balanced trade and fair competition.

Social level of integration includes tasks aimed at deepening solidarity between peoples. In carrying out the tasks, the principle of subsidiarity is implemented, according to which decisions are taken as close to the citizens as possible. In particu-

⁸¹ The Preamble of the TFEU and the TEU.

lar, the EU sets continuous improvement of living and working conditions of individuals as a target of its efforts. In addition, it supports the development of the highest possible level of knowledge for their peoples through wide access to education and through its continuous updating. The activities of the European Union are also directly addressed to an individual becoming the subject of matters. The special status of an individual is shaped by the citizenship of the Union and the Area of Freedom, Security and Justice.

At the level of **external actions** the European Union seeks to create a single representation in foreign policy. The realization of these objectives, at the current state of integration processes, is outside the main area of integration. Common Foreign and Security Policy, including the key areas of external actions, is the domain of intergovernmental cooperation with limited competence of the EU. In a narrow range of external activities, however, the European Union has its own competences.

2. The objectives and tasks of the European Union

1. The European Union is an international organization which, in accordance with the will of the Member States, was set up to achieve certain goals. They have been identified in the Treaties and include an overall condition which the EU seeks to achieve through the implementation of its tasks⁸². EU's objective is to **promote peace, prosperity of the Union and its citizens**⁸³. In determining the relationship between three concepts of peace, and the prosperity of European citizens, it seems legitimate to say that ensuring compliance with the values and striving to achieve a general well-being are *sine qua non* conditions for peace. Achieving peace is dependent to the other two.

2. The objectives are to be achieved through the implementation of four key integration tasks that the Member States put ahead of themselves. These include: ensuring the Area of Freedom, Security and Justice, establishment of the internal market, establishment of Economic and Monetary Union and implementation of activities in the area of external relations. This is not a complete list, but according to the scheme of the treaty, it is a list of the most important tasks. It should be stressed that they are not uniform, but constitute a sum of the sub-tasks.

3. Distinguishing between objectives and tasks can be replaced by identifying the overarching objectives and instrumental objectives. By adopting such a classification

⁸² Division, or the very distinction between tasks and objectives of the European Union is inconsistently treated, both in the literature and legislation. Accepted classification was based on Article 3 of the TEU. However, differentiation between tasks and objectives has been based on the criterion of hierarchical subordination and the order indicated in the Treaty.

⁸³ Article 3 paragraph 2 of the TEU.

instrumental objectives will be the same as tasks and will provide stages that should be completed by the Union in order to achieve the overarching objectives, such as promoting peace and prosperity of its peoples.

4. The tasks of the European Union are a set of elements that are closely related and mutually reinforcing. Implementing one of the tasks cannot be carried out independently of the others. Their implementation requires cooperation and coordination between the European Union and the Member States. Mutual cooperation is especially important in the areas of coordination of Member States that have not been explicitly included in the category of EU competences.

a) Area of Freedom, Security and Justice

1. According to the Treaty on European Union⁸⁴ the Union shall offer its citizens Area of Freedom, Security and Justice without internal frontiers, in which the freedom of movement of persons, in conjunction with appropriate measures to ensure the safety of an individual is guaranteed. In its current form, shaped by the Treaty of Lisbon, the focus of the EU in the Area of Freedom, Security and Justice is the individual - a citizen of the European Union. The Area of Freedom, Security and Justice is to ensure freedom of movement of the individual. Freedom is one of the fundamental rights guaranteed by the European Union. Freedom understood as the freedom of movement of people is a *cornerstone* of The Area of Freedom, Security and Justice⁸⁵.

2. Area of Freedom, Security and Justice is an area without internal borders. It does not cover a particular geographical area, but the **area of uniform regulations** aimed at realization of the free movement of persons in conjunction with the provision of the security of an individual. Policies introduced by the European Union and cooperation with Member States are designed to ensure safety.

First of all, the Union shall develop a common policy on asylum, immigration and external border control. Secondly, it shall provide a high level of security through measures preventing crime, racism and xenophobia and combating these phenomena. In particular, the measures for coordination and cooperation between police, judicial and other competent authorities. It also adopts measures for the mutual recognition of judicial decisions in criminal matters and the approximation of criminal laws. Thirdly, the Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial documents in civil cases⁸⁶.

⁸⁴ Article 3 paragraph 2 of the TEU.

⁸⁵ *The European Council meeting in Tampere, 15-16 October 1999, Conclusions of the Presidency*, European Integration Monitor 28/2000, pp. 90-102.

⁸⁶ Article 67 of the TFEU.

b) The internal market

1. The European Union establishes an area without internal frontiers in which the **free movement of goods, persons, services and capital** is ensured⁸⁷. Through the implementation of internal market objectives the EU is to work towards a lasting peace in Europe⁸⁸. The basis of the internal market is sustainable economic growth and price stability, social market economy⁸⁹, aiming at full employment and social progress and a high level of protection and improvement of the environment.

The internal market is a single regulatory area, within which goods, services, people and capital can freely move⁹⁰. Uniform regulations provide individuals with the ability to use the freedom of establishment and freedom of movement through the territories of the Member States of the European Union. The functioning of the internal market can be considered in two aspects: the unity outside and the freedom to the inside. The external aspect manifests itself in the protection of the EU's trade relations with third countries. The internal aspect includes the guarantee of European freedoms and undistorted competition within the European Union⁹¹.

2. The internal market is not purely of economic nature. Development of the internal market affects the other areas that are not directly related to European freedoms, and their development is dependent on it. In particular the Treaties indicate the necessity to encourage scientific and technical progress, to fight against social exclusion and discrimination and to promote social justice and protection, equality between women and men, solidarity between generations and protection of children's rights. In the internal market, the European Union supports the economic, social and territorial cohesion and solidarity among Member States. The implementation of the task of creating the internal market shall conform to cultural and linguistic diversity. The European Union shall ensure the protection and development of Europe's cultural heritage.

The realization of the internal market requires a multi-faceted, horizontal approach. Differentiating the internal market in the strict sense and in the broad sense corresponds with this statement. In a narrow sense it includes free European market (free movement of persons, goods, services and capital) and the competition rules necessary for its proper functioning⁹². In a broad sense it also applies to EU policies constituting an additional, complementary element⁹³.

⁸⁷ Article 26 paragraph 2 of the TFEU.

⁸⁸ Article 3 paragraph 3 of the TEU.

⁸⁹ Cf. Article 20 of the Polish Constitution.

⁹⁰ A. Kuś, *Podstawowe założenia rynku wewnętrznego Unii Europejskiej*, (in:) A. Kuś (ed.), *Prawo materialne...*, p. 25.

⁹¹ *Ibid*, p. 26.

⁹² Protocol No. 27 to the Treaty of Lisbon on the internal market and competition.

⁹³ *Ibid*, p.28

c) Economic and Monetary Union

1. Economic and Monetary Union includes two levels of the EU. First, **the economic union**, which eventually will lead to **economic convergence**. Cooperation at this level is to coordinate the economic policies of the Member States, the implementation of the internal market objectives and setting common goals as well. Secondly, it includes **monetary union**, under which Member States shall introduce a single currency - the **euro**⁹⁴. At this level, the European Union shall define and pursue the creation of a single monetary policy and exchange rate policy, main objective of which is to maintain price stability and to support the general economic policies in the Union. All activities within the EMU are conducted in accordance with the principle of an open market economy with free competition.

2. The activities of the Member States and the European Union in the framework of EMU entail compliance with the following guiding principles: stable prices, sound public finances and monetary conditions and a sustainable balance of payments⁹⁵. Respect for the principles is particularly important from the point of view of the division of powers between the Member States and the European Union in the field of economic and monetary policy. Although the monetary policy of the euro area Member States is the exclusive competence of the European Union, in the remaining area the EU has only the power to coordinate economic policies and maintain price stability in monetary policy.

The economic policies of the Member States are of common interest⁹⁶. The Council is involved in coordinating activities; it formulates a draft of the broad guidelines for the economic policies of the Member States and the Union and reports it to the European Council. The European Council, on the basis of the report of the Council, discusses a conclusion based on the broad guidelines for the economic policies. Once the conclusion is reached, the Council accepts the recommendation and informs the European Parliament about them. The Council, on the basis of reports prepared by the Commission monitors economic developments and the compatibility of this development with the broad guidelines for the economic policies.

3. Currently, only part of the countries belong to the monetary union. These countries are often referred to **Eurozone**, or the **Eurogroup** countries⁹⁷. Currently, the Eu-

⁹⁴ Article 3 paragraph 4 of the TEU.

⁹⁵ Article 119 paragraph 3 of the TFEU.

⁹⁶ Article 121 of the TFEU.

⁹⁷ This term is used in primary law. See for example Protocol 14 to the Treaty of Lisbon on the Eurogroup.

rozone includes 17 countries⁹⁸. The Member States, that according to the Council do not fulfill the necessary conditions to adopt the Euro, are known as the Member States with a derogation⁹⁹. **Derogation** is the exclusion of countries from the provisions of the monetary union. To adopt the euro a Member must cumulatively meet **four conditions of convergence**. These conditions are:

- a high level of price stability,
- stable public finances,
- observance of the normal fluctuation margins provided for exchange-rate mechanism of the European Monetary System, for at least two years, without devaluing against the Euro,
- convergence of the long-term interest rates.

The condition of price stability is achieved, if the Member State has a lasting price stability, and the average rate of inflation, observed over a period of one year preceding the examination, does not exceed the inflation of the three Member States with the most stable prices by more than 1.5%. Inflation is measured by the consumer price index on a comparable basis, taking into account differences in national definitions¹⁰⁰.

The condition of stable public finances is met if, during the examination the Member State is not covered by the Council's Decision on the existence of an excessive deficit.

The condition of participation in the exchange rate mechanism of the **European Monetary System** means that the Member State has respected the normal fluctuation margins provided for the exchange rate mechanism of the European Monetary System without severe tensions for at least two years before the examination. In particular, the State should not have devalued its bilateral central rate against the euro on its own initiative for the same period.

The convergence of long-term interest rates means that within one year before the examination, a Member State has had an average nominal long-term interest rate that does not exceed the interest rate of three member states with the most stable prices by more than 2%. Interest rates should be based on long-term government bonds or comparable securities, taking into account differences in national definitions.

Not all countries that meet the convergence criteria belong to the Eurozone.

4. After consulting the European Parliament and after a discussion in the European Council, the Council abrogates the Member States concerned. The Council acts having received a recommendation of a qualified majority of its members represent-

⁹⁸ The Eurozone includes: Ireland, Germany, the Netherlands, Finland, France, Germany, Belgium, Luxembourg, Spain, Portugal, Greece, Italy, Slovenia, Cyprus, Malta, Slovakia and Estonia. It is worth mentioning that the crisis of 2008-2009 and the current from the years 2011-2012 show that individual countries of the Eurozone ignoring the restrictions resulting from the Treaties exceeded the deficit limit, trying to stimulate economic growth in their country. This contributed to the destabilization of the whole Eurozone.

⁹⁹ Article 139 paragraph 1 of the TFEU.

¹⁰⁰ Protocol No 13 to the Treaty of Lisbon on the convergence criteria.

ing Member States whose currency is the euro. If it is decided to abrogate a derogation the Council, acting unanimously with the votes of the Member States whose currency is the euro and the given Member State at the request of the Commission and after consulting the European Central Bank, irrevocably fixes the rate at which the euro is substituted for the currency of a Member State and decides on the other measures necessary for the introduction of the Euro as a single currency in the Member State. It is not possible for a state to join the Eurozone without the state's consent.

d) External actions

1. The European Union, from the entry into force of the Treaty of Lisbon, unquestionably has subjectivity under international law. As an international organization within the scope of its competence under international law it has the true ability and capacity to act. In accordance with the Treaties of the EU its external relations uphold and promote its values and interests and contribute to the protection of its citizens¹⁰¹. It works for: peace, security, sustainable development, global solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, particularly the rights of children, as well as the strict observance and development of international law.

The European Union's external actions are based on the principles¹⁰² of democracy, rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the UN Charter and international law. The European Union pursues its powers granted in relations with third countries, as well as international organizations, at regional and global levels. The main objectives of the European Union's external actions are¹⁰³:

- protection of its values, fundamental interests, security, independence and integrity;
- strengthening and supporting democracy, the rule of law, human rights and the principles of international law;
- peace-keeping, conflict prevention and strengthening international security in accordance with the purposes and principles of the Charter of the United Nations, as well as the principles of the Helsinki Final Act and the objectives of the Paris Charter, including the purposes and principles relating to external borders;
- promoting sustainable economic and social development and environmental awareness in the developing countries, with the primary aim of eradicating poverty;

¹⁰¹ Article 3 paragraph 5 of the TEU.

¹⁰² Article 21 paragraph 1 of the TEU.

¹⁰³ Article 21 paragraph 2 of the TEU.

- encouraging the integration of all countries into the world economy, including the progressive abolition of restrictions on international trade;
- contributing to the development of international measures to preserve and improve the environment protection and the sustainable management of global natural resources, in order to ensure sustainable development;
- assisting populations, countries and regions confronting natural or man-made disasters;
- promoting an international system based on stronger multilateral cooperation and good global governance.

2. Considering competences granted by the Member States to the European Union, there are two areas of external actions: the Union's external actions and CFSP. Union's external actions are areas in which competence has been transferred to the European Union. Common Foreign and Security Policy of the Member States is a domain where it is impossible to take legislative acts.

3. **Union's external actions** include: Common Trade Policy, cooperation with third countries, humanitarian aid, international agreements and maintaining relationships with other subjects of international law, in accordance with the powers granted. Common Commercial Policy and the right to enter into international agreements, if the right to its conclusion is provided for in the Treaties, are the exclusive competence of the European Union. In co-operation with third countries and humanitarian aid organizations, the European Union and its Member States are mutually reinforcing and complementary¹⁰⁴.

4. The Treaty of Lisbon abolished the historical pillar structure of the EU. It did not lead to full harmonization of EU competence in all aspects of integration. Still in the framework of the **Common Foreign and Security Policy** some specific solutions exist that shape this area of integration as a platform for intergovernmental co-operation with limited competence of the EU. The Union's competence in the field of the Common Foreign and Security Policy covers all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a Common Defense Policy. Common Foreign and Security Policy is subject to specific rules and procedures¹⁰⁵, the Member States and the High Representative implement by means of national and EU instruments. The European Union may adopt general guidelines, decisions and strengthen systematic cooperation between Member States in the conduct of policy¹⁰⁶.

¹⁰⁴ Cf. Article 208 of the TFEU et seq.

¹⁰⁵ Article 24 paragraph 1 of the TEU.

¹⁰⁶ Article 25 of the TEU.

Member States are free to formulate and conduct their own foreign policy, its national diplomatic service, relations with third countries and participation in international organizations, including the participation of the Member State in the UN Security Council¹⁰⁷.

Within the framework of the CFSP, Member States act in conformity with the principle of loyalty and mutual solidarity and shall comply with the Union's action in this area¹⁰⁸. In the positive aspect they work together to enhance and develop their mutual political solidarity. In the negative aspect they refrain from any action which is contrary to the Union's interests or likely to impair its effectiveness as a cohesive force in international relations.

§5. GENERAL PRINCIPLES OF THE EUROPEAN UNION

1. General Remarks

1. The European Union operates on the basis of the principles of law which are overarching standards expressing fundamental values of the legal system and playing a special role in the interpretation and application of the law¹⁰⁹.

Because of their source the legal principles of the European Union can be divided into two groups: **general** (borrowed) and **structural rules** (own). The first group includes the general principles that are borrowed from international law and the constitutional traditions common to the Member States¹¹⁰. General principles include, among others: the principle of the rule of law, legal certainty, *lex retro non agit*, good faith, *pacta sunt servanda*. The European Union appears here as a continuation of the principles already operating on the national and international level. The second group are the structural rules. They concern both the functioning of the EU and the application of EU law¹¹¹. Structural rules shape the functioning of the European Union and its relations with other entities. The EU is seen here as a particular kind

¹⁰⁷ Declarations No 13 and No 14 on the common foreign and security policy.

¹⁰⁸ Article 24 paragraph 3 of the TEU.

¹⁰⁹ See P. Justyńska, *Zasady Prawa Unii Europejskiej*, in: J. Galster (ed.), *Podstawy prawa Unii Europejskiej z uwzględnieniem Traktatu z Lizbony*, Toruń 2010, p. 219.

¹¹⁰ Principles drawn from the constitutional traditions do not have to apply to all constitutional systems of the Member States. These rules are generally accepted by the legal systems of most countries and in line with the trends unfolding in the legislation of the Member States. See J. Galster (ed.), *Podstawy prawa Unii Europejskiej z uwzględnieniem Traktatu z Lizbony*, Toruń 2010, p. 222.

¹¹¹ Rules for the application of the EU law will be discussed in Chapter VI.

of international organization that combines elements of international cooperation with transnational structure. Structural rules are known to national and international law, the new status of which is based on specific approach of the EU law.

2. In the doctrine there is no uniform distribution of the rule of law, and the distribution shown above represents one of the possibilities. For example, the principle of EU law, taking into account the criterion of origin can be divided into: the axioms which are an integral part of the concept of law, principles derived from the structural characteristics of a particular legal system and common law principles characteristic of transnational legal system. Taking the legal basis as a criterion, the rules can be divided into direct result of the Treaties, derived from the Treaties and the derived interpretation of the law¹¹².

2. The values of the European Union

1. According to the preamble of the Treaty on European Union, the European Union is based on the cultural, religious and humanist inheritance of Europe, from which the universal values have developed. The catalog indicated in the preamble covers the inviolable and inalienable human rights, freedom, democracy, equality and the rule of law. Further articles clarify this directory. In particular, the Union is founded on the values of¹¹³: respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities¹¹⁴. These values are common to the Member States in a society based on pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men.

2. In the catalog of the EU values special place is occupied by fundamental rights. Protection of cardinal rights, or human rights, is one of the fundamental principles of the EU law. The main catalog of fundamental rights is contained in **the Charter of Fundamental Rights**, which is a universal set of laws aimed at protecting individuals, regardless of their origin¹¹⁵. With the entry into force of the Treaty of Lisbon, the Charter became legally binding¹¹⁶, and the European Union was granted the compe-

¹¹² See P. Justyńska, *op. cit.*, p. 227.

¹¹³ Article 2 of the EU Treaty.

¹¹⁴ Similarly, the CPP preamble states that the *Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity, based on the principles of democracy and the rule of law. By establishing the citizenship of the Union and by creating an area of freedom, security and justice it places the individual at the heart of its activities.*

¹¹⁵ See more in Chapter VIII of this handbook.

¹¹⁶ Article 6 of the TEU.

tence to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms¹¹⁷.

3. By reference to the values, as the **axioms of the European Union**, it is stressed that European integration is not only of economic, political and legal nature, and that the European Union is a **community of values**. Compliance with the values is a condition allowing for the accession to the EU of the new state. A Member State violating the values can be suspended from the exercise of certain rights available to it, including the right to vote in the Council¹¹⁸.

§6. EU STRUCTURAL POLICY

1. General Remarks

1. Structural rules are also referred to as **basic principles, or the EU political system rules**. They include four categories of principles:

- rules determining the competences of the European Union,
- rules governing the relations between the European Union and the Member States or between Member States,
- rules governing the relations between the European Union and its citizens,
- the institutional rules of the European Union.

EU competences are determined by the rule of the powers conferred and supplemented by the principle of subsidiarity and proportionality. Relations between the Union and the Member States are determined by the principle of equality of states and respect for national identities and the principle of loyal cooperation. Relations of the European Union to its citizens are laid down by the rules of democracy, and the relationship between the EU institutions are shaped by the institutional framework.

2. Distinguishing the rules governing the powers of the European Union as the first category of structural rules results from the assumption that the principle of the powers conferred is the foundation of the European Union and constitutes it¹¹⁹. Then, bearing in mind that the Member States are the creators of the integration processes, the rules for relations between the European Union and the Member States and between Member States were set up. Putting the principles of democracy as following

¹¹⁷ Article 6 paragraph 2 of the TEU.

¹¹⁸ Article 7 paragraph 3 of the TEU.

¹¹⁹ P. Saganek, *Article 5.*, pp. 173-175.

is determined by giving an individual, as subject to the EU law, a special status. The last group consists of institutional rules.

2. The principles of conferred competences (attributed powers)

1. The European Union acts under the powers conferred (assigned) by the Member States. The Union and its institutions can only work to the extent provided by the treaties. According to the Polish Constitutional Court¹²⁰, Member States retain the right to assess whether the EU's legislative bodies issuing the specific provision acted within the powers conferred and performed them in accordance with the principles of subsidiarity and proportionality, and the regulations issued in excess of these frameworks are not covered by the principle of primacy of EU law.

2. When discussing the principle of conferral it should be noted that, first of all, the European Union does not have the general power to issue regulations, but it needs specific authorizing provisions. Secondly, only the Member States have the power to change and supplement the Treaties. Thirdly, the Union does not have the competence-competence (*Kompetenz-Kompetenz*), which would allow it expand the list of competences of the European Union itself.

Delegation of powers is not irreversible, and the scope of the referral is shaped by the Member States, as the creators of integration processes.

3. The principle of the powers conferred together with the principle of proportionality and subsidiarity have been entered into the primary law as a structural principle in the Maastricht Treaty. This treaty acknowledged a heterogeneous integration structure and unclear international legal subjectivity of the European Union at that time and defined the division of powers between the then Communities and the Member States.

3. The principle of subsidiarity

1. The principle of **subsidiarity** means that the Union shall act only if and to the extent to which the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central, regional or local level and, if the scale or effects of the proposed action is possible to be better achieved at Union level. The principle of subsidiarity does not apply to the exclusive competences of the EU.

¹²⁰ Constitutional Court's judgment of 11 May 2005, Ref. files. K 18/04.

2. Subsidiarity is one of the fundamental principles of the EU and means the duty of any decision-making to be as close to the citizen as possible at the local and regional authorities' level. Action at the EU level is indicated only when it ensures greater **efficiency and effectiveness** than the action at national level. Efficacy refers to the assessment of whether the objectives can be better achieved by the EU. Efficiency criterion concerns the evaluation whether the purpose of the proposed action cannot be sufficiently achieved by the measures taken by the Member States. These criteria should be fulfilled cumulatively.

3. In assessing the fulfillment of the above criteria mandatory quality indicators and optional (where possible) quantitative indicators are considered¹²¹. In assessing the existence of conditions the following are taken into consideration: the need to minimize any financial or administrative burden, and for the burden to commensurate with the objective.

4. The requirement to comply with the principle of subsidiarity is used to evaluate both the host entity act (substantive aspect) and evaluation forms of that act (formal and legal aspect)¹²². At the substantive level this means checking whether the entities authorized to carry out tasks act as close to the citizens as possible. In the first place they should be regional and local bodies, only when their actions are ineffective and inefficient, or when the task should be carried out uniformly throughout the country, the task should be carried out by central authorities. Moving tasks to the EU level takes place when this results in ensuring greater efficiency and effectiveness.

The principle of proportionality in relation to choosing the form of the act, is the selection of such a measure, which while maintaining the required effectiveness and efficiency, will be the least interfering with national law. A classic example of the application of the principle of subsidiarity is the preference of the issues to the regulations.

Compliance with the principle of subsidiarity is ensured both by the EU institutions and national parliaments. Competence of control of national parliaments is, in particular, carried out in the framework of legislative procedures¹²³.

¹²¹ Cf. Article 5 of Protocol No 2 on the application of the principles of subsidiarity and proportionality.

¹²² See M. Witkowska, *Zasady funkcjonowania Unii Europejskiej*, Warsaw 2008, p. 174.

¹²³ More in Chapter V of this handbook.

4. The principle of proportionality

1. The principle of proportionality means that the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties¹²⁴.

2. Nowadays the principle of proportionality stems directly from the Treaties, however, in the past the Court of Justice has already pointed to its validity¹²⁵. In its judgment on *Fédération Charbonnière* the Court of Justice required the Commission to proportionally respond in the event of illegal activity¹²⁶. The principle of proportionality obtained the status of the meter of the EU actions in the judgment *Internationale Handelsgesellschaft*¹²⁷, where the principle of proportionality was associated with the concept of fundamental rights. According to the thesis the freedom of individuals should not be restricted beyond the scope required for the purposes of public interest. This association continues to function as any restrictions on fundamental rights must be in accordance with the principle of proportionality. Currently, the principle in question is much broader in scope and includes the protection of the Member States.

3. Court of Justice has defined the criteria for adopting the measures in conformity with the principle of proportionality. According to it, in order to determine whether an act is proportional the following should be ascertained¹²⁸: whether the measures expected to be used for achieving a goal correspond to the **importance** of the objective and are **necessary** to achieve it. In addition, the measures adopted by the EU institutions **cannot exceed what is appropriate and necessary** to achieve that objective¹²⁹.

Application of this principle leads to the formation of the ban on excessive official actions¹³⁰. The test of proportionality is a multi-stage one, and its use is necessary. The first criterion of assessment of official actions is the appropriateness of the measure, the second is of its necessity. It should be determined whether there are other ways to achieve the objective, according to the idea that you should use the means the least intrusive in the discretion of the individual. For example, you should consider whether or not there is already existing a less stringent rule for a similar situation.

¹²⁴ Cf. Article 5 paragraph 4 of the TEU.

¹²⁵ See more: J. Maliszewska-Nienartowicz, *Rozwój zasady proporcjonalności w europejskim prawie wspólnotowym*, Studia Europejskie 1/2006, p. 59

¹²⁶ 8/55 *Fédération Charbonnière de Belgique*.

¹²⁷ 11/70 *Internationale Handelsgesellschaft*.

¹²⁸ 66/82 *Fromançais SA v. Fonds d'orientation et de régularisation des marchés agricoles (FORMA)*.

¹²⁹ 15/83 *Denkavit Nederland BV v. Hoofdprodukschap voor Akkerbouwprodukten*.

¹³⁰ Citing M. Witkowska, *Zasady funkcjonowania Unii Europejskiej*, Warsaw 2008, p. 179.

Compliance with the principle of proportionality is ensured by both the EU institutions and national parliaments.

5. The principle of equality, respect for national identities and the basic functions of the state

1. Among the structural principles of the EU law, there is a category of rules governing the relations of the European Union and the Member States. In accordance with the Treaties the Union respects the equality of Member States before the Treaties as well as their national identities¹³¹. It leads to the following specific rules:

- the principle of equality,
- the principle of respect for national identity.

2. The principle of equality, which is also called the **principle of sovereign equality of States**, is based on respect for the equality of Member States before the Treaties. It is derived from the principles of public international law, it means that all countries have equal rights and duties and are equal members of the international community, regardless of the economic, social, political or other differences¹³². In particular, they are equal in law, enjoy the rights of full sovereignty, are obliged to respect the personality of another State, territorial integrity and political independence of the State shall be inviolable, and they have the free right to choose and develop their political, social, economic and cultural system; shall fully comply in good faith with their international obligations and live in peace with other countries. Specific approach of the EU law to this rule is pointing to the European Union as an entity obliged to respect the principle of equality.

3. In its case law the Polish Constitutional Court formed the concept of **constitutional identity**¹³³, basing it on sovereignty as an integral attribute of a state, which helps to differentiate it from other entities of international law. According to the tribunal the attributes of sovereignty are: exclusive jurisdictional competence with regard to its own territory and citizens, exercise the powers in foreign policy, decisions on war and peace, freedom as to the recognition of states and governments, the establishment of diplomatic relations, military alliances deciding on membership in international political organizations and leading independent financial, budgetary and fiscal policy. Accession to the European Union is a kind of limitation of state sover-

¹³¹ Article 4 paragraph 2 of the TEU.

¹³² *Declaration of principles of international law concerning friendly relations and co-operation of States under the Charter of the United Nations*, UN General Assembly Resolution 2625 (XXV), 24 October 1970.

¹³³ Constitutional Court's judgment of 24 November 2010, ref. No. K 32/09.

eignty, for the possibility of co-shaping the decisions taken in the European Union. Among the matters covered by complete non-transfer to the European Union there are those that define the supreme rules of the Constitution and the provisions concerning the rights of individuals defining the identity of the state, including in particular the requirement to ensure the protection of human dignity and constitutional rights, the principle of the state, the principle of democracy, the rule of law, the principle of social justice, the principle of subsidiarity and the need to ensure better implementation of the constitutional prohibition of transfer of the state system power and competence to create competencies. Countries belonging to the European Union retain sovereignty due to the fact that their constitutions, which are an expression of sovereignty, retain their importance.

The concept of **national identity** in the EU law is equivalent to the concept of constitutional identity. According to the Treaty on European Union¹³⁴ the Union respects the national identity, inherent in the fundamental political and constitutional structures, inclusive of regional and local government. It also respects the essential functions of the state, especially functions ensuring its territorial integrity, maintaining law and order and protecting national security. National security remains the sole responsibility of the Member States.

National identity also includes the **tradition and culture**. One of the objectives of the European Union referred to in the preamble to the Treaty on European Union is to deepen the solidarity between peoples while respecting their history, culture and traditions. The idea of national self-identity confirmation in solidarity with other nations, not against them, is an essential axiological basis of the European Union in the light of the Lisbon Treaty¹³⁵.

6. The principle of loyal cooperation (solidarity)

1. In accordance with the principle of loyal cooperation, otherwise known as the principle of **loyalty** and **solidarity**, the Union and the Member States have mutual respect and provide support in carrying out tasks derived from the Treaties¹³⁶. The principle of solidarity has two dimensions. In positive terms, Member States should take any appropriate measure, general or particular, to ensure fulfillment of the obligations under the Treaties or acts of the institutions of the Union and facilitate the achievement of the Union's tasks. In negative terms the states may refrain from any measure which could jeopardize the attainment of the objectives of the Union. The principle of solidarity is implemented in two levels of cooperation: firstly, through co-

¹³⁴ Article 4 paragraph 2 of the TEU.

¹³⁵ Constitutional Court's judgment of 24 November 2010, ref. No. K 32/09.

¹³⁶ Article 24 paragraph 3 of the TEU.

operation between Member States and secondly the relationship between the Member States and the European Union, namely the EU institutions.

2. The Court of Justice has defined the conditions for forming the principle of loyal cooperation and emphasized that it is based on the **obligation** to cooperate in accordance with the **principle of good faith** in order to **overcome the identified difficulties** while fully **complying with the provisions of the Treaties**¹³⁷.

3. One of the manifestations of the principle of loyal cooperation, resulting directly from the Treaties, is the solidarity clause provided for in the Union's external actions. In accordance with the clause¹³⁸ if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster¹³⁹, the Union and the Member States must act in a spirit of solidarity. As a rule, this assistance is provided upon request.

4. The principle of loyalty is of great importance to the Area of Freedom, Security and Justice. The principle of solidarity in the area of Freedom, Security and Justice¹⁴⁰ is implemented mainly in the form of administrative and judicial co-operation of the Member States, in accordance with the rules of the EU shaped by law or in accordance with its findings¹⁴¹. Symptoms of such cooperation include cooperation between police and judicial authorities and other competent authorities, as well as the mutual recognition of judicial decisions and approximation of criminal laws.

7. Democratic principles

The principle of the rule of law and democracy are the foundation of the constitutional regimes of the Member States. As general rules they have been received by the European Union to its catalog of general principles. Democracy is the starting point for development of integration processes. In accordance with the Treaties, integration is based on shared values of the Member States, including democracy.

The EU not only recognizes and reaffirms the principle of democracy, but also makes its autonomous interpretation by creating a directory of structural principles collectively called democratic principles.

¹³⁷ Case 52/84 *Commission of the European Communities v. Kingdom of Belgium*.

¹³⁸ Article 222 of the TFEU.

¹³⁹ In 2011, the waves of illegal immigrants from Tunisia and Libya arrived in Italy. Italy initially called for assistance throughout the European Union in the fight against this phenomenon, citing the principle of solidarity. The appeal, however, met a refusal which resulted in the application by Italy the policy enabling the biggest possible number of immigrants migrating to other EU Member States. The geopolitical situation is a clear example of the constraints of the principle of loyal cooperation.

¹⁴⁰ See Article 67 paragraph 2 of the TFEU.

¹⁴¹ Article 73 of the TFEU.

Democratic principles shape the position of an individual by: giving the power to control actions of the Union, enabling participation in the functioning of the European Union, democratization of decision-making, transparency of the activities of the Union institutions. Some of these rights may be implemented individually (e.g. access to documents), others require interaction (e.g. citizens' initiative).

a) The principle of equality of citizens of the Union

1. The principle of equality of citizens of the Union was introduced by the Treaty of Lisbon. The **prohibition of discrimination** on grounds of nationality already existed. The introduction of the principle of equality of citizens did not entail a fundamental change in the approach to the individual. It rather has a political dimension, which is shaping the identity of European citizens.

The principle of equality of citizens includes two aspects: positive and negative. In the positive aspect it is an equal treatment of EU citizens. According to the EU Treaty, in all its activities, the Union shall respect the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies¹⁴². In the negative aspect, it is the prohibition of discrimination on grounds of nationality¹⁴³.

2. A citizen of the Union is every person holding the nationality of a Member State. Citizenship of the Union shall be **additional (subsidiary), complementary and dependent on the national citizenship and shall not replace it**. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties.

b) The principle of representative democracy

1. **Representative democracy**, otherwise known as an **indirect democracy** is about delegating public representatives who represent the citizens' interest. Development of representative democracy as a modern form of the exercise of democracy, both at Member State and EU level results from technical inability to participate in the exercise of power of all individuals. In accordance with the Treaties representative democracy is the basis for the functioning of the Union¹⁴⁴.

2. Representative democracy in the European Union is implemented at two levels: through the participation of citizens and the participation of representatives of the Member States. The first level is the possibility of direct participation of citizens in choosing their representatives, and the functioning of the Union. Such an understanding includes the representation of citizens in the European Parliament and the

¹⁴² Article 9 of the TEU.

¹⁴³ Article 18 paragraph 1 of the TFEU.

¹⁴⁴ Article 10 paragraph 1 of the TEU.

right of citizens to participate in the functioning of the Union. At this level the Treaties assign a special role to political parties in the European Parliament that at European level contribute to forming European political awareness and to expressing the will of citizens of the Union. The second level of representative democracy concerns the representation of Member States of the Union. Member States are represented in the Council and the European Council¹⁴⁵. Participation of representatives of the Member States, however, is separated from the representation of the interests of the individual. Member States aim is to care for the interests of their citizens. The manifestation of the dependency of representatives of the Member States to their citizens is the democratic control of heads of states and governments by national parliaments and citizens.

c) The principle of participatory democracy

1. The principle of participatory democracy, otherwise known as the **principle of civil society**, ensures public participation in the public life of the European Union. It includes participation of the individual in the public exchange of ideas in all areas of the European Union and transparency of institutions based on the principle of openness, social dialogue and taking citizens' initiative.

2. In order to promote good governance and ensure the participation of civil society¹⁴⁶ in accordance with the principle of openness, decisions are taken as close to the citizens¹⁴⁷ as possible. The basic form of the **principle of openness** is openness of the EU. Openness manifests itself primarily in meetings open to the public, access to documents, the conduct of the consultation by the European Commission.

The European Parliament and the Council sessions when considering and voting on a draft legislative act are **public**. An individual residing or having its registered office in a Member State has the right to access documents of the institutions, bodies, offices and agencies. General principles and limits which, because of public or private interest govern the right of access to documents are determined by the regulations of the European Parliament and the Council, acting in accordance with the ordinary legislative procedure. Each institution, body or agency ensures that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents. The Court of Justice of the European Union, the European Central Bank and the European Investment Bank are subject to the **principle of access to documents** only when exercising their administrative tasks. The European Parliament and the Council ensure publication of the documents relating to the legislative procedures. The European Commission carries out broad consulta-

¹⁴⁵ J. Maliszewska- Nienartowicz, *System instytucjonalny i prawny Unii Europejskiej*, Toruń 2010, p. 46

¹⁴⁶ Article 17 of the TFEU.

¹⁴⁷ Article 1 of the EU Treaty.

tions with parties concerned in order to ensure consistency and transparency of the Union actions¹⁴⁸.

3. The principle of participatory democracy institutions gives citizens and representative associations the opportunity to speak up and **publicly exchange their views** in all areas of the Union actions¹⁴⁹. The institutions are obliged to maintain an open, transparent and regular **dialogue** with representative associations and civil society.

4. **The citizens' initiative** involves assigning indirect powers of initiative to a group of citizens. A group of more than a million of citizens of the, with nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit an appropriate proposal on matters on which, according to the citizens, implementing the Treaties requires legislation of the Union¹⁵⁰.

d) The principle of participation of national parliaments

1. The adoption of the principle of representative democracy is to strengthen the role of national parliaments. In view of the fact that national Parliaments scrutinize their governments in relation to the activities of the European Union¹⁵¹ they have been given the ability to control the same institutions of the Union. First of all, the control concerns legislative procedures¹⁵², but may include other issues as well.

2. National Parliaments in domestic order fulfill numerous functions, including the state system, legislative, creative, control, inter-organizational and external relations function. With the accession of the country to the EU national parliaments' functions are limited at the national level, their scope of decision-making in the European Union is also otherwise specified. On the one hand, the national parliament largely loses autonomy of law and the obligations of the transposition of EU law to the national agenda are imposed on it. On the other hand, it acquires wider external competence through participation in EU legislation. The significance of national parliaments control functions relative to the Heads of State and Governments is greater, in accordance with the principle of representative democracy. In order to adjust the position of national parliaments to the EU legislative framework in which they operate, the Treaties confer the following rights on the national parliaments¹⁵³:

¹⁴⁸ Article 11 paragraph 3 of the TEU.

¹⁴⁹ Article 11 of the TEU.

¹⁵⁰ 11 paragraph 4 of the TEU. See more on the citizens' initiative in Chapter V of this handbook.

¹⁵¹ See Protocol No 1 to the Treaty of Lisbon on the role of national parliaments in the European Union.

¹⁵² See more in Chapter VII.

¹⁵³ Article 12 of the TEU.

- receiving information and the EU draft legislative acts from the EU institutions;
- ensuring compliance with the principle of subsidiarity¹⁵⁴;
- participation, as part of the Area of Freedom, Security and Justice, in the evaluation mechanisms for the implementation of the Union policies in this area and getting involved in the political monitoring of Europol and evaluation of Eurojust's activities;
- taking part in the revision procedures of the Treaties;
- receiving information on applications for accession to the Union;
- participation in inter-parliamentary cooperation between national parliaments and the European Parliament.

The European Parliament and national Parliaments together determine the organization and promotion of effective and regular cooperation within the Union¹⁵⁵.

8. The institutional framework of the European Union

1. Among the legal principles that shape the structure of the European Union, there are rules governing the relations between the institutions. According to the Treaties the EU has an institutional framework which aims to promote its values, advance its objectives, serve its interests, the interests of its citizens and those of Member States, and ensuring the consistency, effectiveness and continuity of its policies and actions¹⁵⁶. The Treaties provide that each institution should act within the powers conferred on it by the Treaties, in accordance with the procedures, conditions and objectives set out in them. Institutions loyally cooperate with each other¹⁵⁷.

The institutional framework must be defined as a **set of rules of the institutional order**. The basic ones are:

- institutional balance;
- institutional loyalty;
- institutional autonomy.

At the time of the historical pillar structure of the EU the principle of the **single institutional framework** was of great importance. This is because it assumed that the institutions of the European Union are common to all three pillars and to all existing European Communities. Institutions were responsible for both the objectives and tasks of the EU in the framework of the Community Pillar I of supranational

¹⁵⁴ See Protocol No. 2 to the Treaty of Lisbon on the application of the principles of subsidiarity and proportionality.

¹⁵⁵ Article 9 of Protocol No. 1

¹⁵⁶ Article 13 of the TEU.

¹⁵⁷ Article 13 paragraph 2 of the TEU.

characteristics, and in the second and third pillar, which included intergovernmental cooperation.

Currently, the single institutional framework is relevant only in the context of the functioning of the European Atomic Energy Community. While the Union with the entry into force of the Lisbon Treaty replaced the European Community and became its legal successor¹⁵⁸, and received a single structure, the EAEC is still working alongside the EU. Still, the European Union and the European Atomic Energy Community have common institutions implementing the principle of the single institutional framework.

2. To determine the list of entities covered by the institutional framework, it should be noted that, in accordance with the Treaties, the European Union operates both through its institutional bodies and organizational units. While making the basic typology of EU institutions, we can distinguish **institutions in the strict sense**, the closed folder of which was designated in the TEU¹⁵⁹, and **institutions in the broad sense**, that is, all the other bodies and agencies acting on behalf of the European Union. The institutional framework includes an exhaustive list of institutions identified in the Treaties, although their application to other entities is not impossible. This argument is supported by, among others, giving the Committee of the Regions the right to file a complaint for violation of the CJEU's prerogatives.

a) The principle of institutional balance

1. The division of powers between the EU institutions is not based on the classic tripartite division of the executive, legislative and judicial power. In the structure of the European Union the CJEU can be distinguished as a separate executing judicial authority. Legislative and executive competences, however, are shared between institutions in accordance with the principle of institutional balance.

2. The principle of institutional balance results directly from the Treaties¹⁶⁰ and assumes that each institution shall act within the limits of the powers granted in accordance with the procedures and under the conditions and objectives set out in them. Clarification of the rules was made by the Court of Justice. According to the case-law the above principle is about the division of the competence of decision-making, so that full balance in the division followed, and the institutions were able to **control and restrain each other**. A system of power distribution between the EU institutions, assigning each institution specific role in institutional structures of the European Union and in the implementation of the tasks entrusted to it is created in here.

¹⁵⁸ Article 1 of the TEU.

¹⁵⁹ Article 13 of the TEU.

¹⁶⁰ Article 13 paragraph 2 sentence 1 of the TEU.

Each institution should use its powers with regard to the appropriate authority of other institutions¹⁶¹. Adhering to the principle of institutional balance means that each EU institution uses its powers respecting the powers of the other institutions. In addition, compliance with the institutional balance requires each of its violation to be sanctioned¹⁶². The Court of Justice of the European Union, whose task is to ensure compliance with the law in the interpretation and application of the Treaty, must be entitled to the protection of the institutional balance and, consequently, to monitor compliance with the competence of individual institutions.

3. Institutional balance does not mean equality of institutions but a **system of mutual relations**, mechanisms of mutual checks and brakes between the institutions that represent different interests. The clearest example of this balancing representation of different interests is the division of powers of the institutions participating in the ordinary legislative procedure, where for the purpose of an act being adopted, the Council supports the European Parliament. Within the legislative procedure, the Council, as an intergovernmental body, represents the interests of national governments and the European Parliament is a co-legislator having a democratic mandate of the citizens of the EU. The legislative process is initiated by the Commission, which aims to promote the general interest of the Union.

b) The principle of institutional loyalty

The principle of institutional loyalty is otherwise known as the principle of **sincere institutional co-operation**. According to it, the EU institutions cooperate with each other as actors sharing responsibility for achieving the objectives of the institutional framework. The principle of institutional loyalty is to strengthen the principle of institutional balance and now follows directly from the Treaties¹⁶³.

The principle has been shaped by the Court of Justice, which stressed that the assumptions of sincere cooperation (solidarity) also apply to the relationship between the institutions themselves. **The dialogue between the institutions** is subject to the same rules of cooperation that govern the relations between the Member States and institutions¹⁶⁴.

An example of the implementation of the principle of loyal co-operation of institutions can be found in the legislative process. In the ordinary legislative procedure, in principle, three institutions work together: the European Commission, the European Parliament and the Council. The Commission has a legislative initiative, the Council and the EP are co-legislators. For the procedure to lead to the adoption of the

¹⁶¹ 9/56 *Meroni*.

¹⁶² C-70/88 *European Parliament v. Council* ("Chernobyl").

¹⁶³ Article 1 of the TEU.

¹⁶⁴ C-65/93 *European Parliament v. Council of the European Union*.

EU law institutions should affect the text of the act with respect for each other's other positions. Not reaching an agreement on the content of the act makes it fail. Loyal co-operation is also carried out under the control functions, especially in approving and monitoring the implementation of the budget, the reporting obligation, the impact on staffing management positions and the personal composition of individual institutions¹⁶⁵.

c) The principle of institutional autonomy

1. In accordance with the principle of institutional autonomy each institution was granted **independence** necessary to perform its tasks. In a narrow sense it defines the relationship between institutions and the respect of the Member States for the institutions' rights in the broad sense. In positive terms the principle of institutional autonomy includes the right to shape the internal rules of procedures, to perform creative functions through the impact on staffing of governing and supporting bodies and the right to shape their own administrative apparatus. The negative dimension of the principle of institutional autonomy relates to the prohibition of interference in the powers of the other institutions and the Member States¹⁶⁶.

2. The principle of institutional autonomy must be distinguished from the principle of the autonomy of European Union law and procedural autonomy, which refers to the application of European Union law and the relationship of the legal systems of the Member States with EU law. The principle of the autonomy of European Union law defines the relationship of the EU law, international law and domestic law of the Member States. The principle of procedural autonomy results from the principle of loyalty of the Member States (principle of solidarity) and is implemented at the level of the proceedings before the national authorities implementing the European Union law¹⁶⁷. It covers the whole of the investigation and enforcement of rights in domestic law. The principle of procedural autonomy law does not specify the position of the European Union, nor the issue of its execution, it shapes the political position of the EU institutions.

Study questions

1. Discuss the Copenhagen criteria.
2. Define the concept of absorption capacity of the European Union.

¹⁶⁵ See more in Chapter III of this handbook.

¹⁶⁶ For example, institutions cannot independently determine its premises, as this power is granted to the Member States. See 230/81 *Luxembourg v. European Parliament*.

¹⁶⁷ In more detail in Chapter VI of this handbook.

3. Indicate the stages of the accession procedure.
4. What are the sections of the accession treaty?
5. Discuss the procedure of a state withdrawal from the European Union.
6. What are the areas of the exclusive competences of the EU?
7. Give the definition of the principle of conferral.
8. What is the sharing of competences between the EU and the Member States?
9. Indicate objectives and tasks of the EU.
10. Divide the EU legal rules.
11. What are the structural rules?
12. What is the role of fundamental rights in the European Union?
13. What principles form the institutional framework of the European Union?
14. Discuss the democratic principles of the European Union.
15. Indicate the powers of the European Union.

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4. 6/64 Judgment of 15 July 1964 on *The Costa v. ENEL*.
5. 11/70, judgment of 17 December 1970 on the *Internationale Handelsgesellschaft mbH v Einfuhr-und für Vorratsstelle Getreide und Futtermittel*.
6. 22-70 judgment of 31 March 1971 on *The Commision v. The Coucil (ERTA)*.
7. 230/81 judgment of 10 February 1983 on the *Grand Duchy of Luxembourg v. European Parliament*.
8. 66/82 judgment (First Chamber) of 23 February 1983 on *Fromançais SA v. Fonds d'orientation et de régularisation des marchés agricoles (FORMA)*.
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- 10 C-70/88, judgment of 4 October 1991, *The European Parliament v The Council of the European Communities ("Chernobyl")*.
11. 2/94 opinion of the Court of 28 March 1996, *The accession of the Community to the Convention for the Protection of Human Rights and Fundamental Freedoms*.
12. Constitutional Court's judgment of 11 May 2005, ref. No. K 18/04.
13. Constitutional Court's judgment of 24 November 2010, ref. No. K 32/09.

CHAPTER III

INSTITUTIONAL SYSTEM

§1. INTRODUCTION

1. In accordance with the provisions of the EU Treaty the EU has a **single institutional framework** which ensures the consistency, effectiveness and continuity of policies and actions to achieve its goals¹. The institutional framework also contributes to promoting the Union's values and is intended to serve the interests of EU, its citizens and Member States.

2. The provisions of the TEU mention the following EU 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 institution acts within the limits of the power given to it by the treaties. Union institutions are supported by subsidiary bodies such as the Economic and Social Committee and the Committee of the Regions. In addition, there is the European Investment Bank and a number of committees, agencies, offices and workgroups.

3. There are several rules derived from the provisions of the treaty that govern inter-institutional relations. These are: the principle of institutional balance, the principle of institutional autonomy, the principle of loyal cooperation between the institutions and the principle of openness.

¹ Cf. Article 13 of the TEU. The term "single institutional framework" is used in the preamble of the EU Treaty in which the Treaty expressed the desire to strengthen the democratic nature and effectiveness of the institution, for the better fulfillment of their tasks.

4. **Institutional balance** means that the legislative or the executive competence can not be attributed to a single institution on the exclusive. Each institution performs its assigned functions with due regard for the powers of the other institutions. In addition, this rule prohibits the transmission of powers to other institutions. The principle of institutional balance is a kind of guarantee to maintain the proper balance between individual institutions. It is used primarily in the legislative process, as well as in the application of the European Union law process. The Court of Justice of the European Union ensures observance of this principle.

5. **The principle of institutional autonomy** means that treaties provide the autonomy necessary to perform the functions of each institution. All institutions have the right to determine their structure and operational rules. This law is implemented, among others by: issuing its own rules of procedure, the impact on staffing management bodies, establishment of subsidiary and advisory services. Moreover, to achieve the principle of institutional autonomy, members of the institutions possess privileges and immunities that provide them flexibility in performing given tasks. In respect of the administrative autonomy each institution represents the EU² in matters relating to the functioning of this institution.

6. Among the institutional rules, the principle of loyal cooperation between institutions is also mentioned. It requires institutions to cooperate in good faith to implement the provisions of the treaty. Institutions are obliged to cooperate in the development of Community law and its implementation. All kinds of activities that would hinder other institutions to carry out their tasks are prohibited.

7. In accordance with the provisions of the TFEU³ the institutions, bodies, offices and agencies conduct with the greatest respect for the principle of openness.

8. The provisions of the treaty provide that the office of the institution is determined by common accord of the governments of the Member States⁴. The compromise on the location of the seats of the institutions has been achieved at the beginning of the 90's. It has been written down and included as a protocol to the Treaty of Amsterdam. The compromise was also included in the Lisbon Treaty as the Protocol No 6 with minor changes⁵. It provides the following locations for the headquarters of the bodies:

² Cf. Article 335 of the TFEU.

³ Article 15 of the TFEU.

⁴ Cf. Article 341 of the TFEU.

⁵ *Protocol No. 6 on the location of the seats of the institutions and of certain bodies, offices, agencies and departments of the European Union.*

- a) The European Parliament have its seat in Strasbourg where the 12 periods of monthly plenary sessions, including the budget session, be held. The periods of additional plenary sessions be held in Brussels. The committees of the European Parliament meet in **Brussels**. The General Secretariat of the European Parliament and its departments remain in **Luxembourg**⁶.
- b) The Council have its seat in **Brussels**. During the months of April, June and October, the Council hold its meetings in **Luxembourg**.
- c) The Commission have its seat in **Brussels**. The departments listed in Articles 7, 8 and 9 of the Decision of 8 April 1965 be established in **Luxembourg**.
- d) The Court of Justice have its seat in **Luxembourg**.
- e) The Court of Auditors have its seat in **Luxembourg**.
- f) The Economic and Social Committee have its seat in **Brussels**.
- g) The Committee of the Regions have its seat in **Brussels**.
- h) The European Investment Bank have its seat in **Luxembourg**.
- i) The European Central Bank have its seat in **Frankfurt**.
- j) The European Police Office (Europol) have its seat in **The Hague**.

At this point it is worth noting that there is an unwritten principle that provides for the territory of any Member State to be the location of at least one agency functioning in the structure of the European Union.

§2. THE EUROPEAN PARLIAMENT

1. General remarks

1. The European Parliament has been operating since the beginning of the Communities. In 1951 The Treaty establishing the European Coal and Steel Community (ECSC) provided for the establishment of the Common Assembly as an advisory body. The Assembly consisted of 78 MPs elected from among the parliamentarians of the Member States. The founding treaties of 1957 also provided for the Parliamentary Assembly of the EEC and Euratom. The Convention on certain institutions common to the European Communities, attached to the Treaty of Rome, provided a combination of all three meetings in one and therefore since 1958 it began to function as European Parliamentary Assembly, which in 1962 adopted the name of the European Parliament. This name was introduced to the founding treaties in 1987 by the provisions of the Single European Act.

⁶ It seems that financial considerations should speak for the seats of the institutions located in one city, and have at least the seat of the institution in the same place, which, however, as seen in the example of the European Parliament seems to be impossible, above all for political reasons.

2. From the beginnings of the European Parliament (EP) the process of gradually broadening its powers has been noticed. Between 1970 and 1975, the European Parliament received additional powers in the budgetary procedure. In 1976 it was decided to conduct direct and general elections to the European Parliament (**the first direct elections were held in 1979**). Due to the provisions of the SEA and the TEU Parliament strengthened its position to obtain additional legislative and control powers.

3. The city of **Strasbourg** is the official seat of the European Parliament, where the proceedings are held. Additional meetings, as well as committees, may also be held in Brussels. The Secretary General has its seat in **Luxembourg**. Relevant and timely information on the EP can be found on its official website⁷.

2. Composition

A. Distribution of seats

1. The Treaty on European Union, after the changes introduced by the Treaty of Lisbon, provides that the number of members in the Parliament should not exceed 750, plus the President⁸. However, the basis of elections held in June 2009 were the provisions of the Nice Treaty, according to which the number of seats was 736⁹. Due to the fact that the Treaty of Lisbon entered into force after the elections to the European Parliament, the adoption of transitional measures concerning the composition of the EP by the end of the 2009-2014 term was provided, in the form of (for) extending the mandate of the 18 additional members. After the Lisbon Treaty was entered into force and the Additional Protocol was ratified and revised in 2010¹⁰, the total number of MEPs increased temporarily to 754¹¹. The Protocol has been ratified by the Member States and entered into force on 1 December 2011. Moreover, on 1 July 2013 after the accession of Croatia to the EU, Parliament increased by 12 Members from the new Member State. To sum up, from the date of accession of Croatia to the end of the 2009-2014 term of office, the total number of MEPs is 766. However, the European Parliament elections in 2014 will return to the principle described in the Lisbon Treaty so the number of Members of Parliament will not exceed 750, plus the President of the EP.

2. Considering formal and legal regulations of joining an additional number of MPs during the term of office, it was decided that by the way of derogation from Article 14 of the TEU, where “*Members of Parliament are elected by direct universal suffrage*”

⁷ Official Site of the EP can be found at: www.europarl.europa.eu

⁸ Cf. Article 14 of the TEU.

⁹ Distribution of seats per Member State was precisely defined in Article 190 of the EC Treaty.

¹⁰ Protocol amending the Protocol on the transitional provisions.

¹¹ This figure results from the current 736 Members (elected in June 2009, when the TL has not yet been adopted) and 18 additional members. It is higher than the number assumed in the TL (750+1) of three MPs (754). The difference stems from the fact that, in accordance with the Treaty of Nice Germans chose 99 parliamentarians, and in accordance with the TL they are only entitled to 96. Nobody, however, during the term of office (2009-2014) take the seats away from the three German parliamentarians.

for a five-year term...”, indicated Member States designate the person who will occupy additional seat¹², provided that they have been chosen by:

- a) selection by direct universal suffrage organized for this purpose in the Member State in accordance with the rules applicable to EP election;
- b) reference to the results of EP elections held on 4-7 June 2009;
- c) designation by the national parliament of the Member State from among its members the required number of members.

3. According to the EU Treaty, the minimum number to be selected in the Member State is 6 members. However, none of the Member States can be allocated to more than 96 seats. Distribution of seats among the Member States be made on the principle of “**degressive proportionality**”¹³. Decision determining the composition of the EP, the European Council adopt unanimously. It does so at the initiative of the European Parliament and after receiving its permission. As mentioned above, the Protocol provides that “in due time before the European Parliament elections in 2014”, the European Council adopt a decision determining the composition of the European Parliament, in accordance with *Paragraph 2 of Article 14 TEU*.

Distribution of seats in the European Parliament (term began in 2009 after the elections carried out in accordance with the principles of the Treaty of Nice) modified by the Treaty of Lisbon and after accession of Croatia in 2013:

Member States	Number of MPs	Member States	Number of MPs
Germany		Austria	
France		Bulgaria	
United Kingdom		Denmark	
Italy		Slovakia	
Spain		Finland	
Poland	51	Ireland	
Romania		Croatia	
Netherlands		Lithuania	

¹² In the absence of appropriate legislation in Poland, the Law of 4 March 2010 on the basis of filling in the term of 2009-2014 an additional mandate of a Member of the European Parliament was adopted (Journal of Laws of 2010, No. 56, item. 337). On its basis the National Electoral Commission said in a notice of 7 December 2011 an information about filling an additional mandate of the Member of the European Parliament (Journal of Laws of 2011, No. 273, item. 1617).

¹³ The principle of degressive proportionality means that the ratio of the population of each Member State to the number of seats must vary according to their population, so that each MP of the most populous Member State represented more citizens than an MP from the Member State with fewer people, and vice versa, but also that no less populous Member State had more seats than the more populous one. This is part of paragraph 6 of the report by Alain Lamassoure and Adrian Severin (A6-0351/2007), adopted in 2007 by the European Parliament (Texts adopted, P6 TA (2007) 0429).

reece		Slovenia	
ortugal		Estonia	
elgium		Cyprus	
C ech epublic		u embourg	
ungary		Malta	
Sweden		T :	

Distribution of seats in the European Parliament (term of office 2014-2019)¹⁴:

S		S	
ermany		Austria	
rance		ulgaria	
United ingdom		enmark	
taly		Slovakia	
Spain		inland	
		reland	
omania		Croatia	
etherlands		ithuania	
reece		atvia	
ortugal		Slovenia	
elgium		Estonia	
C ech epublic		Cyprus	
ungary		u embourg	
Sweden		Malta	
		T :	

B. Members of the European Parliament

1. MEPs are elected by **direct universal suffrage in a free and secret ballot**. Their term of office is five years, which may be renewed. The provisions of the Treaty provide that the European Parliament shall be composed of **representatives of the Union's citi-**

¹⁴ See the European Council decision of 28 June 2013 establishing the composition of the European Parliament.

zens¹⁵. It follows that MEPs represent not only Member States or national parliaments, but all citizens of the Union (European character of the mandate).

2. Member's mandate ends at the end of the term, resignation or his death. The European Parliament verify the validity of the mandate. The **mandate is free** - parliamentarian is not affiliated by any instructions or guidance from their country. Members represent the interests of their constituents.

3. According to the *incompatibilitas* principle, during the term MPs cannot connect their deputed function with any other EU Member's institutional function. They cannot also be members of the national government and since 2004 connect the mandate of MEP with the mandate of the national parliament.

4. Representatives benefit from **privileges and immunities** in accordance with the Protocol on the Privileges and Immunities. Parliamentary privileges refer to a free movement within the European Union. MP cannot be stopped, searched or held civilly or criminally liable for the views expressed and presented as part of their function. In their home country MEP has the same status as members of the national parliament. During Parliament sessions MPs use the immunities accorded to members of the parliament in their country, but on the territory of another Member State, MPs have the **immunity from any measure or detention** and from **legal proceedings**. Representatives will not be able to benefit from immunity when they are caught in the act of committing a crime, and when they will be repealed by Parliament.

5. Since 2009 elections, the European Parliament has changed the rules of remuneration of members. According to the decision of Parliament¹⁶, **MPs are paid from the EU budget** on amount of 38.5% of the basic salary of a judge serving on the European Court of Justice¹⁷. The salary, which the MPs had received earlier, depended on the salary received by MPs in their home country. MEPs are entitled to tax free diet, lump sums to keep offices, reimbursement for travel expenses and overheads. According to its charter, Members (shall) be entitled to an old-age **pension** from the age of 63 on amount equal to 3.5% of salary for each full year of the mandate, but not more than 70% of the salary. Pensions (shall) be paid from the EP budget, and the right to a pension exists independently of any other pension.

¹⁵ Cf. Article 14 paragraph 2 of the TEU.

¹⁶ The European Parliament Decision No. 2005/684/EC, Euratom of 28 September 2005 on adopting the Statute for Members of the European Parliament. The Statute entered into force on the first day of the term of the EP began in 2009. The decision provides that Members who were already members of Parliament before the entry into force of this Act, and were re-elected, can with reference to the salary, transitional allowance and pensions for the whole duration of Deputies activity stay with the national system. Then the payment will be made from the Member State budget.

¹⁷ In 2011, the monthly salary of an MP before tax was 7 956.87 EUR, net of tax and national insurance from accidents was 6 200.72 EUR.

C. Elections

1. According to the TEU decision representatives to the European Parliament are elected by **direct universal suffrage in a free and secret ballot**¹⁹. The first such elections to the European Parliament were held in 1979²⁰.

2. The Treaty on European Union imposes on the European Parliament to draw up a draft legislation to carry out direct universal suffrage in accordance with a **uniform procedure in all Member States** or in accordance with principles common to all Member States. However, no such legislation has been prepared so far. Therefore, in each Member State elections to the European Parliament take place in accordance with the election procedures established by the individual states. In Poland, the EP elections are carried out under the provisions of the **Election Code**²¹. Under the Act concerning the election of the members of the European Parliament by direct universal suffrage elections are organized by direct universal suffrage in accordance with the **principle of equality and proportionality** in all Member States.

3. General provisions relating to EP elections can be found in the Act of 20 September 1976 mentioned above, which was amended several times. These provisions are complemented by **Directive 93/109/EC on the right of EU citizens to vote and stand as a candidate in elections to the European Parliament**²². The detailed arrangements for the election be determined by the legislative of each country. However, the European Council designates four consecutive days (from Thursday to Sunday), when the elections are to be held in each of the Member States.

4. Every EU citizen has the **active and passive right to vote** and can use it, regardless of the country of residence. However, no one may vote more than once in an EP election or stand as a candidate in two countries in the same election. EU citizens

¹⁸ Article 14 of the TEU.

¹⁹ Elections in 1979 were held on the basis of *Universal Suffrage Act of 1976*

²⁰ The Act of 5 January 2011 - *Election Code* (Journal of Laws of 2011, No. 21, item 112, as amended), which replaced the previously applicable law of 23 January 2004 – *Election to the European Parliament*. Election Code introduced new electoral law institutions, such as: institutions of two days of voting, proxy voting, absentee voting, and bans during the election campaign of large posters and slogans and election paid ads for radio and television. Among other things, in view of those provisions the Act was challenged before the Constitutional Court. In its judgment the Court took as its starting point the view that the European elections is not governed by the provisions of the Constitution (case C 15/04, K 18/04). The European Parliament is not an authority exercising power in the Republic of Poland, but a body of the European Union. For these reasons, the Court held that the contested provisions of the Election Code, in so far as it relates to elections to the European Parliament, are not inconsistent with the Constitution (see judgment of the Constitutional Tribunal of 20 July 2011, Ref. Act K 9/11, Journal of Laws of 2011, No. 149, item 889).

²¹ Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as candidates in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals.

over the age of 18 have the right to vote²². However, the age limit to stand as a candidate depends on national traditions and ranges between 18-25 years. Each Member State may impose electoral threshold, but not more than 5%.

3. Bodies

A. Governing bodies

1. In quite a complex internal structure of the European Parliament, EP President and Bureau of the EP are responsible for the organization and representation of Parliament.

2. **President of the European Parliament** is elected by a secret ballot. The application are submitted by a political group or at least 40 Members. The selection is made at the first meeting for a period of 2.5 years after which he/she may be re-elected. The President directs the work of Parliament, conducts meetings, manages voting and upholds the regulations. He/she is an institutional representative in the Parliament's external relations and in relations with the other institutions of the European Union. The President is supported by the Vice-Presidents in the performance of his/her duties. It is worth noting that from 14 July 2009 to 17 January 2012 the President of the European Parliament was **Jerzy Buzek**. He was replaced by a German Social Democrat **Martin Schulz**.

3. Vice-Presidents of the EP are announced and elected in the same way as the President of the EP. Their term of office is also 2.5 years. The number of Vice-Presidents is set by the EP (there are 14 Vice-Presidents currently). When choosing, a fair representation of Member States and their political views should be ensured. The task of the Vice-Presidents is to assist and represent duties of President of the EP. The President and Vice-Presidents form the Bureau of the European Parliament.

4. **Bureau of the European Parliament** is the managing body of the EP. It is responsible for regulating all administrative, personnel and organization issues. The power of the Bureau is to appoint the Secretary-General of the Council of the European Union. In addition to the EP President and the fourteen Vice-Presidents, the Bureau consists of five **Quaestors**²³ in an advisory capacity. During the Bureau sessions, in the event of a tie the President has the casting vote. Meetings are generally held twice a month. In addition to the President and the Bureau, the Conference of Presidents is the body which supports the work of the European Parliament.

²² Austria is an exception (is), where the right to vote is granted to people who are 16 years old.

²³ Quaestors is the body responsible in the Parliament for the administrative and financial matters which relate directly to Members. Quaestors are elected by the Parliament for 2.5 years.

5. The Conference of Presidents consists of: the President of the EU and the Chairs of the *political groups*. In its work, without voting rights, also participates the Non-attached Members representative. The Conference of Presidents takes decisions by consensus or vote, but their votes are weighted by the number of members of each political group. The Conference of Presidents is the body responsible for planning the legislative competence of the Parliament and determining the competence of committees and delegations. It also maintains contacts with other EU institutions, national parliaments and third countries.

The Conference of Presidents is responsible for organizing structured **consultation with European civil society** on major topics. This may include holding public debates, open to participation by interested citizens, on subjects of general European interest.

6. In addition, in the EP the **Conference of Committee Chairs** functions, which is the body that provides effective cooperation between the various parliamentary committees. The Conference of Committee Chairs consists of the Chairs of all standing or special committees. The Conference of Delegation Chairs has a similar structure, and consists of the Chairs of all standing interparliamentary delegations.

B. Committees and Delegations

1. Among the functional bodies committees and delegations can be distinguished. Parliamentary committees are divided into: standing committees, special committees (temporary) and committees of inquiry.

2. On a proposal from the Conference of Presidents, Parliament sets up **standing committees**. Their members are elected during the first part-session following the re-election of Parliament and again two and a half years thereafter. Standing committees are divided according to the different fields of EU law (Committee on Foreign Affairs, Committee on Employment and Social Affairs, Committee on Budgets, Committee on Agriculture and Rural Development, etc.). Currently there are 20 standing committees. Each committee elects a chairperson and a maximum of three vice-presidents. Parliamentary committees meet once or twice a month. The committee is preparing the EP's plenary sessions, including the development of expertise on draft laws.

3. On a proposal from the Conference of Presidents, Parliament may at any time set up **special committees**, with powers, composition and term of office defined at the same time as the decision to set them up is taken. Their term of office may not exceed 12 months, except where Parliament extends that term on its expiry. Among the spe-

cial committees (temporary), which ended its activities are: Temporary Committee on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners (TIDP), Temporary Committee on Foot and Mouth Disease (FIAP), Temporary committee on human genetics and other new technologies of modern medicine (GENE).

4. Parliament may, at the request of one quarter of its Members, set up a **committee of inquiry** to investigate alleged contraventions of Union law or alleged maladministration in the application of Union law which would appear to be the act of an institution or body of the European Union, of a public administrative body of a Member State, or of persons empowered by Union law to implement that law. A committee of inquiry (shall) conclude its work by submitting a report within not more than 12 months. Parliament may decide to extend this period by three months twice. After completion of its work a committee of inquiry submits to Parliament a report on the results of its work. At the request of the committee of inquiry Parliament holds a debate on the report at the part session following its submission. The report is published.

The European Parliament uses its powers of investigation quite carefully. Since 1995, only three committees of inquiry were appointed: TRANSIT – of Inquiry into the Community Transit Regime, ESB1 – of inquiry into BSE (bovine spongiform encephalopathy) and EQUI – of Inquiry into the Crisis of the Equitable Life Assurance Society.

5. On a proposal from the Conference of Presidents, Parliament sets up standing interparliamentary **delegations** and decides on their nature and the number of their members in the light of their duties. Delegations contribute to representing the EU abroad and to promoting the values on which the Union is founded in third countries. Interparliamentary meetings are held twice a year (once in the workplace of EP and once in the third country designated by the partner).

Currently there are more than 40 delegations at various levels of cooperation: **joint parliamentary committees** (including the Delegation to the European Union - Croatia Joint Parliamentary Committee, Delegation to the EU - Turkey Joint Parliamentary Committee, Delegation to the EU - Mexico Joint Parliamentary Committee), **parliamentary cooperation committees** (Delegation to the EU - Kazakhstan, EU - Kyrgyzstan and EU - Uzbekistan Parliamentary Cooperation Committees, and for the relations with Tajikistan, Turkmenistan and Mongolia), **delegations to multilateral parliamentary assemblies** (including Delegation to the African, Caribbean and Pacific-European Union Joint Parliamentary Assembly, Delegation to the Parliamentary Assembly of the Union for the Mediterranean, Delegation to the Euro-Latin American Parliamentary Assembly) and other **interparliamentary delegations**.

C. Political groups

1. Members do not sit in the European Parliament by country of origin, but by belonging to one of the pan-European fractions (groups) of politics. According to the Rules of Procedures of the EP, Members may form themselves into groups according to their political affinities²⁴. A political group comprises Members elected in **at least one-quarter of the Member States. The minimum number of Members required to form a political group is 25.** A Member may not belong to more than one political group. There is no obligation to belong to a political group.

2. Political groups have their own secretariats, which are included in the organizational structure of the General Secretariat. They have administrative facilities and use the money set aside for them in the budget of the European Parliament.

The political groups in the EP (during term of office which started in 2009 and after the accession of Croatia):

	A	
Group of the European People's Party (Christian Democrats)	E	
Group of the Progressive Alliance of Socialists and Democrats in the European Parliament	S	
Group of the Alliance of Liberals and Democrats for Europe	A E	
Group of the Renewed European Centre Alliance	E A	
European Conservatives and Reformists Group	EC	
Confederal Group of the European United Left - Nordic Left	EU	
Group of the European United Left - Nordic Left	E	
Others		
Total :		

4. Duties

Due to the complexity of the functions of the European Parliament its powers can be divided into several groups. These are:

- legislative powers,
- deliberative powers,
- supervisory powers,
- external powers.

²⁴ Cf. Article 30 of the EP. The current version of the regulations is available on the official website of the EP: www.europarl.europa.eu

A. Legislative powers

1. The European Parliament, in contrast to the national parliament does not have independent powers entitling to legislate or even to take the legislative initiative. In **enacting the law** of the European Union, Parliament cooperates with other institutions.

2. In accordance with the provisions of the TFEU²⁵, the EP has an **indirect initiative right**. Parliament, acting by a majority of its component members, may request the Commission to submit any appropriate proposal on matters on which it considers that a Union activity is required for implementing the Treaties.

3. Special legislative competence of Parliament is involved in adopting the budget. Parliament, the Council and the Commission are institutions responsible for developing the budget within the scope of their powers and according to the financial provisions²⁶.

4. In addition to legislative competence of the EP also has **the right to issue own instruments** such as resolutions, declarations, opinions and recommendations. These acts are not binding, but they can influence the actions taken by other EU bodies.

B. Deliberative powers

1. EP supervisory functions are mainly used in reference to the European Commission. They are manifested by: firstly - general authority to examine the annual reports prepared by the Commission²⁷. Secondly - Parliament may pass a motion of censure against the Commission²⁸. Thirdly - Parliament has the right to address questions to the members of the EC. MPs benefit from the ability to control quite often, because every year it is a few thousand questions. Questions can be submitted in writing. It is also possible to ask them during the debate. Commission - according to the TFEU²⁹ - has a duty to respond to the questions. Fourth - Parliament may grant or refuse to grant EC budget discharge³⁰. Refusal to grant is not associated with deprivation of the European Commission, but may cause the adoption of a motion of censure against it. Fifth - Parliament controls the Commission, including active participation in the selection procedure of the Commission. The duties of EP include

²⁵ Cf. Article 225 of the TFEU

²⁶ Specific financial provisions for the EU budget are included in the Article 313-316 of the TFEU (the Treaty on the Functioning of the European Union).

²⁷ Cf. Article 233 of the TFEU.

²⁸ In accordance with Article 234 of the TFEU.

²⁹ Article 230 of the TFEU.

³⁰ Article 319 of the TFEU.

questioning the candidates proposed to the commissioners before the final decision to approve the proposed composition. Parliament may therefore actually block the nomination of the EC, if they do not accept the submitted applications³¹.

2. Parliament exercises its supervisory functions also by ensuring the work of the Council. MPs have the right to submit questions to the Council. However, the chairman of the Council or the Secretary-General participates in the EP's plenary sessions and important debates. Council, in accordance with the provisions of TFEU³², can be heard by the EP, on the action taken by it. Starting the presidency, the Chairman of the European Union presents his/her program and debates with MEPs on plenary session. At the end of six months of the Presidency, the Chairman presents the final report to the European Parliament.

3. European Parliament supervisory function is also evident in the relations with the European Council. On the basis of the EU Treaty³³, the European Council is required to report to Parliament each meeting and to submit an annual written report on the progress made by the EU. The ECB³⁴ and the European Ombudsman³⁵ are also required to submit similar reports to Parliament.

Each European Council Summit starts with the statement of the President of the EP, who presents the key positions to the different issues being discussed by the Heads of State and Government. After each summit, the European Council President takes part in a debate with MEPs and presents them a report on the outcome of deliberations³⁶. It seems, however, that the requirement to report is only an informative function, i.e. EP has the ability to get acquainted with the most important findings of the Summit of Heads of State and Government. Parliament does not have any means to control or discipline the European Council. This is due to the specific nature and composition of the institution. This indirectly confirms the EU Treaty, which states that the Heads of State or Government are democratically accountable either to their national Parliaments, or to their citizens, but not to the European Parliament.

4. Parliament can exercise its supervisory functions also by examining petitions from the EU citizens. In accordance with the provisions of the TFEU³⁷, citizens of the

³¹ See the *casus* of Rocco Buttiglione, who, as a candidate designated by the Italian Government for the position of the Commissioner for Justice, because of his conservative opinions on homosexuality, was not been approved by the European Parliament. The representatives of the faction of the Socialists and the Greens stated that such views prevented taking up activities in the area of civil rights, which are among the responsibilities of the Commissioner for Justice.

³² Article 230 of the TFEU.

³³ Article 15 of the TEU.

³⁴ Cf. Article 284 paragraph 3 of the TFEU.

³⁵ Cf. Article 228 paragraph 1 of the TFEU.

³⁶ Cf. Article 10 of the TEU.

³⁷ Article 227 of the TFEU.

Union and any natural or legal person residing or having its registered office in a Member State have the right to address a petition to the European Parliament in the individual and collective issues that directly affect them.

5. Parliament has the possibility of appointing committees of inquiry. On the basis of the TFEU³⁸, 1/4 members of Parliament may request the establishment of a committee of inquiry to investigate fraud or maladministration in the implementation of EU law.

6. Parliament has the right to institute proceedings before the Court of Justice to annul the act of EU law³⁹. The European Parliament also has the right to submit a complaint on another institution to the Court of Justice for a failure to act⁴⁰.

7. The Ombudsman is appointed by Parliament after each election for the duration of the term of office, i.e. 5 years⁴¹. He or she may be re-elected and must be completely independent in the performance of his/her duties, in the interest of the Union and its citizens. The Ombudsman may not seek or take instructions from anybody. The Ombudsman may be dismissed by the Court of Justice at the request of the Parliament (one-tenth of its Members) if he/she no longer fulfills the conditions required for the performance of his/her duties or is guilty of serious misconduct. The Ombudsman deals with cases of maladministration by Community Institutions and bodies (with the exception of the judicial functions of the Court of Justice of the European Union).

C. Supervisory power

1. The European Parliament has an impact on the setting up and staffing of other EU institutions and bodies, i.e. approving candidates for the President of the European Commission and the individual Commissioners. This influence is also expressed by the right of the Parliament to adopt a motion of censure against the Commission.

2. In addition, the European Council consults the European Parliament on the election of members of **the Court of Auditors**⁴². If the opinion adopted by Parliament is negative, the President requests the Council to withdraw its nomination and

³⁸ Article 226 of the TFEU.

³⁹ Cf. Article 263 of the TFEU.

⁴⁰ Cf. Article 265 of the TFEU.

⁴¹ The selection procedure for the European Ombudsman is set out in the Article 228 of the TFEU (the Treaty on the Functioning of the European Union) as well as the Article 204 of the Rules of Procedure of the European Parliament.

⁴² Cf. Article 286 of the TFEU.

submit a new one to Parliament. The same procedure applies for nominations for Vice-President and Executive Board Members of the European Central Bank⁴³.

3. The supervisory powers of the European Parliament include the right to choose the European Ombudsman in accordance with the procedure specified in the TFEU and in the rules of EP.

4. The European Parliament also has an impact on the composition of the panel which is set up to give an opinion on candidates' suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court. The panel comprises seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognized competence, one of whom is proposed by the European Parliament.⁴⁴

D. External powers

1. In the area of external relations, EP expresses opinions, that can be mandatory or optional. Optional opinions are mostly relevant to the conclusion of certain international agreements⁴⁵, while mandatory opinions are on issues such as the conclusion of association agreements, setting specific institutional framework, contracts relevant to the budget and accession of new countries to the European Union⁴⁶.

2. In 1989 the **Conference of Community and European Affairs Committees of Parliaments of the European Union (COSAC)**⁴⁷ was founded. The conference was intended for establishing a more personal contacts between Members of National Parliaments and MEPs. The term 'Parliaments of the European Union' refers to the national Parliaments of the Member States of the European Union (hereinafter referred to as 'national Parliaments') and the European Parliament. The conference is one of the forms of cooperation between Parliament and the national parliaments⁴⁸. The Treaty of Lisbon empowers COSAC to submit any contribution it deems appropriate for the attention of the European Parliament, the Council and the Commission and to promote the exchange of information and best practice between national Parliaments and the European Parliament, including their special committees. It may also

⁴³ Cf. Article 283 paragraph 2 of the TFEU.

⁴⁴ Cf. Article 255 of the TFEU.

⁴⁵ Cf. Article 218 of the TFEU.

⁴⁶ Cf. Article 49 of the TEU.

⁴⁷ The abbreviation derives from the original name of the Conference of Committees for European and Community Affairs of the European Union Parliaments (COSAC) in the French language (*Conférence des Organes Spécialisés dans les Affaires Communautaires*). In order to facilitate and enhance the work of the COSAC, the Rules of Procedure for the Conference of Committees for European and Community Affairs of the European Union Parliaments were enforced.

⁴⁸ Cf. Articles 9-10 of Protocol No 1 on the role of National Parliaments in the European Union.

organize interparliamentary conferences on specific topics, in particular to debate matters of common foreign and security policy, including common security and defense policy.

Each national Parliament can be represented by a maximum of six Members of its Committee(s) for Union Affairs. The European Parliament is represented by six Members. Three members of the Parliaments of each candidate country are invited as observers to plenary and extraordinary COSAC meetings. The Presidency invites observers from the General Secretariat of the Council and the Commission, and it may invite observers from the embassies of the Member States of the European Union, and from other national Parliaments, as well as specialists and special guests.

5. The modus operandi

1. The provisions of the TFEU provide that Parliament establishes its own mode of operation in accordance with its rules of procedure⁴⁹. Parliament works in session mode. Ordinary session lasts one year, and within it are held plenary sessions and committee meetings. Parliament meets for monthly meetings with the exception of August. At the request of the majority of Members, the Council or the Commission, extraordinary session may be convened.

2. Plenary sessions as well as committee meetings are open. Members speak during the session in one of the official languages, MPs speeches are simultaneously translated into all official languages. The General Secretariat, headed by the Secretary-General appointed by the Bureau ensures the coordination of legislative work and organizes plenary sessions. It also provides technical and substantive support to the authorities of Parliament and MPs.

3. The Committee takes all its decisions by a majority of the votes⁵⁰. Treaty introduces an absolute majority vote of all members of the EP (it is required to reject or amend the Council's draft)⁵¹ or double qualified majority (for example, to require a motion of censure against the Commission)⁵². The right to vote is a personal right, so members vote individually and personally.

4. Rules of Procedure provides⁵³ that a quorum exists when one third of the component Members of Parliament are present in the Chamber. All votes are valid wha-

⁴⁹ Article 232 of the TFEU.

⁵⁰ Cf. Article 231 of the TFEU.

⁵¹ Cf. Article 294 of the TFEU.

⁵² Cf. Article 234 of the TFEU.

⁵³ Article 155 of the Rules of Procedure.

tever the number of voters unless the President, on a request made before voting by at least 40 Members, establishes at the time of voting that the quorum is not present. If the voting shows that the quorum is not present, it will be placed on the agenda for the next sitting. As a general rule Parliament votes by show of hands but there are other possible ways of voting (electronic voting, roll call, secret ballot).

§3. THE EUROPEAN COUNCIL

1. General remarks

1. The first informal meeting of leaders of Member States took place in 1961. So-called “summit conference” was convened to resolve the significant concerns that were important for the functioning of the Communities. In addition, the meeting of the Heads of Government, Heads of State and Ministers of Foreign Affairs of the Member States resulted from the need to establish a common foreign policy and to develop tasks on the international stage. Summit Conferences also served to solve crises and conflicts, and to debate on the development of the Communities.

2. In 1974, at a conference in Paris it was proposed that meetings are held regularly, three times a year. The legal basis of the European Council was established only in 1986 by the Single European Act. The provisions of the SEA defined the composition of the European Council, and indicated the frequency of meetings, but without specifying the legal nature of the institution⁵⁴. Similar provisions are contained in the Treaty on European Union. On 1 December 2009 under the Treaty of Lisbon, the European Council was granted formal status of one of the seven institutions of the European Union. The reforms of the Lisbon Treaty are also an extension of the competence of the European Council and the introduction of permanent President of the European Council, role held so far by the head of the country holding the Presidency.

3. The European Council **does not have its headquarters**. In the, the European Council meeting were usually held in a Member State, which currently hold the Presidency of the Council. However, in accordance with the Declaration No 22 to the Treaty of Nice, in a situation when the EU expands to over 18 states, all Council meetings will be held in Brussels. Under the provisions of the EU Treaty⁵⁵, the European

⁵⁴ Cf. Article 2 of the SEA.

⁵⁵ Cf. Article 15 paragraph 3 of the TEU.

Council meets at least twice every six months, and - if necessary - at extraordinary meetings. Nowadays there is also the European Council website where you can find current information about its organization and activities⁵⁶.

2. Composition and organization

1. The European Council, in accordance with the provisions of the EU Treaty, consists of the Heads of State or Government of the Member States, together with its President and the President of the Commission. The phrase “the Heads of State or Government” recognizes the differences in the political and legal systems of the Member States⁵⁷. If the agenda so requires, the members of the European Council may decide each to be assisted by a minister and, in the case of the President of the Commission - a member of the European Commission. The High Representative of the Union for Foreign Affairs and Security Policy takes part in its work.

2. The Council is not an elective institution neither a special mode of its establishment is expected⁵⁸. This is due to the special character of the composition of the Council. Personal changes in the Council stem directly from changes in the positions of Heads of State, Government and Ministers of Foreign Affairs in each of the Member States. In addition, the Treaty on European Union advises that the Heads of State or Government meet national Parliaments, or to their citizens.

3. President of the European Council is elected by the European Council by qualified majority for a period of two and a half years⁵⁹. The same procedure is used to

⁵⁶ The official website of the European Council can be found at: www.european-council.europa.eu.

⁵⁷ This expression along with uncertainties as to the interpretation of the provisions of the Constitution of the Republic of Poland, led to a conflict of competence in Poland between the Prime Minister and the President to the extent of the right to represent the Republic of Poland in the meetings of the European Council. Cf. the decision of the Constitutional Tribunal of the Republic of Poland of 20 May 2009 (file reference number Kpt 2/08, M.P. No 32, item 478). The Constitutional Tribunal stated that the President of the Republic of Poland, the Cabinet, and the Prime Minister in the performance of their constitutional duties and competences are guided by the principle of co-operation of the authorities. The President in the capacity of the supreme representative of the Republic of Poland may decide to participate in a particular meeting of the European Council, if he deems it appropriate and purposeful. However, the position of the Republic of Poland for the meeting of the European Council is determined by the Cabinet. The Prime Minister represents the Republic of Poland in the meeting of the European Council and presents the position that was previously determined. However, the co-operation of the President with the Prime Minister and the competent minister allows for the President of the Republic to address – as far as the matters arising from performance of the President’s competences set out in the Constitution are concerned - the position of the Republic of Poland determined by the Cabinet.

⁵⁸ Cf. Article 10 of the TEU.

⁵⁹ Before the TL (the Treaty of Lisbon) came into force, the head of state or the head of the government of a Member State, which had chaired the Council of the European Union (served as the Presidency), had been the President of the European Council.

render his or her mandate. In the selection of the President of the European Council, the need to respect the geographical and demographic diversity of the Union and its Member States should be considered in an appropriate way⁶⁰. The mandate of the President can be renewable once. The President chairs the European Council and carries out its work. In cooperation with the President of the European Commission and on the basis of the work of the General Affairs Council, he/she ensures the preparation and continuity of the work. The President also supports cohesion and consensus in the Council as far as presenting the report on each meeting of the Council. The provisions of the Treaties confer on the President of the European Council to represent the Union on issues concerning the CFSP⁶¹. President is obliged to summarize the results of the meeting. The first permanent President of the European Council is the Belgian Prime Minister, **Herman Van Rompuy**, elected on 1 December 2009⁶².

4. In a situation where the President of the European Council can not hold the function due to an illness, deprivation of the mandate or in the case of his/her death, until the election of a successor, he or she is replaced by a member of the European Council representing the Member State which currently holds the presidency of the Council.

5. As already mentioned, the European Council **meets twice every six months**. The meetings are convened by the President of the European Council. The proceedings are prepared by the General Affairs Council, which ensures their continuity. In addition, to prepare for the meeting, the President establishes close cooperation and coordination with the Council Presidency and the European Commission President. The European Council operates under the rules of procedure adopted by the European Council on 1 December 2009⁶³. The European Council is assisted by the General Secretariat of the Council.

⁶⁰ The same applies to the election of the President of the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy. See the Declaration regarding the Article 15, Paragraph 5 and 6; the Article 17, Paragraph 6 and 7 and the Article 18 of the Treaty on European Union.

⁶¹ Cf. the Article 15, Paragraph 6 of the TEU (the Treaty on European Union). The EU external representation is provided by the President of the European Council, at his level and within his competence. Furthermore, this right has to be exercised without prejudice to the powers of the High Representative of the Union for Foreign Affairs and Security Policy.

⁶² On 1st of March 2012, Herman Van Rompuy was elected for the second two-and-a-half year term of office. The term of office will commence on 1st of June 2012 and will lapse on 30th of November 2014. Herman Van Rompuy will concurrently serve as the first chairman of the Eurozone summits.

⁶³ Cf. the European Council Decision No 2009/882/EU of 1 December 2009 on adopting the Rules of Procedure. Before the Treaty of Lisbon came into force, the European Council had not have its rules of procedure. The resolution adopted in 1977 at the summit in London and the Rules of Procedure of the EU Council had governed the procedures.

6. The European Council meets for up to two days. The meetings are not public. At the beginning of the meeting, a member of the European Council representing the Member State that holds the Presidency of the Council submits a report on the work of the European Council. The President of the EP may be invited to the meeting of the European Council. The European Council takes decisions by consensus, unless the treaty provides otherwise⁶⁴. As a matter of procedure, the European Council decides by a simple majority. However, in the case of voting under the qualified majority in the EP, the provisions regarding voting in the Council are observed. A quorum is constituted by two thirds of members of the European Union (when it is calculated it does not include the President and the President of the European Commission). During the vote, each member of the European Council may also act on behalf of not more than one other member. If the decisions of the Council are taken by vote, its President and the President of the European Commission do not take part in it⁶⁵. Regulations also provide the possibility of written ballot, with a prior consent of all the members of the European Council. A protocol is drawn up at each meeting. Members of the European Council may also decide to go public with the decisions taken at the meeting and the results of the votes on the various points of the meeting. The European Council is also obliged to submit a report of the proceedings to the European Parliament.

3. Competences

1. The general outline of the competence of the European Council is included in the EU Treaty, which states that the Council provides the Union with necessary **impetus** for its development and defines the general political directions and priorities⁶⁶. It follows that the Council's tasks are mainly **political**. In this area, the Council has the function of accelerating and deepening the integration of the Member States. The Treaty on European Union also reserves that the Council does not exercise legislative functions.

2. The **powers of the Council** mentioned in the rules of the Treaty include:

- a) formulation of the draft of the broad guidelines of the economic policies of the Member States and of the Union on a recommendation from the Commission⁶⁷;

⁶⁴ Cf., for instance, the decisions which require a qualified majority as governed by Article 236 of the TFEU.

⁶⁵ Article 235 paragraph 1 TFEU and Article 6 Rules of Procedure of the European Council.

⁶⁶ Cf. Article 15 paragraph 1 of the TEU.

⁶⁷ Cf. Article 121 paragraph 2 of the TFEU.

- b) consideration of the employment situation in the Union and adoption of the conclusions thereon, on the basis of a joint annual report by the Council and the Commission⁶⁸;
- c) adoption of the annual accounts of the European Central Bank on the activities of the ESCB and on the monetary policy of the previous year and the current⁶⁹;
- d) finding of a violation by a Member State of the values referred to in Article 2 TEU⁷⁰;
- e) adoption of a decision determining the composition of the EP⁷¹;
- f) participation in the creation and appointment of the European Commission⁷²;
- g) appointment of the High Representative of the Union for Foreign Affairs and Security Policy⁷³;
- h) defining strategic objectives and interests of the EU⁷⁴;
- i) defining the general guidelines of the Common Foreign and Security Policy, including matters affecting the political and defense issues⁷⁵;
- j) deciding on the adoption of a common defense policy⁷⁶;
- k) developing eligibility criteria that are taken into account by the Council when making decisions regarding the expansion of the European Union⁷⁷;
- l) convening of the Convention, which aim would be the amendment of treaties⁷⁸;
- m) participating in the procedure of separating a Member State of the EU⁷⁹.

§4. COUNCIL OF THE EUROPEAN UNION

1. General remarks

1. Each of the three founding treaties provide for the functioning of the institutional system of the Council. As a part of the ECSC, the **Special Council of Ministers**

⁶⁸ Cf. Article 148 paragraph 1 of the TFEU.

⁶⁹ Cf. Article 284 paragraph 3 of the TFEU.

⁷⁰ Cf. Article 7 of the TEU.

⁷¹ Cf. Article 14 paragraph 2 of the TEU.

⁷² Cf. Article 17 of the TEU.

⁷³ Cf. Article 18 of the TEU.

⁷⁴ Cf. Article 22 of the TEU.

⁷⁵ Cf. Article 26 paragraph 1 of the TEU.

⁷⁶ Cf. Article 42 of the TEU.

⁷⁷ Cf. Article 49 of the TEU.

⁷⁸ Cf. Article 48 of the TEU.

⁷⁹ Cf. Article 50 of the TEU.

functioned. It included one representative of each Member State, who was a member of the government in his/her country. The task of the Special Council was to coordinate activities of the High Authority and Governments of the Member States in the areas mentioned in the Treaty.

2. Under the treaties of 1957, two new Councils were founded (EEC and EAEC) on the model of the Special Council. Merger Treaty signed in 1965, replaced all three Councils with one Council operating under the three Communities. In subsequent treaties provisions concerning the composition of the Council were clarified and unanimous decision in the Council was replaced, in many cases, by a qualified majority voting. In 1993, the Council under its own decision was renamed the Council of the European Union. This is the common name since the Treaty provisions use the term "Council".

3. The Council has its seat in Brussels. In April, June and October Council meetings are held in Luxembourg. In exceptional cases the Council or COREPER may decide to change the place of meeting⁸⁰. The decision must be unanimous. Relevant information on the Council of the EU can be found on its official website⁸¹.

2. Composition and organization

1. The provisions of the EU Treaty provide that the Council is composed of representatives of all Member States at ministerial level, authorized to incur liabilities on behalf of the government of the country and to exercise voting rights⁸². In the meetings of the European Council are also involved government officials accompanying the ministers, as well as a representative of the Commission. Member of the Council may delegate its rights, including the right to vote, to another member of the Council. He or she cannot, however, represent more than one Member State⁸³. Please note that the decisions taken by the various formations of the Council are considered as decisions of the EU Council.

2. Depending on the subject of the meeting the Council sits in composition of competent ministers. Hence, **the composition of the Council is not fixed** and depends on the type of cases that are the subject of the meeting. It may also happen that the Council works in a number of compositions together when the agenda includes some

⁸⁰ In conformity with the Article 1, Paragraph 3 of the Rules of Procedure of the EU Council; see the EU Council Decision No 2009/937/EU of 1 December 2009 on adopting the Council's Rules of Procedure.

⁸¹ Official website of the Council of the European Union can be found at: www.consilium.europa.eu

⁸² Cf. Article 16 of the TEU.

⁸³ Cf. Article 239 of the TFEU.

of the common areas. The Council meets in different configurations, the list of which is adopted by a qualified majority of the European Council. The provisions of the Treaty on the European Union list the General Affairs Council and Foreign Affairs Council⁸⁴.

In addition, since the Treaty of Amsterdam, **the following Councils** (known as **technical councils**) have been established⁸⁵:

- The Council of Economic and Financial Affairs (ECOFIN);
- The Council of Justice and Home Affairs (JHA);
- The Employment, Social Policy, Health and Consumer Affairs Council ;
- The Competitiveness Council (Internal Market, Industry, Research and Space);
- The Transport, Telecommunications and Energy Council (TTE);
- The Agriculture and Fisheries Council ;
- The Environment Council;
- The Education, Youth, Culture and Sport Council (EYCS) .

3. The General Affairs Council ensures consistency between the work of the different Council configurations. Its task is also to prepare the meetings of the European Council and ensure their continuity. It cooperates in this regard with the President of the European Council and the European Commission. In addition, the General Affairs Council is called upon to resolve disputes arising during the session of specific technical councils. The General Council may also increase the number of technical councils⁸⁶. Foreign Affairs Council functions under the chairmanship of the High Representative of the Union for Foreign Affairs and Security Policy. It is responsible for developing the Union's external actions on the basis of strategic guidelines laid out by the European Council. The purpose of the Foreign Affairs Council is also to ensure coherence of the EU actions.

4. Presidency of Council configurations, with the exception of the Foreign Affairs Council (which is always chaired by the High Representative for Foreign Affairs and Security Policy), is held by representatives of the Member States in the Council on the basis of equal rotation. Decision on the presidency of Council configurations, is made by the European Council by a qualified majority⁸⁷.

Until the entry into force of the Lisbon Treaty, the EU Council was chaired by each Member State for a 6 months period, beginning on 1 January and 1 July each year. With the entry into force of the Lisbon Treaty, the European Council adopted a deci-

⁸⁴ Article 16 paragraph 6 of the TEU.

⁸⁵ Confirmed in the Annex to the Rules of Procedure of the Council.

⁸⁶ Cf. the Decision of the Council (General Affairs) No 2009/878/UE of 1 December 2009 on establishing the list of the Council configurations complementary as referred to in Article 16, Paragraph 6, Section Second and Section Third of the Treaty on European Union.

⁸⁷ Article 16 paragraph 9 of the TEU in connection with Article 236 of the TFEU and Article 1 paragraph 4 of the Rules of the Council.

sion⁸⁸ according to which the Presidency of the Council is exercised by pre-established groups of three Member States for a period of 18 months (the so-called “Trio Presidency”). These groups are created on the basis of equal rotation of the diversity and geographical balance within the EU. Each member of the group chairs by the six-month period to all configurations of the Council (with the exception Foreign Affairs Council). Other two countries of the group support the presiding state in his duties in accordance with previously agreed program.

The initial six-month period was considered to be too short for the presiding country to successfully achieve its objectives. Hence the idea of Presidency group, that brings together the three countries holding the presidency one after another, which coordinate among themselves the main objectives of Presidency by a predetermined program.

The order in which the office of President of the Council shall be held (2007-2020) ⁸⁹:

T	T S	EA
Germany	January- June	
Portugal	July- December	
Slovenia	January- June	
France	July- December	
Czech Republic	January- June	
Sweden	July- December	
Spain	January- June	
Belgium	July- December	
Hungary	January- June	
	July- December	
Denmark	January- June	
Cyprus	July- December	

⁸⁸ The Decision of the European Council No 2009/881/EU of 1 of December 2009 on the exercise of the Presidency of the Council issued in connection with the declaration regarding Article 16, Paragraph 9 of the Treaty on European Union concerning the European Council decision on the exercise of the Presidency of the Council, [in:] *Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon*.

⁸⁹ The order of the office of the President of the Council is set out in the Council Decision 2007/5/EC, Euratom of 1 January 2007 on the order of the Presidency of the Council. In accordance with Council Decision 2009/908/EU of 1 December 2009 laying down measures for the implementation of the European Council decision on the exercise of the Presidency of the Council and on the chairmanship of preparatory bodies of the Council the agenda was divided into groups of three Member States. This decision also shows that the order in which the Member States will hold the Presidency of the Council with effect from 1 July 2020 will be determined by the Council before 1 July 2017. Croatia which joined the EU on 1 July 2013 will be included in the fixed order from that date.

T	T S	EA
reland	anuary- une	
ithuania	uly- eceember	
reece	anuary- une	
taly	uly- eceember	
atvia	anuary- une	
u embourg	uly- eceember	
etherlands	anuary- une	
Slovakia	uly- eceember	
Malta	anuary- une	
United ingdom	uly- eceember	
Estonia	anuary- une	
ulgaria	uly- eceember	
Austria	anuary- une	
omania	uly- eceember	
inland	anuary- une	

The powers of the presidency should be first of all: to represent the Council to other EU institutions and third countries, to organize work of the Council, to convene and chair the meetings of the Council; to manage subsidiary bodies of the Council.

5. **Council meetings** are convened by the Chairman:

- on his/her own initiative,
- at the request of any member of the Council ,
- at the request of the Commission.

The EU Council meetings are open to representatives of the EC and the ECB, unless the Council decides otherwise. The proceedings are not public, except for the debates on adoption and voting on a draft legislative act and public debates on new legislative proposals.

6. Eighteen-month **schedule of meetings** of the Council is prepared at the beginning of the “new” Presidency. Council meetings are preceded by preparatory works within the Committee of Permanent Representatives (COREPER) and the committees and working groups. Council **agenda** is divided into **two parts**. It is prepared on the basis of proposals submitted to the Secretary General by members of the Council. Prior to the meeting the agenda is sent to members of the Council and the European Commission. However, the final approval of the agenda of the Council happens at the

beginning of the meeting. Part A of the agenda includes proposals that do not require discussion, and Part B includes points that involve establishing a common position of the Council.

3. Decision-making

1. Decisions of the Council of the European Union may be taken in one of three variants of the majority:

- **simple majority,**
- **qualified majority,**
- **unanimity.**

2. **The procedure of simple majority**⁹⁰ is that the Council acts by a majority of its members. Each Member State has one vote. Simple majority votings, in practice, are not the most common. They are used mostly in minor issues⁹¹.

3. **Qualified majority voting (QMV)** is associated with the fact that each Member State accounts for a **certain number of votes**, which depends mainly on the demographic potential of each country, with an indication to small countries.

Distribution of votes in the Council of the European Union including the state of the current population in the period from 1 January 2013 to 31 December 2013:

S		
Germany		,
France		,
United Kingdom		,
Italy		,
Spain		,
Romania		,
Netherlands		,
Greece		,
Belgium		,
Portugal		,

⁹⁰ Article 238 paragraph 1 of the TFEU.

⁹¹ Cf. Article 240, paragraph 3 of the TFEU, Article 242 of the TFEU.

S		
Czech Republic		,
Hungary		,
Sweden		,
Austria		,
Bulgaria		,
Denmark		,
Slovakia		,
Finland		,
Ireland		,
Croatia		,
Lithuania		,
Latvia		,
Slovenia		,
Estonia		,
Cyprus		,
Luxembourg		,
Malta		,
T :		

- Since 1 July 2013, a qualified majority requires the following two conditions:
- majority of Member States vote “for” when the Council adopts act on the proposal of the European Commission (in other cases a two-thirds majority is required);
 - at least 260 votes “for” (i.e. 73.86% of all votes).

In addition, any Member State have the right to request verification that the votes cast “for” represent at least 62% of the Union’s population. Rate of 62% of the total population of the EU is based on the figures set out in the Annex to the Regulation of the Council of the European Union (each Member State is required to provide annually data on the state of the population in this country to the European Statistical Office)⁹³. If the required majority is not obtained, a decision is not taken.

⁹² According to the Council’s decision a threshold of 62% of the population of the European Union for the period from 1st of January 2013 until 31st of January 2013 is equivalent to 315 008.3 thousand. Cf. the Council’s decision 2013/345/UE of 1 July 2013 on amending the Rules of Procedure of the Council.

The number of matters covered by the voting system has gradually increased. Despite its complexity it is more practical, taking under consideration such a large number of Member States. The procedure of qualified majority is required (such as) for the adoption of secondary legislation under the ordinary legislative procedure⁹³.

According to the amendments made to the TEU and the TFEU in the Lisbon Treaty, **qualified majority voting** has been applied to many areas of activity. The principle that the Council acts by a qualified majority, supposing the Treaties provide otherwise, also implies changes in the voting system. Treaties⁹⁴ provide for that, **from 2014**, a new **system of qualified majority voting** will be introduced, which will replace the existing Nice voting system.

Since 1 November 2014, a qualified majority provides at least 55% of the members of the Council, but no less than sixteen of them and representing Member States with total population of at least 65% of the population of the Union.

A **blocking minority** must include at least four Council members, representing more than 35% of the population of the participating Member States, otherwise it is considered that the qualified majority is reached.

If the Council does not act at the request of the European Commission or the High Representative of the Union for Foreign Affairs and Security Policy, the qualified majority constitutes at least 72% of the members of the Council representing the participating Member States, with a total population of at least 65% of the population of these countries.

Between 1 November 2014 and 31 March 2017, when an act is to be adopted by a qualified majority, a member of the Council may request that it to be adopted in accordance with the qualified majority as defined in the Nice system. 1 April 2017, only the double majority system presented above will be valid. However, the Treaty of Lisbon introduces a security mechanism, similar to the the Ioannina compromise. If members of the Council group run out of votes to block certain resolution they will still be able to postpone a decision on the matter. The condition will be the appropriate size of the group.

In the period 2014-2017 the members of the Council, representing:

- a) at least 75% of the population, or
- b) at least 75% of the number of Member States,

necessary to constitute a blocking minority may oppose the adoption of legislative act by a qualified majority. The case goes for discussion of the Council, which is required to find a satisfactory solution to the situation within a reasonable time and without exceeding the time limits.

⁹³ Cf. Article 294 of the TFEU.

⁹⁴ Cf. Article 16 of the TEU, Article 238 of the TFEU, the declaration regarding Article 16, Paragraph 4 of the Treaty on European Union and Article 238, Paragraph 2 of the Treaty on the Functioning of the European Union and Article 3 of the *Protocol No 36 on transitional provisions*.

However, from 1 April 2017, a group that will want to block the adoption of the resolution, must represent:

- a) at least 55% of the population, or
 - b) at least 55% of the number of Member States,
- necessary to constitute a blocking minority.

4. The system of unanimity requires agreement of all Member States. Thus none of the members of the Council can raise objections. In addition, the provisions of the TFEU provide that absence is not an obstacle to adopt a decision⁹⁵.

However, in the absence of a member of the Council who did not grant the power of attorney to one of the members of the Council, it is impossible to decide in the procedure of unanimity. This mode is required when making important decisions, such as the adoption of a new member, the association of the European Union states and the revision of the treaties⁹⁶.

4. Competences

1. In general, the competence of the Council is defined in Article 16 of the TEU. On this basis the EU Council fulfills legislative and budgetary functions. The Council is responsible for determining policies and coordination under the terms of the treaties. Furthermore special provisions confer on the Council also other rights. In summary, we can distinguish the following powers of the Council of the European Union:

- **legislative powers,**
- **deliberative powers,**
- **supervisory powers,**
- **external powers.**

2. There are five fundamental **legislative powers** of the Council of the European Union. First of all - the right to issue regulations and directives, take decisions and make recommendations and opinions, which is granted to the EU Council as the supreme decision-making body⁹⁷. Secondly - the power to take appropriate actions (at the request of the EC and after consulting the EP) on matters which are not mentioned in the Treaty, in the scope necessary to achieve one of the objectives of the Union⁹⁸. Thirdly - possibility to require the European Commission to carry out the analysis of the means necessary for the attainment of the objectives set in the Treaty and to sub-

⁹⁵ Article 238 paragraph 4 of the TFEU.

⁹⁶ See e.g. Article 203 of the TFEU, Article 246 of the TFEU, Article 252 of the TFEU, Article 48 of the TEU.

⁹⁷ Cf. Article 288 of the TFEU.

⁹⁸ Cf. Article 352 of the TFEU.

mit appropriate proposals to the Commission. The provisions of the TFEU provide the right of indirect legislative initiative to the Council⁹⁹. Fourth - to provide authorization for the enhanced cooperation¹⁰⁰. Fifth - the right to modify the provisions of the founding treaties¹⁰¹.

3. Deliberative powers (also called nominative) point to a significant impact of the Council on the functioning of other institutions. These are:

- a) receiving lists of candidates for members of the Economic and Social Committee¹⁰², the Committee of the Regions¹⁰³, Court of Auditors¹⁰⁴, prepared in accordance with the proposals made by each Member State;
- b) calculation of salaries of the European Union officials¹⁰⁵;
- c) participation in the procedure of appointment of members of the Commission and the Court of Justice of the European Union.

4. Supervisory powers include:

- a) the right to bring an action for annulment of EU law¹⁰⁶;
- b) the right to bring an action for failure to act of other institutions of the European Union¹⁰⁷;
- c) the right to suspend the Member State in its rights for infringement of the principles on which the EU is founded¹⁰⁸.

5. Among the external powers are:

- a) ensuring the coordination of the general economic policies of the Member States ;
- b) participation in the process of adopting the budget¹⁰⁹;
- c) agreements with third countries and international organizations¹¹⁰;
- d) ensuring the unity, consistency and effectiveness of the EU's external actions¹¹¹;

⁹⁹ Cf. Article 241 of the TFEU.

¹⁰⁰ Cf. Article 329 of the TFEU.

¹⁰¹ Cf. Article 48 of the TEU.

¹⁰² Article 302 of the TFEU.

¹⁰³ Article 305 of the TFEU.

¹⁰⁴ Article 286 paragraph 2 of the TFEU.

¹⁰⁵ Article 243 of the TFEU.

¹⁰⁶ Cf. Article 263 of the TFEU.

¹⁰⁷ Cf. Article 265 of the TFEU.

¹⁰⁸ Cf. Article 7 of the TEU.

¹⁰⁹ In accordance with the procedure referred to in Article 314 of the TFEU.

¹¹⁰ According to the procedure described in Article 218 of the TFEU.

¹¹¹ Cf. Article 21 of the TEU.

- e) taking decisions required for determining the Common Foreign and Security Policy based on the guidelines of the European Council¹¹²;
- f) lawmaking in the area of freedom, security and justice;
- g) decision making on the Common Security and Defence Policy¹¹³.

5. Subsidiary bodies and administration

1. The EU Council is supported by the Committee of Permanent Representatives (COREPER - fr Comité des Représentants Permanents). This committee was set up in 1958 to support the EU Council in carrying out its tasks. The legal basis for functioning of the Committee is Article 240, paragraph 1 TFEU and the provisions contained in the regulations of the Council. As held by the Court of Justice, COREPER is not an institution, but a subsidiary advisory body¹¹⁴.

Committee acts as **COREPER II**, consisting of the heads of delegations of the Member States accredited in Brussels as ambassadors, and as **COREPER I**, consisting of deputy ambassadors. Ambassadors debate on the general issues, while their deputies deal with technical issues. COREPER members are bound by the instructions of Member States. Each Committee group meets at least once a week. The representatives of the European Commission can attend these meetings.

2. The Permanent Representatives Committee is to prepare the work of the Council and to perform the tasks assigned to it by the Council. In addition, it provides a consistent EU policies and activities and is required to ensure compliance with the principles of legality, subsidiarity and proportionality. The Committee also ensures the enforcement of the rules on competence of the institutions and bodies of the European Union. For the effective discharge of its duties COREPER may adopt procedural decisions.

In order to ensure proper and effective functioning of the EU Council, COREPER has the right to appoint committees and working groups, which will address the issues of interest to the EU Council. COREPER is currently supported by about 250 committees and working groups, formed from those delegated by the Member States.

3. The Council is assisted by the General Secretariat¹¹⁵ which is headed by the Secretary General of the EU Council¹¹⁷. The Secretary-General is supported by a deputy,

¹¹² Cf. Article 26 of the TEU.

¹¹³ Cf. Article 42 of the TEU.

¹¹⁴ Cf. judgment in Case C-25/94 *The Commission v. The Council*.

¹¹⁵ Cf. Article 240 paragraph 2 of the TFEU.

¹¹⁶ Before the TL came into force, the Secretary General had concurrently been the High Representative of the Union for Foreign Affairs and Security Policy.

whose tasks include the management of the General Secretariat. Both are appointed by the Council by a qualified majority. The Secretary and his deputy may represent the Council at the EP committees.

The Secretariat is responsible for the organization and coordination of activities aimed at ensuring consistency of the Council work. Furthermore, it is obliged to prepare the annual program of the Council.

§5. THE EUROPEAN COMMISSION

1. General remarks

1. The origins of the European Commission are related to the **High Authority**, which was the main body of the ECSC. The group consisted of nine international officials. The High Authority had the power to legislate and control. Moreover, since 1958, there have been two independent commissions: Commission of the EEC and Euratom Commission. Their composition and powers were similar to those held at the High Authority of the ECSC. In 1967, under the provisions of the Merger Treaty, one committee was set up in place of all three communities. With the expansion of the EU, the number of commissioners is rising. Since the accession of Croatia (2013) the Commission consists of 28 commissioners. The present Commission's term of office will run until 31 October 2014. It is chaired by a Portuguese José Manuel Barroso, who performs this function for (of) his second term. It is worth to remember that the first member from Poland was Danuta Hübner (Regional Policy Commissioner). Also in 2009, Janusz Lewandowski was designated the Commissioner for Financial Programming and Budget.

2. "European Commission" was a commonly used term, although the TEC and the TEU only used the term "the Commission". The term "European Commission" was introduced in the Lisbon Treaty, but only in the article listing the EU institutions, in other articles this institution is referred to as "the Commission". This term means primarily a group of people called to lead the institution. While in the second sense, the Commission "is the institution itself and to its staff.

3. The official seat of the European Commission in **Brussels**. The Commission also has its offices in Luxembourg. In all EU countries, the Commission has representative offices (**representations**), acting as spokesman of the EC in Member States. Delegations of the Commission deal with monitoring public opinion in the countries and disseminate information about the EU through the organization of events and the

distribution of brochures, flyers and other promotional and informational materials. (However,) They reside at the premises of international organizations (including the UN, OSCE, WTO), as well as in third countries (including Albania, Israel, Indonesia, Peru) where they represent the European Commission, which, since the entry into force of the Lisbon Treaty, is expected to become Union **delegacy** subjected to the High Representative of the Union for Foreign Affairs and Security Policy¹¹⁷. Relevant information on the the EC can be found on its official website¹¹⁸.

2. Composition and organization

1. The Commission is appointed for five years within six months from the date of the elections to the European Parliament. The procedure for the appointment of the Commission is made up of several stages regulated by Article 17 of the TEU and Article 244 of the TFEU.

The first stage is to agree by the governing Member States on a joint bid for President of the Commission. A candidate should be put forward respecting the geographical and demographic diversity of the Union and its Member States. A candidate who has been nominated by a qualified majority of the European Council, is introduced to the European Parliament, which must vote on the approval of the nomination. Candidate for President of the EC is elected by the European Parliament by a majority of its members. If the candidate does not secure a majority, the European Council, acting by a qualified majority, proposes a new candidate within one month who is then elected by the European Parliament in accordance with the same procedure.

Then the governments of Member States indicate, in agreement with the nominee for President, **candidates for the Commissioners**, who must be accepted by the Council. The Council prepares a list of members of the Commission with the President and the High Representative of the Union for Foreign Affairs and Security Policy, which is subject to approval by the European Parliament.

The final vote in the European Parliament is preceded by hearings of candidates in the relevant parliamentary committees. After approval and adoption of the submitted Commission composition by the European Parliament, the European Council formally **appoints** the chairman and other members of the Commission, acting by a qualified majority.

¹¹⁷ Cf. Article 220-221 of the TFEU. The EU delegations are commonly referred to as the embassies of the EU. The Union institutions, in addition to the economic issues, will also deal with the matters of defence. Within the framework of the EU delegation, political divisions will be established. The EU ambassadors will have the impact on the EU foreign policy, and for instance, will be in a position to apply for sanctions to be imposed on a particular state.

¹¹⁸ Official website of the European Commission can be found at: www.ec.europa.eu.

2. The Commission appointed between the date of entry into force of the of Lisbon Treaty and 31 October 2014 consists of one citizen of each Member State and includes its President and the High Representative of the Union for Foreign Affairs and Security Policy who is one of the Vice-Presidents of the EC¹¹⁹.

As of 1 November 2014 the Commission shall consist of such a number of members, including its President and the High Representative of the Union for Foreign Affairs and Security Policy, which corresponds to 2/3 of the number of Member States, unless the European Council, acting unanimously, decides to alter this number.

The EC members are elected from among the nationals of the Member States on the basis of a system of strictly equal rotation¹²⁰. This system is designed to reflect the demographic and geographic diversity of all Member States.

The provisions of the treaty guarantee the independence of the members of the Commission in performance of their duties. Commissioners are required to act in the interests of the Union. They cannot receive instructions from any government or other institution, body, office or entity¹²¹. The EC members refrain from taking any action which would be incompatible with their duties or the performance of their tasks.

3. Commissioners are elected for a five-year term. The mandate of the Commissioner is renewable. Only the person holding the nationality of a Member State may be a Commissioner. Such a person should have a general competence and involvement in European issues. Independence of a candidate for Commissioner must be beyond doubt. In the exercise of its function the Commission members may not engage in any other paid or unpaid professional activity. However, after the tenure of this position they are obliged to adopt a fair and prudent appointments or benefits. Breach of duty of honesty or prudence by the Commissioner may result in the dismissal or loss of the right to a pension or other emoluments, which sanctions were adjudicated by the CJEU¹²². In addition, members of the Commission are entitled to special privileges and immunities (such as immunity from jurisdiction or tax).

4. The mandate of the Commissioner ceases to exist upon:

- a) death,
- b) end of the term,
- c) voluntary resignation ,
- d) resignation at the request of the President of the Commission ,
- e) dismissal.

¹¹⁹ According to Article 5 of Protocol No. 36 on transitional provisions the EC members in office on the date of entry into force of the TL shall remain in office until the end of term. However, on the appointment of the High Representative of the Union for Foreign Affairs and Security Policy, the term of office of the member having the same nationality as the High Representative ends (up).

¹²⁰ The system is enforced by an unanimous decision of the European Council in compliance with Article 244 of the TFEU.

¹²¹ The provision of Article 245 of the TFEU provides for the Member States to respect the independence of the Commissioners and shall not seek to influence them.

A vacancy caused by death, resignation or dismissal of a member of the Commission, the Council (in consultation with the President of the European Commission and after consulting the EP) fills by appointing an alternate who will serve as Commissioner until the end of the term of office of the Commission. The Council, acting unanimously on a proposal from the President of the European Commission, may decide not to fill the vacancy. In the event of a voluntary resignation, the outgoing commissioner is obliged to perform his/her duties until the election of a successor.

Member of the EC may also be asked to resign at the request of the President of the Commission¹²³. The President of the EC may also request the resignation of the High Representative of the Union for Foreign Affairs and Security Policy, who is Vice-President of the European Commission.

Commissioner can also be dismissed. Under the provisions of the TFEU, the Court of Justice of the European Union, at the request of the Council or the Commission, may dismiss a Commissioner when he or she committed serious misconduct or failed to satisfy the necessary conditions to exercise his/her functions¹²⁴.

5. The provisions of the treaty provide the procedure to dismiss the whole Commission. Such a decision may be taken by the European Parliament. It should be noted that the EP may adopt a motion of censure against the whole composition of the EC, rather than against individual members of the Commission. The vote in the Parliament on a motion of censure against the EC may be held until at least three days after the request for the appeal. It must be a public vote. If the proposal secures a majority of two thirds of votes cast, representing a majority of the members of Parliament, Members of the Commission must resign, and the High Representative of the Union for Foreign Affairs and Security Policy also resigns from the Commission. Dismissed Commissioners fulfill their duties until the appointment of the new Commission¹²⁵.

6. It is worth noting that the Lisbon Treaty increased the powers of the President of the European Commission. First of all, he/she directs the work of EC in order to ensure the implementation of its pre-defined policy guidelines. The President of EC also determines the extent of the duty of individual Commissioners and allocates them to specific areas of activity where they are responsible for preparing the work of the Commission and the implementation of its decisions. Thus, the President may appoint groups from among the members of the Commission, defining their powers and functions. Furthermore, the President has the right to appoint the EC Vice-Presidents (except for the High Representative of the Union for Foreign Affairs and Security Policy, who is Vice-President by law) and determine the priorities for the

¹²² Cf. Article 245 of the TFEU.

¹²³ Cf. Article 17 paragraph 6 of the TEU.

¹²⁴ Cf. Article 247 of the TFEU.

Commission. President has also the right to request any Commissioner to resign. The President represents the Commission.

3. The modus operandi

1. The Commission is a collective body. Decisions taken by the Commission are joint decisions. Therefore, in accordance with the principle of collective responsibility, all members of the Commission bear an equal political responsibility for decisions taken by the European Commission. In its relations with the other institutions of the European Union, the Commission as a whole is always present.

2. The Commission is **politically accountable to Parliament**, which has the right to dismiss the whole Commission by adopting a motion of censure. Members of the Commission participate in all sessions of Parliament, where their task is to clarify and justify their policy directions. The Commission is also required to respond to written and oral parliamentary questions.

3. The Commission operates under its **own rules of procedure**, to the adoption of which it was obliged under the provisions of the treaty¹²⁵. The Commission meets **at meetings** at least once a week (usually on Wednesdays), but it is possible to organize additional meetings in emergency situations. Each item on the agenda is presented by the Commissioner responsible for that policy area and a decision on the matter is taken jointly by the whole team.

4. Meetings of the Commission **are not open**. The audience does not have access to them, and discussions held during the meetings of the Commission are confidential. The meetings can be convened by the Chairman of the Commission. The **quorum** for the meeting is **more than half of the members**. When there is no quorum, no voting can be carried out, though the meeting itself is valid. With the agreement of the Chairman, it is allowed for an absent member of the Commission to be represented at the meeting by the head of his office. In addition, meetings of the Commission can be assisted by the Secretary-General and Head of Cabinet of the President of the European Commission.

¹²⁵ Cf. Article 234 of the TFEU and Article 17 paragraph 8 of the TEU.

¹²⁶ Article 249, Paragraph 1 of the TFEU. In connection with the enforcement of the amendments arising from the Treaty of Lisbon, the current wording of the Rules of Procedure for the Commission was announced under the Decision No 2010/128/UE, Euratom of 24 February 2010 on amending the Rules of Procedure of the Commission. Furthermore, in connection with the financial crisis in the euro zone, the EC rules was updated with the new rules under the Commission's Decision no 2011/737/UE, Euratom of 9 November 2011 on amending the Rules of Procedure of the Commission.

5. According to the Regulations of the Committee there are four modes of its decision-making. Firstly - making decisions at meetings through the oral procedure. In accordance with the provisions of the TFEU¹²⁷, the Commission takes decisions by a majority vote. Secondly - the procedure of posting (delegation) - The Commission may authorize the Directors General or Heads of Departments to act on behalf of the European Commission and take measures relating to the management or administration. Thirdly - the procedure of permission (attachment) - The Commission may authorize one or more of its members to act on behalf of the European Commission in a matter of an administrative or executive nature. One or more Commissioners may also obtain authorization from the President of the Commission along with instructions as to the adoption of the final version of each proposal or act. Fourthly - the written procedure - Commissioner presents the other members of the Commission with a written proposal of a decision. The text of the proposal goes to the rest of the Commissioners, who in due time may propose amendments or comments. If in a specified time none of the members of the Commission object, the project is considered as approved. In case of objections the text is discussed at the next meeting of the Commission.

4. Competences

1. By analyzing the Treaty provisions of the EC regarding its tasks¹²⁸, four groups of the basic functions of the Commission may be distinguished:

- **supervisory,**
- **legislative,**
- **executive,**
- **external.**

2. The Commission is required to ensure the correct application of EU law. Due to this task, the European Commission is known as a guardian of the Treaties. The Commission may collect a variety of information and perform all checks necessary to ensure compliance with Community legislation by other institutions, Member States and other entities. In order to fulfill this function, the European Commission has the following powers of control:

- a) requesting the Council to establish the existence of a clear risk of a serious breach of the principles on which the Union is founded by a Member State¹²⁹;

¹²⁷ Article 250 of the TFEU.

¹²⁸ Cf. Article 17 paragraph 1 of the TEU.

¹²⁹ Article 7 of the TEU.

- b) instituting proceedings to the Court of Justice of the European Union for breach of treaty obligations by the Member State¹³⁰;
- c) bringing a complaint before the CJEU for annulment of a Community act¹³¹;
- d) bringing a complaint before CJEU on the inaction of the European Council, the European Parliament, the Council or the European Central Bank¹³².

3. The most important of the legislative competences of the European Commission is the exclusive right of legislative initiative¹³³. Draft of new legal acts, submitted by the EC for approval to the Parliament and the Council, must be intended to protect interests of the Union.

The Commission, developing the project, has a duty to consider whether the adoption of a new legal act is necessary. Caring for the high quality of the law, the European Commission consults its proposals with interest groups and advisory bodies such as the European Economic and Social Committee and the Committee of the Regions. The Commission is also required to comply with the principle of subsidiarity, that is proposing a new action only if it considers that the problem cannot be solved more efficiently by actions at national level.

From the principle of direct execution of legislative initiative by the Commission are the following exceptions:

- adoption of a common electoral law to the European Parliament. The Council adopts the provisions after obtaining the consent of the Parliament by a majority¹³⁴;
- the EMU initiative is also entitled to the European Central Bank¹³⁵;
- in the area of freedom, security and justice, initiative is entitled to a group of a quarter of the Member States¹³⁶.

Moreover, the Commission can be “compelled” to initiate the legislative process. The Treaty on Functioning of the EU gives Parliament the right to request the Commission to submit legislative proposals on matters for which the EP maintains that the act of the Union is required to achieve the Treaty¹³⁷. Also, the Council may address the Commission with a request to submit a specific legislative proposal¹³⁸. These examples indicate the possibility of the so-called initiative. The Lisbon Treaty gran-

¹³⁰ Article 258 of the TFEU.

¹³¹ Article 263 of the TFEU.

¹³² Article 265 of the TFEU.

¹³³ Cf. Article 17 paragraph 2 of the TEU.

¹³⁴ Cf. Article 223 of the TFEU.

¹³⁵ Cf. Article 129 paragraph 3 and 4 of the TFEU and Article 219 paragraph 1 and 2 of the TFEU.

¹³⁶ Cf. Article 76 of the TFEU. In the period from 1 May 1999 to 1 May 2004 direct legislative initiative was available to the Member States in matters relating to visas, immigration and policies related to the movement of persons (see Article 67 of the TEC).

¹³⁷ Article 225 of the TFEU.

¹³⁸ Article 241 of the TFEU.

ted the right of indirect legislative initiative to citizens of the Union in an amount of not less than one million, representing a significant number of Member States¹³⁹.

As part of legislative powers the Commission also has the right to independently make all the acts listed in Article 288 TFEU in such areas as transport, competition law and the approximation of the laws.

4. The executive function of the Commission is reflected in the performance of the budget. The Commission (shall) prepares a draft budget and is responsible for its implementation within the limits of the appropriations, and according to the principle of sound financial management¹⁴⁰. In the implementation of the budget, the Commission is subject to scrutiny by Parliament, which has the right to grant or refuse to grant EC budget discharge.

5. Executive functions of the Commission also include the management of EU funds. EU programs administered by the Commission concern a number of fields of action such as: "Interreg" (used for building cross-border partnership), "URBAN" (supporting urban renewal), "Erasmus" (to facilitate the exchange of students in European countries).

6. In terms of external relations, it should be noted that, in accordance with the provisions of the TFEU¹⁴¹, in any Member State, the EU has, as far as possible, the legal capacity. The provisions of the TEU and the TFEU indicate the Commission as an institution, which in this respect is attached to the representation of the Union. With the exception of the CFSP and other cases provided in the Treaties, the Commission serves as the Union's external representation.

The Commission and the High Representative of the Union for Foreign Affairs and Security Policy is responsible for the current support of EU external relations, establishing all appropriate forms of cooperation with international organizations listed by the TFEU: Council of Europe, the Organization for Security and Cooperation in Europe, the United Nations and the Organization for Economic Cooperation and Development¹⁴³. However, delegations in third countries and international or-

¹³⁹ Cf. Article 11 paragraph 4 of the TEU and Article 24 of the TFEU. According to the Regulation of the European Parliament and Council (EU) No. 211/2011 of 16 February 2011 on the citizens' initiative, signatories of a citizens' initiative must come from at least one quarter of the Member States. Moreover, the regulation specifies the minimum number of signatures required in each of the Member States, which should correspond to the number of MPs elected in each Member State, multiplied by 750. According to the present regulation the submission of the European Citizens' Initiative will be possible from 1 April 2012. More on this topic in Chapter V.

¹⁴⁰ On the grounds of the provisions included in Article 314-319 of the TFEU.

¹⁴¹ Article 335 of the TFEU.

¹⁴² Cf. Article 220-221 of the TFEU.

ganizations that provide representation of the Union, are subject to the High Representative of the Union for Foreign Affairs and Security Policy.

One of the external powers of the Commission is also conducting discussions and negotiations with third countries and with international organizations to conclude relevant agreements by the EU¹⁴³.

5. Administration

1. In order to carry out its powers the Commission has a suitably powerful bureaucracy at its disposal, which currently has over 23 000 people.

2. Commission staff works in departments called Directorates-General and Services. Directorates General deal with a specific range of content (such as DG Enterprise and Industry, DG Regional Policy). The heads of the Directorates are Directors General who are accountable to the membership of the Commission. DGs are divided into directorates, and directorates into sections. The Commission has also internal services, which include the Legal Service and the Internal Audit Service. Each of the Commissioners supervises at least one DG or service.

3. The administration of the Commission is managed by the **General Secretariat**, headed by the Secretary General. Its tasks include: to support the President of the Commission, to prepare the the European Commission's meetings, to ensure coordination between the units of the Commission, to participate in meetings of the Commission and to provide the European Commission documents to the other EU institutions.

4. Within the structure of the European Commission an important role falls to the members of the Commission and political offices of members of the Commission. Each of the Commissioners has a team of trusted employees who care about appropriate contacts with Directorates and departments subordinate to the Commissioner. The head of the political office is the principal assistant to the Commissioner. Every Monday the heads of the political offices of Commissioners meet under the chairmanship of the Secretary-General to prepare the meetings of the Commission. They also determine what issues are agreed among the members of the Commission and if they may begin to direct action, and which areas need further discussion at a meeting of the Commission.

¹⁴³ Cf. Article 207 and Article 220 of the TFEU.

§6. THE HIGH REPRESENTATIVE OF THE UNION FOR FOREIGN AFFAIRS AND SECURITY POLICY

1. General remarks

1. The origins of this authority date back to the Treaty of Amsterdam, which introduced the office of the High Representative for the Common Foreign and Security Policy. The High Representative also held the office of the Secretary General of the Council of the European Union. Its tasks included supporting the Presidency in CFSP, running on behalf of the Council, political dialogue with third countries, contributing to the formulation, development and implementation of political decisions taken under the CFSP. The first High Representative was Javier Solana, elected in October 1999, and then re-elected in 2004 for a second five-year term.

However, despite the similarities in the name of the body which is the High Representative of the Union for Foreign Affairs and Security Policy, changes introduced by the Lisbon Treaty significantly extended the powers and increased the liability assigned to the role as compared to previous legislation.

2. High Representative of the Union for Foreign Affairs and Security Policy **is elected by the European Council**, acting by a qualified majority, with the agreement of the President of the European Commission. Under this procedure, the European Council may end its term of office. In selecting persons for the positions of High Representative the need to respect the geographical and demographic diversity of the Union and its Member States should be taken into account¹⁴⁴. Since 1 December 2009, the High Representative of the Union for Foreign Affairs and Security Policy has been **Catherine Ashton**.

3. One of the declarations attached to the Final Act of the Intergovernmental Conference, which adopted the Treaty of Lisbon, clarifies the term, established with the entry into force of the Lisbon Treaty, of the High Representative¹⁴⁵. The term of office begins on the date of entry into force of the Lisbon Treaty and will end on the expiry of term of the Commission at that time, i.e. 31 October 2014.

4. **The position of the High Representative is closely linked with the three EU institutions: the European Council, the Council of the European Union and the European Commission. Firstly, because the High Representative participates in**

¹⁴⁴ Cf. The Declaration regarding Article 15, Paragraphs 5 and 6, Article 17, Paragraphs 6 and 7 and Article 18 of the Treaty on European Union.

¹⁴⁵ Cf. The Declaration on Article 18 of the Treaty on European Union.

the European Council¹⁴⁶. Secondly, the High Representative chairs the Foreign Affairs Council¹⁴⁷. Thirdly, the High Representative is one of the Vice-Presidents of the European Commission¹⁴⁸.

2. Competences

1. By analyzing the provisions of the treaty¹⁴⁹ it can be said that the High Representative leads the Common Foreign and Security Policy and the Common Defence and Security Policy. As the Vice-President of the European Commission, taking over the powers of the Commissioner for external relations, he or she ensures the consistency of the Union's external action.

2. High Representative's activity in the framework of the CFSP and the common security and defense policy is manifested in the following ways:

- a) submitting joint proposals in the field of the CFSP with the Commission¹⁵⁰;
- b) responsibility for the development, execution and implementation of the CFSP, to ensure the unity, consistency and effectiveness of the Union's action in this regard¹⁵¹;
- c) representing the Union in matters relating to the CFSP, conducting political dialogue with third parties on behalf of the EU and expressing the Union's approach in international organizations¹⁵²;
- d) regularly consulting the EP on the main aspects and basic choices of the CFSP and the common security and defense policy, as well as informing the EP about the development of these policies, the EP may address questions and recommendations for the High Representative¹⁵³;
- e) requesting the Council to decide on a common security and defense policy¹⁵⁴;
- f) ensuring coordination of the civilian and military aspects of peacekeeping operations EU¹⁵⁵;
- g) submitting to the Council recommendations to the international agreements on the CFSP¹⁵⁶;

¹⁴⁶ Cf. Article 15 paragraph 2 of the TEU.

¹⁴⁷ Cf. Article 18 paragraph 3 of the TEU.

¹⁴⁸ Cf. Article 18 paragraph 4 of the TEU.

¹⁴⁹ Cf. Article 17 and 18 of the TEU.

¹⁵⁰ Cf. Article 22 paragraph 2 of the TEU.

¹⁵¹ Cf. Article 23, 26 and 27 of the TEU.

¹⁵² Cf. Article 27 of the TEU.

¹⁵³ Cf. Article 36 of the TEU.

¹⁵⁴ Cf. Article 42 of the TEU.

¹⁵⁵ Cf. Article 43 of the TEU.

¹⁵⁶ Cf. Article 218 paragraph 3 of the TFEU.

- h) **giving opinion on the requests of Member States which wish to establish enhanced cooperation between themselves within the CFSP**¹⁵⁷;
- i) requesting the Council to appoint a special representative with a mandate in relation to a particular policy issue; special representative carries out his/her mandate under the High Representative¹⁵⁸.

3. As part of his/her duties as Vice-President of the European Commission the High Representative coordinates external action of the Union. The High Representative supports the Council and the Commission to ensure the coherence of EU external actions with its policies¹⁵⁹. The High Representative is also responsible for the Union's relations with international organizations and third countries. He or she is the supervisor of the EU Delegation¹⁶⁰.

In carrying out the obligations under the European Commission, the High Representative is a subject to Commission procedures. This manifests itself mainly in the fact that, as a member of the European Commission, the High Representative is a subject to, jointly with the President of the European Commission and other Commissioners, the approval by the EP. Moreover, in the case of adoption of a motion of censure against the entire Commission, the High Representative resigns from the Commission. Additionally, the President of the European Commission may require the submission of the High Representative's resignation¹⁶¹.

3. The European External Action Service

1. In fulfilling the mandate, the High Representative is assisted by the European External Action Service (EEAS). This service works in cooperation with the diplomatic services of the Member States. It is composed of officials from relevant departments of the General Secretariat of the Council and the Commission. In addition, it includes individuals delegated by the national diplomatic services. The organization and functioning of the European External Action Service is determined by the European Union¹⁶².

¹⁵⁷ Cf. Article 329 paragraph 3 of the TFEU.

¹⁵⁸ Cf. Article 33 of the TEU.

¹⁵⁹ Cf. Article 21 of the TEU.

¹⁶⁰ Cf. Article 220-221 of the TFEU.

¹⁶¹ Cf. Article 17 TEU.

¹⁶² Cf. Article 17 paragraph 3 of the TEU. The Council decision on the matter will be taken at the request of the High Representative after consulting the Parliament and after obtaining the approval of the European Commission.

2. In the preamble of the Council Decision establishing the organization and functioning of the European External Action Service¹⁶³, it has been characterized as a functionally autonomous body of the Union subject to the High Representative of the Union for Foreign Affairs and Security Policy. The service is designed to support the High Representative in particular with regards to:

- a) implementing the mandate to conduct the CFSP and monitoring the consistency of the Union's external actions,
- b) serving as chair of the Foreign Affairs Council,
- c) exercising the office of Vice-President.

In addition EEAS assists the President of the European Council, President of the Commission and the Commission in exercising their functions in the field of external relations. In order to ensure coherence between the different areas of the Union's external action and consistency in these areas with other policies, the EEAS works and supports the diplomatic services of Member States, the General Secretariat of the Council and the European Commission. The service also provides appropriate support to other institutions and bodies of the Union, collaborating with the European Parliament and with the European Anti-Fraud Office.

3. In carrying out their duties, EEAS staff members are obliged to be guided only by the interests of the Union. Council Decision provides that the staff of the EEAS should have a meaningful presence of nationals from all the Member States. However, recruitment should be based on merit whilst ensuring adequate geographical and gender balance. The provisions of the *Protocol on the Privileges and Immunities* apply to the staff of the EEAS.

4. The European External Action Service has a legal capacity necessary to perform its tasks and achieve goals. Service Office seat is in Brussels. It is managed by the Executive Secretary General, who is reporting to the High Representative. The Secretary is responsible for ensuring the smooth functioning of the EEAS. In addition, it provides effective coordination between all departments in the central government, as well as delegations of the Union.

5. The EEAS includes a central administration and the Union delegations in third countries and by international organizations¹⁶⁴. The central administration is divided into Directorates-General. There are several Directorates-General, focused geographical departments covering all countries and regions of the world, the

¹⁶³ The Council's Decision No 2010/427/EU of 26 July 2010 on establishing the organization and rules of functioning of the European External Action Service.

¹⁶⁴ It bears noting that the first people from Poland, who successfully ran for the positions of the EU Heads of Delegations were: Ambassador Joanna Wronecka (Delegation in Jordan) and Ambassador Tomasz Kozłowski (Delegation in the Republic of South Korea).

Directorate-General for administrative, personnel, budget, security, communication and information system, management and of crisis planning, Civilian Planning and Conduct Capability, European Union Military Staff and The Joint European Union Situation Centre.

6. Union Delegations are established or closed by the High Representative, after consultation with the Council and the Commission. Each Union Delegation is subject to the Head of Delegation, a role which corresponds to the High Representative for the overall management and operation of the delegation following the instructions it receives from the High Representative. The Head of Delegation is authorized to represent the Union in the country, where the delegation is accredited, mainly with regards to contracts and as a party in legal proceedings. In addition, the EU Delegation works in close cooperation with the diplomatic services of the Member States, supports Member States in their diplomatic relations and carries out the task of providing consular protection of Union citizens in third countries.

§7. JUDICIAL INSTITUTIONS OF THE EUROPEAN UNION

1. General remarks

1. The Court of Justice of the European Union (CJEU) is a common term referring to¹⁶⁵:

- a) The Court of Justice,**
- b) General Court,**
- c) specialized courts.**

2. The original institution was the Court of Justice (ECJ), functioning separately under the three founding treaties: ECSC, EEC and EAEC. It has become an institution common to the three Communities in 1958 under the Convention on certain common institutions. A significant change in the structure of judicial institutions was the SEA that authorized the Council to set up a subsidiary body of to the Court of Justice. On this basis the Court of First Instance (CFI)¹⁶⁶ was established. Institutional reform

¹⁶⁵ Article 19 paragraph 1 of the TEU.

¹⁶⁶ The Council's Decision of 24 October 1988 on establishing a Court of First Instance of the European Communities.

carried out under the Nice Treaty has established two separate judicial institutions: the ECJ and the CFI. Moreover, the Treaty contained a mandate for the Council to appoint a judicial panels as the subsidiary bodies to the CFI. The first such panel was formed in 2004 - the Court of the Civil Service Tribunal (CST)¹⁶⁷. The last reform introduced by the Lisbon Treaty established the Court of Justice of the European Union, which includes: the Court of Justice, the General Court and specialized courts.

2. The Court of Justice

1. The first and the highest court in the EU is Court of Justice (ECJ). It is an institution, which, together with General Court ensures the interpretation of the law and application of the Treaties¹⁶⁸.

2. The nature and scope of jurisdiction of the Court of Justice prevents unambiguous determination of the status of the institution. Literature on this subject emphasizes that it has the nature of the constitutional court (declares validity of secondary law, interprets EU law and provides answers to legal questions addressed by national courts), an international court (adjudicates disputes between subjects of international law), the administrative court (determines applications of natural and legal persons of omission or failure to comply with EU legislation) and a civil court (complaints for damages concerning the EU and its officers' actions)¹⁶⁹.

3. The Court of Justice consists of Judges and the Advocates-General. The ECJ includes one judge coming from each Member State¹⁷⁰ and eight Advocates-General (hereafter AG)¹⁷¹, number of which may be increased at the request of ECJ by a unanimous decision of the Council. Judges and AGs are appointed for six years by common accord of the governments of the Member States, after consultation with the Committee. The composition of ECJ is partially changed every three years (alternating 14 or 13 judges and 4 AGs)¹⁷². Committee that gives opinions on the candidates for judges of the Court of Justice and AG consists of seven persons chosen from former members of the ECJ, General Court, members of national supreme courts and la-

¹⁶⁷ The Council's Decision No 2004/752/EC, the EAEC (the European Atomic Energy Community) of 2 November 2004 on establishing European Union Civil Service Tribunal.

¹⁶⁸ Article 19 paragraph 1 of the TEU.

¹⁶⁹ E.g. J. Wojciechowski, *Instytucje i porządek prawny WE*, Warsaw 1995/1996, p. 96; M. Herdegen, *Prawo europejskie*, Warsaw 2006, p. 109.

¹⁷⁰ Article 19, Paragraph 2 of the Treaty on European Union. In the CJEU Poland is represented by M. Safjan.

¹⁷¹ Article 252 of the TFEU.

¹⁷² Article 253 paragraph 1 and 2 of the TFEU.

wyers of recognized competence, including one of the candidates proposed by the EP. The members of the Committee are appointed by the Council at the request of the President of the Court of Justice¹⁷³.

Treaties establish rigorously the qualifications the candidate should have for the position of judge of ECJ and AG. The candidate should be a person whose independence is beyond doubt and with qualifications necessary to hold the highest judicial office in the country of origin or to be a lawyer of recognized competence¹⁷⁴.

Immediately after selecting all the Judges they elect from among themselves the President of the ECJ for a period of three years¹⁷⁵. The President's duties include: dealing with the administration of ECJ, the allocation of cases among the departments, chairing hearings and deliberations of ECJ. Similarly, AGs elect First Advocate General (FAG)¹⁷⁶. Judges and Advocates General are supported by a Secretariat headed by the Secretary elected for six years by the Judges of ECJ.

At the request of ECJ, the Council and the European Parliament acting in accordance with the ordinary legislative procedure, may appoint Assistant Rapporteurs. Their competence is to participate in preparatory inquiries in cases to be discussed by the ECJ judges and cooperation with the Rapporteurs. They are chosen from persons whose independence is beyond doubt and who possess the legal qualifications. They are appointed by the Council by a simple majority of votes. Before nomination they vow to be impartial and diligent in performance of their duties and to maintain the secrecy of the deliberations of the ECJ¹⁷⁷.

4. The Court sits in continuous mode. It appoints panels of: three, five judges, the Grand Chamber and the full court of ECJ.

The Grand Chamber consists of thirteen judges, the President of the ECJ, the Presidents of Chambers (five judges) and judges appointed in accordance with the Regulations. The Grand Chamber decides on the request of a Member State or the EU institutions which are interested in the proceedings.

Full court rules in specific situations (for example, the decision to dismiss the Ombudsman, resignation of Commissioner), or when the case is of an exceptional importance for the EU, after a hearing by the AG¹⁷⁸.

In accordance with the provisions of the Statute, the deliberations are valid provided that an odd number of judges participated in it, accordingly in chambers of 3 and 5 personal quorum - three judges, the Grand Chamber - 9 and the full court of 15 judges¹⁷⁹.

¹⁷³ Article 255 of the TFEU.

¹⁷⁴ Article 253 paragraph 1 of the TFEU.

¹⁷⁵ Since October 7, 2011, V. Skouris has been the President of the CJEU.

¹⁷⁶ Since October 7, 2011, J. Mazák has been the Advocate General.

¹⁷⁷ Article 13 of the Statute of the CJEU, Protocol 3 of the TFEU.

¹⁷⁸ Article 16 of the Statute of the CJEU.

¹⁷⁹ Article 17 of the Statute of the CJEU.

5. Elected judges and AGs have numerous privileges and immunities, as well as restrictions resulting from the nature of the function¹⁸⁰.

Due to the immunity of the office of the judge the importance of legal proceedings should be emphasized, which also extends to the period after the termination of term, but only with respect to acts performed by them in their official capacity, including words spoken or written. This immunity is not absolute. It may be repealed by a unanimous decision of the full ECJ composition. In this case, the judge can be judged only in the country of origin by a court with jurisdiction over the members of the highest national judicial authorities¹⁸¹.

During the term of office, judges and AGs are unable to perform any other functions of professional and commercial character (the Council is in a position to release the concerned of such a ban), or hold any political or administrative role. After the termination they are obliged to embrace a fair and prudent adoption of positions and benefits¹⁸². In addition, judges, AGs and Secretary of ECJ are obliged to live in a place where seat of the Court is (i.e. in Luxembourg)¹⁸³.

6. **Vacancy** of a judge or AG happens in the following situations: the expiry of term, death, resignation and dismissal. Judge resigns following a unanimous decision of ECJ taken in plenary session by the judges and AGs. Judge replacing the member of the Court before the end of their term of office is appointed by the end of his predecessor's term¹⁸⁴.

7. The duties of a judge are: to independent and sovereign rule in the case. However, AG is to act in the public interest. Following the submission of a complaint to the ECJ, the President of AG sends it to the designated AG. The Advocate General with the assistance of the secretariat of law, examines the case and all the circumstances that could have an impact on the solution. Based on these findings, AG formulates an opinion and sends it to Court of Justice. Judges are not bound by the findings of AG, but they very often include it in their decisions. AG opinions are published along with the text of the ECJ judgment.

8. Jurisdiction of the Court of Justice may be quasi-ordinary and ordinary. Quasi-ordinary jurisdiction refers to the following issue of complaints: the failure to fulfill the Treaty by the Member States, the invalidity of an act of EU law, the failure to act legally on EU institutions, compensation, labor disputes, ruling on the basis of ar-

¹⁸⁰ The privileges and immunities enjoyed by the Judges and General Ombudsmen are regulated by Protocol No. 7 on the Privileges and Immunities of the European Union.

¹⁸¹ Article 3 of the Statute of the CJEU.

¹⁸² Article 4 of the Statute of the CJEU.

¹⁸³ Article 14 of the Statute of the CJEU.

¹⁸⁴ Articles 5 and 6 of the Statute of the CJEU.

bitration clauses. Ordinary jurisdiction includes deciding on the issue of preliminary rulings and giving an opinion on the compatibility of negotiated international agreements with the EU law.

3. The General Court

1. In accordance with the provisions of the TFEU, composition of the General Court is determined by the provisions of the CJEU Statute¹⁸⁵. Currently, the General Court consists of 28 judges. It can be supported by the AG. In accordance with the Rules of Procedure, during plenary session General Court is supported by the AG while during the chambers meeting only if the Court finds it necessary because of the legal or factual complexity of the case. The decision in this regard is taken at the plenary session of the Court at the request of the Trial Chamber. In this case, any of the judges of the Court can perform the function of AG, with the exception of the President¹⁸⁶.

2. Candidate for judge must be a person whose independence is beyond doubt and who possesses qualifications necessary to hold high judicial office in the country of origin. The judges are appointed by common accord of the governments of the Member States for a period of six years (every three years there is a partial replacement of the Judges)¹⁸⁷, after consultation with the Committee.

3. Elected Judges have the same privileges and immunities as judges of ECJ and AG and are covered by the same restrictions.

4. A judge vacancy occurs in the following situations: the expiry of term, death, resignation and dismissal. Judge replacing a member of the Court before the end of their term of office is appointed by the end of his predecessor's term.

5. Court meets in continuous mode. It appoints panels of: three, five judges, Grand Chamber and the full court of ECJ.

The Grand Chamber consists of thirteen judges. The Court may rule on the Grand Chamber, in plenary or in the chamber with a different number of judges if required by: legal complexity, severity and specific circumstances of the case¹⁸⁸.

¹⁸⁵ Article 48 of the Statute of the CJEU (the Court of Justice of the European Union). Poland is represented by I. Wyszniowska-Bialecka in the Court.

¹⁸⁶ Articles 17-19 of the Rules of Court.

¹⁸⁷ Article 254 paragraph 2 of the TFEU.

¹⁸⁸ Articles 10-11 of the Rules of Court.

In the absence of the complexities of the legal issues and the lack of complexity of actual state of affairs, if the matter of the case is forthright and in the absence of special circumstances, and if the case was sent to hearing by a different composition and by the decision of the Court in plenary, the case is transferred to the chamber of three judges, it may also be resolved by single judge - the Judge Rapporteur¹⁸⁹.

6. The jurisdiction of the Court currently includes consideration in the first instance of actions or proceedings referred in Articles 263, 265, 268, 270 and 272 TFEU, with the exception of complaints within the competence of the specialized courts (in this case, the Court is decisive institution appealing objections to such decisions).

7. The decisions of the Court may be appealed to the ECJ within two months of notification of the decision with respect to legal issues. The basis for the appeal is: lack of jurisdiction, a breach of prior procedure which adversely affect the interests of the appellant, a breach of EU law by the Court. If the appeal is well justified, the Court of Justice quash the decision and may give final judgment in the case, if the state of the proceedings permits so, or refer the case back to the Court (if it happens, it is bound by the decision of ECJ on points of law).

8. General Court also has jurisdiction to hear appeals against decisions of the specialized courts. A judgment given in this mode, by the Court may incidentally be controlled by ECJ, if there is a serious risk to the unity or consistency of EU law¹⁹⁰.

9. The Treaty of Nice extended the specified directory with the right to issue on preliminary rulings. However, if the General Court finds it necessary the matter must be declared under the rules, which may affect the unity and coherence of EU law, it is entitled to refer the matter for consideration to the ECJ judgment. In addition, it may in exceptional cases and under the conditions laid down by the status, inspect the decisions of the Court, if there is a serious risk to the unity and coherence of EU law¹⁹¹.

10. Control of the Court on issued rulings in the two cases mentioned above are proposed at the request of the First Advocate General. If it is indicated that there is a risk of the unity or consistency of Union law, the First Advocate General may apply to the Court of Justice with a request for surrender of control within one month of the

¹⁸⁹ This applies to complaints: a) employees, b) on the legality of the EU law, inaction and compensation provided, however, that the issues raised are only explained in the settled case law or belonging to the cases with the same subject, one of which has already been finally decided c) on the basis of an arbitration clause.

¹⁹⁰ Article 256 paragraph 2 of the TFEU.

¹⁹¹ Article 256 paragraph 3 of the TFEU.

judgment of the Court. The Court of Justice decides upon the matter within a month. If Court of Justice finds that the decision of the court affects the unity or consistency of the Union law, the matter is referred for reconsideration and General Court is bound by the decision of the Court of Justice on points of law. The Court of Justice may itself give final judgment.

4. Specialized courts

1. The specialized courts are the judicial bodies appointed to the Court. Specialized courts are appointed by the EP and the Council, acting in accordance with the ordinary legislative procedure, by ordinance at the request of the Commission and after consultation of the Court of Justice or at the request of the Court of Justice and after consulting of the Commission.

2. Specialized courts judges are appointed unanimously by the Council, chosen from persons whose independence is beyond measure and who may occupy judicial office in the country of origin.

3. Specialized courts deal with complaints in the first instance referred to the Council's decision. The decisions of the specialized courts may be appealed to the Court on points of law, if that is the decision of the Council, including matters of fact.

4. An example of a specialized court is the Civil Service Tribunal. It consists of seven judges whose number can be increased by a decision of the Council¹⁹². The judges are appointed for six years with the possibility of re-election. Vacancies are complemented by the appointment of a new judge for a period of six years. Candidates must be nationals of a Member State. Judges are selected from persons whose independence is beyond doubt and who may take a position of a judge in the country of origin. CST composition should reflect the broadest possible representation of the geographical area and national legal systems.

5. The judges are appointed unanimously by the Council after consulting with a Committee as per Article 255 TFEU. The Committee delivers its opinion on candidates for judge and creates a list of candidates for the position of CST judge twice as many candidates than the required number¹⁹³.

¹⁹² Recently, the Polish judge – I. Boruta has been appointed as the judge of the Civil Service Tribunal.

¹⁹³ Article 2-3 Decision 2004/752/EC, EAEC.

6. CST jurisdiction covers disputes between the EU and its employees, including disputes between all bodies or agencies and their staff, in respect of which jurisdiction is conferred on the Court of Justice¹⁹⁴.

7. Appeals against decisions of CST are limited to legal issues (lack of jurisdiction of CST, a breach of procedure affecting adversely the interests of the appellant, a breach of EU law by CST)¹⁹⁵ and can be brought to the General Court within two months of notification of judgment, from which appeal is brought, against final decisions of the Court and its decisions disposing of the substantive issues in part only, or disposing of a procedural issue concerning a plea of lack of competence or inadmissibility¹⁹⁶.

8. When considering the appeal, General Court quashes the decision of CST and gives judgment itself on the merits of the case or the matter is referred for reconsideration (in this case CST is bound by the decision of the General Court on points of law)¹⁹⁷.

5. Adjudication procedure

1. Proceedings before the Court of Justice and General Court are regulated under the provisions of the founding treaties, statutes and regulations¹⁹⁸. With regards to CST, issues of conduct are further defined in Council Decision 2004/752/EC The procedure consists of two parts: written and oral.

2. Proceedings are initiated by a request filed in the Registry of the ECJ¹⁹⁹. The written procedure consists of the transfer to the parties, the EU institutions, whose decisions are in dispute: applications, statements of case, defense arguments, comments and answers as well as files and documents that are evidence in the case or their cer-

¹⁹⁴ Article 1 Decision 2004/752/EC, EAEC.

¹⁹⁵ Article 11 Decision 2004/752/EC, EAEC.

¹⁹⁶ Article 9 Decision 2004/752/EC, EAEC.

¹⁹⁷ Article 13 Decision 2004/752/EC, EAEC.

¹⁹⁸ The texts of the Statute and regulations can be found at www.curia.eu.

¹⁹⁹ A properly formulated complaint contains: name and address of the complainant and the description of the signatory, the party or parties against whom the complaint is lodged, the subject matter, conclusions, a summary of the pleas in law that serve the grounds for the complaint. If the complaint is lodged pursuant to Article 263 of the TFEU, it should include the act of law in respect of which the complaint procedure is instituted. A complaint governed by Article 265 of the TFEU has to be supported by the documentary proof that will serve the grounds for the authority to undertake a certain action.

tified copies²⁰⁰. The Secretary forwards the request to the President of the Court of Justice, who designates the Judge Rapporteur, and to the defendant. Parties may comment twice on the case.

3. The oral part is open to the public, unless the Court of Justice decides otherwise. The oral part of proceedings consists of: reading report of the Judge-Rapporteur, hearing agents, advisers, lawyers, solicitors, opinions of AG by the Court of Justice and hearing of witnesses and experts.

4. At the end of the oral part of proceedings, the Court of Justice meets in closed session. Judgment is announced in open session after calling the parties. It is signed by the President, judges adjudicating and the Secretary General²⁰¹. Judgment of the Court of Justice is binding from the date of its publication²⁰². Court rules in a simplified mode. His judgments are final and enforceable.

5. The proceedings before the Court and CST are similar to the proceedings before the ECJ. It should be noted, that CST may at any stage of the proceedings, including the time of application, investigate the possibility of an amicable settlement of the dispute and contribute to the settlement.

§8. COURT OF AUDITORS

1. General remarks

Court of Auditors (ECA) has been established by Council Decision under the Brussels Treaty of 1975 and began its activity in 1977. It did not play significant role until the entry into force the Treaty on European Union, which lists ECA among the major EU institutions.

ECA has its seat in Luxembourg. Current information on the EU can be found on their official website²⁰³.

²⁰⁰ The Party shall response to the complaint within one month of receipt of the complaint. The President of the Court of Justice decides about the time limits for bringing a retort and a rejoinder.

²⁰¹ Judgment of the Court of Justice contains: a statement that the judgement was issued by the Court of Justice; the judgment release date; the name of the President and judges involved in the delivery of the judgement; the name of the Advocate General; the name of the Secretary; particulars of the parties; the names of attorneys-in-fact, advisers and barristers or counsellors-at-law of the parties; the claims of the parties; a reference to the hearing of the Advocate General; a concise statement of the facts; motifs; the conclusion of the judgement along with the decision on costs. Article 63 of the Regulations.

²⁰² Except for judgments that may be occasionally verified by the Court of Justice, they come into force upon the expiry of the time limit for lodging an application for verification of the judgment by FAG..

²⁰³ Official website of the Court of Auditors can be found at: www.eca.europa.eu

2. Composition

1. The ECA consists of one national of each Member State²⁰⁴. Candidates for members of the Tribunal must have experience of working in national external audit institutions or special qualifications. The Member State submits the candidate to the Council, and on this basis he or she is appointed by the Council, acting by a qualified majority after consulting the European Parliament.

2. The term of the Court of Auditors is six years. Its members may be elected for another term. Members, from among themselves, elect the President for a period of three years. President's tasks are: to convene and chair the meetings of the Court, to ensure the implementation of its decisions, the responsibility for the proper functioning of departments and management of ECA actions, electing ECA representatives to dispute proceedings, and representation of the Court of Auditors in external relations. In January 2008, Vítor Manuel da Silva Caldeira from Portugal was elected the President of the Court of Auditors. His mandate was extended for a second term in January 2011.

3. Its members have the status of international officials²⁰⁵. In carrying out their functions they are completely independent and are not bound by any instructions, the government of their country, or any other body. Members of the ECA act in the general interest of the EU. In addition, at the time of their office in the Court they may not engage in any other gainful employment or professional non-profit activities. The membership of ECA ends by: expiry of the term of office, resignation, death or the dismissal ruled by the Court of Justice.

3. Structure and functioning

1. Court of Auditors is a collegial body. It works under the provisions of the Treaty, as well as on the basis of its own internal rules²⁰⁶. Decisions are taken by a majority vote, the quorum is set at 2/3 of members. The Court makes decisions at meetings and in the written procedures. Meetings are convened by the President. Additional meetings may be convened at the request of the President or at the request of at least

²⁰⁴ Article 285 of the TFEU.

²⁰⁵ The provisions of the *Protocol on the Privileges and Immunities of the EU*, which are applicable to the Judges of the Court of Justice of the European Union, is also applied to the members of the European Court of Auditors. Cf. Article 286, Paragraph 8 of the TFEU.

²⁰⁶ In compliance with the provisions of Article 287 of the TFEU, the European Court of Auditors enforces its Rules of Procedure that is required to be approved by the Council. See the Rules of Procedure of the Court of Auditors of the European Union dated 11th of March 2010.

one-fourth of the members of the Court. Meetings are open to the public, unless the Court decides otherwise.

2. Within the Court, the Chambers function, created in order to adopt certain categories of reports and opinions. Chambers also prepare preliminary versions of documents adopted by the Court. Currently, the work of the Court of Auditors is organized around five chambers, which are assigned to individual members. There are four chambers responsible for different areas of expenditure and income. They are called vertical structure Chambers: Chamber I - "Management of natural resources and their protection", Chamber II - "Structural policies, transport and energy" Chamber III - "External actions", Chamber IV - "The revenue, research and internal policies and institutions and bodies of the European Union ". Chamber of a horizontal structure also functions (CEAD- the "coordination, communication, assessment, quality assurance and development").

3. Terms of ECA also provide the possibility of appointing committees, which are responsible for issues not covered by the mandate of the chambers. Within ECA actions, in accordance with the regulations of the Rules of Procedure, functions **Administrative Committee**, consisting of the Chairmen of the Boards and President of the Court, in the chair. The Committee submits to the Court requests to adopt any administrative issues that require a decision of the Court and policy decisions, policies or decisions of a strategic dimension, including: changes to the Regulation and its implementing rules, the overall strategy of the Court, the Court's work program, budget and financial statements, the annual report activity, new administrative procedures.

4. To manage the staff of the Court and its administration the **Secretary General** is appointed, elected by secret ballot by the Court. The Secretary-General is also responsible for the budget, translations, training and information technology.

4. Competences

1. The provisions of the TFEU provide that ECA examines the accounts of all revenue and expenditure of the Union and the accounts of all revenue and expenditure of bodies and agencies set up by the Union. Court examines the legality and regularity of income and expenditure, as well as oversees the sound financial management²⁰⁷.

²⁰⁷ Cf. Article 287 of the TFEU.

2. ECA inspectors may **inspect** EU institutions, Member States and beneficiary countries of the Union. In the case of discovery of fraud or irregularities, the staff of the Court informs **OLAF - the European Anti-Fraud Office**²⁰⁸.

3. ECA tasks also include preparing special reports and opinions on specific issues and ordered by other institutions. The Court also gives opinions on legislative proposals and on financial issues. The duty of the Court of Auditors is to **assist Parliament and the Council** in exercising their powers of control over **the budget**. The Court submits to Parliament and the Council an annual financial audit report for the previous financial year, which is published in the Official Journal of the European Union.

§9. ADVISORY COMMITTEES OF THE EUROPEAN UNION

1. General remarks

1. In accordance with the provisions of the TEU and the TFEU²⁰⁹, the Council, Parliament and the European Commission, have the support the Economic and Social Committee and the Committee of the Regions (CoR), which act in an advisory capacity. The law strictly define the scope of matters which require consultation with the Committees. The seat of Economic and Social Committee and the CoR is in Brussels. All the necessary information is available on the official website of the European Economic and Social Committee and the Committee of the Regions²¹⁰.

2. Economic and Social Committee was established in 1957 under the Treaty establishing the EEC. Under the Convention on certain common institutions, ESC has become a single body for all three Communities. The Committee of the Regions was established by the Treaty on European Union, although its first ersatz could be observed in the sixties of the twentieth century.

3. Economic and Social Committee is a consultative body representing the employers, employees and other stakeholders from civil society, in particular in the socio-

²⁰⁸ The mission of the European Anti-Fraud Office (OLAF) is to protect the financial interests of the European Union, to fight fraud, corruption and any other irregular activity, including inappropriate conduct within the European institutions. The legal basis for action against fraud is Article 325 of the TFEU.

²⁰⁹ Article 13 paragraph 4 of the TUE and article 300 paragraph 1 of the TFEU.

²¹⁰ See www.eesc.europa.eu and www.cor.europa.eu

economic, civil, professional and cultural field²¹¹. Committee of the Regions is a consultative body made up of representatives of local and regional authorities in the Member States.

2. Economic and Social Committee

1. Under the terms of the Treaty, the number of members of the Committee does not exceed 350. However, due to the accession of Croatia to the EU, the number of members of the EESC was temporarily increased to 353.

Distribution of seats for Economic and Social Committee:

S	
Germany, United Kingdom, France, Italy	each
Spain, Poland	each
Romania	
Belgium, Bulgaria, Czech Republic, Greece and Hungary, Austria, Netherlands, Portugal, Sweden	each
Croatia, Denmark, Finland, Ireland, Lithuania, Slovakia	each
Estonia, Latvia, Slovenia	each
Cyprus, Luxembourg	each
Malta	
T	:

2. The members of the Committee are appointed by the Council after the indication of the Member States²¹². During the selection process the Council consults the Commission. It may also consult the European organizations representing the various economic and social sectors. Members of the Economic and Social Committee are completely independent politically and are not bound by any instructions. They are appointed for a renewable term of office of five years. Economic and Social Committee Members do not have to suspend their current functions. They are staying in Brussels only at meetings of the Committee.

3. The Committee elects from among its members the President and the Bureau for a period of 2.5 years. The Committee meets within the **plenary assembly**, discussions of which are prepared by six subcommittees, called sections. They correspond to the various fields of economic and social life (e.g. Section for the Internal Market, Pro-

²¹¹ Cf. Article 300 paragraph 2 of the TFEU.

duction and Consumption, Section for Employment, Social Affairs and Citizenship, etc.). Sections develop a draft on Economic and Social Committee position, which is discussed in plenary. The Committee is convened by its chairman at the request of the European Parliament, the Council or the European Commission. It may also meet on its own initiative.

4. Economic and Social Committee is to advise the European Parliament, the Council and the Commission, by issuing an opinion on the proposed legislation. The provisions of the treaty indicate that the consultation of the Committee may be mandatory²¹³ as well as optional. This committee also has the right to give an opinion on its own initiative, if it deems it appropriate. It should be noted that the European Commission, the Council or the EP are not bound by the opinions issued by the Economic and Social Committee.

5. Economic and Social Committee should also take steps to encourage civil society to become more involved in EU policymaking. In addition, the Economic and Social Committee supports the role of civil society in countries outside the EU and supports the creation of advisory structures inside these countries.

3. Committee of the Regions

1. The CoR consists of regional and local representatives who have electoral mandate of regional or local authority, or are politically accountable to an elected assembly²¹⁴. This means in practice that the members of the CoR are e.g. city presidents, mayors, Marshals.

²¹² In 2010 the selection and appointment procedure for the Polish civil society representatives for the Economic and Social Committee was published on the website of the Ministry of Labour and Social Policy (www.mpips.gov.pl). Civil society organizations can submit their candidates to the Trilateral Commission for Social and Economic Affairs. The employers represented in this Commission recommend seven candidates from among the nominations submitted by the organizations representing the interests of employers; the employees represented in the Trilateral Commission recommend seven candidates from among the nominations submitted by the organizations representing the interests of employees; the social organizations represented in the Public Utilities Council recommend seven candidates from among the nominations submitted by the organizations representing various interests. The list of twenty-one candidates for the ESC members is submitted by the Minister of Labour and Social Policy to the Cabinet. The list is submitted to the Commission on European Union Affairs of the Parliament of the Republic of Poland for opinion. Upon issue of the opinion by the Commission or upon the lapse of 21 days that is the time limit for issue of the opinion, the Prime Minister transmits the list of candidates for members of the ESC to the Council of the European Union.

²¹³ Cf. e. g. Article 46, 114, 153 of the TFEU.

²¹⁴ Article 300 paragraph 3 of the TFEU.

2. CoR members are appointed by the Council, acting by a qualified majority on a proposal from the Member States²¹⁵. They are elected for a five-year term. There is the possibility of re-election. However, a membership of the Committee of the Regions will terminate automatically upon expiration or loss of local or regional mandate under which the member was nominated. In this situation, for the remainder of term a successor is designated. There is also a claim that the members and alternate members of the CoR can not be Members of Parliament. CoR members are independent in the performance of their duties and act in the general interest of the Union.

3. The Committee of the Regions, after the accession of Croatia has 353 members. The number of members from each Member State is the same as the distribution used in the Economic and Social Committee. The Committee elects from among its members the President and the Bureau for a period of 2.5 years. The Committee is convened by its chairman at the request of the European Parliament, the Council or the European Commission. It may also meet on its own initiative.

4. Committee holds five plenary sessions annually, during which the guidelines of the policy are set and opinions adopted. The members of the Committee are assigned to specialized committees, whose task is to prepare the plenary sessions. There are six commissions:

- Commission for Territorial Cohesion Policy (COTER),
- Committee for Economic and Social Policy (ECOS),
- Commission for Education, Youth, Culture and Research (EDUC),
- Commission for the Environment, Climate Change and Energy (ENVE),
- Commission for Citizenship, Governance, Institutional and External Affairs (CIVEX),
- Commission for Natural Resources (NAT).

²¹⁵ The principles as well as the selection and appointment procedures for the representatives of the Republic of Poland in the Committee of the Regions are governed by the Act of 6 May 2005 on the Joint Commission of Government and Local Authorities and the representatives of the Republic of Poland in the Committee of the Regions of the European Union (2005 Journal of Laws, No 90, item 759). In conformity with Article 19 of the Act, the Cabinet submit a proposal containing the list of 21 candidates for members and 21 candidates for alternate members of the CR (Committee of Regions) to the Council of the European Union. They are designated from among those who are councillors of municipality, district or region (voivodship), governors (voys, governors, mayors), county governance board members or members of the regional government. Nominations for candidates are presented to the Cabinet by nationwide associations representing the regional governments – in a total number of 10 candidates for members and 10 candidates for alternate members, and nationwide associations representing district authorities and municipalities (districts, major cities, metropolitan areas, rural communities, small towns, municipalities) – in a total number of 11 candidates for members and 11 candidates for alternate members.

5. Committee of the Regions is a consultative body. Its purpose is to issue non-binding opinions on regional and local policies. There are mandatory and optional consultation²¹⁶. Committee of the Regions is also able to give an opinion on its own initiative and present it to the Council, the European Commission, or the European Parliament.

The Committee is an entity in the mid of privileged in the proceedings before the Court of Justice initiated an action for annulment of EU law. Committee of the Regions may make a complaint to the CJEU only to protect its own prerogatives²¹⁷.

§10. FINANCIAL INSTITUTIONS OF THE EUROPEAN UNION

1. General remarks

Among the EU's financial bodies are the European Investment Bank (EIB) and the European Central Bank (ECB), which is a specialized authority, performing the essential function under EMU. It should be mentioned that discussed financial institutions have their own legal capacity and capacity to act. In addition, the ECB has a the legal status of the EU institution.

2. The European Investment Bank

1. The European Investment Bank was set up by the Treaty of 1957 as a bank providing long-term loans. Currently the EIB operates in the EU and in approximately 140 countries around the world. The seat of the Bank is in Luxembourg. EIB Statute is annexed to the Treaties in one of the protocols²¹⁸. Council may amend it in accordance with the procedure referred to in Article 308 TFEU.

2. The European Investment Bank is a non-profit noncommercial bank. It has legal personality²¹⁹. The Bank does not conduct personal accounts or direct transactions. The main task of the EIB is to provide long-term loans to finance projects that must meet certain conditions (the project must contribute to achieving the objectives of the

²¹⁶ Cf. e. g. Article 164, 168, 178 of the TFEU.

²¹⁷ Cf. Article 263 of the TFEU.

²¹⁸ *Protocol No 5 on the Statute of the European Investment Bank*.

²¹⁹ Article 308 of the TFEU.

EU, it must be economically sound, environmentally safe and should attract funding from other sources). Through these activities it contributes to the balanced and steady development of the internal market in the interest of the Union²²⁰.

3. The EIB's **shareholders** are the EU Member States²²¹. Shares in the share capital of the Bank are covered by the state according to the share of a country's economy in the EU economy. The European Investment Bank does not benefit from the EU budget. Non-commercial Bank and its high credit rating provide very favorable conditions for granting loans. In addition, the EIB supports sustainable development in the candidate countries and third countries. The Bank is also the majority shareholder in the **European Investment Fund**. This is a fund established in 1994 to serve a small and medium-sized enterprises.

4. The general policy of the Bank to provide loans is determined by the Board of Governors. It is composed of ministers (mostly Ministers of Finance) designated by Member States. One of the functions of the Board of Governors is to approve the annual balance sheet and statements of operations. The Council also decides on increasing the share capital. Decisions of the Board of Governors are taken by a majority vote of its members, provided that the majority is **represented by at least 50% of the subscribed capital**. A qualified majority requires eighteen votes representing 68% of the subscribed capital. Absence of members present in person or represented does not prevent the adoption of decisions requiring unanimity.

5. Proper management of EIB is exercised by the Board of Directors. It consists of 29 directors, 28 of whom are nominated by the Member States, and 1 nominated by the European Commission. Moreover, it consists of 19 deputies. The Board of Directors approves such operations as borrowing and lending.

6. In addition to the two Councils in the structure of the EIB's, there is Management Committee that is currently managing the Bank, and the committee responsible for reviewing the operations carried out by the Bank.

3. The European Central Bank

1. The European Central Bank was established in 1998, The ECB seat is in Frankfurt. The main function is to manage the EU's single currency (euro). The Bank also

²²⁰ Cf. Article 309 of the TFEU.

²²¹ In compliance with Art. 4 of the Statute of the EIB capital of the Bank amounts to EUR 233 247 390 000.

ensures price stability. It is a Bank that is responsible for the formation of monetary policy in the euro zone²²². The European Central Bank forms along with 28 central banks of the Member States the European System of Central Banks (ESCB). However, the ECB and the national central banks of the Member States whose currency is the euro form the **Eurosystem**. The European System of Central Banks and the Eurosystem will coexist side by side, as long as at least one of the members will remain outside the euro area. The detailed arrangements for the operation of the ECB and the ESCB Statute can be found in a form of a protocol annexed to the Treaties²²³. All the necessary information on the ECB, the ESCB and the Eurosystem is available on the official website of the bank²²⁴. Since 2011, the President of the ECB has been Mario Draghi from Italy.

2. The European Central Bank is to ensure price stability in the euro zone and protect it from excessive inflation. Its actions seek to maintain the annual increase in consumer prices below 2%. In order to maintain this level, the bank will take various measures. Firstly, it controls the supply of money (by setting interest rates prevailing euro area). Secondly, the ECB monitors price trends and assess their risk for the euro area.

3. Among the bodies of the ECB are: Management Board, the Governing Council and General Council. The Board consists of President of the ECB, its vice-president and four members. The Management Board is appointed by the European Council, acting by a qualified majority on a recommendation from the Council after consultation of Parliament and the Governing Council from among persons of recognized authority and professional experience in monetary or banking matters. The term of office is eight years. It is not possible to extend the mandate for another term. Management is responsible for the current business of the ECB and implements monetary policy set by the Governing Council.

The **Governing Council** is the highest decision-making body of the ECB. It is composed of members of the board and the governors of central banks of the Eurozone. The Governing Council is responsible for defining the monetary policy of the euro area (such as setting interest rates). Meetings are held twice a month.

The European Central Bank is supported by the **General Council**, which includes the president and vice president of the ECB and the governors of the central banks of all 28 EU Member States. Other members of the Board, President of the European Council and the President of the European Commission may participate in meetings of the General Council of the ECB, but without voting rights. The purpose of the Ge-

²²² Currently, the euro zone comprises 17 Member States of the European Union which have introduced the Euro since 1999.

²²³ Cf. *Protocol No 4 on the Statute of the European System of Central Banks and the European Central Bank*.

²²⁴ See www.ecb.int

neral Council is to assist in the preparation of further enlargement of the euro area. According to the Statute of the European System of Central Banks and the European Central Bank, the General Council will be dissolved after the introduction of the common currency of all EU Member States.

§ 11. OFFICES AND AGENCIES OF THE EUROPEAN UNION

1. General remarks

1. First community agencies were created back in the sixties of the twentieth century. Dynamic growth and a significant increase in the number of agencies took place in the nineties. Currently there are over 30 agencies that do not fit in the catalog of basic institutions.

2. EU agency has its own legal personality. It is a body governed by European public law. Agencies are established under the secondary legislation. They are appointed to perform specific tasks: technical, scientific or managerial. Their powers are delegated.

3. In addition to agencies in the EU structures there are also different types of bodies. One example is the European Institute of Innovation and Technology (EIT), which as an independent and decentralized authority combines scientific resources, business and academia to enhance the innovative capacity of the European Union. European supervisory authorities should also be mentioned, established in connection with the economic and financial crisis in Europe. In January 2011, the following authorities were established: the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA). Among the tasks of these bodies is the prevention of threats, which could lead to distortion of the stability of the financial system. These offices are supported by the European Systemic Risk Board (ESRB), also established in early 2011.

2. Structure and functioning

1. The Board is appointed to lead the Agency. Its purpose is to establish general guidelines and approval of work programs of the agency. Management Board of the Agency ensures that all activities undertaken by it are consistent with its primary

mission, available resources and political priorities. The Executive Director is responsible for proper execution of the work program. He/she is appointed by the Board.

2. **The Agency Board members** are always representatives of the Member States and representatives of the Commission. The detailed division of responsibilities between the Board and the Executive Director is always contained in the act establishing the agency to life.

3. Types of Agencies

1. There are various agencies involved in **the policies of the European Union, the agencies for the common security and defense, agencies of police and judicial cooperation, and executive agencies.**

2. Among the agencies involved in the policy areas of the European Union are: Translation Centre for the Bodies of the European Union (Cdt), European Agency for Safety and Health at Work (EU-OSHA), The European Aviation Safety Agency (EASA), The European Maritime Safety Agency (EMSA), European Agency for Network and Information Security Agency (ENISA), The European Chemicals Agency (ECHA), The European Railway Agency (ERA), the European Medicines Agency (EMA), the Agency for Fundamental Rights (FRA), the European Environment Agency (EEA), the European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX), the European Training Foundation (ETF), European Foundation for the Improvement of Living and Working Conditions (Eurofound), the European Centre for Disease Prevention and Control (ECDC), the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), European Centre for the Development of Vocational Training (Cedefop), the European Joint Undertaking for ITER and the Development of Fusion Energy (Fusion for Energy), the European Institute for Gender Equality (EIGE), the European Supervisory Authority of the Global Navigation Satellite System (GSA), the European Food Safety Authority (EFSA), the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM), the Community Fisheries Control Agency (CFCA), the Community Plant Variety Office (CPVO), Agency for the Cooperation of Energy Regulators (ACER), the European Asylum Support Office (EASO).

The European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX), established in 2004, has its seat in Warsaw ²²⁵.

²²⁵ See A. Szachóń, *FRONTEX – praktyczna realizacja zasad dorobku prawnego Schengen w zakresie kontroli i ochrony zewnętrznych granic UE*, [in:] *Układ z Schengen: Szanse i zagrożenia dla współpracy transgranicznej Polski i Ukrainy*, A. Kuś, T. Sieniow (ed.), Lublin 2007, pp. 72-83.

3. Agencies for the common security and defense policy were established in order to perform very specific technical, scientific or managerial services under the Common security and defense policy of the European Union. These are: the European Union Satellite Centre (EUSC), the European Defense Agency (EDA), the European Union Institute for Security Studies (ISS).

4. Among the agencies for police and judicial cooperation the following can be distinguished: the European Police College (CEPOL), the European Police Office (Europol), the team's Judicial Cooperation in the European Union (Eurojust). These agencies were created to coordinate cooperation between Member States in the fight against international organized crime.

5. Executive agencies have been set up in order to entrust them with certain tasks relating to the management of one or more Community programs. They must be located in Brussels or Luxembourg (or at the seat of the European Commission). These agencies are appointed for a fixed period. Executive agencies include: the Executive Agency for Research (REA), the Executive Agency for Education, Audiovisual and Culture Executive Agency (EACEA), the Executive Agency for Competitiveness and Innovation (EACI), the Executive Agency for Trans-European Transport Network (TEN-T EA), the Executive Agency for Health and Consumers (EAHC) and the Executive Agency of the European Research Council (ERC).

Study Questions

1. What rules govern the relations between the EU institutions?
2. What is the principle of institutional autonomy?
3. Point the seats of the main EU institutions.
4. On what basis Members of the European Parliament are elected?
5. Indicate functional bodies of the European Parliament.
6. In what way the powers of control of the European Parliament are manifested?
7. Describe the powers of the High Representative of the Union for Foreign Affairs and Security Policy.
8. What is the composition of the European Union Council?
9. Describe methods of decision-making in the EU Council.
10. Name the powers of the EU Council.
11. What are the tasks of the Committee of Permanent Representatives?
12. Point and discuss cases when a Member of the European Commission ends his/her term.
13. Describe the steps of appointing of the European Commission.
14. What are the financial institutions of the European Union?
15. Discuss the tasks of the European Investment Bank.

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2. 5/68 judgment of 11 July 1968, *Sayag and Others v. Leduc and Others*.
3. 138/79 judgment of 29 October 1980 *SA Roquette Frères v. The Council*.
4. 139/79 judgment of 19 October 1980, *Maizena v. The Council*.
5. 188-190/80 judgment of 6 July 1982, *France, Italy, Great Britain v. The Commission*.
6. 208/80 judgment of 15 September 1980, *Lord Bruce v. Aspen*.
7. C-70/88, judgment of 22 May 1990, *The Parliament v. The Council* (the so-called *Chernobyl Case*)
8. C-417/93 judgment of 10 May 1995, *The Parliament v. The Council*.
9. C-25/94 judgment of 19 March 1996, *The Commission v. The Council*
10. C-432/04 judgment of 11 July 2006, *The Commission v. Édith Cresson*.

CHAPTER IV

SOURCES OF EU LAW

§1. CHARACTERISTICS AND DISTRIBUTION OF SOURCES OF EUROPEAN UNION LAW

1. Sources of EU law have specific characteristics that distinguish them from other legal orders. EU law is a law separate from both the public international law and the internal law of the Member States, although it borrows many features from the first and the second legal order. The European Union, on the basis of the powers granted by the Member States, is entitled under the treaty to lay down the law directly effective in national legal systems. Under the Lisbon Treaty, the European Union replaced the European Community and became its legal successor, which allowed for the organization of the EU legal regime. Due to the specific legal nature of the EU as an international organization, the classification of the sources of EU law according to the criteria of public international law does not reflect the complex nature of the law. The Lisbon Treaty, by abolishing the three-pillar structure of the Union, standardized the sources of law and the manner of their adoption and use. It defined sources of European Union law and the procedures for their regulation. The European Union is an organization that groups multiple supranational mechanisms of action belonging to different philosophies, like mechanisms for cooperation and integration. EU law covers acts developed by the European Communities and the European Union, and in part by the Member States themselves. In this way the **legal system of the European Union** came into being. The EU law, treated as a separate legal system, allows for the organization on the basis of the criterion of its creation or due to subject matter.

2. The law of the European Union, based on the criterion of its creation, is divided into:

- a) **primary legislation** - the EU's constitutive law, enacted by Member States as the founding treaties, reforming treaties and accession treaties;
- b) **derivative (secondary) legislation** – the law created by the European Union institutions under the treaty, within the powers granted by the Member States, which thus partly limited their sovereignty by transferring law-making powers to the EU.

The **primary law** is the **substance of EU law**, and the **derivative law** is created by the institutions pursuant to the authorizations contained in primary legislation. Secondary legislation is the result of the functions and powers of the EU institutions, which were granted by the Member States in the treaties. Secondary law is a derivative law with respect to treaties and concerns mainly legislative and non-legislative acts. In addition, the EU legal system consists of international agreements concluded by the EU and the Member States, and the authority for their conclusion comes from the treaties. EU *acquis* also includes the rules of law and the case law of the Court of Justice of the European Union. The literature also uses the term “European law” to refer to EU law¹. However, the concept is too broad, since it includes the laws of all international organizations operating in Europe, e.g. the European Economic Area, the European Free Trade Area, the Council of Europe, etc.

3. Another division of the European Union law is based on the criterion of subject:

- a) **institutional law** - includes the law on the functioning of EU institutions, including the principles of the EU's institutional system;
- b) **substantive law** – includes the EU substantive law on freedom of the internal market, competition rules, legal aspects of policy, common foreign and security policy as well as the area of freedom, security and justice.

The following conditions can be considered to be the origin of the EU legal order.

First, the legal order of the Communities was the result of the **transfer of competences** of Member States to the European Communities and then to the European Union.

Second, as a consequence of the transfer of competence, the EU law entities are not only the **Member States, but also the individuals**, i.e. natural and legal persons.

Third, **the EU law takes precedence over national law and has a direct effect on it.**

4. The EU law, as a system of norms similar to the international law, governs the relationship **among** the European Union, the Member States, as well as individuals. In this light, the **sources of EU law in the formal sense** are different types of legal acts belonging to the primary and secondary law, which regulate the functioning of the EU's legal area. In practice, this is a rich and developed set of European Union legal acts. In general, the **source of EU law in the material sense** is the

¹ See e.g. M. Ahlt, *Prawo europejskie*, Warsaw 1998.

will of the Member States who transferred in the treaties the power to create law to the European Union and the institutions operating within its uniform institutional framework. **Sources of EU law in the cognitive sense** are the collections of documents issued by the institutions of the European Union, especially the **Official Journal of the European Union**, which is published in the **official languages** of each of the Member States², **in traditional and electronic version** on the official website: **www.eur-lex.europa.eu**. Acts come into force on the date specified in them or within **20 days after publication**³. Publication of EU legislation is the responsibility of the **Publications Office of the European Union**. It is an interinstitutional office, which in addition to the Official Journal of the European Union, publishes or co-publishes publications under the communication policy followed by the individual institutions. It also offers free on-line services under which it provides information on⁴:

- EU law (**EUR-Lex**),
- EU publications (**EU Bookshop**),
- EU public procurement (**TED**),
- research and development in the EU (**CORDIS**).

§2. THE CONCEPT AND SCOPE OF THE *ACQUIS COMMUNAUTAIRE*

1. The term *acquis communautaire* in the broad sense means the **whole of the EU acquis**. The verbatim term means the body of the Community law, but it covers the whole of the EU legal system. It includes both the legacy of the Communities and *acquis* of the Union. It is the treaty term, and therefore legal, but treaties do not define its meaning. Originally it was used by the Court of Justice of the European Union. The term is a legal category functioning both in doctrine and in practice and is commonly understood in international law. *Acquis communautaire* is neither closed nor a systematic catalogue of sources of EU law, it **must be understood and defined in the context of the dynamic development of the EU**. The boundaries of the concept are not clearly defined, so there are doubts as to the classification of certain EU legislation.

² Currently there are 23 official languages. Official Journal of the European Union is published in 22 or 23 languages (in the Irish language if it is legally required). There are also working (procedural) languages, i.e. English, French and German, and in judicial institutions French and the authentic languages of the Treaties, i.e. the official languages of all Member States, each of them is equally binding and equally important.

³ More information on the publication of the EU legislation, see Chapter V.

⁴ Official website of the Publications Office of the European Union: www.publications.europa.eu

2. The doctrine of EU law assumes that the *acquis communautaire* is the entire existing EU law together with the patterned manner of its understanding and application, as well as the policies, practices and values inherent in the foundations of the EU, i.e. all legislative actions and judicial practice of the CJEU. Any State acceding to the EU is required to adopt the *acquis communautaire* in full. In the process of applying for membership in the EU, there are doubts as to the scope of the *acquis*, therefore the framework and content of the *acquis* of EU law are defined additionally in the accession treaties, for the avoidance of doubt as to its precise normative definition.

3. The most important in the *acquis* of the EU law are the primary legislation and derivative legislation (secondary). The primary legislation includes first and foremost the Lisbon Treaty, which comprehensively reformed the previous treaties. At the same time it made changes in the sources of derivative legislation, where the most important are legislative acts⁵: legislative regulations, legislative directives and legislative decisions. They contain authorizations for the creation of non-legislative acts, which are delegated acts and implementing acts. **Delegated acts** are: delegated regulations, delegated directives and delegated decisions. **Implementing acts** are analogous: implementing regulations, implementing directives and implementing decisions.

4. Derivative legislation in a broad sense also includes the instruments of the **Common Foreign and Security Policy**. This area excludes the adoption of legislative acts⁶. The **Area of Freedom, Security and Justice** established a 5-year transition period from the entry into force of the Treaty of Lisbon. During that time, the legal instruments of the former third pillar will be effective, but ultimately by 1 December 2014 they are to be converted into regulations, directives and decisions.

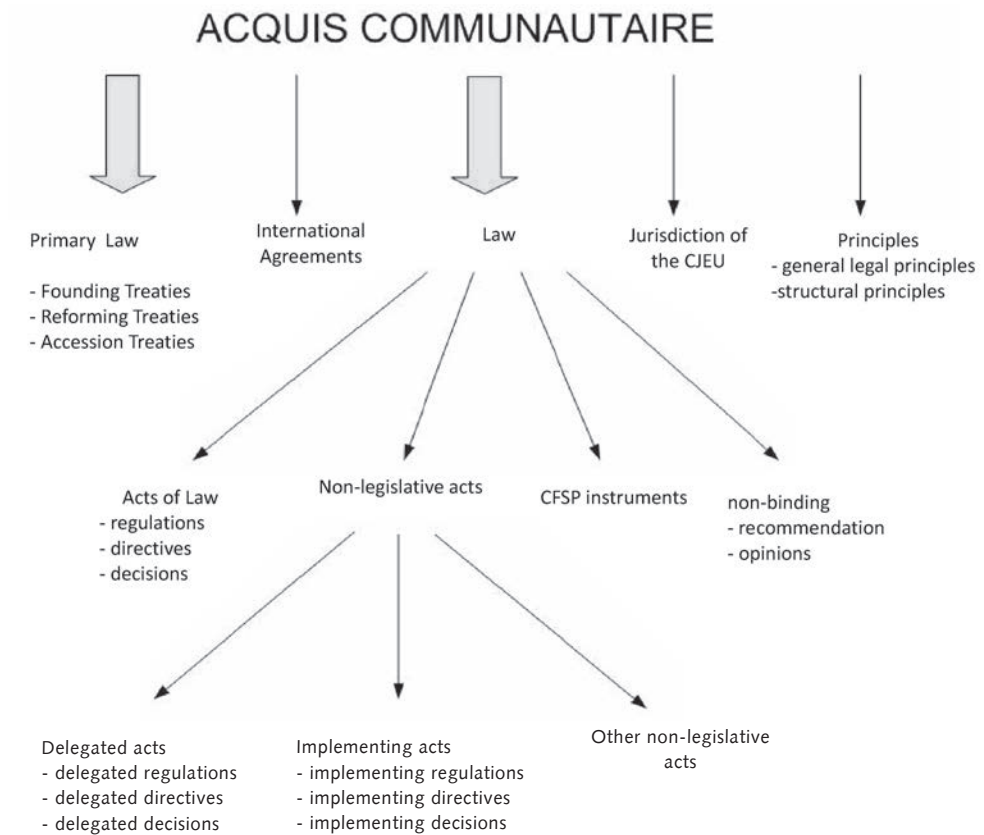
5. Position of international agreements is not clearly defined in the doctrine, but it seems advisable to place them between the primary legislation and derivative legislation. Very important in the *acquis communautaire* is the judicial practice of the Court of Justice of the European Union, which has the exclusive right to interpret treaties. CJEU rulings are binding on both the EU institutions and the Member States⁷.

⁵ Protocol to rectify the Polish language version uses the concept of “constituent” (“non-constituent”) acts instead of “legislative” (“non-legislative”) acts. But in substance it is appropriate to use the concept of “legislative” (“non-legislative”) acts.

⁶ Article 23 TEU.

⁷ CJEU case-law - see Chapter VII.

The components of the *acquis communautaire* are highlighted in the diagram below.



§3. THE HIERARCHY OF SOURCES OF THE EUROPEAN UNION LAW

1. The problem of the hierarchy of sources of law in the legal system of the European Union is a moot point. The acts of the European Union lack a clear answer. In the doctrine, part of the opinions is consistent⁸, but there is no single position. The Lis-

⁸ See more: W.M. Góralski, *Unijny i wspólnotowy porządek prawny*, in: W.M. Góralski (ed.), *Unia Europejska. Tom I. Geneza – System – Prawo*, Warsaw 2007, p. 275; A. Wyrozumska, *Źródła prawa Unii Europejskiej*, in: J. Barcz, M. Górka, A. Wyrozumska, *Instytucje i prawo Unii Europejskiej*, Warsaw 2007, pp. 263-264.

bon Treaty clearly provides a hierarchy only for the sources of the derivative legislation, so there are attempts to find hierarchy of all sources of EU law in the practice of EU legal transactions, the judicial practice of the CJEU and the literature of the subject. Based on all these factors, one can assume, as it seems, the following hierarchy of sources of EU law:

- a) the most important are the **rules of law**⁹, which are based on international law and the legal traditions of the Member States. The basic principles have been incorporated into the treaties¹⁰;
- b) then the **primary legislation**, i.e. the founding treaties together with the amending treaties and accession treaties; the principle of *lex posterior derogat legi priori* applies here;
- c) the primary legislation also includes the **Charter of Fundamental Rights**, which has the same legal value as the treaties. This creates a kind of hierarchy in primary legislation. The interpretation of the provisions of the CFR¹¹ may not lead to widening the scope of EU law beyond the powers of the EU set out in the Treaties¹²;
- d) **international agreements** concluded by the European Union (alone or jointly with the Member States) with other actors in international relations;
- e) the next level in the hierarchy are **legislative acts** as the most important acts of derivative legislation. The Lisbon Treaty clearly underlines the hierarchy of binding secondary legislation acts. The autonomy of legal acts with their simultaneous hierarchy due to the subject matter of the regulation is also expressed in the fact that the regulation is not an act superior to the directive, and the directive does not stand above the decision. In secondary law hierarchical non-legislative acts, i.e. implementing acts and delegated acts, are subordinate to legislative acts;
- f) legislative acts and non-legislative acts also include the **legal instruments of the Area of Freedom, Security and Justice**. The whole area of the AFSJ applies uniform legal instruments (including exceptions for Denmark, the United Kingdom and Ireland). However, a 5-year transition period was established from the date of entry into force of the Treaty of Lisbon, during which the instruments of the former third pillar of the EU are to be trans-

⁹ Rules of law, see Chapter II.

¹⁰ The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society based on pluralism, non-discrimination, tolerance, justice, solidarity and equality among women and men - see Article 3 TEU.

¹¹ Exemptions from the application of the CFR apply to Poland and the United Kingdom. They will also apply to the Czech Republic after the entry into force of the Accession Treaty of Croatia - see *Protocol No. 30 on the rectification of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom*, and the *Declaration of the Czech Republic No. 53 on the Charter of Fundamental Rights*.

¹² See *Declaration No. 1 on the Charter of Fundamental Rights of the European Union*.

formed into regulations, directives and decisions; the prior regime of the third pillar of the EU applies until they are transformed;

- g) derivative legislation includes also the **instruments of the Common Foreign and Security Policy**, which are not legislative acts;
- h) after the binding sources of derivative legislation there is the **non-binding legislation**, i.e. recommendations and opinions;
- i) the hierarchy is complemented by **CJEU case law**, which admittedly is not of precedent nature, but it should be noted that in practice it plays a very important role in shaping the interpretation of the European Union law¹³.

2. The issue of hierarchy of sources of EU law is still in doctrinal dispute. Until the binding acts of EU law do not clearly define it there will still be differences in the doctrine.

§4. PRIMARY LEGISLATION

1. The main source of primary legislation is the Treaty of Lisbon, which changed the previous founding and reforming treaties. The primary legislation is also known as **statutory legislation**, as the EU is an international organization and the treaties act as statutes¹⁴. The first acts of primary legislation were the founding treaties. **Historically, they were:**

- a) the Treaty establishing the European Coal and Steel Community (ECSC Treaty),
- b) Treaty establishing the European Atomic Energy Community (EAEC Treaty),
- c) the Treaty establishing the European Community (TEC), previously the Treaty establishing the European Economic Community (TEEC).

2. The **European Coal and Steel Community** was established by the Treaty signed in 1951 in Paris by Belgium, the Netherlands, Luxembourg, France, Germany and Italy. The Treaty on the European Coal and Steel Community came into force in 1952, it was concluded for a period of 50 years, its binding force expired in 2002. The ECSC Treaty first used the term *supranational*, it also presented a **prototype of the institutional framework** for the European Community and later the European Union. It regulated all matters relating to the functioning of the common market for coal and

¹³ For example, according to settled case-law of the Court of Justice of the European Union, the treaties and the law adopted by the Union on the basis of the treaties have primacy over the law of Member States under the conditions laid down by the said case-law - see *Declaration No 17 concerning primacy*.

¹⁴ R. Grzeszczak, *Pravo pierwotne Unii Europejskiej*, in: J. Barcz (ed.), *Źródła prawa Unii Europejskiej*, Warsaw 2010, p. IV-1.

steel. Although the European Coal and Steel Community no longer exists, it became a kind of laboratory for the EU in its current form.

3. The same countries that signed the ECSC Treaty have also become the founding members of the European Economic Community and the European Atomic Energy Community. The treaties establishing both Communities were signed in 1957 in Rome, hence they are referred to as the Treaties of Rome. They entered into force in 1958 and were concluded for an indefinite period. The European Community (the European Economic Community) was of vital importance, as its successor is the European Union. The European Atomic Energy Community is of secondary importance, but the EAEC Treaty has not been reformed and remains in force to this day, somewhat beside the Lisbon Treaty. Primary legislation also includes the treaties on mergers of institutions of the three European Communities. At the same time as the Treaties of Rome were signed the so called first merger treaty combining the Parliamentary Assemblies and the Courts of Justice of the three Communities into one Parliamentary Assembly and one Court of Justice, and the so-called second merger treaty combined the Councils of Ministers and the Commissions. Resolutions of the Council also have the status of primary legislation, they changed the number of judges and Advocates General of the Court of Justice of the European Union.

4. Primary legislation also includes all annexes and protocols to the treaties. Annexes and protocols are adopted by common accord of the Member States. Their legally binding power is equal to the Treaties. **Protocols** are tailored to the specific, distinct nature of the regulated issues, better than the main text of the Treaties¹⁵. **Annexes** are regulations of a technical nature. Protocols and annexes form an **integral part of the treaties**¹⁶. Treaties are accompanied by **declarations**, which are not sources of EU law, but are part of the *acquis communautaire*. Declarations express the political will, but are non-binding. Content of declarations is varied, and their authors are all Member States, groups of states or individual states¹⁷. Despite the fact that the declarations are not binding, they play an important role in the interpretation of the treaties. Attached to the Treaty of Lisbon are: 37 protocols, 2 annexes and 65 declarations.

5. Another components of the primary legislation are the treaties reforming (supplementing) the founding treaties. Their provisions were reformed in the Lisbon Treaty. These are:

- a) the Single European Act (SEA),
- b) the Treaty on European Union (Treaty of Maastricht) (TEU),

¹⁵ R. Grzeszczak, *op. cit.*, p. IV-4.

¹⁶ Article 51 TEU.

¹⁷ M. Pytka, B. Wojtyniak (ed.), *Prawo ustrojowe Unii Europejskiej*, Warsaw 2010, p. 39.

- c) the Treaty of Amsterdam (TA),
- d) the Treaty of Nice (TN),
- e) the Treaty of Lisbon (TL).

6. **The Single European Act** was the first revision of the founding treaties and made **significant improvements in the field of law**. Among others, it changed the mode of voting in the Council and the procedures of cooperation and consent under the then EEC. Preamble to the SEA expressed the will of the Member States to transform the relations existing among them in the European Union built on the foundations of the existing European Communities and the **European Political Cooperation (EPC)**. Thus, the Single European Act put in a single act of the treaty-level the **community and intergovernmental trend of European integration**, it also gave to the European Council the right to take action in both these areas. The procedure for the adoption of legal acts was entrusted to the Council with ongoing participation of the European Parliament and the Commission. Thanks to the SEA, the European Communities and the European Political Cooperation became the foundations for the creation of the European Union in its present form.

7. **The Treaty on European Union** was signed in Maastricht in 1992 and came into force in 1993. It made a number of significant changes, the most important of which for the EU law turned out to be the **introduction of co-decision procedure, which is now the ordinary legislative procedure**. Part of the Maastricht Treaty contains **modifications to the three founding treaties**, and part is the **founding treaty of the European Union**. **The Treaty on European Union** is therefore both the **treaty reforming** the founding treaties of Communities and the **founding treaty of the European Union**. Institutional reforms initiated by the TEU continued in the Treaty of Amsterdam from 1997 (entered into force in 1999) and the Treaty of Nice from 2001 (entered into force in 2003), primarily to make the changes needed to integrate new Member States to the EU. New settlements were made as to the composition, procedures and allocation of seats in the institutions of the European Communities. The objective scope of legislative activity of institutions was also increased, by covering asylum, immigration and visa policies with EU regulations and by integrating the Schengen *acquis* into the EU law.

8. **The Lisbon Treaty reformed all previously existing treaties**. The Treaty on European Union is the reformed previous TEU. The Treaty on the Functioning of the European Union is the reformed TEC.

9. The components of primary legislation are also the **accession treaties** on accession of subsequent countries to the European Union. The last such treaties related to the biggest EU enlargement mainly with countries of Central and Eastern Europe. They are the accession treaty of 2003 (entered into force in 2004), which concerned the

inclusion of 10 countries in the EU, including Poland, and the treaty of 2005 (entered into force in 2007), under which Romania and Bulgaria became the members of the EU. It should be noted that **accession treaty with Croatia** was signed in 2011 (will enter into force in 2013). **It is the seventh accession treaty.**

10. **Primary legislation takes precedence before both the secondary law and national law.** The law made by the institutions must therefore be based on competency standard contained in primary legislation. Under the principle of conferral, the EU acts only within the limits of the powers conferred on it by the Member States in the treaties to attain the objectives set out therein. Powers not conferred upon the EU in the primary legislation belong to the Member States. Exceeding those powers, and even more activities of EU institutions in areas where they have no powers invalidates secondary legislation, as decided by the CJEU. In addition, the legal personality of the European Union does not in any way authorize the EU to legislate or to act beyond the powers conferred upon it by the Member States in the treaties.

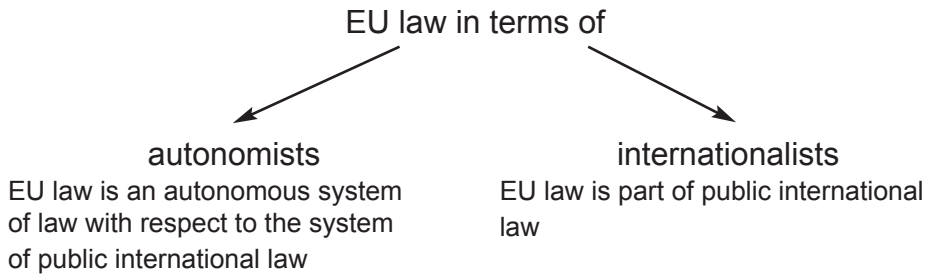
11. The targets of the primary legislation are in the first place the institutions and Member States. It also happens that the primary legislation has direct effect also on the citizens of the European Union. If provisions of the treaties result in laws for individuals they are directly effective in the both **vertical** and **horizontal effects**, i.e. they can be invoked by an individual against domestic authorities as well as other units.

12. We can distinguish the following features of primary legislation:
- a) it is **the highest in the hierarchy** of EU law, after the rules of law,
 - b) it provides a **legal basis for the EU institutions**,
 - c) it results from the **will** of all **Member States**,
 - d) the founding, reforming and accession treaties are on the same level,
 - e) **acts of secondary legislation and national law** must be **in conformity with primary legislation**,
 - f) the Court of Justice of the European Union has exclusive **competence to interpret primary legislation**,
 - g) revision and accession procedures of the treaties express the **sovereign will** of the **Member States**,
 - h) **the primary legislation is at the heart of EU law** as a new legal order distinct from the international law¹⁸.

13. **According to autonomists** the specific characteristics of founding treaties decide that the EU law cannot be regarded as public international law. The Lisbon Treaty has specific features that are not found in other international agreements, or

¹⁸ This last feature is still a contentious issue in the literature.

at least they do not occur with such intensity. **EU law is an independent, autonomous legal order apart from the international law and national laws.** This results from the constitutional nature of the treaties and authorization given by the Member States to the EU institutions to establish directly applicable law. The views of autonomists are confirmed by the ruling 6/64 *Costa v. Enel*, in which the CJEU held that: *The European Economic Community creates its own legal system.*



14. **According to the internationalists** (called traditionalists), **EU law is part of public international law.** The founding treaties are regular international agreements. Thus, they are creating, forming, or constitutive in nature. Internationalists see the confirmation of this view in decision 26/62 *van Gend&Loos*, in which the CJEU held that: *The European Economic Community is the new order of international law.*

15. Although the positions expressed by the autonomists and internationalists seem irreconcilable, there is a possibility to establish a more compromise idea. **The European Union law is the particularistic legal system functioning in a global system of international law.** EU law has particularistic¹⁹ special features listed above with the characteristics of the primary legislation. **European Union law is therefore based on international law, but has special features that allow considering it as a separate legal system.** The specificity of this legal order is confirmed by the judgment *Simmenthal* 106/77, in which the CJEU stressed the principle of not applying by national courts acts contrary to the EU standard. In addition, relying on that judgment and the judgment of *Costa* and *van Gend*, the CJEU in the opinion 1/91 on the compatibility of the draft Agreement on the establishment of the EEA with Community law emphasizes that (...) *the EEC Treaty constitutes the Constitutional Charter of a Community based on the rule of law. The main features of the law are: the principle of priority of Community law over national law and the principle of direct effect of Community law in the national legal orders.*

¹⁹ One should remember the meaning of the word **particularism**, i.e. the desire to break with the whole - in: W. Kopaliński, *Słownik wyrazów obcych i zwrotów obcojęzycznych*, Warsaw 1967, p. 382.

16. One must also have in mind the **distinction between international law and EU law**. In international law there are no mechanisms that allow for effective enforcement of the standards of international law in the legal order of the state. In EU law, however, there is the principle of the direct effect in national law and direct effectiveness. Standards of European Union law take precedence over national law and Member States are obliged to apply EU law and adapt national laws to it. According to the rule of priority and the case-law of the Court of Justice of the European Union, the primary and secondary legislation of the EU have primacy over the law of Member States. It follows from the CJEU case law that primacy of EU law is a fundamental principle of this law. The fact that the rule of priority is not included in the Lisbon Treaty, in no way violates the principle itself and the existing case law of the CJEU²⁰.

17. **The question of the primacy of EU law over national law is controversial, especially** when it comes to the **constitutions of the Member States**. According to the judgment of the Polish Constitutional Court²¹, Polish accession to the European Union does not dispute the status of the Constitution as the “supreme law of Poland”²². This also applies to the standards of secondary EU legislation. As provided for in the Constitution²³, the primacy of ratified international agreement and the law established by an international organization on the basis of such an agreement over the Polish law does not imply precedence over the Constitution. After the Polish accession to the EU, there has been a parallel existence of two autonomous legal systems - Polish and EU. This does not preclude their interaction, and therefore may cause a possible conflict between EU law and the Constitution. In the event of such a conflict, the sovereign decision of the Republic of Poland would be to:

- 1) **amend the Constitution**,
- 2) or **bring about changes in the regulations of EU law**,
- 3) or - **ultimately - withdraw from the EU**²⁴.

§5. INTERNATIONAL AGREEMENTS

1. The consequence of giving legal personality to the EU in the Lisbon Treaty is *ius contrahendi*, or the right to conclude international agreements. Thus, there is a **uniform procedure for concluding international agreements**, namely the adoption of

²⁰ Declaration No 17 concerning primacy.

²¹ Constitutional Court's judgment of 11 May 2005, ref. No. K 18/04.

²² Article 8(1) of the Constitution.

²³ Article 91(1) and 91(3) of the Constitution.

²⁴ For more information on this subject see Chapter VI.

the EU legal regime in this field²⁵. International agreements of the European Union with other subjects of international law are of great importance in the EU law. They are higher in the hierarchy than the acts of secondary legislation. Agreements concluded by the EU are binding on EU institutions and Member States. The European Union may conclude agreements with one or more third countries or international organizations. The EU has the right to conclude international agreements when²⁶:

- a) the Treaties so provide;
- b) conclusion of an agreement is necessary to achieve, under EU policies, one of the objectives referred to in the Treaties;
- c) conclusion is provided for in a legally binding EU act;
- d) conclusion may affect common rules or alter their scope.

2. The Lisbon Treaty empowers the EU to conclude international agreements in the following areas:

- establishing an area of prosperity and good neighbourly relations with neighbouring countries based on the values of the EU and characterized by close and peaceful relations based on cooperation²⁷;
- covered by the Common Foreign and Security Policy; EU may conclude agreements with one or more States or international organizations²⁸;
- readmission of third-country nationals who do not meet the conditions for entry, presence or residence in the territory of one of the Member States or ceased to meet them, to the countries of origin or the countries from which they come²⁹;
- research and technological development³⁰;
- environmental protection³¹;
- common trade policy and transport³²;
- development cooperation³³;
- agreements on economic, financial and technical cooperation with countries other than developing countries³⁴;
- humanitarian cooperation³⁵;

²⁵ J. Barcz, *Umowy międzynarodowe Unii Europejskiej z państwami trzecimi lub organizacjami międzynarodowymi*, in: J. Barcz (ed.), *Źródła prawa Unii Europejskiej*, Warsaw 2010, p. IV-93.

²⁶ Article 216 TFEU.

²⁷ Article 8 TEU.

²⁸ Article 37 TEU.

²⁹ Article 79 TFEU.

³⁰ Article 186 TFEU.

³¹ Article 191 TFEU.

³² Article 207 TFEU.

³³ Article 211 TFEU.

³⁴ Article 212 TFEU.

³⁵ Article 214 TFEU.

- agreements with one or more third countries or international organizations forming an association involving reciprocal rights and obligations, common action and special procedures³⁶;
- monetary policy, in particular the system of exchange rates of the euro against the currencies of third countries³⁷.

3. The right to conclude international agreements results from the treaties and other provisions of EU law. **The Lisbon Treaty provides for direct delegations to conclude international agreements** with third countries or international organizations. Moreover, the right to conclude international agreements results from the principle of **parallelism of internal and external powers** developed in the CJEU case law. This principle, also known as powers implied, allows to conclude international agreements, not only on the basis of direct authority of the treaties, but also on the basis of secondary legislation established under the treaties. The Court of Justice of the European Union expressed it as follows in the ERTA judgment³⁸: *Community has the capacity to enter into international agreements with third countries in the field of all the objectives set out in the Treaty. This power derives not only from the direct authority of the Treaty, but also, in equal measure, from other provisions of the Treaty and the measures issued on their basis by the Community institutions.* Thus, the basis for the conclusion of international agreements by the EU are not only the regulations of the primary legislation, but also the acts of the secondary legislation, which is supported also by the provisions of the Treaty of Lisbon³⁹.

4. **Member States** are obliged to respect the principle of loyalty and **cannot enter into agreements “in parallel” to the EU agreements** with respect to issues that have been settled by an agreement concluded by the EU and cannot impede the achievement of the objectives of the EU. Any agreement entered into by the Member States had to be adapted to EU law at the stage of efforts to join the EU, in accordance with the requirements of the Copenhagen criteria. The States, limiting their sovereignty by joining the EU, also provided the EU with right to conclude international agreements on their behalf. Exceptionally, Member States may conclude agreements for the implementation of EU secondary legislation, but under the strict supervision of the Commission, e.g. agreements on small border traffic.

5. All international agreements concluded earlier by the European Community became the EU agreements. **The European Union took over the rights and obligations arising from EC agreements**, joining them in place of the previous Community.

³⁶ Article 217 TFEU.

³⁷ Article 219 TFEU.

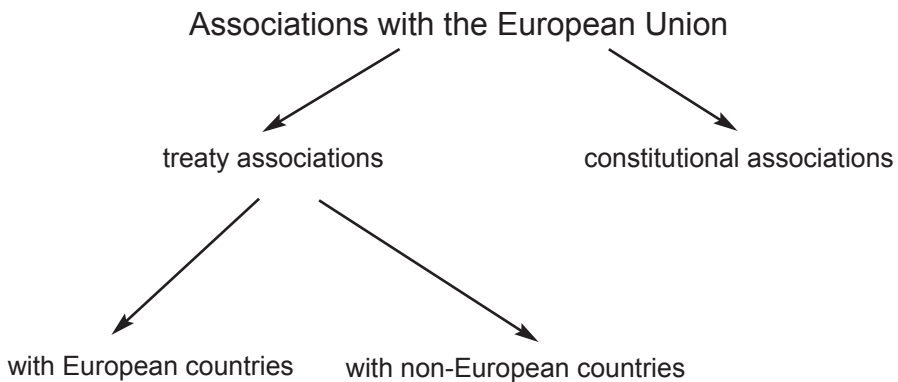
³⁸ 22/70 *Commission v. Council (ERTA)*.

³⁹ Article 216 TFEU.

The EU establishes all appropriate forms of cooperation with the United Nations and its specialized agencies, the Council of Europe, the Organisation for Security and Cooperation in Europe and the Organisation for Economic Cooperation and Development. The European Union is also required to maintain appropriate relations with other international organizations. This obligation rests with the High Representative of the Union for Foreign Affairs and Security Policy and the Commission. Union delegations in third countries and at international organizations are also subject to this obligation. They ensure the representation of the EU and work in close cooperation with the diplomatic and consular missions of the Member States.

6. **International agreements are subject to the CJEU control** for compliance with the Treaties. The exception are CFSP agreements due to the general exclusion of the Court's jurisdiction in this area. CJEU control also covers the agreements in the field of AFSJ. If international agreements are concluded by the EU and the Member States on one side (the so-called **mixed agreements**) with third countries they require ratification by all Member States. Mixed agreements are concluded mainly when their subject includes matters falling within the competence of the EU and the Member States, e.g. the agreement on the establishment of the World Trade Organization (WTO). The agreements determine whether they produce direct effect in national law or not. If they produce such an effect then individuals are guaranteed the right to rely on such agreements.

7. **Association agreements** occupy a special place among the agreements concluded by the European Union. Division of association agreements is shown in the graph below.



The most important for the development of European integration are the treaty associations with European countries. These include bilateral rights and responsibili-

ties, actions and procedures. They are based on **free trade area** and political objectives that could lead to membership. Although there is no such requirement in agreement with European countries, in practice, EU accession agreements are preceded by the EU associations agreements. Then the free-trade zone changes into the **customs union**⁴⁰ by replacing the association agreements with accession agreements. This was the case even for the largest expansion of the EU, when Europe Agreements signed with the countries of Central and Eastern Europe started their way to EU accession. The Court of Justice of the European Union pointed out that the agreements constituted an integral part of EU law, binding both the Member States and the candidate countries⁴¹. The latest type of association agreements with European countries are the European Stabilisation and Association Agreements concluded with the Balkan countries, e.g. with Macedonia. The main difference between treaties and association agreements is that treaties are self-executing and agreements require implementing instruments.

Association treaties with European countries also include the **European Free Trade Area (EFTA)** and the **European Economic Area (EEA)**. The EFTA States are Norway, Iceland, Switzerland and Liechtenstein, and the EEA countries include all Member States of the EU and EFTA countries, except Switzerland. These forms of association with the European Union allow the deepening of European integration, in particular, because the EEA is based on the principles of the internal market⁴².

The associations with non-European countries include: **ACP** (association with African countries, Caribbean and Pacific), **Euro-Med** (association with non-European countries of the Mediterranean). Constitutional associations concern associations of the European Union with overseas countries and territories (former colonies of Member States).

§6. DERIVATIVE LEGISLATION

1. Derivative legislation is issued in order to carry out the tasks set out in primary legislation. Types of secondary legislation are different because of the issuing institutions, the legal nature and the recipients. The number of different types of legal acts of the EU has been significantly reduced. The Lisbon Treaty sanctioned naming of the most important secondary legislation and its characteristics. The main changes included the introduction of the division into legislative and non-legislative acts. In

⁴⁰ For more on free trade area and customs union, see: A. Kuś, *Prawo celne*, Lublin-Bydgoszcz 2003, pp. 64-68.

⁴¹ Poland signed the Europe Agreement in 1991, and after approval by the European Parliament and ratification by the parliaments of the Member States of the Community, it entered into force in 1994.

⁴² For more on this topic see: A. Szachon-Pszenny, *Acquis Schengen a granice wewnętrzne i zewnętrzne w Unii Europejskiej*, Poznań 2011, pp. 138 and 149-151.

addition, this is the form of the AFSJ acts (formerly the third pillar). The Lisbon Treaty divides derivative legislation to:

- 1) **legislative acts:**
 - a) regulations,
 - b) directives,
 - c) decisions,
- 2) **non-legislative acts:**
 - a) delegated acts,
 - b) implementing acts,
 - c) decisions of the European Council,
 - d) interinstitutional agreements;
- 3) **instruments of the Common Foreign and Security Policy;**
- 4) **instruments of the Area of Freedom, Security and Justice** (temporary situation until 2014);
- 5) **non-binding acts.**

2. In the areas covered by the EU legislative competence adopting unnamed acts was abandoned on the grounds that their use can result in an impression of establishing generally applicable standards using non-standard legal instruments. At the same time it was advised to take caution in regulating this type of non-standard instruments in other cases, recommending the use of other legal acts. Considering a draft legislative act, the European Parliament and the Council refrain from adopting acts not provided for by the legislative procedure applicable in the given field.

§7. LEGISLATIVE ACTS

1. General remarks

1. Legislative acts are acts adopted by legislative procedure and determine the essential elements of the given field. Regulations, directives and decisions are adopted by the ordinary legislative procedure or the special legislative procedure. Non-legislative acts are adopted on a completely different basis⁴³. Both **legislative and non-legislative acts are binding sources of secondary legislation**. They are adopted to implement EU powers. Regulations, directives and decisions may be in the legislative, delegated and implementing form. Where the Treaties do not provide for the type of adopted act, the institutions select the type of act to be adopted, in accordance with applicable procedures and the principle of proportionality. Legal acts are justi-

⁴³ Article 297(2) TFEU.

fied and refer to proposals, initiatives, recommendations, requests or opinions required by the primary legislation⁴⁴.

2. Definitions of regulations and directives contained in the TFEU are the same as under the previous legislation, a slight modification was made only in the case of the decision⁴⁵. Regulation, directives and decisions are usually adopted under the ordinary legislative procedure jointly by the European Parliament and the Council on a proposal from the Commission. In special cases provided for in the treaties, the adoption of a regulation, directive or decision by the European Parliament with the Council or by the Council with the European Parliament constitutes a special legislative procedure. Exceptionally, legislative acts may be adopted on the initiative of a group of Member States or the European Parliament, on a recommendation from the European Central Bank or at the request of the Court of Justice or the European Investment Bank⁴⁶.

2. Regulations

1. Regulation has **general application, binding in its entirety and is directly applicable** and constitutes an **act of general application**. It is binding on all Member States and does not require implementation into national laws. Regulation, as the law in national law, is **abstract in nature** and can be used in an unspecified number of cases. It is **addressed to the institutions and bodies of the EU and the Member States and their authorities, as well as natural and legal persons**. Regulations apply in full, so Member States cannot apply them in a selective manner. They must be observed by all the entities that are recipients. Since regulations does not need implementing acts in order to be valid, regulation become part of national law, and the standards contained in them should meet the requirement of completeness.

2. Regulations are binding not only directly, but also immediately, they immediately give powers protected by national courts. Member States must comply with the regulation **simultaneously and uniformly**. They cannot introduce measures in violation of direct application, because the application of the regulation is independent of any reception of national law. Regulation is a manifestation of the EU intervention in national law by the **method of substitution**, which assumes total harmonization of law as a result of the replacement of the national standards by the standards of EU law. Thus, by providing a complete harmonization of the legal system in the European Union, substitution becomes a manifestation of the most advanced European in-

⁴⁴ Article 296 TFEU.

⁴⁵ Article 288 TFEU.

⁴⁶ Article 289 TFEU.

tegration in the field of law. **Regulation is an instrument to standardize the law across the EU and has the greatest impact on the domestic legal order.** Member States may not alter or supplement the regulations. **Member States are losing power to legislate in the area governed by regulation**⁴⁷. In addition, Member States have the obligation, under the principle of solidarity, to ensure the full effectiveness of the regulations.

3. If the earlier national laws are contrary to the regulation, Member States are required to repeal such acts. National law cannot restrict the rights of individuals to rely directly on EU law. **Regulation is an instrument of the EU legislature's deepest interference in the legal systems of the Member States.** These are acts that "automatically" become an integral part of the national legal systems of all Member States. Member States are obliged to repeal the earlier national legislation incompatible with the regulation and to not constitute such legislation in the future. Regulations relate mainly to the most important areas of EU activity, including: common commercial policy, the common agricultural policy, the common fisheries policy, etc.

3. Directives

1. Directives are **addressed to the Member States only and require implementation** into national law. Directives **bind Member States to whom they are addressed, but they allow states to choose freely the form and means as to the result to be achieved.** In order to be effective in national order, the **implementation** must be done in a **correct and timely manner.** Freedom of choice of forms and methods of implementations by the Member States is limited by the requirement, that the implementation should cover all regulations of directives, because the Member States cannot implement only certain provisions of the directives. **The purposefulness of directives** requires that each Member State has accepted as part of its legal system, all necessary measures so the Directive is fully effective, i.e. in line with the objectives. If the directive has not been correctly transposed into national law, it can only grant rights, but not impose obligations on individuals. The courts of the Member States are obliged to take account of this fact, as it results from the principle of the primacy of EU law.

2. **Member States, under the freedom of the manner of implementation of directives into national law, may create new national laws or modify existing ones.** Directive enters into force at the time of its referral to the Member States, and states are required to implement it in a timely manner. Thereafter, if the directive is properly

⁴⁷ See judgment 40/69, *Hauptzollamt Hamburg-Oberelbe v. Paul G. Bollmann Company*.

implemented, the courts and state administrative authorities apply national law implementing the directive, rather than the directive itself. The Member State is required to notify the Commission of the implementing measures, while the national act of implementation should include reference to the directive or the information that it implements the directive. If the Directive does not provide for criminal sanctions for non-compliance, they can be determined by the Member States.

3. **Implementation** of directives is carried out in accordance with the **principle of solidarity (loyalty)**. This means that Member States must take all general and specific measures to comply with treaty obligations or actions of the EU institutions. The CJEU case law clarifies that Member States shall take all measures necessary to ensure that the directive is fully effective, in accordance with the purpose it serves. The Commission constantly monitors and coordinates the implementation of the directives and the Member States are required to comply with all the rules that ensure quick and full integration of legal matter covered by the directive into national law order. The Commission may question the correctness of the transposition of the directive into national law. The main function of these directives is to **approximate the laws of the Member States**. This concerns the harmonization of national legislation with EU law and this assumption should be observed, even if directives are too vague. The obligation to properly implement the directives was also confirmed in the case-law of the CJEU⁴⁸, which highlighted that: *The Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under the principle of solidarity to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts.*

4. If the Member States fail to implement the directive, it may be subject to an **action for breach of EU law**. In addition, if the state does not implement the directive within deadline or implements it improperly, **individuals may pursue claims** against the State **under the provisions of the directive**. As the deadline for the implementation of the directive is **final**, individuals can claim its effectiveness after the deadline for implementation, even if the national authorities did not to implement the directive.

5. The general rule is to **implement the directive by legislative acts of general application in the Member States**. In the Polish case in the form of an act or regulation. The European Court of Justice ruled that the full interpretation requires the proper implementation by legislative measures. In addition, the CJEU expressly noted that

⁴⁸ On the implementation of directives, case 14/83 *Sabine Colson and Elizabeth Kamann v. Land Nordrhein-Westfalen*.

an administrative act is insufficient, due to the fact that the practice of an administrative nature are inherently variable and not sufficiently widely published⁴⁹.

6. **Directives are instruments of harmonization** of national law, but unlike the regulations they do not interfere so much in the national legal systems. Directives lead to the **approximation of Member States' legal systems**, but not their identity. The fact that directives bind the states in relation to the purpose and outcome, leaving the choice of means, proves that this type of secondary legislation takes into account the legal conditions of each Member State. As a result the directives are **flexible harmonization instruments** used in different ways by the EU institutions. Usually a directive is addressed to all Member States and therefore the CJEU held the directive as an act of general application. In view of this, directives are measures to ensure alignment with the *acquis* in the Member States by means of two methods: harmonization and coordination. **Harmonization** is the reconciling, mutual adjustment of individual elements into one whole; the EU, by means of directives, obliges the Member States to eliminate the most significant differences between their legal systems. **Coordination**, however, is the interaction for the mutual approximation of the laws. It is used when too many difference in national systems does not allow for harmonization. Therefore it relates to those areas of law which by their nature do not require the intervention of EU in legal relationships governed by national law.

7. Directive as a mean of harmonization of national legislation is subject to doctrine discussions. The doctrine according to the contents of the directive divides harmonization to⁵⁰:

a) **complete harmonization**;

b) **partial harmonization**:

- partial in the strict sense, when the directive only partially regulates the area in question,
- optional, if the standard of the directive gives Member States the choice of an appropriate measure,
- alternative, if the directive clearly shows the options that can be selected alternatively,
- minimum, if the standard specifies only a minimum standard.

The national **act of implementation** should include reference to the directive, or the information that it implements the directive. Member States are required in the framework of implementing measures to notify the European Commission of the measures taken. The Lisbon Treaty has strengthened the **obligation to notify**. The

⁴⁹ The implementation of the directives see: B. Kurcz, *Dyrektywy Wspólnoty Europejskiej i ich implementacja do prawa krajowego*, Cracow 2004.

⁵⁰ A. Wyrozumska, *Źródła prawa Unii Europejskiej*, in: J. Barcz, M. Górka, A. Wyrozumska, *Instytucje i prawo Unii Europejskiej*, Warsaw 2011, p. 285.

Commission in an action against a Member State for breach of treaty obligations⁵¹ may bring an action against the State for failure to fulfil the obligation to notify of measures taken to implement the directive. The Commission shall, if it considers it appropriate, immediately in the first phase of the proceedings before the ECJ, specify the amount of the lump sum or penalty payment to be paid by the Member State⁵², which it considers appropriate in the circumstances. This obligation shall take effect on the date specified in the judgment of the Court⁵³.

8. There is controversy in the doctrine with regard to the direct effect of directives. The conditions of the direct effect of directives are **clarity, accuracy and unconditional provisions of the directive**. The CJEU case law developed this problem⁵⁴. The Court held that **directives have direct effect, but only on the vertical plane**. This means that an individual can rely on the provisions of the directives in the proceedings against the Member State. Direct effect of directives on the vertical plane is conditioned by the deadline for implementation, then the Member States apply national law implementing the directive, rather and not the directive itself. However, in the absence of the implementation of the directive, despite the lapse of the prescribed period, individuals may rely directly before the court on the rules of not implemented or improperly implemented directive. Directives do not, however, have direct effect on the horizontal plane, that is, one cannot invoke the provisions of the directives in proceedings against individuals. This is due to the fact that directives are only addressed to the Member States and it is for them as such that directive creates obligations.

9. EU law requires **Member States to make good the damage caused to individuals as a result of the lack of implementation of the directive**. Individual is entitled to compensation after meeting three conditions.

Firstly, the purpose of the directive must be to grant rights on individual entities, i.e. the intended effect is to give the rights to individuals.

Secondly, the content of those rights can be determined under the provisions of the directive.

Thirdly, there must be a causal link between the breach of the obligation by the State and the damage.

10. Therefore, the Member State bears the responsibility for incorrect or untimely implementation of the directive. As a rule, the **deadline for implementation ranges**

⁵¹ Article 258 TFEU.

⁵² Previously it was only possible in the proceedings against a Member State that has not implemented the judgment of the CJ.

⁵³ A. Wyrozumska, *op. cit.*, p. 258-259.

⁵⁴ See, *inter alia*, CJ ruling on: 43/75 *Defrenne v. Sabena*; 41/74 *van Duyn v. Home Office*; C-91/92 *Faccini Dori*.

from one to three years. The state cannot rely on the internal difficulties of implementation. Any such objection is notified by the Member State in the process of establishing the directive, in the discussion in the Council. The state can then submit request for modification of the directive. Any objections on the part of Member States are taken into account at the stage of development of this act of secondary law. Since the entry into force of the directive, Member States are obliged to take any action in order to implement it correctly and on time. In the period **between the entry into force of the directive and the date of implementation, the national authorities have a duty to refrain from interpreting domestic law not in accordance with the objectives of the directive.** Therefore, Member States are obliged to respect in this transition period the principle of loyalty in the negative aspect.

11. **Individuals may pursue claims** against state authorities **under the provisions of the directive that has not been implemented or has been implemented incorrectly.** Thus, the directive can be invoked against the state before the national courts, which act in such situations as the courts of the EU. In addition, it should be noted that the case-law of the CJEU has extended the concept of a Member State in relation to state indemnity associated with non-compliance with the provisions of the directive.

12. Extending the concept of a Member State in the case law is called the **emanation of the state.** The Court of Justice pointed out in several judgments that indemnity for failure to implement the directive applies not only to the state in the sense of its classical legislative, executive and judicial authorities. By developing the concept of emanation of the state, this responsibility was extended to organizations or bodies subject to the authority or control of the State or having special powers that go beyond the scope of the powers arising from the normal rules applicable in relations between individuals⁵⁵. Action against the State may be brought regardless of the form of the state, whether a public authority or an employer⁵⁶. Therefore an emanations of the state according to the CJ are, among others, customs, police, taxation, local and regional authorities, companies with state ownership, state-owned airlines, public health services, etc.

13. **Directive**, as opposed to the regulation, **only involves the Member States** to which it is addressed, while the regulation is effective for all recipients, all entities of EU law. The basis for a directive is in the first place the treaties, but often the basis for the directive is in regulation. Thus, the full effectiveness of the directive is ensured by **two-stage drafting.** First, the directive is issued by the competent EU institutions, then compulsorily implemented into national law by the relevant authorities of the Member States.

⁵⁵ See judgment C 188/89 *Foster v. British Gas*.

⁵⁶ See judgment 152/84 *Marshall v. Southampton and South-West Hampshire Area Authority*.

14. Directives played a special role in the development of the internal market. From SEA up to a common market the means of implementing its objectives were primarily directives. Currently, directives apply among others, to labor law, tax law, consumer protection, etc.

4. Decisions

1. **Decisions are binding in their entirety. A decision which specifies its recipients is binding only on them.** The recipient can be EU institutions, Member States and individuals. The institutions of the European Union may establish decisions without the recipients, but most often they are individually addressed to specific recipients. Recipients are referred to, directly or indirectly, *inter alia* by specifying a particular group of individuals or legal entities and Member States. They are called *pro foro externo* decisions. There are also the so called *pro foro interno* decisions, i.e. relating to the so-called EU internal law, and therefore mainly to activities of institutions and the technical issues. The decision is essentially to apply the principles of the treaties in individual cases. The essence of the decision shows that the content may be detailed, and can even specify the methods of achieving the objective.

2. **The decision, which indicates the recipient is a specific-individual act**, and not a widely applicable act like the regulation. It is binding in its entirety upon those to whom it is addressed, therefore it imposes directly effective obligations, and the recipient does not have the freedom as to how to implement the decision. Decisions which specify the recipients are notified to the recipients and take effect upon such notification⁵⁷. **Decisions which do not specify the recipients are referred to as decisions of general application**, as they have effect in relation to all those potentially affected.

3. **Decisions addressed to the Member States apply in full to all of their bodies and can be invoked by an individual against the state.** Decisions addressed to Member State cannot invoke horizontal effects⁵⁸. Member States must therefore take all necessary measures to implement the provisions of the decision. The state cannot rely on internal difficulties as a condition for failure to apply the decision. The Court of Justice of the European Union ruled that in such a case, a Member State, in consultation with the Commission, shall determine how to address the problems arising during establishment of decisions. Decisions are individual, **they can be compared to national administrative decisions**. Decisions are an instrument of the executive

⁵⁷ Article 297 TFEU.

⁵⁸ A. Wyrozumska, *op. cit.*, p. 289.

functions of the Council and the Commission, which they use in giving instructions or authorization to the recipient of the decision.

4. Individuals may rely on the content of the decisions before the national courts. The circle of recipients of the decision is in principle limited; **decision cannot produce *erga omnes* effects**. This feature essentially distinguishes decisions from regulations. The subjects of decisions include: state aid, mergers of companies.

§8. NON-LEGISLATIVE ACTS

1. General remarks

1. The Lisbon Treaty does not specify what types of legal acts fall into the category of non-legislative acts, nor does it define the category. In general, it can be assumed that these are all types of legal acts of the EU other than legislative acts. The category of non-legislative acts provided for in the Lisbon Treaty includes:

- 1) delegated acts;
- 2) implementing acts;
- 3) other non-legislative acts (including, among others: decisions that are not decisions of a legislative nature, interinstitutional agreements, etc.).

2. Non-legislative acts are binding legal acts. These acts are not subject to subsidiarity check carried out by the national parliaments and the adoption process, especially in the Council, does not have to be open⁵⁹.

2. Delegated acts

1. Delegated acts include:

- delegated regulations,
- delegated directives,
- delegated decisions.

2. In accordance with the TFEU⁶⁰, legislative act may delegate to the Commission the powers to adopt **non-legislative acts of general application that supplement or**

⁵⁹ *Ibidem*, p. 282.

⁶⁰ Article 290 TFEU.

amend certain non-essential elements of a legislative act, i.e. the delegated acts. The delegation of powers cannot relate to the essential elements of an area because they are reserved for the legislative act. The mandate of the legislative act clearly defines the objectives, content, scope and duration of delegated powers. **Delegated acts grant quasi-lawmaking powers to the Commission.** Conditions to which the delegation is subject are clearly defined in legislative acts, with the mode of control of delegated acts issued by the European Commission, which is expressed in two aspects:

- **The European Parliament or the Council may decide to revoke delegated powers;**
- **delegated act may enter into force only if the European Parliament or the Council do not object within a period set by the legislative act.**

3. The Council and the EP will be able to use these surveillance measures independently. For the purposes of these provisions, the European Parliament establishes by a majority of its component members, and the Council by a qualified majority. Delegation of the act to the European Commission may be cancelled if the EP or the Council considers that the proposed measures go beyond the powers delegated to the Commission in the directive, regulation or decision. The Council or the EP may revoke the delegation if it is determined that the measures taken by the European Commission are not compatible with the aim or content of the act or that they violate the principle of subsidiarity or proportionality. Objection of the Parliament or the Council requires the Commission to present a revised draft implementing act, or to propose a legislative act (regulation, directive or decision of the Council and the European Parliament) including provisions that the Commission had previously planned to issue in the form of its implementing act. The possibility of an independent block by the Council and the EP of a draft delegated act of the Commission is quite radical, because it results in withdrawal of the powers previously delegated to the European Commission. At the same time it is *ex post*, because it will be used only after a negative opinion of the Council or the Parliament on the Commission's use of powers granted in the given field. Less radical is the power of the Council or the Parliament to object within the time provided by a legislative act, as it leads to blocking of the entry into force of a specific delegated act, and thus is an *ex ante*⁶¹.

4. Withdrawal by the Council or the EP of powers delegated to the European Commission does not require changes in the legislative act, which included those rights. The Commission issues delegated acts under the powers contained in the acts laid down both in accordance with the ordinary legislative procedure (i.e. by both insti-

⁶¹ C. Herma, *Likwidacja „struktury filarowej” Unii – podmiotowość prawno międzynarodowa UE oraz reforma systemu aktów prawa pierwotnego i wtórnego*, in: J. Barcz (ed.), *Traktat z Lizbony. Główne reformy ustrojowe Unii Europejskiej*, Warsaw 2008, p. 142.

tutions together) and in accordance with special legislative procedures (by the Council with the participation of PE or by the PE with the participation of the Council). If the powers of the European Commission have been delegated in a legislative act established in accordance with a special legislative procedure, withdrawal of the European Commission's powers will be a controversial issue.

Problematic situation would arise for example if the Parliament wants to take the Commission's powers to issue delegated acts already granted by the legislative act of the Council, issued after consultation (only) with the EP.

5. Delegated acts are adopted by delegation recognized in a legislative act. Establishment of delegated acts shall belong exclusively to the Commission. It depends upon the approval of the EU legislator, namely the Council and the European Parliament, whether and to what extent the powers are delegated. Delegated acts are both for establishing "technical" rules aimed at detailing the legislative act and for changing certain elements of the act. **EU institution that issued the legislative act, which included the authority to issue a delegated act, has mechanisms to supervise the activities of the European Commission.** Delegated acts are an attempt to reconcile the need for clear democratic legitimacy of acts establishing generally applicable standards with the need for rapid and accurate response to the dynamic situation in some areas within the competence of the EU (e.g. in the area of financial markets). This allowed delegating powers to set generally applicable standards, but with the "technical" nature, for the European Commission, while maintaining EU legislator's strong supervisory powers over the use of granted powers by the Commission⁶².

6. Delegated acts are hierarchically subordinate to legislative acts. Their normalization range is limited to supplementing or amending certain non-essential elements of legislative acts. Delegated acts are established as a result of the procedure completely different from both the regular and special legislative procedure. However, from the point of view of the effects in the legal systems of the Member States, their legal nature will be identical to the nature of legislative acts. For example, **in terms of implementing obligations of the Member State, the legal nature of a delegated directive, which is a non-legislative act, is analogous to the directive, which is a legislative act.** At the same time, one should remember that delegated acts concern non-essential elements of legislative acts. The essential elements are regulated exclusively by the legislative acts. It is a vague concept, so in the future it may give rise to disputes as to the scope of the Commission's delegated powers. It seems that this may be the reason for an action before the Court of Justice of the European Union.

⁶² *Ibidem*, pp. 119-120.

3. Implementing acts

1. Implementing acts are:
 - implementing regulations,
 - implementing directives,
 - implementing decisions.

2. In accordance with the TFEU⁶³, if uniform conditions are necessary for **implementing legally binding EU acts**, those acts shall confer **implementing powers on the Commission** or exceptionally on the Council (in duly justified cases and in matters of the CFSP). **Implementing acts are designed for implementation of legislative acts**. Implementing acts can be adopted under the supervision of the Member States. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, lay down in advance of the rules and general principles concerning **mechanisms for control** by Member States of the Commission's implementing powers.

3. In general, the Member States adopt all measures of national law necessary to implement legally binding EU acts. Thus, the execution of EU law remains a domain of national authorities. Basically, the execution of EU law is done with the use of the instruments of Member States. In a broad sense, the instruments of national law that implement the EU law should be regarded as implementing acts of the EU.

4. Implementing powers are provided to the Commission by the European Parliament and the Council (in legislative acts established in both the ordinary and special legislative procedure). However, implementing powers to the Council are provided by the European Council (in the CFSP non-legislative acts). A controversial issue is the transfer of implementing powers in a delegated act. Although it is a legally binding act, it actually would be a transfer of implementing powers to the Commission by the delegated act issued by the European Commission.

4. Other non-legislative acts

1. The Lisbon Treaty also provides for the issuance of non-legislative acts which cannot be classified as implementing acts or delegated acts. Therefore, it seems advisable to give them a working name: other non-legislative acts. The most important among them are the specific non-legislative decisions, interinstitutional agreements and other, e.g. acts of the European Central Bank.

⁶³ Article 291 TFEU.

2. The TFEU provides for making decisions that are not of legislative nature, and are neither implementing nor delegated acts. Such decisions may indicate or not indicate the recipient and are used primarily in the area of CFSP. Assuming that the basic division of binding legal acts of the new EU is of dichotomous nature, the category of non-legislative acts - in addition to delegated and implementing acts - also includes:

- acts of the Council, adopted on the basis of the Lisbon Treaty without any involvement of the European Parliament (under different EU policies), also known as independent acts of the Council, e.g. the Council determines common customs tariff duties, acting on a proposal from the Commission⁶⁴; the Council may (after consulting the ECB) to accept protective measures on the movement of capital to or from third countries⁶⁵; the Council may decide that public aid is compatible with the internal market⁶⁶;
- decisions of the Council and the European Council adopted in the framework of the CFSP;
- decisions of the European Council concerning the internal organization of the Council⁶⁷;
- decisions of the European Council under the simplified revision procedures of the Treaties⁶⁸.

3. Non-legislative acts of the EU also include **interinstitutional agreements**. The European Parliament, the Council and the Commission consult each other and by common agreement make arrangements for their cooperation. For this purpose, they may, in compliance with the Treaties, conclude interinstitutional agreements which may be binding⁶⁹. Interinstitutional agreements are formal acts, applied by the institutions, and the European Commission takes initiatives in the annual and multi-annual programming of the EU to achieve interinstitutional agreements.

4. Specific acts are also other acts that are not legislative acts, while they are not delegated acts and implementing acts, such as: Council regulations determining the languages of the EU institutions (without prejudice to the provisions of the Statute of the CJEU)⁷⁰; regulations and decisions of the European Central Bank⁷¹. The possibility of establishing such acts undermines the unified catalogue of sources of EU law.

⁶⁴ Article 31 TFEU.

⁶⁵ Article 66 TFEU.

⁶⁶ Article 108(2) TFEU.

⁶⁷ Articles 236 and 342 TFEU.

⁶⁸ Article 48(6–7) TFEU.

⁶⁹ Article 295 TFEU.

⁷⁰ Article 342 TFEU.

⁷¹ Article 132 TFEU.

§9. NON-BINDING ACTS

1. Non-binding acts are recommendations and opinions. The Council adopts the **recommendations** at the request of the Commission, in all cases where the Treaties provide for adoption of acts by the Council on a proposal from the European Commission. The Council makes determinations unanimously in those areas in which unanimity is required for the adoption of the EU act. The Commission and the European Central Bank adopt recommendations in the specific cases provided for in the treaties⁷². **Opinions**, just like recommendations, are non-binding acts, but may have legal effects. Opinions are usually issued when the request is made by other institutions. If the treaty provides for an opinion, e.g. of the Parliament, the Council admittedly does not have to take it into account, but failure to request an opinion by the Council to the European Parliament is a significant breach of the procedural requirement and as a result may lead to the invalidity of the act.

2. Non-binding secondary legislation is known as the so called *soft law*. Sometimes soft law is created in areas where institutions do not have the competence to adopt binding acts or there is no political will among the Member States to adopt them. The actual status of the legal act is always determined not by its name, but by the content.

3. **Recommendations and opinions** are legal acts created on the own initiative of a legislative body (recommendation) or inspired by another entity (opinion). They are not legally binding, but the courts may take into account the recommendations indicating the interpretation of EU law. Internal recommendations (addressed to EU institutions and bodies) are published as **COM** documents, which in practice may precede release of legislative and non-legislative acts.

4. In addition, there are many new categories of acts, called atypical acts, such as patterns of activities, schedules, projects, programmes, etc. They are *sui generis acts* on the verge of law and policy. They are defined as unnamed (informal) acts, and as modified by the TL, it is recommended to use them rarely.

§10. INSTRUMENTS OF THE COMMON FOREIGN AND SECURITY POLICY

1. CFSP instruments are the exception to the unified catalogue of sources of EU law. Common foreign and security policy is subject to specific rules and procedures;

⁷² Article 292 TFEU.

it is implemented by Member States and the High Representative by means of national and EU instruments. **The CFSP excludes the adoption of legislative acts.** Therefore, they are a special kind of non-legislative acts, different from the delegated acts and implementing acts. They are established only by the **Council and the European Council**. Parliament's role here is limited.

2. According to the EU Treaty CFSP instruments are⁷³:

- 1) general guidelines;
- 2) adopting decisions defining:
 - i) actions to be undertaken by the Union;
 - ii) positions to be taken by the Union;
 - iii) arrangements for the implementation of the decisions referred to in points (i) and (ii);
- 3) strengthening systematic cooperation between Member States in the conduct of policy.

3. **General guidelines of the CFSP are determined by the European Council**, including matters with defence implications. On their basis the Council makes the decisions necessary for defining and implementing the Common Foreign and Security Policy. General guidelines most often regulate political issues, especially military issues.

4. **Decisions in the CFSP are taken by the European Council and the Council on the initiative of the Member States, the High Representative of the Union for Foreign Affairs and Security Policy, or the High Representative with the support of the Commission.** Member States and the High Representative - alone or with the support of the European Commission - can also refer to the Council any question relating to the common foreign and security policy and may submit proposals⁷⁴. In cases requiring a rapid decision, the High Representative shall call, on its own initiative or at the request of a Member State, within 48 hours, or - in an emergency - a shorter time period, an extraordinary meeting of the Council. When taking the decision in the field of the CFSP, if the State abstains from voting at the same time it can make a formal statement. In a spirit of mutual solidarity, the Member State shall refrain from any action likely to conflict with or impede EU action taken on the basis of that decision. Other Member States are obliged to respect its position. The decision shall not be adopted if the Council members who have made a statement in connection with abstention represent at least one third of the Member States whose total population is at least 1/3 of the population of the Union. As a rule, the Council takes decisions by consensus, but also exceptionally allows for qualified majority voting,

⁷³ Article 25 TEU.

⁷⁴ Article 30 TFEU.

e.g. in the adoption of decisions defining Union action or position, in accordance with the proposal of the High Representative, which was presented following a specific request from the European Council on its own initiative or on the initiative of the High Representative, or in the adoption of decisions implementing decisions defining a Union action or position.

5. Decisions determining the actions that should be undertaken by the Union, are operational in nature. They apply to specific situations in which taking operating action is deemed necessary. These decisions determine the range of actions, objectives, scope and resources to be made available to the Union, the conditions for their implementation and duration. However, decisions on the positions to be taken by the Union concern international relations. They define the EU's approach to specific issues of geographical or thematic nature.

6. In addition, a **common approach** defined in the TEU⁷⁵ can be considered an instrument of the CFSP. Member States in the European Council and the Council agree on all matters of the CFSP, which are of general interest, in order to determine a common approach. Before taking any action on the international scene or entering into any commitment which could affect the interests of the EU, each Member State consults the others within the European Council or the Council. Member States ensure, through the convergence of their actions, the possibility of implementing the European Union interests and values on the international arena. The rule of loyalty is applicable here. When the European Council or the Council has defined a common approach, the High Representative and the foreign ministers of the Member States coordinate their activities within the Council. The diplomatic missions of the Member States and the Union delegations in third countries and at international organizations cooperate and contribute to the formulation and implementation of a common approach.

7. The former third-pillar instruments (general guidelines and principles, common strategies, joint actions, common positions and decisions) apply temporarily, but they have to be replaced as soon as possible by the new CFSP instruments.

⁷⁵ Article 32 TEU.

§11. INSTRUMENTS OF THE AREA OF FREEDOM, SECURITY AND JUSTICE

1. General remarks

The area of freedom, security and justice is an area without internal frontiers which assures free movement of persons in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime. This includes the Schengen *acquis* integrated into the former I and III pillar. So **AFSJ gives a uniform legal nature to the Schengen *acquis* incorporated to the EU law**. Compromise specific solutions are **transitional provisions** on the status of the acts created in the third pillar⁷⁶, according to which they will be valid for **5 years from the entry into force of the Treaty of Lisbon**, i.e. until 30 November 2014. During the transitional period acts are to be changed to regulations, directives and decisions. Also, compromise solutions are some of the provisions granting powers to exclude participation of the United Kingdom, Ireland and Denmark in their establishment and application.

2. Definition of the Schengen *acquis*

1. **The AFSJ's most important part is the Schengen *acquis***. Therefore, it is necessary to define this term, which determines a set of basic sources of law, from which derives the Area of Freedom, Security and Justice. Schengen *acquis* is a treaty term, also used in the acts of EU secondary legislation, doctrine and case law. It was originally formed in the Protocol integrating the Schengen *acquis* into the legal framework of the European Union annexed to the Treaty of Amsterdam⁷⁷. Since that time, it is an integral part of the EU legal system sanctioned by the Lisbon Treaty.

2. **Schengen *acquis* includes** the Schengen Agreement of 1985⁷⁸, the Convention implementing the Schengen Agreement of 1990⁷⁹ and all acts based on them. In ad-

⁷⁶ See Article 10 of the *Protocol No. 36 on transitional provisions*.

⁷⁷ *Protocol integrating the Schengen *acquis* into the framework of the European Union* – annexed to the TA. Replaced by *Protocol No. 19 on the Schengen *acquis* into the framework of the European Union* annexed to the Treaty of Lisbon.

⁷⁸ Agreement, signed in Schengen on 14 June 1985 among the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders.

⁷⁹ Implementing Convention to the Schengen Agreement, signed in Schengen on 19 June 1990 among the Kingdom of Belgium, the Federal Republic of Germany, the French Republic, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands.

dition, the Schengen *acquis* also includes the related acts of primary and secondary legislation created after the incorporation of the Schengen *acquis* into EU law, in particular the Schengen Borders Code and Community Code on Visas⁸⁰. **Schengen *acquis* is part of the open directory of the sources of European Union law**⁸¹.

3. Instruments in force until 2014

1. Legal instruments of the third pillar remain valid until 2014. These are:

- a) common positions,
- b) joint actions (modified by TA),
- c) decisions,
- d) framework decisions,
- e) conventions and convention implementing measures.

Within the AFSJ, and previously in the fields of police and judicial cooperation in criminal matters, Member States are obliged to inform each other and conduct consultations with one another within the Council. They are also required to organize cooperation between the competent national administrative services.

2. Member States presented their vision for common positions on intergovernmental conferences. However, joint actions are more precise and defined more closely than the common positions. The **principle of subsidiarity** applies here - a joint action could be taken by the European Union only if the EU achieved its purpose better than Member States acting alone. Joint actions could provide that measures needed for their implementation will be adopted by qualified majority⁸². The Amsterdam Treaty modified the structure of the acts of the former third pillar, eliminating joint actions and replacing them with decisions and framework decisions. Joint activities in the third pillar are no longer taken, but those created prior to the TA are still valid.

3. **Decisions and framework decisions created in the former third pillar are binding, but do not have a direct effect as legislative and non-legislative decisions.** These are similar to directives, since they require implementation. Just like directives they have a deadline for implementation. The Court of Justice of the European Union ruled that **individuals can rely on the framework decisions before national courts.** The most characteristic example of the framework decision is the European Arrest Warrant⁸³ (EAW) of 2002.

⁸⁰ Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code).

⁸¹ For more on this topic see: A. Szachon-Pszenny, *op.cit.*, p. 23-26.

⁸² For example, joint action on the creation and exchange in legal professions (GROTIUS).

⁸³ *European Arrest Warrant*.

4. Conventions and convention implementing measures were developed by the Council at the request of the Commission or the Member States. Adoptions of conventions and their implementing measures were made by the Member States. They are not typical legal acts, but **international legal measures**, e.g. the Convention on the EUROPOL. The Lisbon Treaty does not provide for the conclusion of conventions between the Member States, which is a definite shift away from that instrument⁸⁴.

5. The AFSJ adopted **specific legal provisions** supporting its structure. These are:
- a) **warranty clause** – according to which, cooperation on AFSJ does not exclude and does not replace the responsibility of states for the maintenance of order and security;
 - b) **reinforced (enhanced) cooperation** - can be taken by the Member States on the basis of multilateral agreements. This rule allows the Member States to determine the circle of cooperation in integration, but under certain conditions, it does not need to involve all Member States. The principle of enhanced cooperation does not deny the efforts of Member States to achieve targets jointly set by the EU, but allows the differentiation of progress towards these targets, depending on the individual circumstances of each country. The successes of closer cooperation include, among others, the introduction of the common travel area, Benelux passport union, the signing of Schengen Agreement and the Schengen Convention.

6. It should be noted that under these transitional provisions to the acts of the former third pillar special rules apply until they are converted into new laws. **During the transitional period, an action for breach of Treaty obligations cannot be brought⁸⁵ by EC, and the powers of the CJ are the same as before the entry into force of the Lisbon Treaty** (i.e. the Member States had to agree to the jurisdiction of the Court in the field of police and judicial cooperation in criminal matters). Only the change to the new legal act causes the full application of the powers of the institutions according to the provisions of the TL. One must keep in mind that the replacement of old acts with new ones must be made by the end of the transition period and **from 1 December 2014** only new legal acts will apply in AFSJ.

4. New legal acts of the Area of Freedom, Security and Justice

1. The AFSJ from 1 December 2014 will use a standardized catalogue of sources of EU law corresponding to legislative and non-legislative acts. Thus, the former

⁸⁴ A. Grzelak, *Postanowienia przejściowe (Protocol 36)*, in: J. Barcz (ed.), *Źródła prawa Unii Europejskiej*, Warsaw 2010, p. IV-51.

⁸⁵ Thus, there is no application of Article 258 TFEU.

third-pillar instruments need to be converted to regulations, directives and decisions. Thus they will become directly applicable acts, e.g. the framework decision will be changed to the directive. Implementing and delegated acts will also be established on their basis. In addition, since the entry into force of the Lisbon Treaty, AFSJ legislation is established in the form of legislative and non-legislative acts.

2. Under the protocols and declarations annexed to the Treaty of Lisbon, the United Kingdom, Ireland and Denmark will be in a special situation⁸⁶.

§12. CASE-LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION AND THE RULES OF LAW

1. Case-law of the Court of Justice of the European applies to all EU legislation. The exception are the instruments of the CFSP, as here CJEU has very limited powers. Temporarily, CJEU powers are not full with respect to AFSJ acts, due to the 5-year transition period.

2. The largest part of the judgments of the Court of Justice of the European Union was made in response to questions referred for a preliminary ruling of national courts, thus the initial decisions have the most important effect on the Court. However, formally CJEU rulings do not set precedents and have not been recognized as sources of law as is the case in common law systems. However, they are very important. It is believed even that the Court of Justice becomes a quasi-legislative body. In the doctrine there are even the views on the so-called **law of judicial decisions**.

3. Despite doctrinal disputes on the position of CJEU rulings in the catalogue of the sources of EU law, it should be remembered that the main task of the Court is the interpretation of treaties. The Court of Justice of the European Union interprets treaties and controls the legality and compliance of secondary legislation with the treaties and compliance of delegated acts and implementing acts with legislative acts. As a result of this interpretation, the rules of law are very broadly characterized in the case law. **The Court of Justice of the European Union does not establish the rules of law, but extracts them, because they lie inherently in the treaties.** Thus, in this dimension, the rules of law can be considered as the source of primary law.

⁸⁶ See Protocol No. 19 on the Schengen acquis integrated into the framework of the European Union, Protocol No. 20 on the application of certain aspects of the Article 26 TFEU to the United Kingdom and Ireland, Protocol No. 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, Protocol No. 22 on the position of Denmark.

4. General principles have their origins in the sources of international law, namely international agreements, general principles of international law or customary international law. CJEU judges try to adapt these principles to the objectives of the Union. Using the constitutional traditions common to the Member States in determining the general principles of EU law has been confirmed by the Lisbon Treaty, in particular in the context of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Charter of Fundamental Rights⁸⁷. The Court of Justice of the European Union ruled that these rules are binding both on the EU institutions and the Member States' authorities. In addition to the **general principles**, the Union acts on the basis of its **own structural rules**, related primarily to systemic and institutional issues and lawmaking. In addition to general principles of law and the structural principles (e.g. subsidiarity, loyalty, proportionality, institutional balance)⁸⁸, there are principles of the common law⁸⁹, which are present throughout the European law. However, while the general principles of law and structural principles are important in the EU legal system, the common law is of marginal importance.

Study questions

1. Characterize the division into primary and derivative legislation.
2. What is *acquis communautaire*?
3. Describe the components of the EU *acquis*.
4. What are the characteristics of primary legislation?
5. Characterize EU law in terms of autonomists and internationalists.
6. What is the implementation of the directive and what are the conditions?
7. Discuss the principle of state liability for failure to implement the directive.
8. What are the effects of regulations, directives and decisions?
9. What are the instruments of the CFSP?
10. Define the Schengen *acquis*.
11. What are the legal acts in force in the AFSJ?
12. What is the European Union *ius contrahendi*?
13. What is the position of international agreements under EU law?
14. Discuss the hierarchy of sources of EU law.
15. What is the significance of the CJEU case law?

Main literature

1. M. Ahlt, *Prawo europejskie*, Warsaw 1998;
2. J. Barcz, *Poznaj Traktat z Lizbony*, Warsaw 2008;
3. J. Barcz (ed.), *Źródła prawa Unii Europejskiej*, Warsaw 2010;

⁸⁷ On the protection of human rights, see Chapter VIII.

⁸⁸ On the rules of law, see Chapter II.

⁸⁹ An example of the application of customary law is, for example, replacing the minister of the Council with the Secretary of State, even though the provisions pertain to the ministerial level officials.

4. Z. Brodecki, *Prawo integracji w Europie*, Warsaw 2008;
5. P. Buława, *Źródła prawa UE*, in: M. Pytka, B. Wojtyniak (ed.), *Prawo ustrojowe Unii Europejskiej*, Warsaw 2010;
6. W. Góralski (ed.), *Unia Europejska. Tom I. Geneza-System-Prawo*, Warsaw 2007;
7. C. Herma, *Likwidacja „struktury filarowej” Unii – podmiotowość prawno międzynarodowa UE oraz reforma systemu aktów prawa pierwotnego i wtórnego*, in: J. Barcz (ed.), *Traktat z Lizbony. Główne reformy ustrojowe Unii Europejskiej*, Warsaw 2008;
8. M. Kenig-Witkowska (ed.), A. Łazowski, R. Ostrihansky, *Prawo instytucjonalne Unii Europejskiej*, Warsaw 2007;
9. M. Pytka, B. Wojtyniak (ed.), *Prawo ustrojowe Unii Europejskiej*, Warsaw 2010.
10. K. Scheuring, *Stosowanie prawa wspólnotowego przez organy administracyjne państw członkowskich UE*, Poznań 2008;
11. K. Sobczak, *Prawo Unii Europejskiej*, in: K. Wojtaszczyk (ed.), *Integracja europejska. Wstęp*, Warsaw 2006;
12. A. Szachon-Pszenny, *Acquis Schengen a granice wewnętrzne i zewnętrzne w Unii Europejskiej*, Poznań 2011;
13. A. Szachon, *Źródła prawa Unii Europejskiej*, in: A. Kuś (ed.), P. Gilowski, E. Krzysztofik, K. Miaskowska-Daszkiewicz, T. Sieniow, A. Szachon, P. Wojtasik, *Prawo Unii Europejskiej z uwzględnieniem Traktatu Lizbony*, Lublin 2010;
14. J. de la Rochere, *Wstęp do prawa Unii Europejskiej*, Warsaw 2004;
15. A. Wyrozumska, *Źródła prawa Unii Europejskiej*, in: J. Barcz, M. Górka, A. Wyrozumska, *Instytucje i prawo Unii Europejskiej*, Warsaw 2011.

List of main decisions

1. 26/62, judgment of 5 February 1963, *van Gend & Loos v. Netherlands Inland Revenue Administration*;
2. 6/64, judgment of 15 July 1964, *Costa v. Enel*;
3. 40/69, judgment of 18 February 1970, *Hauptzollamt Hamburg-Oberelbe v. Paul G. Bollmann Company*;
4. 22/70, judgment of 31 March 1971, *Commission v. Council (ERTA)*.
5. 41/74, judgment of 4 December 1974, *Van Duyn v. Home Office*;
6. 43/75, judgment of 8 April 1976, *Defrenne v. Sabena*;
7. 106/77, judgment of 9 March 1978, *Simmmenthal v. Amministrazione delle Finanze dello Stato*;
8. 14/83, judgment of 10 April 1984, *Sabine Colson and Elizabeth Kamann v. Land Nordrhein-Westfalen*;
9. 152/84, judgment of 26 February 1986, *Marshall v. Southampton and South-West Hampshire Area Authority*;
10. C-188/89, judgment of 12 July 1990, *Foster v. British Gas*;
11. C-91/92, judgment of 14 July 1994, *Faccini Dori v. Recreb Srl*.

CHAPTER V

LAW-MAKING IN THE EUROPEAN UNION

§1. CREATING PRIMARY LAW

1. General Remarks

Given that the concept of primary law includes: the founding treaties, revision treaties and the treaties of accession, it is clear that **primary law-making procedure** will include:

- a) **conclusion of the founding treaties** as well as
- b) **revision procedures of the treaties** and
- c) **conclusion of accession treaties.**

Primary law is created by a **particular legislator**, in principle - **the Member States.**

2. The conclusion of the founding treaties

1. Procedure for the founding treaties by its nature is not dealt with in the TEU or TFEU. Conclusion of the founding treaties took place in accordance with procedures of **international public law**, as a result of negotiations of the countries concerned, during the session of the **Intergovernmental Conference**. Content of the negotiated treaties is adopted by consensus, and the entry into force is subject to the States being parties to the Treaty carrying out the treaty procedures in accordance with their respective constitutional requirements.

2. So far, three intergovernmental conferences aimed at concluding founding treaties have taken place:

- a) the conference in Paris in the years 1950-1951 has resulted in the ECSC,
- b) Rome conference in the years 1956-1957, during which EEC and EAEC treaties were negotiated and concluded,
- c) conference in Maastricht in 1990-1991, during which the TEU was concluded (although at same conference amendments to the founding treaties of the Communities were also adopted)¹.

3. Ordinary treaty revision procedure

1. Until the creation of the European Union by the Treaty of Maastricht, each of the Communities operating at that time had a distinct treaty basis of the amendments to the founding treaties. The Treaty on European Union provides a unified procedure for amending the TFEU and the Treaty on European Union², the Treaties may be amended under **ordinary or simplified procedure**.

2. The basic procedure is the procedure for amending the treaties by Article 48 paragraph 2-5 of the TEU, these rules are the so-called ordinary revision procedure.

3. Proposed amendments to the Treaties may be prepared and submitted to the Council (at the hands of the Presidency) by: **the Government of each Member State, the Parliament or the Commission**. The Council will then send the received proposals to the **European Council and shall notify the national parliaments**.

The European Council, after consulting the EP and the Commission, may by a simple majority of votes adopt a decision to examine the proposed changes. In that case, **the President of the European Council shall convene a Convention** composed of representatives of national parliaments, the Heads of States or the Governments of Member States, the European Parliament and the Commission. In the case of institutional changes in the monetary area the European Central Bank is also consulted. The main **function of the Convention** is to consider the proposed amendments and **adopt recommendations for the IGC by consensus**.

In exceptional cases, the European Council may by a simple majority of votes and with the approval of Parliament take a **decision not to convene the Convention**, then the European Council itself sets the mandate for the IGC. **The mandate** precisely

or more on the conclusion of each of the founding treaties see Chapter of this handbook
Article of the TEU

spells out the objectives of the conference and the scope of changes to be made in the treaties.

4. **Decisions** relating to the implementation of the proposed changes in the treaties are **made by consensus** (by mutual agreement) by the representatives of the Member States at the Intergovernmental Conference convened by the Chairman of the Council.

5. **Amendments** adopted at the Intergovernmental Conference **enter into force after being ratified by all Member States** in accordance with their respective constitutional requirements.

6. In a situation where **after two years from the signing of a treaty amending the Treaties**, it has been ratified by four fifths of Member States and one or more Member States have encountered difficulties in ratification proceedings, the matter is referred to the European Council to take a political decision on the fate of the treaties' revision.

4. Simplified treaty revision procedures

1. The Treaty on European Union regulates two **simplified treaty revision procedures**³, which are **non-competitive** meaning that the use of each of them is subject to premises appropriate only for the one.

2. A common feature of simplified procedures is that the **decision to amend** the provisions of the Treaty is made by the **European Council**, while they differ in the scope of implementation as well as the participation of national parliaments. Simplified treaty revision procedures are referred to as **special revision clauses** or "**passerelle**" procedures.

3. In the first of the simplified procedures **proposed amendments may be submitted to the European Council** by: **the government of each Member State, the EP or the Commission**. Proposals for changes are **limited to the provisions of Part Three of the TFEU** concerning internal policies and actions of the Union.

The European Council may decide to amend them, however, the TEU introduces additional requirements for the effectiveness of such a decision:

- a) unanimity in the European Council,

Article paragraph and of the TEU

- b) mandatory consultation with the European Parliament and the Commission and the European Central Bank (in the case of institutional changes in the monetary area)
- c) the entry into force of the decision is subject to approval of Member States in accordance with their respective constitutional requirements (hence this procedure is called a **bridging clause subject to ratification**)
- d) decision taken according to the simplified treaty revision procedure may not increase the competences conferred on the Union in the Treaties.

4. The second of the simplified treaty revision procedures is **limited to the TFEU and Title V of the Treaty on European Union** (general provisions of the Union’s external actions and specific provisions on CFSP).

This mechanism is based on the fact that the European Council may decide to:

- a) **authorize the Council to act by a qualified majority** in the given area or in that given case, in which the treaties provided unanimity in the Council (apart from decisions having impact on military or defense issues)
- b) **allow for the adoption of legislative acts in accordance with the ordinary legislative procedure**, while the TFEU provides that acts are adopted by the Council in accordance with a special legislative procedure.

The described procedure is protected by national parliaments’ control mechanism that can - within six months - notify the European Council of their opposition to the proposed submitted changes. In a situation where at least one of the parliaments of the Member States opposes, the amending decision shall not be adopted, and in the absence of opposition, the European Council may adopt the decision (we are talking about the so-called **tacit ratification by national parliaments**).

In Polish political conditions in accordance with the Rules of Parliament⁴, after consideration of the draft of European Council decision authorizing the Council to change the method of voting, the EU Parliamentary Committee may submit the Parliament a draft resolution expressing justified opposition to this decision. Due to the importance and special nature of the case, the first reading of the draft resolution is carried out in a meeting of the Parliament, during the second reading no amendments to its contents can be submitted. In the case of adoption of a resolution by the Parliament, the Speaker of the Sejm shall notify the European Council of the opposition.

⁴ Polish Sejm resolution of 20 July 2016 (Appendix to the notice of the Speaker of the Polish Sejm as of 20 January 2017, Official Gazette of the Republic of Poland, 2017, item 1000), Article 100a

European Council's decision to amend the treaties in this case shall be taken **unanimously and after obtaining the consent of the European Parliament**, expressed by the majority of its component members.

5. Conclusion of accession treaties

Treaty basis for accession to the European Union were uniformly regulated in the EU Treaty⁵, the result is simultaneous accession of the State concerned to both treaties underpinning the functioning of the EU.

The accession procedure is **iterative and sequential** (meaning that each stage is conditioned by the implementation of the previous one) and is quite **complex**, and lengthy. For the purposes of this study the following **stages of the accession process** can be distinguished:

- a) the stage of diplomatic arrangements, which ends with a **formal request** of the State submitted to the Presidency. European State which respects the values on which the EU is founded⁶, and which undertakes to support them and meets the so-called **Copenhagen criteria**⁷, may apply for membership in the European Union. **The Council informs the EP and national parliaments**,
- b) the Council's decision on the basis of a positive opinion from the Commission as to the criteria of membership granting **candidate status** to the State,
- c) **the stage of the accession agreement negotiations** within the Intergovernmental Accession Conference, in which Member States, Acceding States and the Commission participate. The basis of the negotiations are: the negotiating position of the candidate country and the common position of the Member States. Individual contentious points are subject to negotiations and temporary closure, (the "nothing is agreed until everything is agreed" rule). Negotiations are finally closed after all the issues in dispute have been agreed. Conclusion of the negotiations is stated by the European Council,
- d) the negotiated treaty draft is edited by the Legal Services of the Commission and the Council and a Special Committee with the participation of the applicant State and submitted to **the Council**, which after the (formally non-binding) **opinion of the Commission and the consent of the European Parliament** given by an absolute majority of the members, **unanimously decides** to accept the State to the Union,
- e) **ceremonial signing of the Treaty** takes place on the final summit conference by the representatives of all Member and acceding States,

Article of the TEU

Article of the EU Treaty

or more on the criteria for accession to the EU see Chapter of the handbook

- f) accession Treaty enters into force for the given acceding country under the condition of all the Member States and the given State ratifying the accession agreement in accordance with their respective constitutional requirements and the instruments of ratification being deposited.

§2. THE RULES FOR CREATING SECONDARY LAW IN THE EUROPEAN UNION

1. General Remarks

1. With the adoption of its own catalog of sources of EU law, Member States shall lay down rules for creating legislation.

The provisions of the TEU and the TFEU in this area are aimed primarily at the **democratization of decision-making process**. This is achieved by:

- a) **granting indirect legislative initiative to the nationals of Member States,**
- b) **granting a new role in the lawmaking process to the national parliaments and**
- c) **enhancing the role of the European Parliament by extending the ordinary legislative procedure to most areas covered by the treaty.**

2. When creating the secondary law in the European Union all EU general principles⁸ and rules relating to the sources of the legal system⁹ apply.

3. Legislative activity of the EU's institutions is dependent on the EU's power to act in this area. The **principle of conferred competences** is therefore of paramount importance for the creation of secondary law. Each institution is also constantly required (and thus also when adopting legislation) to monitor the compliance with the **principles of subsidiarity and proportionality**¹⁰.

2. The principles of conferred competences

1. The European Union, as any other international organization has as many powers as - under the Treaty establishing the organization - Member States granted it.

discussion of the rules - see Chapter of the handbook

discussion of the rules - see Chapter and of the handbook

Cf Article of protocol on the application of the principles of subsidiarity and proportionality

This is called **the principles of conferred competences (the principle of conferral)**¹¹. Under the TFEU the division of competences between the Union and the Member States was explained and clarified.

The EU does not have competence to define its powers, **it does not decide on its competences**. The adoption of a binding legal instrument requires a standard granting permission for its release. **The European Union shall act within the powers conferred by the Treaties and in the light of the objectives set out in them**. Secondary legislation adopted must therefore be given according to the objectives of the EU. Treaties confer law-making competences upon the EU institutions.

2. While delimiting competences between the EU and the Member States it should be noted that the TEU can interpret **the presumption of competence of the Member States**¹².

3. **The Union can act only within the limits of the powers conferred upon it by the Member States in the Treaties to attain the objectives set out therein**. The provisions of the TFEU divide the EU's jurisdiction into:

- a) exclusive competences of the European Union,
- b) EU competences shared with the Member States,
- c) supporting, supplementing, harmonizing competencies.

4. The European Union has **exclusive competences** in five areas: the customs union, the establishment of competition rules necessary for the functioning of the internal market, the monetary policy for the Member States whose currency is the euro, the conservation of marine biological resources under the common fisheries policy, common commercial policy¹³. This is a complete list.

The Union also has exclusive competence for the conclusion of international agreements when the conclusion is provided for in a legislative act of the EU, or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope.

If the **treaties give the EU exclusive competence** in the whole of a specific area, this means that **only the Union may legislate and adopt legally binding acts**, the Member States may do so only under the authority of the Union or for the implementation of Union acts.

5. The areas in which the European Union shares competence with the Member States are the areas listed in the treaties that do not belong to the areas falling within

Cf Article of the TEU

Cf Article , paragraph and item sentence of the TEU

Cf Article of the T EU and eclaration o concerning the delimitation of competences

the exclusive competence of the EU and the competences supporting, coordinating or supplementing the actions of the Member States¹⁴.

The Treaty on the Functioning of the European Union identifies the **major areas covered by the shared competences** and these are: the internal market, social policy for the aspects defined in the TFEU, economic, social and territorial cohesion, agriculture and fisheries, excluding the conservation of marine biological resources, the environment, consumer protection, transport, trans-European networks, energy, the area of freedom, security and justice, common safety concerns in public health matters, for the aspects defined in the TFEU¹⁵.

The exercise of shared competences lies in the fact that **both the EU and the Member States may legislate and adopt legally binding acts in a specific area**. However, the action of Member States can be of successive nature in relation to the EU activity, Member States exercise their competence to the extent that the Union has not exercised its competence or in which the EU has decided to cease exercising its competence¹⁶.

This situation occurs when the relevant EU institutions decide to repeal a legislative act, in particular to ensure constant respect for the principles of subsidiarity and proportionality¹⁷.

If the EU acts in the area classified as an area of shared competence, the exercise of competence covers the elements governed by the Union act, and therefore does not cover the whole area¹⁸.

6. Third kind of EU competences are powers for actions supplementing, supporting and harmonizing actions taken by the Member States. The areas of such action, **at European level**, are: protection and improvement of human health, industry, culture, tourism, education, vocational training, youth and sport, civil protection and administrative cooperation. This is a complete list.

Measures taken by the EU, however, cannot replace Member States' competence in these areas. Legally binding acts adopted under the EU Treaties relating to these areas do not entail harmonization of the laws and regulations of the Member States.

7. Referring to competence in the **field of the CFSP**, a clear reservation that the freedom of the *formulation and conduct of its foreign policy, its national diplomatic service, relations with third countries and participation in international organizations, including a Member State's membership in the Security Council of the United Nations* are guaranteed to the Member States has been stated and national security issue was restricted to be in the scope of the exclusive responsibility of the Member States; explaining that hav-

Cf Article of the T EU

Cf Article of the T EU

Cf Article paragraphs of the T EU

According to the provisions of the declaration o on the delimitation of competences, cf Article of the T EU

See rotocol o to the T on the e rcise of shared competence

ing a **legal personality** in *no way authorizes the Union to (...) to act beyond the competences conferred upon it by the Member States in the Treaties*¹⁹.

8. Within the **Area of Freedom, Security and Justice** it was stressed that the Union shall respect the functions of the Member States, including the ones aiming at *maintaining public order and guarding national security* and it was reserved that, *in particular, national security remains the sole responsibility of each Member State*²⁰.

9. In view of the principle of conferred powers the construction of the so-called **flexibility clause**²¹ is interesting, as it allows the European Union to take action without a clear legal basis, when it is necessary to achieve the objectives of the EU. The use of the flexibility clause is also called the *implied powers*. It is a kind of silent, default transfer of powers, if it is necessary to take action needed to achieve one of the EU's objectives, and Treaties have not provided the necessary powers.

The Council shall adopt appropriate measures acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.

This clause has been bearing additional restrictions. CFSP has been clearly excluded from its actions and the objectives of the Union²², which may be taken into account in its application, have been specified. Clarifying the meaning of the flexibility clause has been done by the Member States in one of the declarations attached to the TFEU: *Article 352 of the TFEU (with reference to the CJEU case-law - self note -K.M.-D.) being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Union powers beyond the general framework created by the provisions of the Treaties, in particular, by those that define the tasks and the activities of the Union. This article cannot in any event be used as the basis for the adoption of provisions whose effect would, in substance, be to amend the Treaties without following the procedure which they provide for that purpose*²³.

10. In order to protect the rights of Member States to grant powers of the EU, the EU Treaty establishes the principle according to which the European Council decision on the revision of the Treaties in a simplified procedure for amendment of the Treaties shall not increase the competences conferred upon the European Union in the Treaties²⁴.

See declaration on the European Union's legal personality

Cf Article of the TEU

Cf Article of the T EU

See declaration referring to Article of the Treaty on the functioning of the European Union

See declaration referring to Article of the Treaty on the functioning of the European Union

Cf Article paragraph part three of the TEU

3. The principle of subsidiarity

1. **The principle of subsidiarity** was introduced into EU law by the Treaty of Maastricht, but the very idea of subsidiarity was not entirely new to the EU, because of the reference to it in the SEA in the context of environmental policy²⁵.

2. The definition of the principle of subsidiarity is regulated in the EU Treaty and in accordance with it, **the Union shall act only if and to the extent to which the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local levels, and by reason of the scale or effects of the proposed action, better achieving of it is possible at the Union level**²⁶.

It should be noted that the principle of subsidiarity **does not specify what powers the EU is entitled to, but how its competences are to be executed**. Subsidiarity **does not apply to the exclusive competence of the Union**. When assessing compliance of the legal act with the principle of subsidiarity, one should begin with finding what EU competence we have to deal with.

3. The principle of subsidiarity provides **two criteria that must be met** for the EU institutions to take action legally. These are the **expediency and efficacy**. The criterion of expediency is associated with the assessment whether the objectives of the proposed action can be sufficiently achieved by the Member States or their regional or local governments acting alone. Efficacy refers to the assessment of whether the objectives can be better achieved by the EU.

The basis for determining that a Union's objective can be better achieved at the EU level is justification for the institution's legislative act, showing the **qualitative indicators** and, wherever possible, **quantitative indicators**²⁷. It is therefore necessary to determine whether the objective will be achieved for example, faster, cheaper, with less effort by the EU than by the Member States.

4. Institutions of the EU have a responsibility to ensure respect for the principles of subsidiarity and proportionality²⁸, and the national Parliaments are to ensure compliance with the principle of subsidiarity²⁹.

or more on this subject see Maliszewski, *Principles of Regional Law in the Member States*, Toruń, 2007, pp. 1-10.

Cf Article 1 paragraph 1 of the TEU

Cf Article 17 of Protocol 10 on the application of the principles of subsidiarity and proportionality

Cf Article 17 of Protocol 10 on the application of the principles of subsidiarity and proportionality

Cf Article 17 of Protocol 10 on the application of the principles of subsidiarity and proportionality

4. The principle of proportionality

1. **The primary function of the principle of proportionality** in terms of the derivative law is **to define the scope and form of the exercise of powers of the EU**, both exclusive and shared as well as supporting ones.

2. In accordance with the principle of proportionality, **the content and form of the Union action shall not exceed what is necessary to achieve the objectives of the Treaties**³⁰. This provision is designed to protect against the expansion of the European Union legislative action. In assessing the performance of the EU's competence **the criterion of the need to act** is crucial, (having determined that the Union and the particular institution have competence in this area and that the EU action is consistent with the principle of subsidiarity) in the context of the implementation of its objective.

3. The principle of proportionality in the context of the EU institutions **form of action** refers to the **form of the legal act**.

The Treaty on the Functioning of the European Union, in many cases gives concrete type of a legal act which can be established by the institutions authorized within the framework of given policies. In some areas, however, the right to choose by the institutions, *in accordance with applicable procedures and the principle of proportionality*³¹, the kind of legal act that should in the given case be accepted has been maintained.

In such cases, the provisions of the Treaties authorize institutions to adopt "measures"³², "applicable laws"³³ or "rules"³⁴.

Eligible institutions must, in accordance with the spirit of the principle of proportionality, adopt a harmonizing directive rather than a unifying regulation.

The reform made by the Lisbon Treaty introduced harmony in the catalog of the secondary legislation sources. Parliament and the Council are obliged to refrain from adopting acts not provided for by the relevant legislative procedure in the area³⁵, thus reducing the adoption of the so called **unnamed acts** (*sui generis acts*) by the EU institutions.

4. **The scope of the EU actions** indicated in the principle of proportionality refers to the **intensity of the measures adopted by the institutions expressed in the legal text**, for example, the penalty imposed by the Commission's Decision on businesses for the infringement of the competition rules.

Cf Article , paragraph of the TEU

Cf Article of the T EU

See e.g. Article paragraph of the T EU

See e.g. Article paragraph of the T EU

See e.g. Article paragraphs point b) of the T EU

Cf Article part three of the T EU

Entities authorized to develop draft legislative acts are required to take the appropriate measures so that any financial or administrative burden falling upon the Union, national governments, regional or local authorities, economic operators and citizens, is minimized and proportionate to the aim pursued³⁶.

§3. PRINCIPLES OF GOOD LEGISLATION AND THE STRUCTURE OF LEGISLATIVE ACTS

1. Principles of good legislation

1. In 1992-1993, the institutions of the European Communities recognized the impact of the quality of Community legislation on the quality and accuracy of national transfer of EU law. Since the European Council meeting in Edinburgh in 1992, the need for better drafting legislation - in the form of more transparent and simple acts corresponding to the principles of good legislation - has been recognized at the highest political level. Both the Council and the Commission have taken measures to meet these requirements³⁷. The importance of good legislation at EU level was confirmed in the Declaration No 39 on the quality of drafting of Community legislation, annexed to the Final Act of TA.

This led to the conclusion by the European Parliament, the Council and the Commission of the **Interinstitutional Agreement** of 22 December 1998 **on common guidelines for the quality of Community legislation**. On the basis of the guidelines Joint Practical Guide of the EP, the Council and the Commission on the drafting of EU legislation was established, most recently updated in 2005 by the Interinstitutional Editorial Committee³⁸.

2. The most important general principles of good legislation of the EU law were contained in the guidelines of the institutional agreement³⁹.

Due to the fact that the legal system of the European Union is made up of a number of legal instruments and, therefore, is quite complicated, the first requirement of the EU acts is their **clarity and unambiguity**, which determine the **understanding of**

Cf Article of rotocol o on the application of the principles of subsidiarity and proportionality
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the act by its various recipients. Acts should be formulated in a manner that is simple and precise, leaving no doubt in the recipient.

Institutions claim that these principles are also an expression of general principles of law, such as: **the equality of citizens before the law**, in the sense that law should be accessible and understandable to all and **legal certainty**, that is, the ability to predict how the law will be applied.

3. The European Union laws are drawn up **taking into account the nature of the act**, and in particular whether it is binding or not (regulation, directive, decision, recommendation or other act). The different types of acts have their standard form and contain standard terms. Due to the fact that **regulations** are binding in their entirety and are directly applicable, they must be formulated so that the recipient had no doubt as to the rights and obligations arising from them. They should therefore avoid identifying the intermediary of the national authorities in the implementation of EU law, unless the act is still under follow-up by the Member States.

Directives addressed to the Member States should be less detailed to allow the Member States sufficient flexibility in their implementation. If the operative part is too detailed and does not leave such discretion, the right instrument is a regulation and not a directive.

Decisions should be drafted taking into account the recipient, but in principle they should also correspond to formal requirements of generally applicable legislation.

And the wording of **recommendations** or **opinions** has to take into account the non-binding nature of the rules.

4. **Drafting should take account of the persons to whom they are intended to apply**, with a view to enabling to identify their rights and obligations, and the persons responsible for putting the acts into effect. In particular, each group of recipients is entitled to expect that the provisions will be formulated in the language they understand. Taking into account different target groups is reflected in a variety of formulations, both in justification and enacting terms.

5. Due to the fact that the system of EU law is multicultural and multilingual, provisions of acts should be **concise** and their **content** should be as **homogeneous** as possible. Excessively long articles and sentences as well as unnecessarily convoluted wording and excessive use of abbreviations should be avoided. The text of the act should be **consistent** both with the **entire system of EU law**, as well as **internally consistent**.

6. Throughout the process leading to their adoption, the draft rules should be framed in terms and sentence structures which respect the **multilingual nature** of the EU legislation. Concepts or terminology specific to national legal systems should be used with particular caution.

The original text must be **particularly simple, clear and direct**, as excessive complexity or even a slight ambiguity can lead to inaccuracies, errors, or even differences in the translation into other languages of the European Union. In particular, the use of expressions and phrases - particularly legal terms - too specific for the language or legal system of one country increases the risk of translation problems.

7. **Terminology** used in the Act **should be consistent both internally and with acts already in force**, especially in the same area.

Identical concepts should be expressed in the same terms, as little as possible departing from their meaning in ordinary, legal or technical language. The implementation of the principle of terminology cohesion is to facilitate **understanding and interpretation of the act**. Consistency of terminology should be understood in terms of both formal and material consistency expressing the logic of the whole act.

2. The structure of legislative acts

1. All EU acts of general application are made in accordance with the standard structure and include: a) a title, b) a preamble, c) enacting terms and annexes (optional).

2. **The title of an act** indicates content in as concise and complete way as possible, not misleading the reader as to the content of the rules. It contains all information identifying the act in the header: identification of the act, the act number and year, name (s) of the institution which adopted the act, the date of adoption, a concise definition of the object of the act. Between the title and the preamble some technical guidance can be put (data on the original version, relevance for the EEA, serial number).

In the case of individual acts authentic language or languages should be given following the title.

3. **The preamble** is the part between the title and the enacting terms of the act. It includes **citations, recitals and legislative formula**.

The purpose of citations is to determine the legal basis of the act and the main stages in the procedure leading to the adoption of an act. Empowerments are usually standard in form (in Polish they usually start with *uwzględniając* in English - *having regard to*, and in French - *vu*). The first one relates to the legitimacy of the Treaty constituting the general basis for action, then secondary legislation acts, preparatory acts (such as reviews), and empowerment of the procedure are created.

The aim of recitals is concise **justification** of the main provisions of the enacting terms, without reproducing them. They do not contain normative provisions or political exhortations. Regulations, directives and decisions must include justification⁴⁰.

Cf Article part two of the T EU

This requirement is designed to allow any interested person acquire an explanation of the circumstances in which the institution constituting the act made use of its legislative empowerment⁴¹, so that the parties in the event of a dispute had the opportunity to defend their rights, as well as the CJEU could make judicial review.

The scope of the obligation to state reasons depends on the nature of the legal act. In the case of **acts of general application** the overall philosophy governing the act should be sought to be clarified, and not each and every particular provision should be justified⁴². However, in the case of **implementing acts** a more specific justification is necessarily and one should try to be concise. **Individual acts**, especially the dismissal of an application, must be justified in a more accurate way. It should be noted that specific justification is required in the case of the project compliance with the principle of subsidiarity and proportionality⁴³. In the areas falling within the exclusive competence of the EU justification refers to proportionality.

The recitals should include **financial recitals** of the act⁴⁴. On 17 May 2006 the European Parliament, the Council and the Commission adopted the Interinstitutional Agreement on budgetary discipline and sound financial management, in accordance with it legislation on long-term programs includes a provision in which the legislative authority determines the financial envelope for the program⁴⁵.

Recitals are numbered, a single recital does not need numbering.

4. **The enacting terms** are part of a legal act, they may be accompanied by annexes. **The enacting terms** of a binding act do not contain binding rules of non-normative nature, such as wishes or political declarations, or those that reproduce or paraphrase passages or articles of the TEU and the TFEU, or those which restate legal provisions already in force.

At the beginning of the enacting terms an article defines the subject matter and scope of the act.

In the event that the terms used in the act are not clear, they should be defined together in a single article at the beginning of the act, the definitions do not contain autonomous normative provisions.

As far as it is possible, **the enacting terms are standard in structure: the subject and scope - definitions - rights and obligations - provisions conferring implementing powers - procedural provisions - implementing measures - transitional and final provisions**⁴⁶.

See [enacting terms](#)
See [article 41](#) in [recital 41](#) of the [interinstitutional agreement on budgetary discipline and sound financial management](#)
Cf [Article 41](#) of [Protocol 1](#) on the application of the principles of subsidiarity and proportionality
Cf [Article 41](#) paragraph 1 of the [TEU](#)
See [point 41](#) of the [interinstitutional agreement on budgetary discipline and sound financial management](#)
In this context, see legislative checklist attached to the [general guidelines for legislative policy](#) adopted by the Commission on [January 2006](#) (SEC (2006) 12)

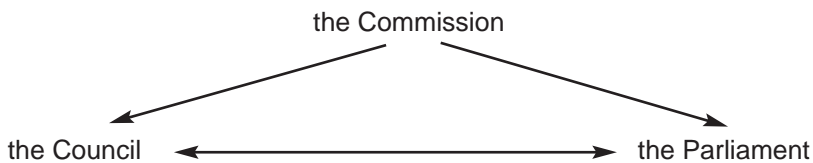
The enacting terms are subdivided into articles and, depending on their length and complexity, titles, chapters and sections. When an article contains a list, each item in the list should be identified by a number or a letter, instead of being indented.

§4. LEGISLATIVE PROCEDURES

1. General Remarks

1. The Treaty of Lisbon, drawing on the idea of the constitutional treaty, organizes procedures of law derived in the European Union in connection with the catalog of those acts. **Legislative acts: regulations, directives and decisions** are adopted by the EP and the Council within two procedures⁴⁷: **the ordinary legislative procedure or the special legislative procedure.**

2. The structure of the **institutional legislation triangle** is the basis of the most important procedure of derivative legislation in the TFEU - **the ordinary legislative procedure.**



3. **Strengthening the role of the European Parliament** by giving it the function of a **“co-legislator”** on an equal footing with the Council and the extension of the ordinary legislative procedure to most areas of the treaty, as well as **clarifying the role of national parliaments** in the legislative procedure is to increase the legitimacy and democratic control of the operation of the European Union.

2. Legislative initiative

1. As a rule, the European Commission has **the exclusive right of legislative initiative**⁴⁸.

Cf Article 17 of the T EU
 Cf Article 16 paragraph 1 of the TEU

The Commission publishes **an annual legislative program** as well as any other instrument of legislative planning or political strategy at the same time as it submits them to the national parliaments, the European Parliament and the Council.

Before taking the appropriate legislative actions aimed at the preparation of an act the Commission publishes **White or Green Papers** as consultation documents.

2. **Green Papers** are documents of the European Commission, which are intended to stimulate debate and launch a process of consultation at European level. They include an area of functioning of the EU the regulation or reform of which is being considered. As a rule they are developed by the European Commission's Directorates-General or initiated by one of the commissioners. They usually have the form of a **communication**, and their main purpose is to initiate a discussion on the issue. Green Papers **do not contain specific projects, legislative solutions, but represent particular variant proposals to regulate** the issue. Consultations launched by an issued Green Paper may result in the development of a White Paper.

3. **White Papers** are the summary of consultations on how to regulate the functioning of the EU area, launched by the Green Paper and usually contain **specific proposals for legislative solutions**.

Both White and Green Papers specify the period within which the Member States' authorities, natural and legal persons may submit comments on the proposed solutions. On the basis of these suggestions, the Commission prepares a legislative proposal with the factual and legal grounds and in accordance with the principles of subsidiarity and proportionality.

4. Legislative proposals, the Committee of the Regions' or the Economic and Social Committee's proposals are published in the COM series, in the Official Journal of the EU C series (called *communications*) and on the website of the European Union, where you can track the progress of the legislative process.

5. The Treaty on the Functioning of the European Union provides for the so-called **indirect legislative initiative**, which means that the Commission will draw up a draft of a legislative act on behalf of another institution.

The Council, acting by a simple majority may request the Commission to undertake any studies the Council considers desirable for the attainment of common objectives, and to submit any appropriate proposals. In this case, if the Commission does not submit a proposal, it is required to notify the Council of the reasons for failure⁴⁹.

In addition, **the European Parliament** may, acting by a majority of votes of its component members, request the Commission to submit any appropriate proposals

Cf Article of the T EU

on matters on which it considers that a Union act is required for the purpose of implementing the Treaties⁵⁰.

In the light of the provisions of the Framework Agreement on relations between the European Parliament and the European Commission of 2010⁵¹, the Commission is required to inform the EP about the specific actions taken as a result of any requests to submit a proposal within three months of the adoption of the relevant resolution at the plenary session. The Commission submits a legislative proposal within a maximum of one year or shall put the application to the work program for the following year. If the Commission does not submit a proposal, it is required to provide detailed reasons for the EP.

6. By way of exception, the TFEU indicates several situations in which entities other than the Commission have legislative initiative⁵²:

- the EP prepares a draft electoral law to the EP⁵³,
- the ECB has the initiative in the framework of EMU⁵⁴,
- the group of one quarter of the Member States have, in addition to the Commission, initiative for acts within the Area of Freedom, Security and Justice⁵⁵.

7. The right of indirect **legislative initiative of citizens of the Union in an amount not less than one million**, representing a **significant number of Member States**⁵⁶ is an instrument of **participatory democracy**. The procedures and conditions required for such initiatives defined in the Regulation of the Council and the European Parliament (EU) No 211/2011 of 16 February 2011 on the citizens' initiative⁵⁷ were adopted on a proposal from the Commission.

The threshold of "significant number of Member States" has been set up at the level of **at least one quarter of the Member States**⁵⁸. In order to provide citizens with similar conditions to support a citizens' initiative **the minimum number of signatures required in each of the Member States**, whose citizens participate in the legislative initiative has also been established according to the principle of degressive proportionality. This number corresponds to the number of the Members of the European Parliament elected in each Member State, multiplied by 750⁵⁹.

Article 17 of the TFEU
 Framework Agreement on relations between the European Parliament and the European Commission (2010/778/EU), item 1, part 1
 Cf Article 17(1) paragraph 1 of the TFEU
 See Article 17(1) of the TFEU
 Cf Article 17(1) paragraph 2 and 3 of the TFEU
 Cf Article 17(1) point b of the TFEU
 Cf Article 17(1) paragraph 1 of the TEU and Article 17(1) of the TFEU
 This regulation applies from April 2012, hereinafter Regulation (EU) 2011/211
 Article 17(1), item 1, Article 17(1) paragraph 1 and of the Regulation (EU) 2011/211
 See Annex 1 to the Regulation (EU) 2011/211, in Poland, the citizens' initiative would need to be supported by at least 100,000 people

The organizers of a citizens' initiative must be natural persons having the nationality of the European Union and have reached the voting age (in accordance with the laws of the country of origin) in elections to the European Parliament.

Organizers form a **citizens' committee**, composed of at least **seven people living in seven different EU Member States**.

The organizers of a citizens' initiative report it to the European Commission⁶⁰, which within two months of receiving the information referred to in Annex II to the Regulation 211/2011/UE registers the proposed citizens' initiative under individual registration number and sends a confirmation to the organizers. **The Commission registers the initiative** provided that the following conditions are met:

- a) a citizens' committee was formed and a contact person was appointed,
- b) the proposed citizens' initiative does not clearly go beyond the powers of the Commission for the submission of the proposal for an EU legal instrument for the implementation of the Treaties,
- c) the proposed citizens' initiative is not an obvious abuse, is not clearly frivolous or vexatious,
- d) the proposed citizens' initiative is not manifestly contrary to the values of the Union as defined in Article 2 of the TEU⁶¹.

In case of **refusal of registration** of the proposed citizens' initiative, **the Commission informs the organizers of the reasons for the refusal** and of all possible judicial and non-judicial, remedies available to them.

Within a period not exceeding twelve months from the date of registration of the proposed initiative, the organizers collect statements of support⁶² - both on paper and on-line - from citizens who have reached the voting age (in accordance with the laws of the country of origin) in elections to the European Parliament⁶³.

After collecting the necessary number of statements of support, the organizers of the initiative submit them to the competent authorities of the Member States which have three months for certification and verification. After this stage, the organizers receive a certification of the number of valid statements of support from the citizens' initiative of the given Member State⁶⁴.

It should be noted that **EU citizens do not have the right of direct legislative initiative**, they are only able to submit an application to the Commission to take the initiative. **This application, however, is not binding on the Commission**, which means that the Commission examines a citizens' proposal and takes a decision on starting the development of a draft legislative act and subjecting it to further legislative procedures.

Content of the report is set out in Annex to regulation UE
Article paragraph of regulation UE
Article paragraph of regulation UE
Article paragraph of regulation UE
See Article of regulation UE

After submitting a citizens' initiative by the organizers, together with the relevant certificates and information for all the support and funding received for the initiative:

- a) the Commission publishes a citizens' initiative in the registry,
- b) the Commission meets the organizers at an appropriate level to allow them explain in detail the issues concerning the citizens' initiative,
- c) within three months the Commission issues a communication with legal and political conclusions on the citizens' initiative, information on possible actions intended to be taken and the reasons for taking or not taking such actions⁶⁵.

8. Each EU **draft legislative act**, regardless of what entity it is derived by, should be **justified in relation to the principles of subsidiarity and proportionality**. Any draft legislative act should contain a detailed statement making it possible to assess compliance with the principles of subsidiarity and proportionality. The draft should contain data allowing assessment of financial impact and, in the case of a directive, of its implications for the regulations put in place by Member States⁶⁶.

3. The role of national parliaments in the legislative procedure

1. The role of national parliaments in the EU decision-making processes has undergone an interesting evolution. In Declaration No. 13 on the role of national parliaments in the European Union, annexed to the Maastricht Treaty it was declared that the inclusion of national parliaments in the activities of the Union, in particular, intensification of the exchange of information between national parliaments, is of paramount importance. The Maastricht Treaty tendency to strengthen the role of national parliaments in the EU decision-making processes has been perpetuated by the provisions of the TA. In Declaration No. 23 on the future of the European Union, annexed to the TN, the question of the role of national parliaments was considered one of the most urgent ones to be solved. In this context the European Parliament signaled that the "democratic deficit" in the EU may exacerbate the lack of progress in the area of "democratic monitoring of the democratic processes"⁶⁷.

The Treaty on the Functioning of the European Union confirms and reinforces the importance of national parliaments, which - while fully respecting the role of the EU institutions - can now be more closely involved in the work of the Union. The TL expressly recognized the rights and responsibilities of national parliaments in the context of the EU, both in terms of access to information, monitoring the application of

Article of regulation UE

Cf Article of rotocol o on the application of the principles of subsidiarity and proportionality

Mars a ek- awa, arla en r esia arla en nar e nii r esie ,Toru , p

the principle of subsidiarity⁶⁸, assessment mechanisms in the area of freedom, security and justice⁶⁹, including the functioning of Eurojust and Europol⁷⁰, as well as the amendments of the Treaties⁷¹.

Three main fields of activity of national parliaments in relation to the EU should be indicated:

- a) exercising control over the Heads of State or Governments at the European Council and over the representatives of the Council⁷²,
- b) direct, active participation in the work of the European Union⁷³,
- c) participation in inter-parliamentary cooperation within the European Union⁷⁴.

2. The **new role** given to national parliaments, which consists of **prior examination of the legislative acts regarding their compliance with the principle of subsidiarity** is essential. In Protocol 2 to the TL for the first time the right to participate directly in the legislative process in the EU has been granted to national parliaments, although their function is **not of formative nature to legislative acts, but merely consultative or blocking**. Although the title of Protocol 2 provides for the exercise of control by national parliaments in terms of the principles of subsidiarity and proportionality, but detailed regulations of that protocol apply only to the principle of subsidiarity⁷⁵.

3. In accordance with the principle of subsidiarity, the European Union takes actions only when they are more effective than actions taken at national level, with the exception of matters of its exclusive competence⁷⁶. The procedure indicated in Protocol 2 on the application of the principles of subsidiarity and proportionality is an “**early warning system**” as to the possibility of exceeding the European Union’s responsibilities.

Draft legislative acts, regardless of whether they are received in the ordinary legislative procedure or the special procedure, are addressed by the applicants to the national parliaments, while a draft is submitted to the Council and the EP in the ordinary legislative procedure.

Expressing opinions by national parliaments as to the conformity of the legislative acts is **their privilege**, which can be used **within 8 weeks** of notification of the

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Cf Article and of the T EU
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Cf Article of the TEU and rotocol o on the role of national parliaments and rotocol o on the ap-
plication of the principles of subsidiarity and proportionality
Cf Article and of rotocol o on the role of national parliaments
Cf Article and of the rotocol o on the application of the principles of subsidiarity and proportional-
ity
More about the principle of subsidiarity, see of this chapter

project in the official languages of the Union. National parliaments or their chambers send EP Presidents, the Council and the Commission a reasoned opinion stating why they consider the given project to be not consistent with the principle of subsidiarity. Each national parliament or its chamber is to consult, where appropriate, regional parliaments with legislative powers. The lack of reviews of any national parliament does not preclude later legislative procedure.

4. The present regulation respects different parliamentary systems in the Member States, hence the principle that **each national Parliament shall have two votes**. In the case of a bicameral Parliamentary system, each of the two chambers shall have one vote⁷⁷. Depending on the matter the assessed draft concerns, the threshold of votes allocated to national parliaments is otherwise specified, the achievement of it causes the need for the draft to be re-examined.

If at least a **majority of 1/3 of the votes** allocated to national parliaments express the opinion that the draft is not consistent with the principle of subsidiarity, it must be **re-analyzed (“a yellow card”)**. This threshold is **1/4 of the votes** for a draft legislative act submitted within the Area of Freedom, Justice and Security⁷⁸. After such a re-evaluation the approving authority may decide to **maintain, amend or withdraw the draft**.

5. In addition, if a **simple majority** of national parliaments’ votes allocated to them recognize that the draft legislative act to be adopted in accordance with the ordinary legislative procedure, **is not compatible with the principle of subsidiarity**, the project must be re-examined by the Commission.

After another review, **the Commission may decide to maintain, amend or withdraw the draft**. If the Commission decides to **maintain the proposal**, it shall submit a reasoned opinion specifying the reasons why it considers the proposal to comply with the principle of subsidiarity. In this case, before the end of the first reading two legislative authorities must consider the application compliance with the principle of subsidiarity. If the **Parliament acting by a majority of votes cast** by its members or **the Council by a majority of 55%** state that the proposal does not comply with the principle of subsidiarity, **the application will not be given further consideration**.

6. In addition to the possibility of controlling legislative acts *ex ante*, national parliaments have the possibility to make an *ex post* control of already adopted legislative acts in terms of their compliance with the principle of subsidiarity. Member States shall file to the CJEU, in accordance with their legal order on behalf of their national

Currently, therefore, with the Member States the number of votes attributable to the national parliaments is
 pursuant to Article of the T EU

Parliament or a chamber of parliament, a **complaint concerning invalidity** of institution's act⁷⁹.

In Polish political conditions one of the houses of parliament: the Sejm or Senate can autonomously take an action for infringement of the principle of subsidiarity by the legislative act to the CJEU. An appropriate resolution is transferred, respectively by the Speaker of the Sejm or Senate, to the **President of the Council of Ministers**, who shall immediately **file a complaint** within the time limits under European Union law, to the Court of Justice of the European Union⁸⁰.

4. The ordinary legislative procedure

1. The ordinary legislative procedure under the TFEU is the **basic procedure for the adoption of legislation**. It was introduced into EU law as the **co-decision procedure** in the Maastricht Treaty. The Treaty of Amsterdam simplified this procedure and expanded its use to 32 areas of the treaty, while TN - up to 44 areas of treaty control. Currently, after the reform introduced by the Lisbon Treaty, the ordinary legislative procedure covers 85 treaty areas.

2. The scope of the ordinary legislative procedure in the TFEU was extended to a large number of important areas of action where previously the Parliament was entitled only to the right of consultation. These include in particular: agriculture and fisheries, freedom, security and justice, the areas of criminal justice and criminal law, Eurojust and Europol and police cooperation, liberalization of services in certain sectors, cooperation with third countries.

The ordinary legislative procedure covers some areas in which previously the Parliament was not involved at all, it's all about the area of common commercial policy belonging to the area of exclusive competence of the Commission.

3. **The basis of the ordinary legislative procedure is the principle of parity** between the directly elected **European Parliament**, representing the citizens of the Union and **the Council**, representing national governments. Both institutions participating in legislative procedures **jointly** adopt the EU legislative acts and **have equal rights and obligations** - none of them can accept any act independently, without the approval of the other institutions.

Cf Article of rotocol o on the application of the principles of subsidiarity and proportionality
Cf Article of the Act of ctober on cooperation between the Council of Ministers with the Se m
and the Senate on matters relating to the olish membership in the European Union (ournal of aws o , item
)

4. The ordinary legislative procedure is about adopting a regulation, directive or decision jointly by the **European Parliament and the Council**, as a rule, **at the request of the Commission**⁸¹.

The ordinary legislative procedure shall consist of a **maximum of three readings**, with two of the institutions participating in legislative procedures **being able to complete it at any reading, if they reach a full agreement in the form of a joint draft**.

5. Upon receipt of a legislative proposal from the Commission, **Parliament shall adopt its position at first reading and communicate it to the Council**. The Council may in such a case:

a) approve the European Parliament's position, the proposed act will be adopted in the wording which corresponds the position of the European Parliament or

b) not approve the European Parliament's position and adopt its own position at first reading and communicate it to the European Parliament.

The Council, in the case of non-approval of the EP's position, informs the European Parliament of the reasons which led the Council to adopt its own position at first reading.

It should be noted that the total rejection of the first reading is not expressly prohibited or provided for by the Treaty⁸². Throughout the first reading stage, neither the Parliament nor the Council are subject to any time limit on the closure of the first reading of the Commission.

6. **Second reading** stage is subject to strict time limits. **In a period of three** or, if it has been agreed to extend the deadline, **four**⁸³ **months** from the transfer of the Council's position at first reading, the Parliament must:

a) approve the Council's position - an act is considered to have been adopted in the wording which corresponds to the position of the Council,

b) reject the Council's position by a majority of votes of its component members - the proposed act is deemed to have not been adopted,

c) suggest, by a majority of votes of its component members, amendments to the Council's position at first reading - thus amended text is submitted to the Council and the Commission, which shall deliver an opinion on those amendments.

In the absence of a decision after the expiry of the deadline the act shall be considered adopted in accordance with the Council's position.

Cf Article paragraph of the T EU

As in the case of re ection of the second reading, cf Article paragraph point b) of the T EU

Cf Article paragraph of the T EU

The Council, acting by a qualified majority, may, within **three months of receipt of the EP's amendments**:

- a) accept all the amendments - the act is deemed adopted, the Council decides on the adoption of the EP's amendments by qualified majority, but if the Commission objected to Parliament's amendments unanimity is required⁸⁴,
- b) not accept all amendments - then within 6 weeks the **Conciliation Committee** should be convened.

7. The **conciliation procedure** provided for in the TFEU is about **direct negotiations between the Parliament and the Council**, and aims at **reaching an agreement in the form of a "joint draft"** of a legislative act, accepted both by the European Parliament and the Council. The President of the Council, in consultation with the President of European Parliament, convenes the Conciliation Committee within six weeks (or eight, if extension of the deadline has been agreed⁸⁵) after the second reading by the Council and official information to the Parliament that it was not able to accept all of its amendments.

The Conciliation Committee consists of two delegations. Council delegation consists of individual representatives of the Member States (Ministers or their representatives), the delegation of the Parliament is composed of the same number of deputies. From 1 January 2007, the Conciliation Committee has consisted of 54 (27 +27) members.

The delegation of the Parliament to the Conciliation Committee shall be appointed separately for each conciliation, i.e. separately for each legislative proposal requiring conciliation. After the elections of June 2009 political composition of the EP delegation to the Conciliation Committee is as follows: EPP - 11 members, S&D - 7 members, ALDE - 3 members, Greens/EFA - 2 members, ECR - 2 members, EUL/NGL - 1 member, EFD - 1 member.

A representative of the Commission taking all the necessary initiatives with a view to reconciling the positions of the European Parliament and the Council also participates in the work of the Conciliation Committee.

The Conciliation Committee has six weeks (or eight, if extension of the deadline has been agreed) at its disposal **to reach full agreement in the form of a "joint draft"**. The starting point for committee's considerations are the positions of the Parliament and the Council adopted at second reading⁸⁶.

Cf Article paragraph of the T EU

Cf Article paragraph of the T EU

The Court confirmed the possibility, to reach an agreement and to respect the principles of good regulation, for the Council and the Parliament to change the provisions of the common position, not amended by the Parliament at second reading, see the judgment in the first case for conciliation of January Case C-... an..., where it ruled that the existing Article ... of the TEC does not, in itself, contain any limit as to the means by which the Committee may seek to reach agreement on a joint draft To justify this decision, the Court held that using the term conciliation, the authors of the Treaty intended to ensure the effectiveness of this procedure and grant

If, within six weeks of it being convened, **the Conciliation Committee does not approve a joint text**, the proposed act shall be deemed not adopted.

8. If, within six weeks, the Conciliation Committee approves a joint text, there is the third reading in the European Parliament and the Council.

The European Parliament and the Council have a period of six weeks from the approval of a joint draft by the Conciliation Committee to adopt the act in question in accordance with the draft. **The European Parliament by a majority of votes cast, and the Council - by a qualified majority.**

If the European Parliament or the Council does not accept the “joint draft” at the third reading, the act shall be deemed not adopted. In this case, the ordinary legislative procedure may be started again only after a new legislative proposal being presented by the Commission.

9. Legislative acts adopted under the ordinary legislative procedure are **signed by the President of the European Parliament and of the Council**⁸⁷.

5. The special legislative procedure

1. The special legislative procedure is the second **special procedure for the adoption of legislation and is to give primacy to the Council or the Parliament in determining the contents of a legislative act.** The possibility to use the procedure by institutions is limited to the cases expressly provided for in the provisions of the TFEU.

2. The Treaty on the Functioning of the European Union states that a special legislative procedure means adopting regulation, directive or decision by the European Parliament with the Council’s participation or by the Council with the European Parliament’s participation⁸⁸. Therefore, we can distinguish two cases:

- a) the Council adopts a legislative act with the European Parliament’s participation,
- b) the European Parliament adopts a legislative act with the Council’s participation.

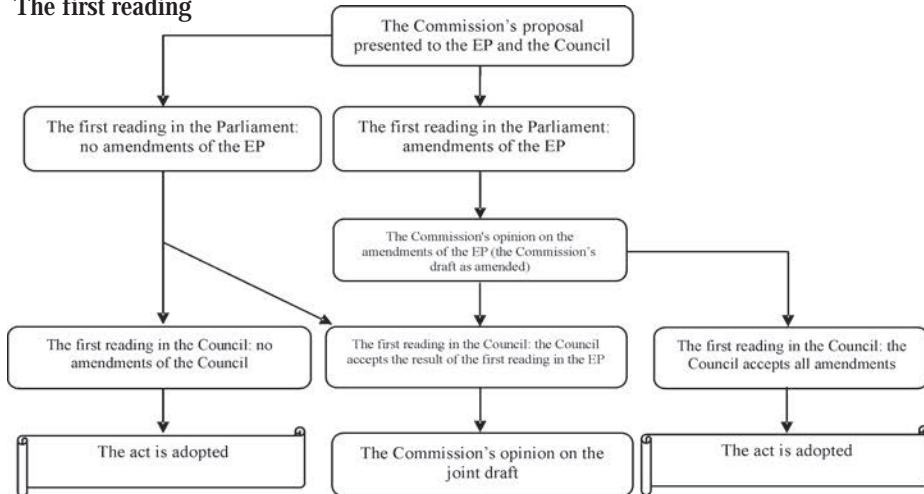
Indication of what **“participation”** is with respect to the Council’s or the EP’s - in a special legislative procedure takes different forms than in the Treaty. **Participation** may in some cases mean only **consent** or **required consultation**.

the Conciliation Committee broad discretion The aim is to approximate the position of the European Parliament and the Council’s position on the basis of the analysis of all aspects of the differences between the two institutions

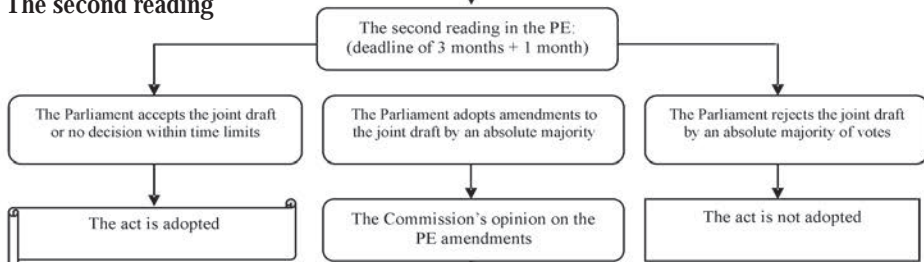
Cf Article 101 paragraph 2, part one of the T EU

See Article 101 paragraph 2 of the T EU

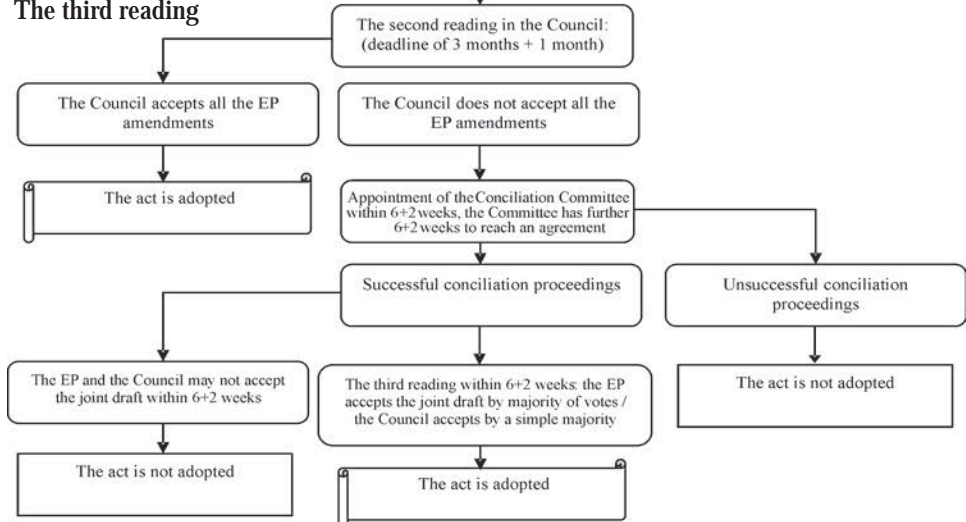
The first reading



The second reading



The third reading



- a) the Council may adopt an act with the consent of the European Parliament⁸⁹ or after consultation with the European Parliament⁹⁰,
- b) the European Parliament may adopt an act with the consent of the Council⁹¹, the TFEU does not provide a procedure in which the Parliament adopts an act after consultation with the Council.

It should be noted, however, that in contrast to the ordinary legislative procedure, the institution that agrees or which is only consulted, does not affect the content of the legislative act.

The adoption of an act without the consent of other institution required by the Treaties or without consultation with the indicated institution is a violation of procedure, which is a prerequisite to claiming invalidity of the institution's act by the CJEU⁹².

3. Legislative acts adopted in a special legislative procedure are signed by the President of the institution which adopted them⁹³, respectively by the Chairman of the Council or the President of the European Parliament.

6. Publication of legislative acts

1. The end of the legislative process and at the same time a condition necessary for the entry into force of legislative acts is their promulgation in the **Official Journal of the European Union**, which is published daily in the language of each Member State. Binding legal acts are published in the Official Journal of the EU **L series** (legislation), and the so-called soft law in the EU Official Journal **C series** (Information and notices). Moreover, there is an addition to the Official Journal **S series**, including invitations to tender for public contracts, e.g. for air services and contracts in the field of public utilities.

Legislative acts come into force on the date specified in them or within 20 days after their publication⁹⁴. The very wording of that provision says that the regulation cannot take effect in law unless it has been published in the Official Journal of the European Union. Such understanding of the obligation of appropriate publication corresponds to the principle of legal security of EU citizens. As noted by the Court: *In particular, the principle of legal certainty requires that the given Community legislation should enable the concerned precise getting to know the extent of the obligations imposed on*

See e.g. Article 187 paragraph 1 of the T EU

See e.g. Article 187 part two of the T EU

See e.g. Article 187 paragraph 1 of the T EU or Article 187 part three of the T EU

Cf. Article 187 part two of the T EU

Article 187 paragraph 1 part two of the T EU

Article 187 paragraph 1 part three of the T EU

In view of the above, the case law of the Court of Justice of the EU formed the view that the obligations contained in the EU legislation, which have not been published in the Official Journal of the European Union in the language of a new Member State, if that language is the official language of the Union, cannot be imposed on individuals in that country, even if they could take a look at that legislation by other means (e.g., ads in newspapers, publications on the official website of the institution). At the same time it should be noted that the Court made a distinction between the effects of the lack of publication to persons (natural or legal persons who are recipients of a provision) and to the Member States, pointing out that the fact that you cannot rely on the EU regulation in relation to individuals in the Member State in the language of which it has not been published, it does not in any way affect the fact that as part of the *acquis communautaire*, the provisions are binding on the Member State concerned since the date of accession¹⁰⁰.

3. Referring to promulgation, the Court of Justice ruled unequivocally that the annex to the regulation, which was not published in the Official Journal of the European Union, is not binding to the extent that it seeks to impose obligations on individuals. Citing the justification of *Skoma-Lux* case, the Court held that since the “publication” of a Regulation on the EUR-Lex website does not satisfy the requirements of art. 297 of the TFEU - *a fortiori* - a publication of a press release in limited number of official EU languages (English, French and German) cannot be regarded as adequate or as respecting legal certainty.

At the same time - by the way - it should be noted that the CJEU confirmed the possibility of using properly published national legislation, which essentially corresponded to the regulations of EU legislation, not yet published in the Official Journal of the EU¹⁰¹.

An interesting view of the possibility of relying on decisions of national administrations on EU legislation not published in the language of the given Member State was presented by the Court of Justice in one of the judgments on Polish administrative practices¹⁰². In response to a question submitted by the Supreme Court whether regulatory authorities in the Member States are obliged to apply the Commission’s guidelines not published in the language of that country, the Court of Justice, citing the content of art. 58 of the Act of Accession, claimed that the provision does not preclude a national regulatory authority to rely on the Commission’s guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services in the decision under which the authority requires a provider of electronic communications

Case C-161/06, *ax eln ředitelství I*
 Case C- 560/07 *Balbiino Pollumajandusminister Maksu- a olliameti la maksu- a tollikeskus.*
 Case C- 410/09 *Polska telefonia r a Ltd) sp. e resident the Office r electronic communications.*

specific regulatory responsibilities, despite the fact that these guidelines have not been published in the Official Journal of the European Union in the language of the Member State in question, even if the language is the official language of the Union.

§5. PROCEDURES OF DRAFTING NON-LEGISLATIVE ACTS

1. Adoption of delegated acts

1. **Delegated acts** are a new kind of secondary law source in the EU, **they are acts of a general nature, whose essence lies in supplementing or amending** certain non-essential **elements of the legislative act** (e.g. annexes).

For the issuance of them the Council and the European Parliament may empower solely **the Commission on the basis of a clause contained in a legislative act** (adopted in both the ordinary and the special legislative procedure¹⁰³).

The clause in a legislative act authorizing the Commission to adopt a delegated act shows the **objectives, content, scope and the duration of the delegation of powers**.

2. The Treaty on the Functioning of the European Union provides **two mechanisms of control of the exercise of the Commission's delegated lawmaking**. **First**, both the European Parliament and the Council may decide to revoke the delegation¹⁰⁴, **and second**, the delegated act may enter into force only when the European Parliament or the Council do not object within a period specified in the act of transferring legislative powers of the Commission¹⁰⁵.

The Council and the EP may take such measures of supervision independently of each other, the European Parliament acting by a majority of votes of its component members, and the Council - by a qualified majority.

2. Adoption of implementing acts

1. As a rule, exercising the European Union law belongs to the Member States, thus implementing acts will be acts of particular countries or specific recipients of EU legislative acts.

Cf Article paragraph of the T EU
Cf Article paragraph point a) of the T EU
Cf Article paragraph point b) of the T EU

2. If it is necessary to ensure uniform conditions for legally binding acts of the European Union **implementing acts** are issued **by the European Commission** in the framework of implementing powers¹⁰⁶.

Implementing powers are transferred to **the Commission by the European Parliament and the Council in legislative acts** (adopted in both the ordinary and the special legislative procedure).

3. **In special cases**, and for **the Common Foreign and Security Policy** the TFEU provides for the **transfer of the implementing powers of the European Council to the Council**¹⁰⁷.

The European Parliament and the Council have been authorized by the TFEU to adopt regulations which lay down the rules and general principles concerning mechanisms of Member States' control over the Commission's implementing powers in accordance with the ordinary legislative procedure¹⁰⁸.

4. Procedures under which the Commission carries out its implementing powers are called **comitology procedures** (in Polish translation the terms: *komitetologiczne* or *komitetowe* procedures are also met). They are based on the EC cooperation with committees made up of representatives of the **Member States (officials from relevant ministries and experts)**. At the head of each committee there is a representative of the Commission, whose duty is to present the committee with draft regulations prepared by the Commission. Committees are appointed on the basis of regulations, directives or decisions.

5. **Comitology procedures** are carried out in the framework of two procedures: **the advisory procedure** and **the examination procedure**. The type of procedure may be indicated in the basic legislative act, given the nature and impact of the required implementing legislation.

The basic procedure is the advisory procedure and it is used in all cases where the examination procedure does not apply.

The examination procedure should be used in the case of:

- a) implementing acts of general application;
- b) other implementing acts relating to:
 - programs with significant effects;
 - Common Agricultural Policy and the Common Fisheries Policy;
 - environmental, safety or the health or safety of humans, animals or plants;

Cf Article paragraph of the T EU

Cf Article paragraph of the T EU

Cf Article paragraph of the T EU Currently, it is a regulation of the European Parliament and the Council of the European Union laying down the rules and general principles concerning mechanisms for control by Member States of implementing powers of the Commission, hereinafter Comitology regulation

- common commercial policy;
- taxation¹⁰⁹.

The cited folder is open, because - as mentioned earlier - a legislative act may provide for the examination procedure in other cases as well.

6. After examining the proposal from the Commission, **the committees adopt the opinion by voting:**

- a) a **simple majority of votes** of its component members - in the advisory procedure or
- b) basing on the **double majority system**, at least 55% of the members of the committee, representing Member States whose total population is at least 65% of the EU - in the examination procedure¹¹⁰.

The Commission's representative on the committee does not have the right to vote the opinion of the committee¹¹¹.

The procedural consequences of a **negative opinion of the committee** vary depending on the procedure in which the committee worked:

- a) in the advisory procedure - **negative opinion does not prevent the adoption of the draft of the implementing act** by the European Commission, the Commission is obliged to take into account the opinion delivered and the conclusions of the discussion within the Committee as much as possible¹¹²,
- b) in the examination procedure - **negative opinion of the committee defers the adoption of the draft of the implementing act by the Commission**. If the drafted implementing act is deemed necessary, the President may submit a revised version of the draft implementing act to the same committee within two months of the adverse opinion or submit the draft implementing act for further discussion to the appeal committee within one month of such an opinion¹¹³.

7. However, the **control** exercised by the Member States over the implementation of the European Commission's power to issue implementing acts is *ex ante*, in justified cases provided for by legislative acts, the Commission may adopt an implementing act with immediate use, without prior submission to the committee. Those implementing acts remain in force for a period not exceeding six months, unless the basic legislative act provides otherwise¹¹⁴.

Article paragraph of Comitology egulation

Article paragraph of the TEU in connection with Article paragraph of Comitology egulation, the way of voting in the committee is sub ect to the provisions of the transitional period of Article paragraph of the TEU and autonomy of Article paragraph of the T EU

Article paragraph part of the Comitology egulation

See Article paragraph of the Comitology egulation

Article paragraph of the Comitology egulation

Article paragraph of the Comitology egulation

Committees exercise the *ex post control* because not later than 14 days after the adoption of the act of immediate application, the President submits it to the relevant committee for its opinion. If, in a given case, the examination procedure is in use, and the opinion delivered by the committee is negative, the Commission immediately repeals the implementing act¹¹⁵.

3. Publication of non-legislative acts

The obligation to publish in the Official Journal of the European Union includes non-legislative acts issued in the form of regulations, directives and a decision addressed to all Member States, as well as decisions that do not indicate the recipient. They enter into force on the date specified in them or, in the absence thereof, on the twentieth day following its publication¹¹⁶.

Directives other than those listed above, as well as decisions which specify the recipient are notified to the addressees and take effect upon such notification. **Notification** is a formal act of communicating the recipient the fact of its release. With regard to the lack of notification of the decision on an individual basis, the CJEU held that: *a complete lack of service may not cause any effect other than a statement of non-existence, or the annulment of the act*¹¹⁷.

§6. ADOPTION OF THE BUDGET OF THE EUROPEAN UNION

1. General Remarks

Initially, each Community had a separate budget. It was not until the entry into force of the so-called II Merger Treaty that the Community administrative budgets were connected in 1968, and in 1971 research and investment budget of the EAEC (Euratom) was included into the EEC budget.

The financial management of the EU is based on the annual financial plan, which is **the EU budget**. The budget in accordance with the **principle of completeness**, includes all EU revenue and expenditure¹¹⁸. Financial planning should also comply

Article paragraph and of the Comitology egulation
 Article paragraph part of the T EU
 Case C- , oechst v Commission
 Cf Article paragraph of the T EU

with the **principle of budgetary balance**, according to which expenses are covered by income¹¹⁹.

Unlike most international organizations, the EU funding since 1970 has been based on its **own resources**¹²⁰, among which there are the following types:

- a) **traditional own resources** - mainly from customs duties resulting from the application of the common customs tariff for trade with third countries; bringing in approximately 12% of total revenue,
- b) resources based on **value added tax (VAT)** - in the form of a uniform percentage rate applied to the unified value of VAT revenue achieved by each Member State, the funds obtained in this way represent approximately 11% of total revenue,
- c) resources based on **gross national income** - obtained by using a flat percentage rate of the gross national income of each Member State, it is the largest source of EU funding, constituting about 76% of total revenue,
- d) **other income**, such as payroll taxes paid by EU staff, contributions paid by non-EU countries to certain EU programs and fines on companies that breach competition law and other regulations; these measures constitute approximately 1% of the budget.

The budget also includes unused funds from the previous year.

The Council - by a special legislative procedure - unanimously and after consulting the European Parliament, adopts the provisions applicable to the Union's own resources system. In this context it may establish new and change the existing categories of own resources. In view of the fact that such a decision interferes in the financial management of the Member States, for its entry into force its approval by the Member States in accordance with their respective constitutional requirements is required¹²¹.

EU **budget expenditures** are classified according to the following departments: agriculture, structural measures, internal policies, external actions, administration, provisions, pre-accession assistance and compensation¹²².

The budget is adopted for the financial year corresponding to the calendar year¹²³ and must be compatible with the multiannual financial framework¹²⁴. Both the EU budget and the MFF are set in euros¹²⁵. The budget for 2012 was agreed on 129.1 billion (an increase of 1.86%) in payments and 147.2 billion (an increase of 3.8%) in liabilities¹²⁶.

Cf Article paragraph part of the T EU
Cybulski, e s ln nii r e s i e , in li a g s a r a, e d iniarski, ar saw
, p , cf Article part of the T EU
Cf Article part of the T EU
Cybulski, l c , pp -
Cf Article of the T EU
See Article paragraph part of the T EU
See Article of the T EU
<http://ec.europa.eu/commission> - lewandowski library documents budget cp pdf of anu-
ary

2. Multiannual Financial Framework

1. The Lisbon Treaty has given formal status to the **multiannual financial framework** which is a five-year spending plan reflecting the political priorities of the EU in financial terms determining the amount of expenditure of the Union during the given period. The MFF is a binding legal instrument based on a special legislative procedure.

2. The Council adopts a **regulation** laying down the **multiannual financial framework**. The Council acts unanimously after obtaining the consent of the European Parliament, which represents a majority of its component members. The TFEU provides the ability to change the procedure by unanimous decision of the European Council, which authorizes the Council to adopt MFF by qualified majority¹²⁷.

The MFF *rationale* is to improve fiscal discipline and expenditure in the EU in a more systematic way and within the limits of its own resources.

The Multiannual Financial Framework determines not only *the amounts of the annual ceilings on commitment appropriations by category of expenditure and an overall annual ceiling on payments, but also include any other provisions required for the right annual budgetary procedure*¹²⁸.

The MFF concept fits into the overall interinstitutional strategic planning - the idea was, moreover, reinforced by the Lisbon Treaty - as proposed in the report of the Committee on Constitutional Affairs on the institutional balance¹²⁹.

3. The budgetary procedure

1. **The budgetary procedure** is defined as a **special procedure** of the TFEU and it is regulated in Article 314 of the TFEU.

2. The Commission prepares a draft budget based on estimates made by all institutions, apart from the ECB and submitted to the Commission by 1 July of the year preceding the year for which the budget is being prepared. The Commission may modify its draft budget until the Conciliation Committee being convened.

The Commission then submits a proposal containing the draft budget to the EP and to the Council no later than on 1 September of the year preceding the year in which the budget is to be implemented.

3. The Treaty on the Functioning of the European Union established a new budgetary procedure, which provides for **only one reading of the draft budget by each**

Cf Article 314 paragraph 1 of the TFEU
 Cf Article 314 paragraph 1 of the TFEU
 Schaene report of March 2001 on the impact of the Treaty of Lisbon on the development of the institutional balance of the European Union (A - 2001-1000)

institution. This regulation does not allow institutions to change their position at the second reading as it was possible before.

The Council adopts a **reasoned position on the draft budget** and forwards it to the EP no later than on 1 October of the year preceding the financial year.

Then the EP **within forty-two days** of the Council's position may:

- a) confirm the position of the Council - the budget is adopted;
- b) take no decision - budget shall be deemed to have been adopted;
- c) adopt amendments by a majority of votes of its component members - revised draft is then submitted to the Council and the Commission and the EP President, in consultation with the President of the Council immediately **convenes the Conciliation Committee**. The Conciliation Committee does not meet, if within ten days of the draft being forwarded, the Council informs the EP about approving all its amendments.

4. **The Conciliation Committee**, which includes members of the Council or their representatives and an equal number of members representing the European Parliament, is to, basing on the positions of the EP and the Council, **reach an agreement on the joint budget draft** by a qualified majority of the Council members or their representatives and by a majority of members representing the European Parliament, **within twenty-one days** of it being convened.

It should be noted that the Commission is to take all necessary initiatives to approximate the positions of the EP and the Council in the Conciliation Committee, **the Commission** should play **the role of a mediator** between the EP and the Council with a view to reaching agreement.

If within 21 days the Conciliation Committee does not agree on a joint text, the Commission will submit a new draft budget.

If, however, the Conciliation Committee within 21 days developed a joint position of the EP and the Council on the draft budget - the EP and the Council would have 14 days from the date of the agreement on the adoption of the joint draft.

5. At this stage of the procedure the following can take place:

- a) if the EP and the Council approve the joint text or fail to take a decision, or if one of these institutions approves the joint text while the other one fails to take a decision, **the budget shall be deemed to be definitively adopted in accordance with the joint draft**,
- b) if the EP, by a majority of votes of its component members, and the Council both reject the joint draft, or if one of these institutions rejects the joint text while the other one fails to take a decision, **the Commission shall submit a new draft budget**,
- c) if the EP, by a majority of votes of its component members, rejects the joint draft, while the Council approves it - **the Commission will submit a new draft budget**,

d) if the EP approves the joint draft whilst the Council rejects it, the Parliament may, within fourteen days from the date of rejection by the Council acting by a majority of votes of its component members and three fifths of votes cast, decide to confirm all or some of the amendments, **the budget shall be deemed to be definitively adopted on this basis.**

Points c) and d) are worth noting, the TFEU confers a decisive role for the EP at the end of the budgetary procedure.

6. In the event that at the beginning of the financial year the budget has not been finally adopted, the expenditure can be implemented monthly within one twelfth of the budget under the given budget chapter in the previous financial year, whilst the amount may not exceed one-twelfth of the appropriations provided for in the same chapter of the draft budget¹³⁰.

§7. TAKING DECISIONS ON THE COMMON FOREIGN AND SECURITY POLICY

1. As it has been indicated previously¹³¹ Common Foreign and Security Policy is subject to specific rules related to granting and exercise of EU competence in this area. As a result, the procedures by which it comes to the adoption of instruments different than in other areas of the EU, also show differences. At the same time treaties exclude possibility of drafting legislation acts in the matter¹³².

2. Due to the “sensitive” regulatory matter, **decisions taken in the field of the CFSP** are essentially **unanimously taken by the European Council and the Council**, on the initiative of a Member State, at the request of the High Representative of the Union for Foreign Affairs and Security Policy or at the joint request of the High Representative and the Commission.

Unanimous decision-taking is a rule, however, abstention does not block a decision. The Member State abstaining from voting, making a “formal declaration”, accepts the fact of the EU being bound by a particular decision, but will not be obliged to comply with it. In connection with **the principle of solidarity between Member States towards each other and towards the EU**, repeatedly emphasized in the EU Treaty¹³³, the Member State which abstained from the adoption of a decision has an

Cf Article part of the T EU

See of this chapter relating to the division of competences between the EU and the Member States

Cf Article paragraph part two of the TEU and Article paragraph of the TEU

See e.g Article paragraph of the TEU, Article paragraph part two of the TEU or Article of the TEU

obligation to refrain from any action likely to conflict with or impede the Union actions based on that decision and the other Member States will respect its position.

3. **The decision shall not be adopted** if a formal statement related to refraining from voting is made by one third of the Member States with a total population of at least one-third of the population of the Union¹³⁴.

4. Although unanimity is the principle of decision-making in the CFSP, **qualified majority** voting is permissible in the case of:

- a) decisions defining the Union's action or position, on the basis of a decision of the European Council on the strategic interests and objectives of the Union,
- b) decisions defining the Union's actions or positions, adopted on a proposal from the High Representative, submitted in response to a former special application of the European Council¹³⁵,
- c) adopting any decision implementing a decision defining the Union's action or position,
- d) decision of appointing a special representative with a mandate in relation to particular policy issues¹³⁶,
- e) decision on the principles of the establishment, management and financial control of the so-called start-up fund, created by contributions from Member States, designed for preparatory operations (which are not charged to the Union budget) to the EU mission within the CFSP¹³⁷,
- f) decision defining the statute, seat and operational rules of the European Defense Agency¹³⁸.

Voting in the Council cannot take effect, if while the qualified majority decision-making procedure, at least **one member of the Council declares** that, for vital reasons of national policy, which must be clearly defined, it **intends to oppose the decision**.

The High Representative is in such a situation to carry out a consultation with the Member State concerned, after which he proposes a solution suiting the state. If he does not succeed, the Council, acting by a qualified majority, may request to take the matter to the European Council to take a unanimous decision.

5. The European Council may **override** the unanimous decision-taking procedure provided for in Title V of the TEU by the **principle of qualified majority voting**. The European Council endorses the unanimous decision stipulating that the Council

Cf Article paragraph in fine TEU
Cf Article paragraph second indent TEU
Cf Article of the TEU
Cf Article paragraph part three of the TEU
Cf Article paragraph of the TEU

acted by a qualified majority. The Council cannot make changes to the way decisions are made if the Council made decisions affecting the military or defense issues.

6. In the field of the CFSP the possibility of using the so-called **flexibility clause**¹³⁹, that is the ability to take decisions in the Union without a clear legal basis, when it is necessary to achieve its objectives, was excluded.

§8. INTERNATIONAL AGREEMENTS

1. General Remarks

1. The EU's ability to enter into international agreements - *ius contrahendi* – is an inherent attribute of its legal international subjectivity. The European Union has the right to conclude international agreements with third countries and international organizations in the four cases where:

- a) it is provided by the provisions of the TEU¹⁴⁰ or the TFEU¹⁴¹,
- b) conclusion of an agreement is necessary in order to achieve the Union's policies, one of the objectives referred to in the Treaties,
- c) conclusion is provided for in a legally binding Union act,
- d) conclusion may affect common rules or alter their scope¹⁴².

The EU also has the power to enter into contracts, *which contribute to the overall objectives of the Union's external action, but without limiting the competence of Member States to negotiate and conclude agreements with third countries and international organizations in these areas*¹⁴³ (a similar objection applies to cooperation for development, humanitarian and economic, financial and technical cooperation and agreements in the field of monetary policy).

This adjustment of EU competence to conclude international agreements confirms the principle developed by the CJEU in the *ERTA* judgment¹⁴⁴, the Court held that whenever the (then) Community lays down common rules, then this is the transfer of powers to the Community, with regard to the conclusion of international agreements as well. This phenomenon is referred to as **the principle of simultaneous internal and external competence** of the European Union¹⁴⁵.

Cf Article 17 of the T EU

E.g. Article 17 of the TEU - concluding agreements within the European neighbourhood policy

See e.g. Article 17 of the T EU - concluding agreements in the field of humanitarian aid

Cf Article 17 paragraph 1 of the T EU

Cf Article 17 of the T EU

See *Commission v. Council*

It is worth noting that the provisions of international agreements are governed by Article 17 of the T EU, concerning the European Union's external actions

2. In accordance with the general principles of the division of competences between the Union and the Member States and in accordance with the principle of loyalty, agreements concluded by Member States “in parallel” to the EU agreements cannot regulate the issues that have been settled by the agreement concluded by the Union, and cannot impede the achievement of the relevant objectives of the Union.

The obligation to comply with international agreement concluded by the EU lies both with the EU institutions and the Member States, and requires direct application of the provisions of the agreement - as long as they are self-enforceable and the obligation to implement the decisions taken by the body established under an international agreement with the EU being the party.

2. The procedure for concluding international agreements

1. A common procedure for the EU to conclude international agreements is governed by Article 218 of the TFEU. The provisions contained herein shall apply to the negotiations and conclusion of agreements in principle in all areas, and thus incorporate the provisions of the CFSP. Consolidation of several pre-existing procedures for the conclusion of international agreements allowed to adopt in the TFEU a rule, according to which - regardless of the agreement – **the Council decides to start negotiations, adopts negotiation guidelines, sets negotiation team** (with the exception of agreements on trade policy that the European Commission negotiates¹⁴⁶) and **concludes agreements after they are negotiated**.

One can distinguish a principle that the mode of taking decisions by the Council on the EU being bound by an agreement in the given area stems out from the same rules for the adoption of appropriate secondary legislation¹⁴⁷.

2. The Treaty on the Functioning of the European Union expands the powers of the CJEU in the **ex ante control of the compliance of agreements concluded by the EU with the provisions of the TFEU** to all agreements concluded by the EU¹⁴⁸, with the exception of those related to CFSP, due to the general exclusion of the jurisdiction of the Court in this area.

Member States, the European Parliament, the Council or the Commission may obtain the opinion of the CJEU on the compatibility of the envisaged agreement with the TEU and the TFEU. In the case of the negative decision of CJEU the envisaged agreement may not enter into force unless it is amended or the Treaties are revised.

3. The European Union may conclude international agreements within the CFSP, these agreements are, however, of specific nature, among others, visible in the ex-

Cf Article of the T EU
Cf Article paragraph of the T EU
Cf Article paragraph of the T EU

clusion of the European Parliament's participation from the process of concluding and their exemption from the jurisdiction of the Court of Justice¹⁴⁹.

4. The **Commission** takes the **initiative** of concluding an international agreement, **addressing appropriate recommendations to the Council**. In the event that the envisaged agreement relates exclusively or principally to the common foreign and security policy, the recommendation to the Council directs the High Representative of the Union for Foreign Affairs and Security Policy.

The Council adopts a decision authorizing the opening of negotiations and, depending on the subject of the envisaged agreement, **nominating the Union negotiator or the chairman of the Union's negotiation team**.

At the request of the negotiator **the Council adopts a decision authorizing the signing of the agreement or its provisional application before entry into force and takes a decision on the conclusion of the agreement**.

As a rule, during the entire procedure for the conclusion of an international agreement the Council acts by a **qualified majority**. **The Council shall act unanimously**, if:

- a) the agreement covers an area for which unanimity is required for the adoption of a Union act,
- b) in the case of association agreements and agreements on economic, financial and technical assistance with the candidate countries for accession,
- c) the agreement concerns the accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms - the decision concluding such an agreement enters into force after it has been approved by the Member States in accordance with their respective constitutional requirements.

5. The procedure for concluding international agreements by the EU is a clear **strengthening of the European Parliament**.

The Council adopts a decision on concluding an agreement **after obtaining the consent of the European Parliament** in the case of:

- a) Association Agreements;
- b) agreements on the Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms (let us recall that because of the importance of this agreement, the status of which will be raised to the primary law of the EU, the Council decides unanimously, and such an agreement will enter into force after it has been approved by all the Member States in accordance with their respective constitutional requirements);
- c) agreements establishing a specific institutional framework by organizing co-operation procedures;
- d) agreements having important budgetary implications for the Union;

Cf Article part one of the T EU

- e) agreements covering areas where either the ordinary legislative procedure or the special legislative procedure are applicable if the consent of the European Parliament is required.

However, **in other cases**, the Council adopts a decision on the conclusion of an agreement **after consulting the European Parliament**, which gives its opinion within a time limit which the Council may lay down according to the urgency of the matter. No reviews of the EP within that time means the Council's right to self-regulation in this area.

3. Conclusion of international agreements in the area of the Common Commercial Policy

1. Within the framework of the common commercial policy the procedure for concluding international agreements is modified¹⁵⁰.

The Commission makes recommendations to the Council, which authorizes the Commission itself to open the necessary negotiations. The Council and the Commission are responsible for ensuring the negotiated agreements' compliance with internal Union policies and rules.

The Commission conducts negotiations in consultation with a special committee appointed by the Council to assist it in this task and within the guidelines that the Council may issue to it. The Commission shall regularly report to the special committee and the EP on the progress of negotiations.

2. In this procedure **the Council, as a rule, acts by a qualified majority**. **The Council acts unanimously** for the negotiations and conclusion of agreements:

- a) in the area of trade in services and the commercial aspects of intellectual property, as well as foreign direct investment, where such agreements include provisions for which unanimity is required for the adoption of internal rules,
- b) in the area of trade in cultural and audiovisual services, where these agreements risk prejudicing cultural and linguistic diversity of the Union;
- c) in the area of trade in social services, education and health, where these agreements seriously risk disturbing the national organization of such services and prejudicing the responsibility of Member States to deliver them.

Cf Article of the T EU

Study questions

1. What are the rules for the establishment of EU legislation?
2. What areas fall within the exclusive competence of the EU?
3. What is the sharing of competences between the EU and the Member States?
4. What do *the implied powers* concern?
5. Determine the elements of the EU legislation acts.
6. Name the legislative procedures.
7. Who has the right of the EU legislative initiative?
8. What is citizens' initiative in the EU?
9. What are the Green and White Papers?
10. What is the role of national parliaments in the legislative procedure?
11. What stages of the ordinary legislative procedure can be distinguished?
12. What is the Conciliation Committee and what is its function?
13. What is the budgetary procedure?
14. What is the procedure for concluding international agreements by the EU?

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List of main decisions

1. 24/62 judgment of 4 July 1963 on *Federal Republic of Germany v. Commission of the E.E.C.*
2. 26/69 judgment of 12 November 1969 on *Stauder v. City of Ulm*.
3. 22/70 judgment of 31 March 1971, *Commission v. Council (ERTA)*.
4. 73/74 judgment of 26 November 1975 on the *Groupement des Fabricants de papiers PEINTS de Belgique et al. v. Commission*.
5. 230/78 judgment of 27 September 1979 on *Eridania-Zuccherifici nazionali and Società per l'industria italiana degli Zuccheri*.
6. 138/79 judgment of 28 October 1980 on the *SA Roquette Frères v. Commission*.

7. C 45/86 judgment of 26 March 1987, *Commission v. Council*.
8. C-227/92 judgment of 8 July 1999, *Hoechst v. Commission*.
9. C-6/98 judgment of 28 October 1999 on the *Arbeitsgemeinschaft Deutscher Rundfunkanstalten (ARD) v. PRO Sieben Media AG*.
10. C-176/03, judgment of 13 September 2005 on *Commission v. Council*.
11. C-344/04 judgment of 10 January 2006 on *the IATA and ELFAA v. Department for Transport*.
12. C-158/06 judgment of 21 June 2007 on *the ROM-projecten v. Staatssecretaris van Economische Zaken*.
13. Case C-161/06 of 11 December 2007 on *Skoma-Lux v. Celní ředitelství Olomouc*.
14. C-560/07 judgment of 4 June 2009 on *Balbiino AS v. Pollumajandusminister, Maksu- ja Tolliameti Pohla maksu- ja tollikeskus*.
15. C-410/09 wyrok z 12 maja 2011 r. w sprawie *Polska Telefonía Cyfrowa sp. z o.o. p. Prezesowi Urzędu Komunikacji Elektronicznej*. C-410/09 judgment of 12 May 2011 on *Polska Telefonía Cyfrowa (PTC Ltd) Sp. z o.o. v. The President of the Office for electronic communications*.

CHAPTER VI

THE CHARACTER OF THE EUROPEAN UNION LAW

§1. INTRODUCTION

1. Law is a set of legal rules that govern the defined material scope in the framework of social relations. According to saint Thomas Aquinas, law is a promulgated regulation of reason, published for the common good by the one who has the community under his care¹. European Union law is an autonomous legal system consisting of international treaties adopted by Member States, which constitute and reform the European Union, and of acts created by EU institutions and bodies.

2. European Union law can be divided into primary and secondary (derivative) legislation². The primary legislation includes the founding treaties, the amending treaties and the treaties of accession. It is, therefore, the part of EU law which forms the basis of the constitution and functioning of former European Communities and today the European Union. The secondary legislation is a set of standards established by the EU institutions. They can be divided into legislative acts, non-legislative acts, instruments of the Common Foreign and Security Policy (CFSP) and non-binding acts (recommendations, opinions). The legislative acts include directives, regulations and decisions. The non-legislative acts consist of delegated acts (delegated directives,

¹ *Lex est ordinatio rationis ad bonum commune, ab eo qui communitatis curam habet, promulgata.*

² For more on this subject see Chapter V of this handbook.

delegated regulations, delegated decisions), implementing acts (implementing directives, implementing regulations, implementing decisions), inter-institutional agreements and other non-legislative decisions.

3. The fundamental principles of the law developed in the case-law of the Court of Justice are of essential importance for the understanding of the nature of EU law. These are:

- a) the principle of primacy of EU law,
- b) the principle of direct effect of EU law,
- c) the principle of indirect effect.

In addition, the issues of their reception by the constitutional courts of the Member States are also of great importance. The case-law and rules developed by them constitute a determinant of functioning of the application of EU law in practice.

§2. THE AUTONOMY OF THE EUROPEAN UNION LAW

1. Considering the issue of the nature of EU law can be assumed that EU law is a part of the classically understood international law. However, the consequence of such qualification of the EU legal order would be the possibility to lay down rules for the application of EU standards in basic laws and the judicial decisions of constitutional courts in the Member States. As a result, this would lead to diversification in the application of law and resolving conflicts between the national and the EU standards. Undoubtedly this would harm the principle of unity of the legal system of the EU and its objectives. Therefore it should be considered that **EU law is autonomous in relation to international law and national laws, and its application in the plane of the legal systems of the Member States requires separate rules**. It is not recommended to perceive the power and position of the EU legal order differently in the various countries of the EU. Guarantee of the absence of such diversity is given only in the model of the autonomous classification of EU law. However, this independence is not absolute. EU law is derived from public international law and the unique characteristics gained during its application allow us to consider it as a separate and independent legal order.

2. The question of the nature of EU law was also the subject of discussions between the so-called internationalists, who recognize that EU law is only a part of public international law, and autonomists, who assume complete independence of EU law from public international law³. It should be noted that both of these approaches

³ See also Chapter V of the handbook.

are characterized by an extreme outlook on the problem of place and nature of the EU legal system. It cannot be assumed that the total subordination of EU law to international law, nor the full independence from the international plane, from which, in fact, EU law arises.

3. Due to the fact that the provisions of the Treaties do not determine the nature of EU law, the case-law of the CJEU played a major role in this respect. The Court's judicature in this area should be seen as a kind of a process. The first step was the judgment in *Van Gend en Loos*⁴, in which the Court held that the **European Economic Community established a new international legal order, for which the states reduced, although to a limited extent, their sovereign rights**⁵. The Court of Justice expressed in this way the new quality of the EU's legal system. It should be noted that the CJ did not grant the status of independent international law to this "new legal order", thus tending toward the internationalist theory.

4. The turning point in the analysis was the CJ judgment in *Flaminio Costa v. ENEL*⁶. In this judgment, the Court pointed for the first time to the **autonomous nature** of EU law. The Court found that:

- a) it is a separate legal order,
- b) the system is not based on the principles of international law.

Thus, the CJ separated the EU law from the classic public international law, equipping this legal system with the attributes of autonomy and integrity. In its ruling, CJ assumed that *by contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply (...). The Member States have limited their sovereign rights and have thus created a body of law which binds both their nationals and themselves*. It should also be noted that, in the opinion 1/91⁷, the Court of Justice explicitly stated that the EEC Treaty is the *Constitutional Charter of the Community based on the rule of law*.

5. The CJ judgment in *Internationale Handelsgesellschaft* was also important for defining the nature of EU law; the Court referred in the judgment to the relationship between the EU law and the legal systems of the Member States. The Court accepted that *the validity of measures adopted by the institutions of the community can only be judged in the light of community law. The law stemming from the treaty, an independent source of*

⁴ See judgment 26/62 *N. V. Algemene Transport – en Expeditie Onderneming Van Gend & Loos v. Nederlandse Administratie der Belastingen*.

⁵ W. Czapliński, R. Ostrihansky, P. Saganek, A. Wyrozumska (selection and ed.), *Prawo Wspólnot Europejskich. Orzecznictwo*, first edition, Warsaw 2005, p.33.

⁶ See judgment 6/64 *Flaminio Costa v. ENEL*.

⁷ The document contains the assessment of conformity of the draft agreement to establish EEA with EU law (then Community law).

law, cannot be overridden by rules of national law, because of its very nature however framed, without being deprived of its character as community law and without the legal basis of the community itself being called in question.

6. The Constitutional Court of the Republic of Poland in 2005 examined the compatibility of the Treaty of Accession with the Polish Constitution⁸ and thus joined the discussion on the nature of EU law. Polish Court held that both the model and the concept of European law created a new order in which autonomous legal systems exist next to each other. The Court also emphasized that the relationship and interaction of EU legal order and national orders (including Polish law) are not exhausted in the classical concepts of monism and dualism in the system: domestic law - international law. Thus, the Polish Constitutional Tribunal emphasized the special nature of EU law.

§3 RULES FOR THE APPLICATION OF EU LAW

1. General remarks

1. The founding treaties did not define the rules for the application of EU law in the legal systems of the Member States. This was the task for the case-law of the Court of Justice. It should be noted that questions referred for a preliminary ruling by the national courts were of particular importance for the development of principles. This allowed for the development of a coherent case-law of the Court in this regard⁹. The principles of applying EU law include:

- a) the principle of primacy,
- b) the principle of direct application of EU law,
- c) the principle of indirect effect.

2. On the one hand, the lack of regulations in the treaties on the principles of applying EU law equips the CJ with significant amount of flexibility in their definition and interpretation. This allows the Court to adjust its line of case-law to the prevailing realities. On the other hand, it means that constitutional courts of the Member States make a different interpretation of these principles, even in matters of their competence in the field of compliance of the secondary legislation with basic laws of those countries¹⁰.

⁸ See the judgment of the Constitutional Tribunal of 11 May 2005 on the Accession Treaty, ref. No. K 18/04.

⁹ The rules for the application of EU law do not apply to acts taken by the EU in the framework of the CFSP.

¹⁰ This will be discussed in § 4 of this chapter relating to the case-law of constitutional courts of the Member States regarding the relationship of EU law and national law on the examples of Germany, Italy and Poland.

2. The principle of primacy

1. The principle of supremacy (primacy) of EU law is **the primacy of EU legislation over the acts of domestic law of the Member States in the event of a conflict between the standards contained therein**. Its content has been developed by the Court of Justice as a result of problems in the sphere of application of EU law in the legal systems of the Member States. The present shape of the principle of primacy is the result of the CJ case-law in this field. It should also be noted that the principle of primacy of EU law has been adopted and recorded in the form of Declaration No. 17 to the Treaty of Lisbon. However, it is not an integral part of the treaties, because the declarations were not indicated in Article 51 TUE¹¹. The content of the declaration shows that, *according to settled case-law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States under the conditions laid down by the said case-law*.

2. The principle of primacy of EU law over national law means that:

- a) provisions of EU law take precedence over the provisions of domestic law;
- b) national *lex posterior* – i.e. the law established later – does not derogate the previously established EU law - *lex prior*;
- c) in the event of a conflict between a provision of EU law and the provision of national law, the provisions of the EU apply;
- d) Member State is obliged to ensure effective application of the EU law;
- e) Member States should not apply (establish) legal acts inconsistent (conflicting) with EU law.

3. **The principle of supremacy of EU law excludes the use of national act contrary to the law of the EU**. An important issue is the determination of the scope of primacy of EU law over national law, i.e. which acts of EU law take precedence over which national laws. It should be noted that the catalogue includes all acts of EU law,

¹¹ The opinion of the Legal Service of the Council of 22 June 2007, annexed to the declaration No. 17, stresses the lack of regulation of the principle of priority in the Treaties. According to the Service, this does not undermine in any way the content of this principle and the related case-law of the Court of Justice. It should also be noted that a group of deputies who applied for the control of conformity of the Treaty of Lisbon with the Constitution of the Republic of Poland stated, referring to the Declaration No. 17, that *in the opinion of the applicant the declaration is a normative act, because it is the first official document issued on behalf of all Member States - parties to the treaties constituting the Union - which proclaims the principle of priority in general and abstract manner. Using the form of a declaration for the general and abstract proclamation of this principle, according to the applicant, does not deprive the normative nature of the challenged act, even though the applicant sees that, pursuant to Article 51 (consolidated) of the Treaty on European Union, Declaration No. 17 does not have the status of a treaty norm*. In turn, the Attorney General, being a party to the proceedings before the Tribunal, claimed that *Declaration No. 17 is not a normative act but a political one. It consists of two parts: first – informational, and second - containing the opinion of the Council Legal Service. The content of Declaration No 17 brings no new value, merely confirms the continuity of case-law of the Court of Justice of the European Union*".

i.e. acts of both primary and secondary legislation and international treaties, together with the acts issued on the basis thereof, and extends to all the provisions of national law - regardless of their status - including the standards contained in basic laws of the Member States (which causes much controversy in the judicature of constitutional courts of these countries)¹².

4. In the case-law of the Court of Justice, the principle of primacy of EU law has been expressed by the Court in *Costa v. ENEL* case. The Court drew attention to the specific nature of the Treaty establishing the European Economic Community in comparison to other international agreements. Proving its thesis, the CJ also found that EEA Treaty forms the basis of an autonomous legal system which with its entry into force permanently penetrated into the legal systems of the Member States and has become their integral part¹³. This results in the obligation to apply treaty norms by national courts. Member States have voluntarily limited their sovereignty by moving part of the powers to the EU (former EC). As a result, the community was equipped with its own institutions, its own personality, its own legal capacity and the capacity of representation on the international level, as well as the powers necessary to achieve common goals. Consequently, **Member States cannot establish laws contrary to legal norms of the EU**. The Court held that **the application of the law under the Treaty cannot be excluded by the national laws, because it would violate the Community nature of the law and undermine the legal basis for the functioning of the EU**.

5. In *Internationale Handelsgesellschaft*¹⁴, the Court of Justice has extended the scope of the principle of primacy of the EU law over national law also to **cases of conflict between the standards of the EU and the standards contained in basic laws of the**

¹² See the judgment on 11/70 *Internationale Handelsgesellschaft*.

¹³ By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply. By creating a community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the Community, the Member States have limited their sovereign rights and have thus created a body of law which binds both their nationals and themselves.

¹⁴ See the judgment on *Internationale Handelsgesellschaft*. Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as community law and without the legal basis of the Community itself being called in question. Therefore, they cannot take precedence over the law derived from the Treaty, which is an independent source of law, due to its very essence, without depriving it of the nature of Community law, and without calling into question the legal basis of the Community itself. Therefore the validity of a community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure.

Member States, i.e. acts which are the highest in the hierarchy of domestic sources of law¹⁵. The Court strongly criticized the appeal by the Member States to standards and national (internal) legislation as the bases of legality control for standards adopted by the EU. According to the CJ this practice leads to a reduction in the clarity and efficiency of EU law. The only criterion for such verification should be the EU law. The Court of Justice also noted that the national laws must not take precedence over EU law and raised the argument of freedom of their formulation in individual Member States. Such superiority would harm the fundamentals of the EU, in which the Treaty is an independent and autonomous source of law. Also the legality and effectiveness of EU law cannot be made dependent on their conformity with fundamental rights and principles contained in the constitutions of the Member States. As the Court stated: *The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.*

6. In the *Simmenthal* judgment¹⁶, the CJ stated that the principle of primacy assumes that the provisions of the treaties and directly applicable secondary legislation after its entry into force, firstly, **automatically exclude the application of any conflicting national laws**, and secondly, **exclude the possibility of the adopt of new laws inconsistent with the provisions of EU law**. In the case of the application of EU legislation, the national court has a duty to ensure that the provisions are fully effective. According to the interpretation of the Court, it gives the court the possibility to refuse (ex officio) the use of (disregarding) any rule of national law which is contrary to EU law, even if it was adopted later than the EU rules. This principle is known as the so-called principle of primacy of EU law¹⁷.

7. A report devoted to the decisions of the National Constitutional Courts of 2003 pointed out that the principle of supremacy of EU law over national law can be seen in three aspects. Firstly, an analysis is conducted of the relationship between EU law and national legislation adopted later (*lex posterior*) in the event of any conflict between them. Secondly, there is an analysis of the conflict of laws and constitutional principles of the Member States with the EU legal standards. And thirdly, the competence criterion is also important. In other words, it has to be determined who has the ultimate power (*ger. Kompetenz - Kompetenz, fr. Competence sur la competence*, the so-called competence-competence, ultimate power to rule on one's jurisdiction)¹⁸.

¹⁵ The Court of Justice had to express its views in relation to the reasoning that assumed violation of the principles of the German Basic Law by the agreements on export licenses under the common agricultural policy.

¹⁶ Judgment on 106/77 *Simmenthal*.

¹⁷ In this case, it is not necessary to use the procedures to repeal a national law that is contrary to EU law.

¹⁸ Report, *Orzeczenia Narodowych Trybunałów Konstytucyjnych (Niemcy, Włochy, Francja i Hiszpania) w sprawie zgodności prawa wspólnotowego z konstytucjami państw członkowskich*, Parlamentarne Procedury Legislacyjne, 2003, p. 4-5.

8. The principle of *lex posterior derogat legi priori* means that the act passed later repeals (derogates) the effect of an act adopted in a given field earlier. This rule therefore applies to the relationship between the provisions of law in terms of time, and is applicable in case of a collision between the two. A legal act adopted later takes precedence over the act passed earlier. It should be noted, however, that the principle of *lex posterior derogat legi priori* applies only to acts of the same legal force. Resolution of the conflict between the acts of different legal force is always in favour of the act which is higher in the hierarchy of sources of law.

9. The Court of Justice, with reference to the *lex posteriori* principle, stated emphatically that it cannot apply to the relationship between the EU law and the national law of the Member States. A settlement of the primacy of the act due to the time of its adoption cannot be a principle in the conflict between the EU and national standards. The provisions of the EU law and the national law cannot be regarded as acts of the same legal force. The ruling on the *Costa v. ENEL* case, which concerned a collision of the standards in the later adopted national law nationalizing the energy company with the EU legal standards, the CJ stated that *the obligations undertaken under the treaty (...) would not be unconditional, but merely contingent, if they could be called in question by subsequent legislative acts of the signatories*. The possibility of applying the principle of *lex posteriori* in the evaluation of the CJ would jeopardize the uniform application of EU law by applying solutions that are different or even contrary to the EU legal standards. This would offer the possibility of a selective application of EU law in the Member States, depending on the preferences that exist in a given time and political system.

10. The question of the relationship of constitutional norms in force in the EU Member States and the EU law standards was the subject of discussion in both the Court of Justice and constitutional courts of the Member States (e.g. Germany, Italy and Poland). In the judgment described above on the *Internationale Handelsgesellschaft* case, the CJ stated that the acts of EU law take precedence over national law, even in the event of a conflict between the constitutional principles and the EU standards. The constitutional courts of the Member States in their decisions questioned repeatedly the CJ's thesis, as an example can be indicated the Federal Constitutional Tribunal judgment on *Solange I*, the judgment on the *Lisbon Treaty*, the decision of the constitutional court of the Italian Republic on *Granital v. Amministrazione delle Finanze dello Stato*, or the judgment of the Polish constitutional court regarding the constitutionality of the Accession Treaty¹⁹.

11. The issue of conflicts of competence in terms of the primacy principle relates primarily to the determination of the limits of those competences – i.e. indication as

¹⁹ For more see § 4 point 3 of this chapter.

to who should have the final authority. According to the CJ interpretation, the CJ is the guardian of *Kompetenz-Kompetenz*, and the courts of the Member States do not have the cognition to assess the legality of the EU secondary legislation. The statement of the Court of Justice regarding its powers was that their primary objective is to ensure the uniform application of EU law by the courts of the Member States. The Court expressed the view that the *requirement of uniformity is particularly imperative when the validity of a Community act is in question. Divergences between courts in the Member States as to the validity of Community acts would be liable to place in jeopardy the very unity of the community legal order and detract from the fundamental requirement of legal certainty*²⁰. A different view on the matter is presented by constitutional courts in some Member States, e.g. in Germany and Poland, which are open to check compliance of the EU secondary legislation with the Constitution²¹.

3. The principle of direct effect of EU law

a) General remarks

1. Similar to the principle of primacy, the principle of direct effect of EU law has been shaped by the case-law of the Court of Justice in response to problems with the application of EU law in the legal systems of the Member States. Direct effect of EU law includes:

- a) direct application,
- b) direct effect.

2. The direct application of EU law relates to the question of who may apply what type of act of EU law, and to what extent. This rule applies to the formal aspect of the inclusion of EU provisions into legal systems of the Member States. As interpreted by the CJ in the *Simmenthal* judgment, the principle of direct effect applies to both decision-making bodies and bodies applying the law in the Member States. Law-making authorities have a duty to adopt acts in accordance with EU law. However, the authorities applying the law are obliged to apply the standards of EU law in situations where they are most appropriate for a given legal situation²². In the judgment, the CJ indicated that *the direct applicability of community law means that its rules must be fully and uniformly applied in all the Member States from the date of their entry into force and for so long as they continue in force. Directly applicable provisions are a direct source of rights and duties for all those affected thereby, whether member states or individuals; this consequence also concerns any national court whose task it is as an organ of*

²⁰ Judgment 314/85 on *Foto-Frost*.

²¹ The FCT judgment on *Solange II*, judgment of the Constitutional Tribunal in case No. 45/09.

²² Judgment on *Simmenthal*.

a member to protect the rights conferred upon individuals by community law. The Court also held that the final decision assuming the direct effect of a provision of a treaty is within the CJ jurisdiction.

3. The principle of direct effect is the ability to rely directly on EU law before national courts and administrative authorities of the Member States, by both public and private entities²³. It therefore applies to a catalogue of entities that can rely on EU law. It is consequently an indication of who is the target of the rights and obligations contained in the standards of EU law.

4. When considering the principle of direct effect, there should be distinguished the concepts of **direct vertical effect** and **direct horizontal effect**. The direct vertical effect takes place in the relations individual - the state, and means the possibility to rely on EU law against the Member States and those who represent them. The direct horizontal effect refers to the relationship between individuals (private parties) and means the possibility to rely on the EU act against another individual.

5. The decision in *Van Gend en Loos* case was fundamental for the shaping of the principle of direct effect, in which the CJ stated that the then European Community as a new quality in the international order creates a legal system through delegation of sovereign rights by Member States, where subjects are not only the Member States but also individuals (private parties). The Court of Justice held that *regardless of the laws of the Member States, the right of the Community can not only impose obligations on individuals, but may also confer upon them rights which become part of their legal status*²⁴. The judgment of the CJ for the first time acknowledged that private parties are the targets of standards under EU law and can rely on them directly before the courts and the public authorities of the Member States. It is worth noting that the decision of the CJ involved direct effect of EU law (specifically the provisions of the treaty) in the vertical plane, the complaint was in fact directed against the state.

6. In *Defrenne v. Sabena* judgment²⁵ the CJ commented on the direct horizontal effect of EU law. The parties to the dispute were in fact private parties, a hostess and Belgian airline, and the complaint concerned the violation of the treaty principle of equal treatment for men and women in terms of pay for work. The Court held that the order of non-discrimination also applies in relations between individuals. Therefore, participation of a public entity is not a *sine qua non* condition for the direct ef-

²³ One should distinguish the principle of direct effect from the principle of direct applicability, which refers to the inclusion of EU provisions to the legal systems of Member States. It should be noted that only regulations have such power.

²⁴ Also in the judgment on *Costa v. ENEL*, the Court noted that law of the EU (then Community) is a system that binds not only Member States but also their nationals.

²⁵ Case 43/75.

fect of EU law standards. As interpreted by the CJ in *Defrenne v. Sabena* – also agreements entered into between private parties are subject to the prohibition of discrimination. This means that individuals have the right to rely directly on the provisions against other private entities, and the role of courts and administrative authorities of the Member States is to ensure the implementation of these rights. The Court of Justice held that *the principle that men and women should receive equal pay may be relied on before the national courts. These courts have a duty to ensure the protection of the rights which that provision vests in individuals, in particular in the case of those forms of discrimination which have their origin directly in legislative provisions or collective labour agreements, as well as where men and women receive unequal pay for equal work which is carried out in the same establishment or service, whether private or public.* It should be noted that the full effectiveness in vertical and horizontal aspects is enjoyed only by regulations. Other acts are directly applicable only vertically and horizontally when they are addressed to private entities, and the goal is to impose on them certain responsibilities.

7. The Court of Justice also pointed out the conditions to be met by the provision of EU law to be directly effective. According to the criteria established by the CJ such provision should be:

- a) clear,
- b) unconditional,
- c) precise,
- d) independent of the actions taken by the Member States (e.g. legislative) or the EU²⁶,
- e) not based on discretionary power²⁷.

8. Analyzing the CJ case-law from the perspective of the **catalogue of Union acts under the principle of direct effect**, one can observe a progressive expansion of the list of acts that are subject to it. This catalogue includes - treaty provisions, regulations, directives, decisions, international agreements and acts based on them. Also important is the **time dimension** related to the application of the principle of direct effect. It is understood that the provision has a direct effect from the date of its entry into force²⁸.

b) The direct effect of regulations

1. A regulation is a legislative act of general application, binding in its entirety and directly applicable in the Member States of the EU²⁹. It becomes part of the na-

²⁶ This means that its effectiveness is not dependent on any actions taken by the state or the EU.

²⁷ This means the lack of competence to take decisions in conditions of the so-called discretion.

²⁸ See the judgment in case 61/70 *Denkavit Italiana*. Different position in this regard CJ presented in its judgment in case 43/75 *Defrenne v. Sabena*, in case 24/86 *Blaizot* and in case C-163/90 *Legros* where the time of the decision was crucial.

²⁹ Article 288 TFEU.

tional legal systems without the need to implement its provisions. In the judgment in *Variola*³⁰ case the CJ stated that *the direct application of a regulation means that its entry into force and its application in favour of or against those subject to it are independent of any measure of reception into national law*. The Court also referred to the legal force of regulations confirming the possibility of establishing through them the rights and obligations of individuals. In the judgment in the *Koninklijke Scholten Honig* case, the CJ stressed the normative character of the regulation stating that *regulation is a measure which applies to objectively determined situations and produces legal effects with regard to categories of persons regarded generally and in the abstract*³¹.

2. Direct applicability of regulations guaranteed by the TFEU does not mean at the same time the direct effect of their provisions. In line with the CJ case-law, the possibility to rely directly on the provisions of the regulations is subject to their compliance with relevant conditions. These are set out in the judgment in *Carl Schlüter v. Hauptzollamt Lörrach*³² case, where the Court referred to the following criteria: clarity, precision and the lack of discretion of Member States' authorities.

3. In its judgment in the *Muñoz* case³³, the CJ stated that the possibility to rely directly on the provisions of the regulation should be assessed for each act individually. The Court also confirmed the direct effect of regulations on both the vertical plane, that is against the state, as well as the horizontal plane, i.e. against another individual.

c) The direct effect of directives

1. A directive is an act directed to the Member States of the EU. It is binding on the recipient with regard to the result and is subject to a mandatory implementation within the prescribed period³⁴. Using directives the European Union legislature determines the directions to modify national legislation. The issue of direct effect of directives has been the subject of judicial analysis of CJ in the absence or incorrect transposition of the provisions of these acts by the Member States, which in the opinion of the Court should not benefit from their own unlawful conduct - *ex iniuria non orbitur ius*.

2. The judgment in the *Yvonne van Duyn v. Home Office*³⁵ case was of fundamental importance in this respect, the CJ for the first time spoke about the direct effect of di-

³⁰ Judgment in case 34/73 *Variola*.

³¹ Judgment in case 101/76 *Koninklijke Scholten Honig*.

³² Judgment in case 9/73 *Carl Schlüter v. Hauptzollamt Lörrach*.

³³ Judgment in case C-252/00 *Antonia Muñoz y Cia S.A. Superior Fruticola S.A. v. Frumar Limited Redbridge Produce Marketing Limited*.

³⁴ Article 288 TFEU.

³⁵ Judgment in case 41/74 *Yvonne van Duyn v. Home Office*.

rectives. It should be noted that the judgment related to the possibility of referring to the directives in the vertical plane, individual – the state. The Court found that due to the fact of granting a binding force to directives, it is not allowed to exclude the possibility of relying on an obligation that derives from its content, because that would undermine the binding effect of its provisions and would limit the effectiveness of EU law. This is because the element of EU law is, on the one hand, the possibility of relying by the individual before the national courts directly on the directives, and on the other hand, the right to rely on their contents by the courts of the Member States in the conduct of their proceedings. According to the CJ, the decisive criterion in a particular case is a detailed analysis of whether the provision meets the conditions for direct effect.

3. Another important judgment was in the *Ratti* case³⁶ in which the Court indicated the conditions for direct effect of directives, such as: clear and precise content, unconditionality and expiry of the period of implementation³⁷. In its analysis, the CJ referred to the *ex iniuria non orbitur ius* assumption, stating that failure by a Member State to observe implementation date or improper implementation of the provisions of the directive cannot undermine the right of individuals to rely directly on its provisions in this situation (of course against the state).

4. In the *Marks & Spencer* judgment³⁸, the CJ extended the scope of the direct effect of directives allowing direct reliance on their provisions also in a situation where a Member State has made a transposition. The Court pointed out that the implementing procedure itself does not exhaust all obligations related to the achievement of the results established in the directive. Therefore, if the means used by the Member State are not sufficient to ensure the possibility of full use of targets set in the directive for individuals, they can rely directly on this directive in court proceedings against the State.

5. The Court of Justice dealt in its case-law also with the direct effect of directives in the horizontal plane (individual - individual). It should be noted, however, that the CJ has consistently refused the possibility to rely directly on the provisions of the directives in the proceedings in which the parties are private entities. This is because the directive, as an act directed to the state, cannot be a direct base in relationships between individuals. Judgments in *Marshall*³⁹ and *Faccini Dori*⁴⁰ cases were crucial in this respect. The Court of Justice proceeded on the basis that allowing the direct effect of directives horizontally would make it possible for the EU to settle the status of individuals. Meanwhile, the European Union legislature has the legitimacy to im-

³⁶ Judgment in case 148/78 *Postępowanie karne v. Ratti*.

³⁷ Judgment in case 51/76 *Nederlandse Ondernemingen v. Inspecteur der Invoerrechten en Accijnzen*.

³⁸ Judgment in case 148/78 *Marks & Spencer*.

³⁹ Judgment in case 152/84 *Marshall*.

⁴⁰ Judgment in case C-91/92 *Faccini Dori*.

pose obligations on individuals only in situations where the law authorizes it to issue regulations. No exception to this rule is possible in the opinion of the CJ.

6. In order to mitigate the categorical exclusion of the possibility to rely directly on directives by individuals, the CJ adopted in its case-law a fairly wide definition of the state and the entities constituting the “**emanation of the state**”. According to the interpretation made by the Court in its judgment in the *Foster* case⁴¹, it does not matter in what form the state is acting. Therefore, the category of entities against which one can rely directly on the provisions of the directives covers any entity which, under specific national rules, is responsible for the provision of public services under the control of the state and is equipped with special powers to that effect. In the *Marshall* judgment the CJ stated, however, that it does not matter whether the state acts as a governmental body or employer. Analyzing the issue of the so-called “emanation of the state”, the CJ referred to the parties representing in its opinion the state and considered as such the tax authorities - in the judgment in the *Ursula Becker* case⁴², the authorities responsible for law and order - in the judgment in the *Marguerite Johnston* case⁴³, and local government bodies - in the judgment in the *Fratelli* case⁴⁴.

7. In addition to the above-described interpretation of entities representing the state, the CJ mitigates the consequences of rejecting direct horizontal effect of directives also by using the principle of the so-called indirect effect, i.e. consistent interpretation⁴⁵ and the possibility of relying on the provisions of directives in triangular situations⁴⁶, that Court has confirmed in its judgment in *CIA Security International SA v. Signalson SA and Seciuritel SPRL*⁴⁷ cases or the judgment in *Uniliver Italia SpA v. Central Food SpA*⁴⁸.

d) The direct result of a decision

1. A decision is an individual and a specific legislative act, binding recipients in its entirety. It can be targeted at both the state and individuals⁴⁹. In contrast to the abstract acts it concerns a specific case. The effect, in the form of binding by the provisions of the decision, arises only for the recipients.

⁴¹ Judgment in case C-188/89 *Foster v. British Gas*.

⁴² Judgment in case 8/81 *Ursula Becker*.

⁴³ Judgment in case 222/84 *Marguerite Johnston*.

⁴⁴ Judgment in case 103/88 *Fratelli*.

⁴⁵ See earlier comments devoted to the principle of indirect effect § 3 point 4 of this handbook.

⁴⁶ Triangular relations take place in the vertical plane, in which when the action of an individual is directed against the state it also has a horizontal aspect.

⁴⁷ Judgment in case C-1994/94 *CIA Security International SA v. Signalson SA and Seciuritel SPRL*.

⁴⁸ Judgment in case C-443/98 *Uniliver Italia SpA v. Central Food SpA*.

⁴⁹ Article 288 TFEU.

2. The judgment in the *Grad* case⁵⁰ was of fundamental importance to the issue of the direct effect; the Court held that the binding nature of decisions guaranteed in the treaty determines their direct effectiveness. Furthermore, the Court referred to the principle of *effet utile* stating that the lack of possibility to rely on the provisions of decisions by individuals (citizens of countries to which the decision is addressed) in the proceedings before the national courts would undermine the essence of this principle. Also the courts of the Member States, in the opinion of the CJ, should be able to rely on decisions as part of EU law. The Court of Justice also referred – as was already previously mentioned – to the criteria of the direct effect, i.e.: clarity, precision and unconditionality⁵¹.

e) The direct effect of international agreements and acts based on them

1. The European Union may conclude international agreements with third countries and international organizations. Such agreements are binding in relation to the EU itself and to all Member States. They are part of the EU legal order⁵².

The principle of direct effect applies to them, as long as the conditioning criteria are met.

2. The Court of Justice in its judgment in the *Bresciani* case⁵³ held that provisions of an international agreement, which are clear, precise and unconditional have direct effect, while taking account of their wording and the object and purpose of the agreement⁵⁴.

3. In the judgment in the *Haegeman* case⁵⁵, the CJ stated that *an agreement concluded by the Council (...) is, as far as it concerns the Community, an act of one of the institutions of the Community (...). From the date it comes into force, its provisions form an integral part of Community law*. The Court adopted thus, that it has jurisdiction to rule on the scope in preliminary rulings, as an international agreement is an institutional act⁵⁶.

4. In its judgment on the *Kupferberg* case⁵⁷, the CJ referring to the EU but also national dimension of international agreements accepted that their efficacy and use must not be dependent on their position in the legal systems of the Member States, as they are an integral part of the EU legal system. Therefore, in the opinion of the Court, in

⁵⁰ Judgment in case 9/70 *Grad*.

⁵¹ For more see page 9 of this chapter

⁵² Article 216 TFEU.

⁵³ Judgment in case 87/75 *Bresciani*.

⁵⁴ It should be noted that some of the provisions of international agreements in the opinion of the CJ do not use direct effect. The Court denied such effectiveness to the provisions of the GATT.

⁵⁵ Judgment in case 181/73 *Haegeman*.

⁵⁶ Article 267 TFEU.

⁵⁷ Judgment in case 104/81 *Hauptzollamt Mainz v. Kupferberg*.

order to ensure uniform application of international agreements, only the Court has the authority to interpret its provisions. The Court also confirmed the conditions of the direct effect, that is: clarity, precision, unconditionally, and stressed that they must be read in the context of the entire agreement.

5. A direct effect of acts issued on the basis of international agreements has been the subject of the CJ analysis in the judgment in *Sevince* case⁵⁸, concerning the association agreement, namely the decision of the Association Council⁵⁹. Acts adopted by bodies appointed under the association agreement are an integral part of the EU legal system. A direct result of such acts depends on the fulfillment of the criteria under the CJ case-law, i.e.: clarity, precision and unconditionality.

4. The principle of indirect effect

1. The principle of indirect effect otherwise known as the principle of **Pro-European interpretation, consistent with EU law or EU law friendly** stipulates that the **national judicial and administrative authorities are obliged in the process of applying the national law to interpret its provisions in accordance with EU law**. Just as the principles of primacy and direct application characterized above, the principle of indirect effect was also established in the case-law of the Court of Justice. Its content has been formed on the basis of the Court's interpretation of the principle of solidarity in order to ensure the full effectiveness of EU law. At first, the principle of indirect effect was used as a specific remedy for mitigating the effects of excluding by the CJ the possibility to directly rely on the provisions of the directives by individuals (private parties) in the horizontal plane (i.e. against other individuals). With time, the Court extended the scope of consistent interpretation to all acts of EU law. In its judgment on *Murphy*⁶⁰ the CJ referred to the provisions of the treaties, while in the *Grimaldi* case⁶¹ to the recommendations.

2. The concept of interpretation in conformity with the provisions of EU law accompanied the CJ rulings especially with regard to the directives and regulations implementing it⁶². This is important for the national courts interpreting the legislation implementing directives. The CJ judgment in *Von Colson*⁶³ was of crucial importance

⁵⁸ Judgment in case C-192/89 *Sevince*.

⁵⁹ The case concerned the decision taken by the Council of the Association constituted on the basis of the Association Agreement of the then Community with Turkey.

⁶⁰ Judgment in case 157/86 *Murphy*.

⁶¹ Judgment in case 322/88 *Grimaldi*.

⁶² Judgment in case 14/83 *Von Colson* and judgment in case C-322/88 *Grimaldi*.

⁶³ Judgment in case 14/83 *Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen*.

in this respect. In the judgment, the CJ stated that Member States are obliged to protect the instruments necessary for application in their legal orders of the objectives set out in the directive and to ensure their effective implementation. This in turn means that the interpretation of such provisions should be made, as the CJ noted, in light of the objectives and the content of the directive (i.e. EU law). In subsequent rulings the CJ extended the scope of indirect effect to the whole EU law.

3. According to the CJ case-law, the pro-European interpretation covers all acts of EU law and all national legal standards. As the Court stated in its judgment in the *Marleasing* case⁶⁴, its scope covers the provisions:

- a) issued for the application of EU law,
- b) issued before the act of EU law,
- c) issued after the act of EU law.

In its judgment in the *Van Colson* case, the CJ held that boundaries of indirect effect extend as far as the freedom of adjudication (discretionary power) of a national court. However, in the judgment in the *Marleasing* case, the Court stretched the boundaries of pro-European interpretation as far as possible in a given situation. In its judgment in the *Pupino* case⁶⁵, the Court focused on the limits of the pro-European interpretation from the perspective of the general principles of law. The indirect effect of EU legislation must not conflict, according to the CJ, with the principle of *lex retro non agit*, the principle of legal certainty or lead to the interpretation of national law *contra legem*.

4. In its judgment in *Adeneler*⁶⁶, the CJ stated that in case of the cumulative existence of evidence in the form of prejudice to the period of implementation of the directive by the Member States and the lack of direct effect of its provisions, the national courts are to interpret national law in the light of the purposes and wording of the directive using the interpretation of national law which is closest to these criteria. This requirement is activated upon the expiry of the period of implementation. The Court also pointed to the time of the entry of the directive into force. At that time, the national courts are in fact bound by the obligation to refrain from interpreting national law in a manner seriously threatening - after the deadline for implementation - the objectives of the directive.

⁶⁴ Judgment in case C-106/89 *Marleasing*.

⁶⁵ Judgment in case C-105/03 *Pupino*.

⁶⁶ Judgment in case C- 212/04 *Konstantinos Adeneler et al. v. Ellinikos Organismos Galaktos (ELOG)*.

§4. THE CASE-LAW OF CONSTITUTIONAL COURTS IN SELECTED MEMBER STATES WITHIN THE RELATIONSHIP OF THE EUROPEAN UNION LAW AND NATIONAL LAW

1. General remarks

1. Adjudication activity of constitutional courts of the Member States in relation to the EU legislation refers to assessing the constitutionality of primary legislation (the founding treaties, amending treaties and accession treaties) and controlling internal laws implementing EU law. A controversial issue is the issue of national verification of compliance of secondary EU legislation with basic laws of the Member States. This issue is the subject of lively discussion in the judicature of constitutional courts, it should be noted however, that only some of them allow for the possibility of such control (after fulfilling the relevant conditions) e.g. the Polish Constitutional Court in its judgment SK 45/09 or the German Constitutional Court in cases *Solange II* and *Bananenmarktordnung*⁶⁷.

2. Ambiguity of interpretation in the control of compliance of the EU secondary legislation with national basic laws is visible in the relationship between the principle of loyal cooperation⁶⁸ and the principle of respect for national identities of the Member States⁶⁹. Depending on which one will be given primacy, it is possible to both recognize and challenge the national jurisdiction of constitutional courts to verify the secondary legislation. The principle of loyal cooperation assumes mutual respect of the EU and the Member States, and providing mutual assistance in carrying out tasks resulting from the Treaties. This means that Member States take any appropriate measures, general or particular, to ensure fulfilment of the obligations under the Treaties or the acts of the EU institutions, to facilitate the achievement of the EU's tasks and refrain from taking any measures which could jeopardize the attainment of its objectives. On the other hand, the principle of respect for national identity presupposes respect for the fundamental functions of the Member States on the part of EU, in particular those aimed at ensuring territorial integrity, maintaining public order and protecting national security. This identity is inextricably linked with the basic political structures (including local and regional) and its essential factor which is the **constitutional identity**⁷⁰. Therefore it is vital to determine the limits of

⁶⁷ These issues are further discussed in § 3 points 2 and 4 of this chapter.

⁶⁸ Article 4(3) TFEU.

⁶⁹ Article 4(2) TFEU.

⁷⁰ Cf. judgment CT 32/08.

both the autonomy of EU law and judicial interference by constitutional courts of the Member States in the legal standards established by the EU institutions (the EU secondary legislation). From this perspective, it seems particularly important to consider selected judgments of constitutional courts of Germany, Italy and Poland, which in their judicature often took polemical arguments against the case-law of the Court of Justice.

2. Germany

a) General remarks

1. The constitutionality of normative acts in the German legal system is controlled by the **Federal Constitutional Tribunal** (*Bundesverfassungsgericht*, hereinafter the FCT)⁷¹, based in Karlsruhe, Baden-Württemberg. It plays the role of a guardian of the constitution of the Federal Republic of Germany (*Grundgesetz*)⁷².

2. The Federal Constitutional Tribunal granted itself the cognition to control conformity of both primary legislation and secondary (derivative) legislation of the EU

⁷¹ The literal translation indicates that it is a Federal Constitutional **Court**, however, the studies adopted the name of the Federal Constitutional **Tribunal**.

⁷² For more on this subject see A. Rainer, *Orzecznictwo niemieckiego Federalnego Trybunału Konstytucyjnego a proces integracji europejskiej*, *Studia Europejskie*, 1/1999, pp. 1-13 and P. Sarnecki, *Ustroje konstytucyjne państw współczesnych*, Zakamycze 2003, p. 248. The Tribunal is composed of two senates. The composition of each of them is made up of eight judges. The Tribunal is headed by its president, who is head of all officials. In accordance with Article 93 of the German Basic Law of 23 May 1949, the Federal Constitutional Tribunal decides:

a) on the interpretation of the Constitution in the event of a dispute about the rights and responsibilities of the federal supreme authorities or other entities that are provided under the Basic Law or the rules of the highest federal authority with their own rights;

b) in the case of disagreement or doubt as to the formal or substantive compatibility of federal law or the national law with the Basic Law, or as to the compatibility of land law with other federal laws;

c) in case of differences of opinion as to whether the act corresponds to conditions of Article 72(2) (the so-called competition law between the federal and national authorities), at the request of the Federal Council, the land government or representatives of people;

d) in other public legal disputes between the Federation and the lands, between lands and within a land, if no other legal way is provided;

e) on the constitutional complaints that may be filed by anyone who believes that public authority violated any of the fundamental rights or any of the rights contained in articles 20(4), 33, 38, 101, 103 and 104 of the Basic Law, such as the right of resistance, equal status of all German citizens, the right to be elected to the German Federal Parliament, the ban on exceptional courts, fundamental rights of the accused, the legal guarantees for deprivation of liberty;

f) on the constitutional complaints of municipalities and municipal associations for violating the right to self-government under Article 28 of the Basic Law, and in the case of land laws only if a complaint cannot be brought to the land constitutional court;

g) in other cases provided for in the Constitution;

h) in other cases provided by the Federal Constitutional Tribunal under the Federal Law.

with the German Basic Law. Due to the function of the guardian of the constitution, the FCT assigns to itself the right to protect the principle of primacy of the German Constitution also in relation to the legislation produced by the EU institutions, seeing threats to its proper functioning not only in the rules that make up the German legal system, but also those that come from the EU legislator.

3. The construction of the Federal Constitutional Tribunal's case-law in the control of secondary EU law is based on the assumption that **the court examines not the EU secondary legislation act, but the order by a public authority to apply particular act contained in Germany's ratification agreement**⁷³. As a result of such a control, FCT declares the ratification agreement to be compatible or incompatible in the scope covering a specific provision or act of EU secondary legislation. This verification is therefore of a typical "scope" character. In the case of a **judgment of non-compliance with the Basic Law only German public authorities are bound by the prohibition of such secondary legislation**. FCT decision does not affect the validity of the derivative act in the EU's legal area.

4. The Federal Constitutional Tribunal's case law pays particular attention to EU's compliance with the principle of acting within the competences set out in the treaties (whether the EU institutions do not operate outside the defined competences), and ensuring the proper level of protection of human and civil rights, which are entered in the German Constitution.

5. The line of case law indicated above has been kept in the FCT judicature since 1970s. Only the control procedure, its subject matter and the criteria evolved over that period. It should be noted, however, that at first (1960s) the FCT excluded its cognition in the control of EU secondary legislation and recognized the constitutional complaints directed against acts of the secondary legislation as inadmissible. The Court also did not bestow on itself the competences in the control of the secondary legislation through legal questions, which were submitted by the German courts (1971). Secondary legislation was treated as a manifestation of the will of supranational institutions separate from the power of the Member States, including Germany⁷⁴.

6. It should also be noted that the German doctrine is critical towards assigning the competence of the Federal Constitutional Tribunal in the control of compliance of secondary legislation with the German Basic Law. The arguments of "dogmatic-legal

⁷³ See P. Czarny, *Opinia prawna w sprawie dopuszczalności kontroli przez niemiecki Federalny Trybunał Konstytucyjny aktów prawa pochodnego Unii Europejskiej*, Zeszyty Prawnicze Biura Analiz Sejmowych Kancelarii Sejmu, Year VIII 2(30) 2011, pp. 9–19.

⁷⁴ *Ibidem*

weakness“ for justification of such cognition and the negative consequences for the process of European integration are raised in this issue⁷⁵.

7. Legal basis for the control of secondary legislation done by the FCT should be seen in the Court’s interpretation of the German Basic Law and the ratification act, and not in the provisions of the Constitution itself, the provisions governing the functioning of the FCT contained in the Federal Constitutional Tribunal Act of 1951 and other acts of German law. This control therefore has no normative base.

8. The ratification act, under which Germany gave “sovereign powers” (sovereign rights) to the EU meant that the system of national law opened up to EU law. This opening, however, was not absolute. **Membership in the EU may not in fact lead to a violation of fundamental and immutable constitutional principles of the German state system** (which is not allowed by the Basic Law itself) i.e. the **constitutional identity (the core of constitutional identity)**. This means that **EU secondary legislation cannot affect the values indicated above, because the use of such acts would contradict the order entered into the Basic Law of the Federal Republic of Germany.**

9. Article 23 of the German Basic Law contains the so-called **integration clause**. It assumes that for the realization of a united Europe, the Federal Republic of Germany shall contribute to the development of the European Union. The Union is therefore bound by the national legal rules, social and federation rules and the principle of subsidiarity. It is also obliged to ensure the protection of fundamental rights comparable to that which is contained in the Constitution of the Federal Republic of Germany. The provision also assumes that the legitimacy of the European Union and the change of its treaty foundations and comparable regulations, resulting in modifications or additions to the German Basic Law or the possibility of introducing such changes or additions, require the consent of two thirds of members of the Federal Parliament and two thirds of the Federal Council⁷⁶. However, the change of the Basic Law, which violates the division of the Federation to the lands, the essential cooperation of lands in terms of legislation or the rules contained in Articles 1 and 20 of the Constitution, is unacceptable⁷⁷. This is about the principle of respect for and protection of human dignity and integrity and the protection of inalienable human rights expressed in Article 1 of the Basic Law. In accordance with Article 20 of the Constitution, the Federal Republic of Germany is a democratic and social federal state. All state authority emanates from the people. The people exercise this power through elections, voting, and

⁷⁵ It is worth noting the FCT never determined that a derivative act for constitutional reasons cannot be applied in Germany.

⁷⁶ Article 79(2) of the Constitution of Germany.

⁷⁷ Article 79(3) of the Constitution of Germany.

special bodies of legislation, executive and judiciary. Legislation is bound by constitutional order, whereas executive and judiciary powers are bound by law. Any changes detrimental to these values are not permitted.

b) *Solange I*

1. The Federal Constitutional Tribunal in its judgment in *Solange I* challenged the principle of absolute primacy of EU law over German law⁷⁸. The name “*solange*”, which describes this decision of FCT, in German means “as long as” and refers to the adoption by the FCT of the principle of supremacy of Community law (now EU law) and the principle of direct effect of the law, but only under certain conditions⁷⁹. Community law (now EU law) was defined by the FCT as an autonomous system that goes beyond the law of the Member States and international law.

2. German Constitutional Court also pointed out that Community order does not specify the basic human rights. The Federal Constitutional Tribunal also stated that, due to the fact that the process of the creation of Community law (now EU law) is still in progress, this does not provide adequate protection guarantees for fundamental rights set out in the German Basic Law. In the FCT opinion, part of the Basic Law devoted to the fundamental rights has inalienable and principal characteristics of this act. This is the so-called German constitutional identity. It is therefore not possible for the transfer of sovereign powers to violate these values in any way. Therefore, FCT acknowledged its cognition for verifying conformity of derivative legislation with the catalogue of fundamental rights contained in the German Constitution until the formation of these rights by the legal system of the Community (now EU legal system). As stated by FCT, the control will be exercised by it: *until the integration process does not become so advanced that the Community law also receives a catalogue of fundamental rights conferred by the parliament and with established legality, which is sufficient in comparison with the catalogue of fundamental rights contained in the Constitution.*

3. The Federal Court also found that both the German and the Community legal system are separate autonomous orders equipped with separate apparatus with certain powers and operating within them. Therefore, the Court of Justice should not rule on the compatibility of derivative legislation with the German Basic Law, just like the Federal Constitutional Tribunal does not have jurisdiction to control the compliance of secondary legislation with primary legislation.

⁷⁸ Judgment of FCT of 29 May 1974, BvL 52/71 *Solange I*.

⁷⁹ The name “*solange*” comes from the judgment of the FCT and refers to the basic expression used by the Tribunal.

b) *Solange II*

1. The FCT judgment on *Wünsche Handelsgesellschaft*⁸⁰, referred to as *Solange II*, slightly changed the Federal Court's approach to the issue of controlling the compliance of derivative legislation with the German Basic Law⁸¹. While in *Solange I* the FCT pointed to the lack of adequate protection of fundamental rights in Community law (now EU law), in *Solange II* it decided that the Community system (including the case-law of the Court of Justice) has already developed a level of protection comparable to that contained in the Constitution of the Federal Republic of Germany. For this reason, the FCT decided to suspend its cognition for the verification of the secondary legislation. However, it should be noted that the suspension of control did not constitute a waiver of that power by the Federal Constitutional Tribunal. The Federal Court only temporarily withdrew from the jurisdiction in that regard. The suspension of judicial activity of the FCT was to apply until the level of protection of fundamental rights offered by the Community system (now the EU system) would, according to the Federal Constitutional Tribunal, guarantee the protection of these rights in the light of the German Basic Law.

2. As the FCT stated, it is crucial to the German constitutional system to demonstrate that the EU law *does not allow for measures which are not in conformity with fundamental rights recognized and guaranteed by the constitutions of the Member States*. Federal Court, while considering *Solange II*, carried out a kind of verification of the achievements of the EC (now the EU) in defining the catalogue of fundamental rights and the level of protection in the legislation and the decisions of the Community (now the EU). The Federal Constitutional Tribunal stated that:

- a) the Court of Justice in its case-law respects and protects fundamental rights more than before (although the nature of these rights is not always clear);
- b) four freedoms inherent in the treaties are part of the fundamental freedoms;
- c) the Court of Justice applies the principle of proportionality and the principle of good administration, and treats the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) as a source of law.

⁸⁰ The FCT judgment of 22 October 1986 - *Wünsche Handelsgesellschaft*, 2 BvR 197/83 *Solange II*.

⁸¹ *Solange II* case referred to the freedom of trade guaranteed by the German Basic Law and procedural issues related to the right to speak and means of defence when issuing administrative decisions. The complaint was lodged by importers of mushrooms who have not obtained permission to import and therefore argued that their fundamental rights under the Constitution of Germany have been limited by the provisions of the Community. After considering the case and reviewing the law and jurisprudence of the EC (now the EU), the FCT said that *the question of whether (the plaintiff) is right in alleging that the Commission regulations at issue (...) infringe the fundamental rights (recognized by the relevant parts of the German Constitution) must therefore remain without response (because the Tribunal has not carried out analyses of compliance with the Constitution)*.

3. The interpretation made by the FCT in *Solange II* was changed in its judgment of 12 May 1989 which is referred to as *Wenn-nicht-Beschluß*⁸². The Federal Constitutional Tribunal has distanced itself from the earlier findings and concluded that it has cognition to control secondary legislation as long as the Court of Justice will not be able to guarantee adequate protection of fundamental rights.

d) *The Maastricht case*

1. The Treaty of Maastricht was the subject of the FCT judicial activity on a complaint based on the assumption that the German legal system does not provide constitutional grounds for the ratification of the treaty⁸³. Thus, a group of German applicants challenged the possibility of introducing its regulations to the legal system of Germany. Charges related primarily to the EU's increasing interference in the sphere of sovereignty of the Member States and, consequently, their lesser impact on the process of governance⁸⁴. The Federal Constitutional Tribunal controlled the issues related to the competences of the EU institutions and their transfer from Member States to EU in specific subject areas. The main issue in this regard was to ensure that EU institutions act within the powers delegated to them by the Member States. The Federal Court also emphasized the lack of binding Germany with acts going beyond the range of competence indicated above, stating that *if the institutions or agencies of the European Union treated or developed Treaty on European Union in a manner not covered by the Treaty (...), the resulting legislative instruments would not be legally binding in the area of German sovereignty. (...) The Court will accordingly review the legal instruments of the European institutions or agencies to determine whether they fall within the limits of the sovereign rights conferred on them, or go beyond these limits.*

2. The Federal Court also held that the interpretation of the treaty provisions, although necessary to achieve the objectives of the EU, cannot lead to expanding treatment of EU powers delegated by the Member States, stating that: *in the future, it will be necessary to take into consideration, when it comes to interpretation of the rules on granting full powers by the Community institutions and agencies, that the Treaty on European Union distinguishes, in principle, between the exercise of sovereign powers granted to achieve limited objectives and the amendment of the Treaty, so that the interpretation could not have effects equivalent to an extension of the Treaty. Such an interpretation of the rules on granting powers would not have binding force for Germany.*

⁸² The FCT judgment of 12 October 1993, 2 BvR 2134, 2159/92 on the *Treaty of Maastricht*.

⁸³ Decision of 12 October 1993 *Brunner and others* [1994] 1 CMLR 57. Bundestag adopted the Treaty of Maastricht on 2 December 1992. The Act came into force on 31 December 1992.

⁸⁴ The complaint raised the issue of a common currency, or granting the right to vote in local elections to people who are not EU citizens.

3. The judgment of the Federal Constitutional Tribunal in *Solange II* was referred to, on the occasion of the so-called banana market case⁸⁵, by the Federal Court stating that *it will use its jurisdiction only when the ECJ rejects the criterion adopted by the court in Solange II*. In addition, the FCT ruled that *the constitutional requirements set out in Solange II are satisfied as long as the judicial practice of the CJ provides a general effective protection of the fundamental rights in respect of the sovereign powers of the Community, which is essentially comparable to the necessary constitutional standards and provides overall protection of fundamental guarantees for the basic rights*.

e) The case of the Treaty of Lisbon

1. On 30 June 2009, the Federal Constitutional Tribunal delivered its judgment on the Treaty of Lisbon. The German Constitutional Court stated that the Lisbon Treaty is compatible with the Constitution of the Federal Republic of Germany and the acceptance of the decisions taken under these new rules of the EU's primary legislation should be made by the German Parliament by means of law. The Federal Court drew attention to the nature of the European Union, which is not a federation, but a union of sovereign and independent states that voluntarily create its structure. Constitution of the federation would require the unanimous will of the German people as expressed in a referendum (Article 146 of the Constitution of Germany). In addition, the FCT took the view that: *Article 23 of the Basic Law entitles to participate in the European Union, conceived as an association of states, and in its development. The concept of association includes strict, permanent joining of the Member States retaining their sovereignty, which hold the supreme power under the treaty, whose base remains in their responsibility only, and in which nations, consisting of persons having the nationality of the Member States, remain the subjects of democratic legitimacy*.

2. Theses included in the decision emphasize the independence and sovereignty of Germany as a country forming part of the EU⁸⁶. According to the FCT, the limit of the integration processes is the essence of the German state as defined in the Basic Law. In its interpretation, the Federal Constitutional Tribunal referred to the provisions of primary legislation, namely Article 4(2) of the TEU, which stipulates that the EU shall respect the national identity of the Member States, which is inherent in their fundamental political and constitutional structures. According to the interpretation of the provision made by the FCT, EU legislation must respect the constitutional orders of the Member States and consequently the case-law of constitutional courts, including that of the FCT.

⁸⁵ Decision of 7 June 2000.

⁸⁶ The concept of sovereignty is repeated in the judgment of the Federal Constitutional Tribunal as much as 49 times. The FCT judgment is defined as the return of the nation state.

3. The Federal Constitutional Tribunal in its judgment on the Treaty of Lisbon, said that:

- a) it has some objections to the nature of the European Parliament as a representative body raising shortcomings in the definition of equality;
- b) any decision on the competence of the EU must be approved by the Bundestag;
- c) **it has the power to audit the EU secondary legislation** on the basis of the criterion of compliance by the EU system with the so-called essence of the principles adopted in the German Basic Law. It should also be noted that the FCT suggested to the German legislature development of a special judicial-constitutional control procedures in this area;
- d) it has the authority to verify whether secondary legislation satisfies the principle of subsidiarity and the principle of delegated powers;
- e) it reiterates the view expressed in an earlier case-law concerning the suspension of control of secondary legislation based on the criterion of the protection of fundamental rights until the catalogue of these rights is guaranteed by the EU legislator. The Federal Court has emphasized that this is not a waiver, but only a temporary exemption from such control;
- f) is independent of the CJEU and has jurisdiction to review any violations.

3. The Italian Republic

a) General remarks

1. The role of a guardian and defender of the Constitution in the Republic of Italy has been entrusted to the Constitutional Court of the Italian Republic (*Corte Costituzionale della Repubblica Italiana*, hereinafter the CC)⁸⁷. The Court is composed of fifteen judges appointed in one-third by the President of the Republic, in one-third by the Parliament in joint session, and in one-third by higher general and administrative courts⁸⁸.

⁸⁷In accordance with Article 134 of the Italian Constitution of 22 December 1947, the Constitutional Court decides:

- a) in matters relating to the constitutionality of laws and acts with the power of laws of the state and regions;
- b) in the event of conflicts of jurisdiction between the authorities of the state, between the state and the regions, and between regions;
- c) in case of action brought against the President of the Republic on the basis of the provisions of the Constitution.

If the Constitutional Court finds non-compliance of statutory norm with the constitution, or of the act with the force of law, the norm shall be repealed with effect from the day following the delivery of the judgment. Judgment of the Court is published and communicated to the Houses of Parliament and to regional councils concerned, so that, if they deem it necessary, they take the appropriate measures set out in the Constitution.

⁸⁸ Article 135 of the Constitution of the Italian Republic.

2. The line of case-law of the Constitutional Court of the Italian Republic concerning the relationship of EU law and national law was subject to evolution⁸⁹. Initially, the Court challenged the principle of supremacy of EC law (now EU law) over Italian law. Ultimately, however, it recognized the precedence of EU law under certain conditions. In the Italian doctrine, jurisprudence of the Italian Constitutional Court is divided into three stages⁹⁰:

- a) first stage - in years 1964–1973;
- b) second stage - in years 1973–1984;
- c) third stage - after 1984.

3. **The first stage** of the judicial activities of the Constitutional Court of the Italian Republic was characterized by a clear rejection of the principle of primacy of the EU law over the Italian legal system. A manifestation of this approach was the fact that the Court held that it had jurisdiction to check the conformity of derivative legislation with the Constitution. As in the case of the German Federal Constitutional Tribunal also Italian Constitutional Court does not have explicitly defined normative basis for the control of secondary legislation. Italy has transferred part of its sovereignty on the basis of Article 11 of the Constitution. The interpretation of this provision (rather free) was the basis for the adoption of the thesis about the possibility of controlling the secondary legislation by the Italian Constitutional Court⁹¹. **In the second stage** of its judicial activity (*Frontini v. Ministero delle Finanze*⁹²) the Constitutional Court of the Italian Republic stated that it is possible to adopt the principle of primacy of EU law, provided, however, that priority is ensured in the framework of the constitutional principles of the Italian Republic. At the same time, the Constitutional Court acknowledged it has the cognition to repeal national laws adopted later than the Community law (now EU law)⁹³. **In the third stage** the Italian Constitutional Court recognized the principle of primacy of the Community law (now EU law) over national law. It should be noted, however, that such recognition was conditional.

⁸⁹ J. Wawrzyniak, *Opinia w sprawie kognicji Sądu Konstytucyjnego Republiki Włoskiej w zakresie prawa wtórnego UE*, Zeszyty Prawnicze Biura Analiz Sejmowych Kancelarii Sejmu, Year VIII 2(30) 2011, pp. 20-25.

⁹⁰ *Ibid.*, p. 21.

⁹¹ In accordance with Article 11 of the Constitution of the Italian Republic:

a) first, Italy rejects war as an instrument of aggression against the freedom of other peoples and as a means of settling international disputes;

b) second, Italy agrees on equal terms with other countries to limit the sovereignty necessary to ensure peace and justice among Nations;

c) third, Italy support international organizations with such goals in mind.

⁹² Judgment of the Constitutional Court of the Italian Republic in case 183/1973 *Frontini v. Ministero delle Finanze*.

⁹³ J. Wawrzyniak, *op. cit.*, p. 22. Report, *Orzeczenia Narodowych Trybunałów Konstytucyjnych (Niemcy, Włochy, Francja i Hiszpania) w sprawie zgodności prawa wspólnotowego z konstytucjami państw członkowskich*, Parlamentarne Procedury Legislacyjne, pp. 14-15.

b) *Flaminio Costa v. ENEL*

1. The Constitutional Court of the Italian Republic stated in *Costa v. ENEL*⁹⁴ that EU law and national law are systems with an equal (the same) force. The adoption of this assumption allowed the Court to conclude that an international agreement and the Act that implements such an agreement into national law are acts of equal status. In such case, the contradictions between the law and the agreement are settled using the rule of *lex posterior derogat legi priori*. This means that the act adopted later derogates the act adopted earlier – the law adopted later repeals the earlier law.

2. In the opinion of the Italian Constitutional Court, reliance on the principle of *lex posterior derogat legi priori* when considering the conflict between the standards of the EU law and subsequently issued rules of national law excludes the need to resolve the conflict by the CJ in preliminary rulings. Moreover, the Court held that the consent regarding the transfer of supreme power, and thus a limitation of sovereignty, to the EU is not absolute. The possibility to adopt an act revoking a limitation of sovereignty remains within the competence of Member States.

3. Considering the case of *Costa v. ENEL*, the Court of Justice has come to entirely different conclusions than the Italian Constitutional Court, pointing out the flaws in the reasoning of its decision. The Court of Justice found that the Treaty has a status different from that of traditional international agreements. It was a basis for creating an autonomous legal system which is also part of the legal systems of the Member States. By limiting their sovereign rights, the States simultaneously made themselves bound by the EU standards. According to the CJ, application of the principle of *lex posterior derogat legi priori* is not permissible in the case of a conflict of EU law standards with national laws adopted later because of the need to ensure the effectiveness of EU law. The Court has also taken a polemic with a thesis of the Italian Constitutional Court regarding the possibility of unilateral revoking of the limitation of sovereignty under the act issued *ex post*. The Court of Justice held that the Member States have agreed in the EEC Treaty to definitely limit their sovereign rights and therefore the action described above is unacceptable⁹⁵.

⁹⁴ Judgment of the Constitutional Court of the Italian Republic in case 14/1964 *Costa v. ENEL*. Italian attorney, Flaminio Costa, claimed there is a conflicts between Italian law provisions allowing the nationalization (it was to create a state-owned company, which took over the functions of generation and distribution of electricity) with the legal system of the Community (now EU law), which includes a ban on state monopolies.

⁹⁵ B. Banaszkiwicz, P. Bogdanowicz, *Relacje między prawem konstytucyjnym a prawem wspólnotowym w orzecznictwie sądów konstytucyjnych państw UE*, Office of the Constitutional Tribunal, Department of Jurisprudence and Studies, Warsaw 2006, pp. 111–113.

c) The San Michele case

1. In its judgment on *San Michele*⁹⁶, the Constitutional Court softened somewhat its view on the relationship between EU law and national law as outlined in the judgment in *Costa v. ENEL*, stating that the responsibility of the EU Member States is to ensure the effectiveness of the EU law standards in the national legal order. However, in the opinion of the Court, this obligation did not include the treatment of the law as part of the internal system.

2. In the ruling on *San Michele*, the Constitutional Court also ruled on the evaluation of legal acts of the institutions. In its opinion, the suspension of such act cannot belong to the competence of bodies operating in the internal structure of a Member State. However, it is permissible to check whether an act can be (should be) considered in the internal legal order. If an act of EU law protects the rights of individuals at levels consistent with standards designated by the provisions of the Constitution of the Italian Republic (or more generally the Italian legal system), the exclusive judicial competence in this area belongs to the CJ, not to the national courts. This view was a sign of change in the judicature of the Italian court in the direction of excluding the possibility of national control of EU secondary legislation.

c) The Granital case

1. The judgment of the Court of Justice in *Granital v. Amministrazione delle Finanze dello Stato*⁹⁷ was of fundamental importance for standardizing the case-law of the Constitutional Court of the Italian Republic. There should be noted a significant change in the approach of the Court to the principle of the primacy of EU law and its normative and practical implications in legal transactions⁹⁸. Italian Constitutional Court stated that the EU and domestic legal orders are autonomous and independent legal systems, which coexist with each other in accordance with the agreed division of tasks. It also referred to the pro-European interpretation of national law as an instrument to achieve consistency (compatibility) of national law standards with the EU acts.

2. Italian Constitutional Court recognized and acknowledged the supremacy of the EU legal system over the legal system of the Italian Republic. However, the concept that assumes the primacy of EU law provisions was not based on the recognition of unconditional and absolute primacy. Indeed, the Constitutional Court formulated some reservations, which, if applied, allowed for adoption of supremacy of the (then) Community law. These barriers were interpreted under Article 11 of the

⁹⁶ Judgment of the Constitutional Court of the Italian Republic of 27 December 1965, 98/1965 *San Michele*.

⁹⁷ Judgment of the Constitutional Court of the Italian Republic in case 170/1984 *Granital*.

⁹⁸ J. Wawrzyniak, *op. cit.*, p. 23.

Italian Constitution, and their basis was the sovereignty of the Italian Republic. They included the principles of constitutional order and the inalienable human rights. In this light, it would not be allowed to accept such regulations, which by their very nature would undermine the republican and democratic constitution and the fundamental rights of people. This means that EU law (then Community law) should provide at least the same level of protection of those rights as guaranteed by the Italian Basic Law. The court noted, however, that EU law *does not repeal incompatible national acts, but only prevents their use in a particular case. Such acts are not invalid and are used to the extent not covered by the objective and temporal binding force of Community rules*⁹⁹.

d) The Cover case

1. The Italian Constitutional Court decision on the *Cover* case¹⁰⁰ is also worth noting. The Court considered the relationship between submitting a question referred for a preliminary ruling to the CJ, and submitting a legal question for the CC with respect to the same provision. It is therefore an issue of bipolar doubt of the court that applies it. On the one hand, uncertainty concerns the EU legal system, on the other hand, the compliance with the Italian Constitution.

2. According to the CC, on the time of submitting the question to the CJ, the state of the so-called Community preliminary rulings arises (currently one should use the term EU preliminary rulings). This means that the question of law addressed to the CC is unacceptable for obvious reasons due to the lack of relevance for the proceedings pending before the national court. The Constitutional Court thus granted priority to the evaluation adopted by the CJ, by formulating a kind of rule of conflict in this area.

3. Poland

a) General remarks

1. Judicial control of compliance of normative acts with the Constitution is exercised by the Polish Constitutional Tribunal (CT)¹⁰¹. The Tribunal is an independent constitutional body and with the State Court and courts of justice it exercises judicial power in the Republic of Poland¹⁰². The Constitutional Tribunal investigates the com-

⁹⁹ B. Banaszkiwicz, P. Bogdanowicz, *op. cit.* p.117.

¹⁰⁰ Decision 249/2001 of the Constitutional Court of the Italian Republic on *Cover*.

¹⁰¹ The first Act on the Constitutional Tribunal, by virtue of which it has been constituted in the Polish law, was passed on 29 April 1985. Currently, the Act of 1 August 1997 on the Constitutional Tribunal (Dz. U. of 1997, No. 102, item 643, as amended) is in force.

¹⁰² See Article 10 of the Polish Constitution of 2 April 1997 (Dz. U. of 1997, No. 78, item 483, as amended).

patibility of legal norms of lower-order with legal norms of higher order (headed by the Constitution of the Republic of Poland). Its decisions are universally binding and final¹⁰³.

2. The Constitution states that the Republic of Poland may in some cases, on the basis of an international agreement, delegate to an international organization or international institution the competence of state authorities. However, the law approving the ratification of such international agreement must be adopted by the Sejm by a majority of two thirds of votes in the presence of at least half of the statutory number of deputies and by the Senate by a majority of two thirds of votes in the presence of at least half of the statutory number of senators. Consent to ratification of such an agreement can also be passed in a national referendum. Resolution on the procedure for giving consent to ratification is adopted by the Sejm by absolute majority of votes in the presence of at least half of the statutory number of deputies.

3. The Polish Constitutional Tribunal grants itself the cognition to control compliance of the following with the Constitution of the Republic of Poland:

- a) primary EU legislation, as expressed in judgments on the Accession Treaty K 18/04 and the Treaty of Lisbon K 32/09,
- b) secondary legislation, dealt with (directly) in the judgment of 45/09 and indirectly, in the order U 6/08¹⁰⁵ and the judgment on the European Arrest Warrant, P 1/05 (ENA)¹⁰⁶.

¹⁰³ See Article 190 of the Constitution. The Tribunal consists of 15 judges, elected individually by the Sejm for nine-year terms from among people with an outstanding knowledge of law. Re-election to the composition of the Tribunal is not permitted. President and Vice President of the Tribunal are appointed by the President of the Republic from among candidates proposed by the General Assembly of the Judges of the Constitutional Tribunal. The judges of the Constitutional Tribunal in the exercise of their office are independent and subject only to the Constitution. The Polish Constitutional Tribunal has jurisdiction to hear cases (based on Article 188 and Article 189 of the Basic Law):

- a) on the conformity of international acts and agreements with the Constitution,
- b) on the conformity of acts with ratified international agreements whose ratification required prior consent expressed by the act;
- c) on conformity of legal provisions issued by central State authorities, ratified by international agreements and acts, with the Constitution;
- d) on conformity with the Constitution of the purposes or activities of political parties,
- e) of constitutional complaint,
- f) of jurisdictional disputes between the central constitutional bodies of the state.

¹⁰⁴ See Article 90 of the Constitution.

¹⁰⁵ See the Tribunal decision of 17 December 2009, U 6/08. The Tribunal stated that in light of the Polish Constitution, there is no possibility of making abstract review of the constitutionality of acts of secondary legislation. Cf. Article 188 points 1-3 of the Polish Constitution.

¹⁰⁶ See CT judgment on the European Arrest Warrant of 27 April 2005, P 1/05. Judgment was announced on 4 May 2005 in Dz. U. No. 77, item 680. The Constitutional Tribunal ruled on the unconstitutionality of the provisions of the Code of Criminal Procedure transposed into Polish law for the implementation of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between

It should also be noted that the CT has explicitly postulated to determine separate procedures in the Polish legal order for controlling constitutionality of primary and secondary EU law¹⁰⁷.

b) The case of the Accession Treaty

1. The Polish Constitutional Tribunal in its judgment of 11 May 2005 on the Accession Treaty¹⁰⁸ considered itself to be competent to assess its compliance with the Constitution of the Republic of Poland. In that judgment, the CT considered issues related to the impact of Poland's accession to the EU, both in terms of national legislation, as well as its own cognition to control EU acts. The Tribunal emphasized the supremacy of the Constitution as the supreme source of law in the territory of the Republic of Poland.

2. The CT, referring to the relationship of domestic law and EU law, found that there is a relationship between the principle of supremacy of the Constitution and the sovereignty of the Republic of Poland. Constitutional law is in fact essentially the expression of the *sovereign will of the people* and its provisions cannot lose effect and *cannot be undermined by the very fact of the creation of an irremovable contradiction between certain Community acts and the Constitution*. The supremacy of the Constitution over the EU law is in fact a manifestation of maintaining sovereignty by Poland as a Member State¹⁰⁹. In the opinion of the CT, Poland's accession to the EU did not question the principle of the supremacy of the Constitution, it only changed its perception.

3. According to the CT, even the use of pro-European interpretation cannot lead to *results contrary to the clear wording of the constitutional rules and impossible to agree with the minimum warranty functions carried out by the Constitution*. That is why the limit of the European integration are individual rights and freedoms which in the opinion of the Constitutional Tribunal are *the minimum threshold that cannot be reduced or called into question by the introduction of Community rules* (now the EU). Transfer of authority to an international organization (the EU), based on the provisions of the Constitution¹¹⁰, is neither acceptable nor effective, if this would lead to deprivation of the ability to function as an independent and sovereign state.

Member States 2002/584. The Tribunal also took advantage of the possibility of delaying the binding force of unconstitutional provisions of the Code of Criminal Procedure and made changes to the provisions of the Constitution adapting them to the requirements of EU law in the ENA case.

¹⁰⁷ See CT judgment in case SK 45/09.

¹⁰⁸ See CT judgment in case K 18/04.

¹⁰⁹ K. Wójtowicz, *Suwerenność w procesie integracji europejskiej*, [in:] *Spór o suwerenność*, ed.: W. Wołpiuk, Warsaw 2001, p. 174.

¹¹⁰ See Articles 90 and 91 of the Polish Constitution.

4. The Constitutional Tribunal also held that the introduction of a regulation contrary to the norms of the Polish Constitution to the EU legal order is not an independent basis to challenge the legal force of the constitutional norm. Furthermore, by analyzing the nature of EU law and its relationship with the Polish legal order, the CT stated that EU law is not *the law completely external to the Polish state. It is so because, in the part constituting the treaty law, it is created by the acceptance of treaties concluded by all Member States (including the Republic of Poland). And in the part covering the statutory (derivative) Community law it is created with the participation of representatives of the Governments of the Member States (...) representatives of European citizens (including Polish citizens) - in the European Parliament.*

5. In case of the irreparable conflict between the norms contained in the Constitution of the Republic of Poland and in the EU law, if it would not be possible to use interpretation respecting the relative independence of the two legal systems, the CT firmly excluded the possibility of resolving the conflict by giving priority to the Union regulation. In the opinion of the Tribunal, it is not acceptable to deprive a constitutional norm of legal power, replace it with the standard of EU law, or limit its scope. **In this case, the CT decided that the Polish legislator would be legitimized to take the decision (of an alternative nature):**

- to amend the Constitution,
- to initiate changes in the EU regulations,
- to withdraw from the European Union.

c) The case of the Treaty of Lisbon

1. Polish Constitutional Tribunal declared that the Lisbon Treaty is compatible with the Constitution of the Republic of Poland. Decision in this case gave the CT the opportunity to comment on the relationship between Polish law and EU law¹¹¹. The Constitutional Tribunal considered the arguments presented in support of the judgment in case K 18/4, on the supremacy of the Constitution as an expression of state sovereignty¹¹², to be valid. Sovereignty is in fact an inherent attribute of the state, it is a kind of attribute that allows to distinguish it from other entities of international law. It is not, of course, about absolutizing sovereignty, but about defining some insurmountable limits in the integration process, which is after all the will of the state. According to the CT (as in the case law of the FCT) the limit is the state's identity,

¹¹¹ See the CT judgment of 24 November 2010 on the Treaty of Lisbon, K 32/09. Judgment was announced on 6 December 2010 in Dz. U. No. 229, item 1506. Applicants (groups of deputies) had doubts about the mechanism for the creation of EU law. But above all, doubts concerned the authority under the Treaty to transfer competence, which, in their opinion, interfered with the process of democratic delegation of powers referred to in Article 90 of the Polish Constitution.

¹¹² K. Działocha, comments to Article 8 of the Polish Constitution, [in:] *Konstytucja RP. Komentarz*, ed. L. Garlicki, vol. 5, p. 34, Warsaw 2007.

which is expressed in the norms of the Constitution¹¹³, and it is guaranteed by Article 90 of the Polish Constitution and the conditions defined therein for the transfer of authority.

2. The Constitutional Tribunal stressed that participation in international organizations like the EU, on the one hand limits the sovereignty of the Republic of Poland, and on the other hand increases it, by participation in the EU decision-making processes¹¹⁴. According to the CT, even the principle of conferral, which means relinquishing autonomous action *does not lead to a permanent reduction of the sovereign rights of the states, because the transfer of power is not irreversible*. That is because in the Tribunal's opinion the states remain the subjects of the integration process, retain "the power of competence", and the model of European integration is the form of international organization. The Polish Constitutional Tribunal referred by this to the judgment of the Federal Constitutional Tribunal on the Treaty of Lisbon and its assessment of the processes of European integration. Sharing the view in the doctrine¹¹⁵, the CT also stated that *the competence prohibited to transfer form constitutional identity, and thus reflect the values on which the Constitution is based*. The CT included in this catalogue the supreme rules of the Constitution and the provisions on the rights of individuals that define the identity of the state, and in particular:

- a) the principle of protection of human dignity and constitutional rights,
- b) the principle of statehood,
- c) the principle of democracy,
- d) the rule of law,
- e) the principle of social justice,
- f) the principle of subsidiarity,
- g) the requirement to ensure better implementation of constitutional values,
- h) the prohibition of transfer of organic power and competence to create competencies.

3. By analyzing the relationship between the Polish legal system and the EU law, the Constitutional Tribunal stated that the EU legal order is a multi-component system from the point of view of the Member States. It covers primary legislation, secondary legislation, as well as the internal law of the country concerned. Article 9 of the Constitution assumes that Poland complies with international law binding upon it. This allows for regulations in the Polish territory from outside the domestic legal order. The Court also emphasized the dynamic nature of the system of EU law, namely the continuous evolution of the relationship between EU law and domestic

¹¹³ *The sovereignty of the Republic of Poland is expressed in the non-transferable powers of state authorities, which constitute the constitutional identity of the state.*

¹¹⁴ L. Garlicki, *Polskie prawo konstytucyjne*, Warsaw 2009, p. 57.

¹¹⁵ Cf. K. Wojtyczek, *Przekazywanie kompetencji państwa organizacji międzynarodowym*, Kraków 2007, p. 284 and subsequent.

orders. As stated by the CT, *any change in the EU mechanism requires (...) checking the correlated system of mechanisms and safeguards in national law. The control of constitutionality provides such verification, which is confirmed by the practice of European constitutional courts.*

4. The Constitutional Tribunal confirmed its previous case-law line (case K 18/04) and found that Article 91(2) of the Constitution which assumes primacy of agreements on the transfer of powers “in some cases” – before the provisions of the laws *does not lead to the recognition of the same precedence of these agreements over the provisions of the Constitution. The Constitution therefore remains - by virtue of its special power - Polish supreme law for all binding international agreements of the Republic of Poland. This also applies to ratified international agreements on the transfer of powers “in some cases”. Because of the superior legal force resulting from Article 8(1) of the Constitution, the Basic Law enjoys the priority of application in the territory of the Republic of Poland.*

5. In addition to the Constitutional Tribunal of the Republic of Poland, the issue of compliance with the provisions of the Basic Law with the Lisbon Treaty was subject to consideration of the constitutional courts of Germany, Hungary, the Czech Republic and Austria, and the French Constitutional Council¹¹⁶. Their rulings included:

- a) emphasizing the openness of the constitutional systems to European integration;
- b) highlighting the "constitutional and political identity" and their reference to the principle/issue of sovereignty;
- c) highlighting the nature of the EU as an international organization, not a federal state;
- d) emphasizing the importance of the principle of conferral of powers, the principle of subsidiarity and the principle of sovereignty;
- e) reference to the decisive voice of national parliaments (the power to cancel EU action in the absence thereof);
- f) dependence of the effectiveness of EU Member States' on constitutional procedures.

d) Case SK 45/09

1. The complaint addressed to the Constitutional Tribunal challenged the compliance of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters with the Polish Constitution. This gave the Polish Tribunal the possibility to take a position in the debate

¹¹⁶ For more see K. Zaradkiewicz (ed.), *Relacje między prawem konstytucyjnym a prawem wspólnotowym w orzecznictwie sądów konstytucyjnych państw Unii Europejskiej*, Warsaw 2010.

about the legitimacy of the constitutional courts of the Member States to examine the constitutionality of laws issued by the EU institutions. It should be noted that the judgment of the Constitutional Tribunal on *SK 45/09* was a precedent because the Tribunal has never ruled directly on the conformity of derivative legislation with the Constitution of the Republic of Poland¹¹⁷. The Tribunal accepted the possibility of such verification only under the constitutional complaint, rejecting the possibility of assessing the constitutionality of derivative legislation under abstract control¹¹⁸.

2. It was crucial to answer the question **whether secondary legislation may be subject to control under the constitutional complaint**. For this purpose, the CT considered the scope of its judicial powers by analyzing the catalogue of legal acts under its jurisdiction. As interpreted by the Tribunal, the action under the constitutional complaint can be brought against **the laws and other normative acts by which a court or public authority has made a final judgment of the freedoms, rights and responsibilities under the Constitution**¹¹⁹. The Constitutional Tribunal must therefore determine whether EU regulations can be categorized as normative acts and whether they are acts by which a court or public authority has made a final judgment on constitutional freedoms, rights and responsibilities¹²⁰. Both of these questions were answered in the affirmative by the CT, which confirmed its competence to carry out the substantive control of the compatibility of EU secondary legislation

¹¹⁷ See the CT judgment of 16 November 2011 on case K 45/09. The Judgment was announced on 25 December 2011 in Dz. U. No. 254, item 1530.

In its analysis the CT often referred to proposals made on the occasion of ruling on the constitutionality of the Treaty of Accession (K 18/04) and the Treaty of Lisbon (K 32/09).

¹¹⁸ More about the conformity with the Constitution of EU secondary legislation, see *Dopuszczalność kontroli zgodności aktów pochodnego prawa UE z Konstytucją RP. W przeddzień rozstrzygnięcia Trybunału Konstytucyjnego*, Studia Prawnicze KUL, No. 2 (46) 2011, pp. 59-85.

¹¹⁹ The scope of the rules to be challenged in a constitutional action is determined in an independent and comprehensive manner in Article 79(1) of the Polish Constitution. This catalogue is autonomous in relation to the acts subject to abstract control set out in Article 188(1-3) of the Constitution, under which the Tribunal's jurisdiction includes ruling on the compatibility: of international acts and agreements with the Constitution; acts with ratified international agreements whose ratification required prior consent granted by the act; provisions of law issued by the central state authorities, ratified by international agreements and acts, with the Constitution. CT may therefore allow considering the merits of the acts outside the designated list of Article 188 of the Constitution, under the constitutional complaint, if it decides that they belong to the category of normative acts on the basis of which it is possible to make final decision on the rights, freedoms and constitutional obligations of individuals.

¹²⁰ In the judgment of 7 June 1989, ref. No. U 15/88, the Constitutional Tribunal found that *the normative act is the act of establishing a legal standard of general nature (and thus directed to a class of recipients singled out because of some of their common feature) and abstract nature (i.e. establishing certain patterns of behaviour)*. The Constitutional Tribunal allowed considering of the constitutional complaint, which challenged provisions of local law, but the case was not completed in a judgment, see decision of 6 October 2004, ref. No. SK 42/02, OTK ZU No. 9/A/2004 item 97). Similarly, in the decision of 6 February 2001, ref. No. CJ 139/00, OTK ZU No. 2/2001, item 40), in which the Tribunal recognized a constitutional complaint against acts of local law, provided that they are normative.

with the Polish constitution. As a normative act, a regulation is directly applicable in the legal systems of EU Member States¹²¹, and judicial and administrative decisions are based on its provisions. It also provides the basis for the rights and obligations of individuals¹²².

3. The CT also devoted a substantial part of its analysis to the relationship between the Constitution of the Republic of Poland and the EU regulations and the legal effect of the two acts. The Tribunal again emphasized that the principle of primacy of EU law does not include the provisions of the Constitution, which is the supreme law of the Republic of Poland¹²³. The Constitution has the status of an act superior to other sources of law in the territory of the Republic of Poland, and its provisions use the primacy of the application also with regard to the EU law. This superiority was another argument in the opinion of the CT in favour of admissibility of the control of constitutionality of EU regulations.

4. Referring to the assessment procedures for conformity of secondary legislation with the Polish Constitution, the Tribunal relied on the principle of prudence and judicial restraint. The course of such verification and the individual steps should therefore be related, in the opinion of the Tribunal, to these principles. This is particularly important because of the dual nature of this control. On the one hand, because it is an autonomous control, and on the other hand, because it is only subsidiary to the CT jurisprudence and cognition¹²⁴.

5. It should be noted that the CT decided that the contested provision of Regulation No 44/2001 complies with the provisions of the Constitution. However, the considerations made in the course of resolving the complaint allowed it to determine what would be the effects of a judgment in which the Tribunal considered an act of secondary legislation to be contrary to the constitution. In the light of the interpretation adopted by the Tribunal, such judgment would disable the use of standards deemed unconstitutional by the public authorities in Poland. This would conflict with the principle of sincere cooperation, which in turn would expose Poland to be accountable to the CJ as a result of breach of treaty obligations¹²⁵. The Constitutional Tribunal stated emphatically that the decision on non-compliance of secondary legislation with the Constitution should be a *ultima ratio* and should be allowed only in the total absence of the possibility of eliminating the contradiction between the

¹²¹ The CJ judgment in 34/73 *Variola*.

¹²² The CJ judgment in C-253/00 *Muñoz*.

¹²³ Article 91(3) in connection with Article 8 of the Polish Constitution.

¹²⁴ Poland, by joining the EU, gave it some of their sovereignty and jurisdiction.

¹²⁵ Article 4(3) TEU in connection with Articles 258-260 TFEU.

Polish and the EU legal order. Referring to its decision on the Treaty of Accession, the CT pointed out that in this situation there are three alternatives:

- a) amendment of the constitution,
- b) taking action to amend EU law,
- c) withdrawal from the EU (as a last resort).

However, the principle should be to take all necessary measures to eliminate the conflict. It would be an acceptable procedure for the CT to defer the loss of binding force of an unconstitutional act of secondary legislation¹²⁶.

Study questions

1. Discuss the nature of the EU legal order.
2. Characterize the autonomy of EU law.
3. Point out the principles of EU law and specify their source.
4. What is the principle of primacy of EU law?
5. Discuss the concept of direct application of EU law.
6. Characterize the principle of direct effect of EU law.
7. What is the principle of direct application of EU law?
8. What are direct vertical effect and direct horizontal effect?
9. What is the principle of indirect effect of EU law?
10. Discuss the views of the Federal Constitutional Tribunal on the relationship of German law and EU law.
11. Characterize the case-law of the Constitutional Court of the Italian Republic in terms of EU law.
12. Discuss the views of the Polish Constitutional Tribunal on the relationship of EU law and the Polish Constitution expressed in its judgment on the Accession Treaty.
13. Define the relationship of Polish and EU law in the opinion of the Constitutional Tribunal contained in the judgment on the Treaty of Lisbon.
14. Characterize the basic assumptions of decisions issued as the result of the control of conformity of the Lisbon Treaty with the constitutions of the Member States.
15. Discuss the views of the Polish Constitutional Tribunal on compliance of EU secondary legislation with the Constitution of the Republic of Poland.

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33. Judgment SK 45/09 of the CT of 16 November 2011

CHAPTER VII

THE SYSTEM OF LEGAL PROTECTION IN THE EUROPEAN UNION

§1 INTRODUCTION

1. The Court of Justice of the European Union has unequivocally assumed that the European Union constitutes an autonomous, independent legal system that is constructed within the limits of competences granted to it. A distinguishing feature of this system is its scope. It combines the classic subjects of international law: the EU itself and the Member States as well as individual entities: natural persons and legal persons. It governs directly in the national system and possesses priority over the nonconforming national law standards¹.

2. The nature of the Union law is determined by the EU system of legal protection. It is based on **dualist system**: of the Member States and EU. In principle, the treaties normalize only the scope of jurisdiction of CJEU, whereas they do not pertain to the competences of national courts². The jurisdiction has introduced general criteria of **division of competences between the national courts and CJEU**.

¹ For more information on the EU legal system see chapter IV of this textbook.

² The national courts become the EU courts when judging under the EU law. However, for the clarity of reasoning the name of national courts will be preserved in order to emphasise the separateness of systems.

The former possess unlimited competences within the scope of judgments in disputes arising under the EU law. **The national courts are responsible**, first and foremost, for guaranteeing the direct governance of the EU law in the national system, interpretation of the national law compliant with the objectives of the EU law as well as equal protection of rights arising from this legal order.

Whereas CJEU is obliged to provide uniform interpretation and application of law. The treaties provide also for the instrument of strict cooperation of both systems - mutual cooperation which is manifested mainly by the national courts' possibility of posing the prejudicial question to CJEU.

3. Correspondingly to the structure of the legal protection system in EU, this chapter has been divided into two parts. The first part covers issues within the scope of CJEU jurisdiction³. The second part presents the duties of the national courts within the scope of: reference for a preliminary ruling judgments regarding the liability of the Member States for the infringement of the EU law as well as the procedural autonomy principle.

§2 THE ROLE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

1. General notes

1. **The role** of CJEU was set forth in TEU as "to ensure that in the interpretation and application of the treaties the law is observed⁴.

2. CJEU shall have jurisdiction in following disputes:

According to TFEU:

- a) action against Member States for failure to fulfill obligations under the treaties (Article 258, 259, 260),
- b) disputes relating to the application of acts adopted on the basis of the Treaties which create European intellectual property rights - upon their approval by the Member States (Article 262),

³ The CJEU system, its structure and procedural principles have been discussed in chapter III.

⁴ Article 19 of TEU.

- c) action relating to the legality of an EU legal act (Art. 263) as well as inapplicability of an act of general application (Art. 277),
 - d) complaint regarding an EU institution's failure to act (Art. 265),
 - e) reference for a preliminary ruling (Art. 267),
 - f) actions for damages (Art. 268 and 340),
 - g) requests relating to legality of an act adopted by the European Council or Council pertaining to the political responsibility of a member state (Art. 269),
 - h) staff cases (Art. 270),
 - i) disputes concerning: performance of obligations of the Member States arising from the EIB Statute, means adopted by the EIB's Board of Governors, means adopted by the EBI's Board of Directors, performance of the obligations arising from the Treaties as well as ESCB and ECB Statutes by the national central banks (Art. 271),
 - j) actions filed pursuant to the arbitration clause (Art. 272),
 - k) disputes between Member States related to the subject matter of the Treaties submitted under a compromise (Art. 273),
 - l) revision of compatibility of the draft international agreement upon the request of a member state, EP, Council or Commission (Art.218 section 11).
- Secondly, from the **Treaty establishing EAEC**:
- a) dispute regarding the conditions of the non-exclusive licence of the industrial property rights connected with the generation and use of nuclear power (Art. 12),
 - b) appeal from the judgment of the Arbitration Committee regarding granting the non-exclusive licence (Art. 18),
 - c) appeal from the decision of the Commission imposing sanctions for the violation of the safety means regarding the split materials (Art. 83),
 - d) complaint of the Commission regarding an infringement of EAECT other than in Art. 83 of EAECT by a natural person or an enterprise (Art. 145),
 - e) dispute conducted under the arbitration clause arising from an agreement concluded by the EU or on its behalf.

3. One must note the restriction of CJEU's competences regarding two policies. The Common Foreign and Security Policy has been excluded from the CJEU's jurisdiction. The only exception in this discipline is its authorisation to control the observance of Art. 40 TEU as well as to adjudicate regarding the validity of complaints lodged under the conditions specified in Art. 263 paragraph 4 TFEU related to the control of legality of decisions providing for restrictive means against natural and legal persons adopted by the Council within the framework of the Common Foreign and Security Policy⁵.

⁵ Article 275 section 2 TFEU.

4. Similarly, the CJEU's competences have been limited within the scope of the Area of Freedom, Security and Justice. The abolishment of the pillar structure resulted in the introduction of the specified provisions to TFEU with all consequences, i.e. uniform sources of law and competences of the EU institutions⁶. However, taking into account the problems with immediate implementation of such solutions, the 5 years long transition period has been adopted. Thus, CJEU will obtain full competences within the scope of police and court cooperation in criminal cases only upon the lapse of 5 years from the entry into force of TL. Nevertheless, it retained its powers acquired on the basis of the previous legal status within the transition period⁷.

5. Furthermore, CJEU is neither competent within the scope of police and court cooperation in criminal cases to control the validity or proportionality of the actions of police or other law enforcement bodies in the Member States nor to adjudicate in cases regarding Member States' performance of the obligation to maintain public order and protect public safety⁸.

6. The detailed jurisdiction determined in such a manner is performed jointly by CJ, the General Court and specialised courts.

The analysis of the detailed scope of jurisdiction of CJ significantly exceeds the framework of the handbook, thus the deliberations undertaken in this part will be limited to four complaints, the most important ones in the context of review of observance of the EU law.

2. Action against member state for failure to fulfill an obligations under the treaties

a) The notion of state in the European Union law

1. The main concept necessary to explain in the context of the member state's liability for the infringement of the EU law is the notion of "state". The interpretation of this notion constitutes a subject of multiple judgments of CJ as well as rich doctrine discussion. Summarising these deliberations, one must assume that a state, in the meaning of the EU law, includes: **governmental, central, local bodies** as well as... *entities regardless of their legal form which are responsible for rendering public service under the control of the state on the basis of the standards adopted by the state and for this purpose they have been awarded special powers which exceed those arising from the regular prin-*

⁶ For more information on the subject see chapter IV of the handbook.

⁷ Article 10 sections 1 and 2 of protocol no. 36 on the transition provisions,

⁸ Article 276 of TFEU.

*ciples applicable in the relations between private individuals*⁹. Criteria specified in such a manner must be fulfilled collectively in order to deem the activity of the given entity an activity of the state in the subject of its responsibility.

2. The issue of the member state's responsibility for the actions of the national courts raises great controversies. Two situations must be indicated here:

- a) **judgments of the national courts noncompliant with the EU law and**
- b) **national courts refraining from raising the prejudicial questions to CJ.**

There is a view in the doctrine that the state may be held responsible for the actions of courts consisting in ruling in a manner noncompliant with the Union law in the situation when *the court has omitted the Union law or deprived it of its meaning in a considered manner*¹⁰.

In the second case the Commission **possesses a discretionary right to initiate proceedings** against a state whose courts, regardless of the obligation to ask for a preliminary ruling, omit this instrument.¹¹ Such proceedings have not been initiated so far, but the Commission launched a control procedure towards Sweden due to the infrequent use of the institution of preliminary ruling by the courts. Examining the conduct of this state, the Commission concentrated on: the number of preliminary references the Swedish Supreme Court and Supreme Administrative Court submitted to CJ, lack of detailed procedural provisions related to their posing, improper practice of the national courts in the subject of posing of prejudicial questions as well as lack of possibility to invoke in the cassation complaint the charge of improper application or interpretation of the EU law as an independent cassation basis before the Swedish Supreme Court.¹²

b) Forms and subject of infringement of the European Union law by the Member States

1. **The subject of the action is the infringement of: provisions of the establishment treaties, acts issued by the EU institutions, international agreements and other acts of secondary legislation.** Moreover, the member state may bear liability for the infringement of the **general principles of law and structural principles**. It is worth emphasising that while bringing an action to CJ, the Commission most frequently indicates the infringement of the loyalty principle in addition to the detailed subject of infringement in the form of, for instance, failure to implement a directive in the national order.

⁹ C-188/89 *Foster v. British Gas*.

¹⁰ Opinion of the Advocate General Warner in the case 30/77 *R. v. Bouchreau*.

¹¹ Opinion of the Advocate General Warner in the case 9/75 *Meyer-Buckhard v. Commission*.

¹² M. Wąsek-Wiaderek, *Konsekwencje nieuzasadnionego odstąpienia od wystąpienia z pytaniem prejudycjalnym*, [in:] ed. M. Domańska, M. Wąsek-Wiaderek, E. Wojtaszek-Mik, A. Zielony, *Pytanie prejudycjalne do Trybunału Sprawiedliwości Wspólnot Europejskich*, Warsaw 2007, p. 91 – 92.

2. The analysis of the judgments of CJ in the subject of the discussed action indicates various **form of infringement** consisting in:

- a) actions undertaken by the Member States in a manner noncompliant with the EU law (e.g. when the member state has adopted a legal act nonconforming with the EU law or when the practice applied by the administration bodies infringes the Union laws)¹³,
- b) inaction, failure to undertake actions the state is obliged to (e.g. failure to implement a directive to the national order)¹⁴,
- c) and even in the passive stance or acceptance of the infringements of the EU law by individual entities¹⁵.

3. During the proceedings regarding the discussed action, the Member States raise multiple **arguments in order to release themselves from the liability for the infringement of the EU laws**. The Court of Justice evaluates the potential excuse stances for the defective conduct of the state in a restrictive manner. The most common arguments include:

- a) force majeure (occurrence of events beyond the control of the state),
- b) no intention to infringe the EU law (the Member States indicate such reasons for the infringement of the EU law as, for instance in the case of failure to implement the directive, technical or political problems, lengthiness of the decision procedures).
- c) illegality of the measure in the situation when the subject of the infringement was the failure to perform a prohibited measure,
- d) failure to perform the given obligation by other entities: EU institutions or other Member States.

In most cases CJ has assumed a **negative** stance towards the arguments raised by the Member States, usually emphasising that it is obliged to provide objective evaluation of the occurrence of the infringement and not to examine the intention or fault of the state.

¹³ In the case of infringement of obligations by the administrative practice, the European Commission must indicate that it is of permanent and common nature to a certain extent. See e.g. C387/99 *Commission against the Federal Republic of Germany*, C494/01 *Commission against Ireland*, C-441/02 *Commission against the Federal Republic of Germany*.

¹⁴ The problem of failure to implement a directive requires a broader commentary. CJ has emphasized in its judgments that the infringement of the EU law as a result of failure to implement a directive includes various situations: the state has not implement the directive to the national order and the time limit specified in the directive has lapsed, the state has implemented the directive in an improper manner, but it accepts to not exercise the instruments adopted for this purpose.

¹⁵ C-265/95 *Commission against the French Republic*.

c) Proceedings within the scope of action regarding the Member State's failure to perform the treaty obligations

1. The proceedings regarding the discussed complaint covers **two stages**: the preliminary stage conducted by the Commission and the court stage taking place before CJ upon the bringing a case by the Commission.

2. The proceedings are **initiated by the Commission** upon its own initiative or petition of another member state. The basis for the instigation of the proceedings is **the suspicion of the Commission regarding an infringement of the EU law by one of the Member States**. It initiates the proceedings on the basis of its own observations but also on the basis of information obtained from other entities: Member States, EU institutions as well as natural or legal persons. The Commission has prepared an internal system of monitoring and assessment of information provided by the individual entities which relate to the potential infringements. The entity providing the subject information is obliged to disclose their data, however it is possible to reserve that the data cannot be disclosed in the relations with the interested member state. The entity is informed about the decision of the Commission and the progress in the conducted procedure, mainly about the complaint having being lodged to CJ. In principle, the entity turning to the Commission is not obliged to demonstrate that they possess a legal interest, thus *actio popularis* is admissible.

3. **The preliminary stage** has a clarification nature. The Commission collects information regarding the occurrence of the infringement and conducts informal consultations with the member state. Firstly, it turns to the permanent representative of the member state to the European Union to take a stance in the issue in question. Then, the so-called *letter of formal notice* is sent to the Ministry of Foreign Affairs which obliges the Member States to provide answers to the questions regarding the infringement within the time limit specified in the document.

4. The next stage is sending the **reasoned opinion** to the member state. It is a special act in the relations between the Commission and the member state. The reasoned opinion **determines the subject and scale of the infringement as well as contains the time limit** specified by the Commission for the member state for rectification of its conduct. The opinion is of fundamental meaning for the further procedure. It binds the Commission since, filing the complaint with CJ, it is bound by the subject and scale of the infringement specified in the said complaint. This means that bringing a case before CJ, the Commission cannot raise new charges that have not been specified in the opinion¹⁶. In such a situation the Commission must instigate new proceedings. On the other hand, the reasoned opinion binds the member state, as the lapse of the specified time limit authorises the Commission to bring a case before CJ.

¹⁶ C-7/69 *Commission against the Italian Republic*.

5. **The second stage** of the proceedings takes place before CJ. In principle, the treaties and the judgments of CJ do not provide any precise time limit for bringing the case. The Court of Justice has ruled that the case can be brought at any time upon the lapse of the time limit specified in the reasoned opinion. Moreover, it has stated that the Commission possesses the discretionary power within this scope. Thus, it is the only entity which makes the decision regarding the time of bringing the case before the CJ.

A similar stance has been assumed by the European Commission claiming that it possesses the discretionary power within the scope of instigation of proceedings against the failure to perform the treaty obligations as well as regarding the issue of lodging a complaint to CJ.¹⁷ Thus, it is impossible to lodge a complaint against failure to act on the basis that the Commission has not undertaken the said action.

6. During the court proceedings, CJ examines the infringement of the EU law within the period preceding the time limit specified in the reasoned opinion. The performance of the obligation by the member state upon the lapse of this time limit has no influence on the decisions of CJ in the pending proceedings. Nevertheless, any **case can be withdrawn** by the Commission if it deems the specified obligations performed by the member state before the verdict is returned by CJ.

7. Upon the request of the Commission, CJ can apply **interim measures** in the course of the proceedings. It is justified if they prevent the situation when the return of the verdict would be ineffective.

8. **The proceedings are concluded with a return of verdict.** The withdrawal of the complaint by the Commission results in the discontinuation of the proceedings before CJ. The verdict is of **declaratory nature**. The Court of Justice states that the Member State has infringed the EU law, determining which obligation has been infringed and by which conduct of the state. However, the Court of Justice does not determine the manner of discontinuation of the infringements in the verdict and does not specify the time of verdict enforcement.

d) Proceedings within the scope of action regarding the Member States' failure to perform the treaty obligations upon the request of another Member State

1. **The second entity** that can initiate proceedings regarding an infringement of the EU laws by the Member States is **another Member State**¹⁸. This action is used sporadically by the Member States¹⁹.

¹⁷ Commission Communication of 20 March 2002, COM (2002) 141.

¹⁸ Article 259 of TFEU.

¹⁹ Thus far, there have been only three complaints lodged: C-141/78 *French Republic against United Kingdom*, T-338/95 *United Kingdom*, C-145/04 *Kingdom of Spain against United Kingdom*.

2. The Member States cannot bring the case before the CJ without fulfilling additional conditions. They are obliged to **previously inform the Commission** which, having received the notification, hears both States and makes the attempt to resolve the dispute in an amicable manner. In the situation where the agreement cannot be reached, it conducts the proceedings described above. However, if the Commission does not undertake the actions within the time limit of **3 months** upon the delivery of this information by the Member State, it can bring an action to CJ itself.

e) Control of judgment execution

1. A returned verdict stating the infringement of the treaty obligations means that the given state must undertake actions necessary to execute it. The Court of Justice has emphasised that the actions aiming at the execution of the judgment must be undertaken *immediately and concluded as soon as possible*²⁰. The entity monitoring the execution of the verdict is the Commission²¹. In this case it is not obligatory to conduct the proceedings as it is in the case of the obligation infringement. Moreover, the content of the decisions itself does not oblige the Commission to issue a reasoned opinion. However, it is essential that the State interested must have time to assume a stance²². The Commission can send a petition to CJ the obligatory element of which is a proposed pecuniary penalty or amount of the lump-sum²³.

2. If CJ has stated that the Member State had not observed the previously returned verdict, it may impose a periodical pecuniary penalty or a lump sum which, however, cannot exceed the amount specified by the Commission. The obligation comes into force within the time limit specified in the verdict of CJ.

f) Proceedings regarding the infringement of the treaty obligations of the Member States in the event of failure to provide information on the measures undertaken for the purpose of transposition of the directive to the national order

1. Each Member State, according to the loyalty principle, is obliged to implement the directives within the specified time limit as well as to send the information note regarding the measures undertaken for the purpose of its transposition to the national order. Thus, the full implementation contains a material aspect in the form of particular actions of the state as well as a procedural aspect connected with the in-

²⁰ C-387/97 *Commission against Greece*.

²¹ Article 260 section 1 and 2 of TFEU.

²² Opinion of the Advocate General Kokott in the case C-526/08 *Commission against Luxembourg*.

²³ The principles of determination of the pecuniary penalties were standardised in the Commission Communication of 9.12.2005. The calculation of the pecuniary penalty is 600 euro daily. The daily amount is multiplied by the infringement severity coefficient (1 - 20) and its duration (1 - 3) as well as payment capabilities of the state.

formation on the manner of transposition of the directive to the national order²⁴. The described procedure introduced by CJ refers solely to the procedural aspect.

2. It allows direct imposition of the pecuniary penalty on the State already in the first proceedings regarding the infringement of the treaty obligations²⁵. The main difference is the indication of the pecuniary penalty or determination of the lump sum value already at the stage of the reasoned opinion addressed to the Member State and, further on, its confirmation in the complaint lodged to CJ.

3. The Court of Justice, accepting the arguments of the Commission, imposes a pecuniary penalty or the amount of the lump sum according to the principles described above. In principle, it is not bound by the proposal of the Commission, however it cannot impose a penalty higher than the one proposed by the Commission.

3. Review of legality of a legislative act of the European Union

a) Entities entitled to bring an action

1. The treaties specify the entities entitled to initiate review of legality of a legislative act of the European Union by the CJEU in a precise manner. There are three types of entities differentiated: privileged, partially privileged and unprivileged.

2. **The privileged entities** include: Member States and EU institutions (Council, Commission, EP). They can challenge any EU legislative act subject to the control of CJEU under Art. 263 of TFEU without the necessity of indication of the legal interest. These entities bring actions before the CJ.

3. **The partially privileged entities** include: Court of Auditors, ECB and Committee of the Regions. They are entitled to challenge the same acts as the privileged entities, but solely for the purpose of protection of their own prerogatives. These entities also bring actions before the CJ.

4. **Unprivileged entities** include natural and legal persons. The Court of Justice has expanded the catalogue of these entities with: commercial law companies, associations and even units of the local self-government. In this case, the subject of the

²⁴ C-551/08 *Commission against Poland*.

²⁵ Article 260 section 3 Of TFEU.

action can be the EU legislative acts addressed directly to the person requesting review of which is of direct and individual concern to the person, and against a regulatory act which is of direct concern to the person and does not entail implementing measures. These entities can challenge the legislative and non-legislative decisions addressed to them as well as those addressed to third parties or legislative and non-legislative regulations in the form of decisions²⁶ under the condition that they pertain to them in a direct and individual manner. The Court of Justice has conducted the interpretation of both notions stating that **the act is of direct and individual concern** only when *the given decision affects their legal position due to the certain features characteristic for them or due to the circumstances differing them from other persons and, thus, distinguishing them individually as in the case of the decision addressee*²⁷, whereas it pertains **in a direct manner** solely in the event when *the decision affects them due to the certain features characteristic for them or due to the circumstances differing them from other persons, distinguishing them individually as if they were the addressees of the decision*²⁸. The actions from the unprivileged entities are examined by the Court.

5. The actions brought by the specified categories of entities are lodged **against the acts of the Council and EP, Council, Commission, ECB, EP and European Council as well as acts of the EU bodies and organisational units** and even **the Court of Justice and the Court**, but only against those which are issued within the scope of judgment competency²⁹.

b) Subject of the review

1. The legality control covers:

- a) **legislative acts,**
- b) **acts of the Council, Commission, ECB, other than recommendations and opinions,**
- c) **acts of EP and European Council the aim of which are legal effects on third entities,**
- d) **acts of the EU bodies or organisational units the aim of which are legal effects on third parties.**

Undoubtedly, the regulations, directives and legislative decisions, non-legislative acts, i.e. delegated and executive acts of the EU, are subject to the control of legality. The subject of the discussed complaint is the entire content of the legal act. However, CJ has accepted the possibility of challenging only the **justification** under the stipu-

²⁶ These are acts which must be issued in the form of a regulation, but with rights and duties specified by name. C-305/86 and C-160/87 *Neotype Technashexport*.

²⁷ C-25/62 *Plaumann*.

²⁸ C-106 and 107/63 *Alfred Toepfer and Getreide-import Gesellschaft*.

²⁹ R. Ostrihansky, op. cit., p. 350.

lation that the statements included in it result in incorrect interpretation of the content of the act³⁰.

The subject of the review can also be **international agreements**, however this excludes appendices to the treaty of accession³¹.

2. The decisive criteria of admissibility of control of an act are the **content and results** it may have. In principle, CJEU reviews the legality of acts which **produce legal effects, affect the legal position of the given entity**. It is not important who has issued such an act. The Court of Justice of the European Union does not follow the name of the act, publication in the Official Journal of the European Union either. It must be emphasised that the **effects must be final**, thus the preliminary acts as well as those having legal effects outside the area of the EU internal administration are excluded³².

The Court of Justice has stated that **the ordering and accounting acts as well as acts with a nature of invitation for negotiations or attempt of amicable resolution of the case** are not subject to proceedings³³.

c) Grounds of invalidity

1. The provisions of the treaty indicate **four alternative grounds of invalidity of an EU law act: lack of competences infringement of an essential procedural requirements, infringement of the treaties or any rule of law relating to their application as well as misuse of power**.

2. The first ground specified in the treaty is the **lack of competence**. This regards the situation where an EU institution exceeds its powers and rules within competence of another institution. Similarly, when the institution exceeds the competence of the European Union while issuing a legislative act. The ground of lack of competence is also met in the situation where an act is issued without the appropriate legal basis.

3. **The infringement of the essential procedural requirement** can pertain to the infringement of a decision procedure (e.g. omission of the Conciliation Committee in the course of a regular legislative procedure) or the mere form of the act (e.g. lack of justification of the legislative act or lack of sufficient justification of compliance with the principle of subsidiarity). It must be emphasised that the occurrence of the dis-

³⁰ T-50/00 *Dalmine SpA against Commission*.

³¹ C-31/86 i 35/86 *Levantina Agrícola Industrial SA (LAISA) and CPC España SA*

³² J.D. Mouton, *System ochrony prawnej*, [in:] ed. R. Skubisz, E. Skrzydło-Tefelska, *Prawo europejskie, zarys wykładu*, Lublin 2003, p. 174.

³³ M. Kaszubski, *Kontrola legalności aktów instytucji, organów i jednostek organizacyjnych Unii Europejskiej*, [in:] ed. A. Wyrozumska, *System ochrony prawnej w Unii Europejskiej*, vol. V, Warsaw 2010, p. 158.

cussed ground requires the infringement to result in the limitation of rights of third parties, addressee of the act or to have influence on its content.

4. The third ground is the **infringement of the treaties or rules relating to their application**. The grounds for the statement of invalidity of an EU law act will be the infringement of:

- a) a primary law,
- b) a secondary law. The Treaty of Lisbon expanded the catalogue with a source of the secondary law, establishing the hierarchy of the particular categories. In consequence, it is necessary to verify the compliance of the given secondary law act with a higher act.
- c) an international agreement binding in the EU,
- d) rules of law with particular consideration of the principle of proportionality,
- e) fundamental rights of an individual.

5. The last ground of invalidity of an EU law act is **misuse of power**. It occurs sporadically as the ground for the statement of invalidity of an EU law act. It is fulfilled in the situation when the institutions operate within the scope of their competence, according to the procedures specified in the treaties, but the objective of their operation is different than the one for which they were entrusted with competence (e.g. when the act was issued in order to secure the interests of a privileged group of entities).

d) Time limit for bringing an action for review

The treaty specifies the time limit to challenge an EU law act. The treaty provides for **2 months from the publishing of the act in the Official Journal of the European Union**. If the act has not been published, the time limit runs from the **day of notification or at the time the entity acquires knowledge of the said act**. According to the provisions of the regulations, the time limit runs from the **14th day from the publication**. All time limits are subject to prolongation by 10 days in connection with the remoteness of the place of residence or seat of the claimant³⁴.

e) Effect of the judgment

1. The Court of Justice of the European Union can decide about admissibility of the action. Then it issues a verdict stating the invalidity of the entire or of the part of the EU legislative act. It may also dismiss the action, stating that the grounds of invalidity have not been met. The verdict results in invalidity after the verdict becomes final.

³⁴ Article 81 section 1 of the CJEU's Regulations.

2. The CJEU judgment is of **constructive nature**. This means that the lack of verdict would make deeming the given act invalid impossible. Thus, the state cannot release itself from the liability for its failure to execute this act within the period preceding the judgement.

3. In principle, the invalidity of an EU act has an *ex tunc and erga omnes* effect. The legislative act is deemed null and void. Whereas the institution that has issued the given act is obliged to revoke all acts issued on the basis of the said act.

4. The Court of Justice of the European Union can also, in relation to regulations and other acts of general nature, **preserve the force of certain effects of the invalid act**.³⁵ As an example from the rule, it is also possible to limit the *erga omnes* effect of the verdict to the parties to the proceedings.³⁶

4. Plea for declaration of inapplicability

1. The plea for declaration of inapplicability remains in direct relation to the review of the legality of an EU legislative act. It is of **accessory nature** and it cannot constitute an individual subject of proceedings before CJEU. The plea may be raised solely in the event when:

- a) the challenged act is of general nature,
- b) there is a direct connection between the general act and the act being the subject of the main dispute.

2. **The subject of the plea** is constituted by **the acts of general scope (legislative and non-legislative regulations as well as decisions of general nature - legislative and non-legislative)**³⁷, however CJEU has expanded the range of acts which can occur in this case stating that the scope of application of Art. 277 of CJEU covers *...acts of institutions which, although not issued in the form of a regulation, cause similar effects and can be challenged under Art. 173 on this basis by the natural and legal persons other than community institutions*³⁸. Thus, it is possible to expand the subject matter scope of the plea with **the acts of secondary law causing results similar to the general regulations and decisions**. Whereas the plea of inapplicability cannot be raised by entities that have obtained the capacity to challenge an act on the basis of Art. 263.

³⁵ Article 264 of TFEU.

³⁶ C-163/94 and T 165/94 *NTN Corporation and Koyo Seiko Co. Ltd.*

³⁷ Article 277 of TFEU.

³⁸ C-92/78 *Simmmenthal*.

3. **The grounds for the statement of inapplicability the same as these** are specified in Art. 263 of TFEU: **lack of competence, infringement of an essential procedural requirements, infringement of the treaties or any rule of law relating to their application, or misuse of power.**

4. The statement of inapplicability of a legal act differs from the result of a judgment in the case of statement of invalidity. It results solely in the **lack of legal effects of the inapplicable act for the purpose of the main dispute.** The statement of inapplicability of an act does not mean that it ceases to be in force in the system of actual ineffectiveness. Each act issued on its basis will be deemed null and void by the EU law, but it causes its CJEU on the basis of lack of legal basis. Moreover, the institution that has issued such an act is obliged to its immediate revoking.

One must also consider the relation of the non-legislative act and the legislative act. In case the European Parliament and Council, in the course of a regular legislative procedure, adopt a legislative regulation with occurrence of one of the invalidity premises and the time limit for its challenging has lapsed the delegated or executive act can be challenged under Art. 277 of TFEU, thus resulting in the legislative act not being applied.

5. Action against the European Union institution for a failure to act

The objective of the action is to counteract the inactivity of institutions, bodies and organisational units of the European Union. One must note that it is directly connected with the previously discussed action which is directed at the removal of an illegal act of law from the legal order of the Union. Together, they constitute an instrument for control of functioning of the European Union. This relation should be emphasised. The action against the institution's failure to act motivates the institutions, bodies and organisational units of the European Union to undertake actions they are obliged to (it cannot be used if the given action is only a privilege). Therefore, the subject of the action is the failure to act. Whereas the effect of these actions is subject to control in terms of their legality.

a) Subject matter scope of the action

1. The provisions of Art. 265 of TFEU specify the **entities entitled to bring this action** in a precise manner. There are two types of entities that have a title to do it: privileged and unprivileged.

2. **The privileged entities** include: Member States and all EU institutions, obviously except for the institution the action is related to. These entities can bring an action against any institution or body and organisational unit in default.

3. **The unprivileged entities:** natural persons and legal persons can bring an complaints regarding the failure to act of institutions or bodies and organisational units if they have not issued the act that was to be addressed to them in a direct manner, other than recommendations and opinions. In the case of the discussed complaint, it is impossible to expand the subject matter scope with other acts, even if they pertain to the entity in a direct and individual manner.

b) Conditions of bringing an action.

1. The discussed action can be through against one of the institutions of the European Union: **Council, European Council, Commission, EP and ECB**. The entitlement to the complaint occurs when the institution **has not issued the act causing effects towards the third parties**. In its judgments, the Court of Justice of the European Union equates the subject matter scope of the action against invalidity of an act of the EU law and the action against the institution's failure to act³⁹.

2. Bringing an action against the institution is directly conditional on the premise that **it is obliged to undertake the given action**. The institution cannot be sued if the given action is solely its right.

3. **Bringing an action against inactivity of an institution is contingent on its prior request to undertake actions**. The treaties specify the forms in which the entity must address the institution, however it is assumed that the form must be **precise and unambiguous**, allowing to recognise the subject action. The Court of Justice has emphasised that the request addressed to an institution must be clear⁴⁰. The entity interested must specify the action they expect from the institution in an express manner. The content of the request must specify the potential scope of the future dispute.

4. The institution is entitled to **2 months** to undertake the appropriate actions. The lapse of this time limit authorises the entity to bring the action before CJEU within **the next 2 months**. The institution can issue the decision of refusal which will preclude the lodging of the complaint against institution's inactivity by the entity. However, the entity can also challenge the said decision under Art. 263 of TFEU.

³⁹ C-15/70 *Amadeo Chevalley*.

⁴⁰ C-84/82 *Germany against Commission*.

c) Effect of the judgment on the European Union institution's omission

The Court of Justice of the European Union can **dismiss** or **accept the action**. If CJ decides that the institution has infringed the EU law by way of omission, the latter will be obliged to undertake actions. Thus, the institution must issue a legal act. Nevertheless, it must be emphasised that the content of this act does not have to meet the expectations of the party. The judgment of CJEU does not refer to the content of the said act, but to the action of the institution consisting in the issue of the given act.

6. Action for damages

The action for damages is governed by the provisions of Art. 268 of TFEU and 340 of TFEU. This instrument has been implemented in order to strengthen the position of the private entities in the system of control of execution of the EU law. The discussed action covers both **contractual liability as well as tort liability of the European Union**.

a) Entitled entities

The action for damages is an instrument used mainly by the **private entities**. However, there is no EU Law Provision excluding the **Member States'** right to bring an action for damages.

b) Grounds of liability

1. Under Art. 340 of TFEU, the EU contractual liability is governed by the appropriate provisions of the national law or international law when looking for EU's liability for the breach of an international agreement. The EU law does not provide for any norms of the material civil law which would regulate the issues not governed by the agreement itself. Thus, **in such situations the applicable right will be the right of the state being the party to the agreement or provisions of the agreement binding the European Union**.

2. The treaties provide other provisions regarding the **tort liability**. It is regulated according to the general principles common for all Member States. However, CJEU has clarified the **grounds on which the EU tort liability is conditional** in its judgments:

- a) illegal conduct of the EU institution,
- b) actual damage,

- c) Causal link between the damage and the illegal conduct of the EU institution⁴¹.

3. The notion of the “**damage**” covers both the **actually incurred loss as well as the lost profits**. CJEU has also granted compensation for **future damage** in certain situations.

c) Illegal conduct of institution

1. **Illegal conduct of institution** must be understood as the conduct of the institution itself and the officers of EU. In the latter case, the European Union bears liability if the damage occurred in connection with the actions of an officer undertaken for the purpose of performance of a function (e.g. failure to execute orders, acting in bad faith).

2. **The conduct of the institution may consist in action or omission**. In the latter case, CJEU has emphasised that the institution must be obliged to act (e.g.: failure to issue a legal act addressed to an entity which results in the entity’s damage). Whereas in the event of action it must be illegal or conducted in an unlawful manner (e.g. improper administration).

d) Legislative illegality

1. The European Union can also bear liability for damages in connection with its legislative activity. The Court of Justice of the European Union has indicated that the EU’s liability for damages pertaining to general acts is contingent on the fulfilment of additional premises. According to the so-called *Schöppenstedt’s formula*, *the EU’s liability for damages occurs in the event of sufficiently obvious violation of a supreme legal standard regarding protection of an individual*.⁴² Then, CJEU has stated that *in the disciplines where the Community benefits from great liberty of action, e.g. agricultural policy, liability applies solely in the case when the institutions have exceeded the limits of exercising of their powers in an obvious and serious manner*⁴³. It emphasises in the *Factortame* judgment that **the EU’s liability arising from the legislative illegality is based on the same premises as the liability of a state for the infringement of the Union law by the legislature**. It enumerated three **conditions** which must be met collectively:

- a) the EU law awards rights to an individual,
- b) the violation of law is sufficiently serious,

⁴¹ C-4/69 *Alfons Lütticke GmbH*.

⁴² C-5/71 *Aktien-Zuckerfabrik Schöppenstedt*.

⁴³ A. Wyrozumska, *System ochrony prawnej*, [in:] ed. J.Barcz, *Prawo Unii Europejskiej, zagadnienia systemowe*, Warsaw 2003, p. 283.

c) direct causal link between the infringement and the resulting damage.

§3. POSITION OF THE NATIONAL COURTS

1. General notes

1. The courts with unlimited competence for the resolution of disputes arising in connection with the application of the EU law are the national courts referred to as “**courts of first contact**”. As it has been indicated above, the EU law constitutes an autonomous, independent legal order directly applicable in the EU area in addition to the internal law of the Member States. This means that the EU citizens are the subjects of this law and they seek their rights before the national courts on its basis. Each disputable issue based on the EU law is resolved by the national courts, appropriate due to their competence, which are obliged to uniform and effective application of the EU law, observance of principles of primacy and direct effect as well as interpretation of the national law in the context of the EU law.⁴⁴

2. In consequence, considering the position of the national courts in the process of application of the EU law, it must be emphasised that they are **obliged to consult CJEU** within the scope of the EU law interpretation. In every situation when the national court resolves a problem within the scope of the EU law, it must/may turn to CJEU to conduct the interpretation of the given legal provision of the European Union or to examine the compliance of the provisions of the secondary law with the primary law. This institution is specified by the treaties as the **reference for a preliminary ruling**.

3. Taking into account the nature of the EU law, one must note that it creates the rights and duties for the entities, including the individual entities, however it does not establish the procedural principles or sanctions arising from the application of laws. The trial aspect of application of the EU law: determination of the national court’s competence and the procedural principles are standardized with the national law. This constitutes the so-called **principle of procedural autonomy of the EU law**. However, in the context of trial the courts are limited with the principles of **equivalence and effectiveness**.

⁴⁴ See chapter VI for more information regarding the nature of the EU law, principle of direct governing of the law as well as pro-Union interpretation.

4. The nature of the EU law, as it has already been stressed, means that it is directly applicable in the national law system. Thus, the individual can seek the rights awarded to them by the Union law in an effective manner. In addition, emphasising the need of complete guarantee of the rights to the individual as well as providing the effectiveness of the EU law, CJEU has developed **the doctrine of state liability for the damage incurred by the individual in connection with the infringement of the EU law by the state.**

2. Cooperation of the national courts and the Court of Justice of the European Union - preliminary ruling

a) Obligation to submit a question to the Court of Justice of the European Union

1. Under Art. 267 of TFEU, the court bodies of the Member States can/must submit to the Court of Justice a question regarding the “interpretation of Treaties, validity and interpretation of acts adopted by institutions, bodies or organisational units of the Union” under the condition that they constitute the basis for the judgment in the case pending before it.

2. The first contentious notion requiring clarification is the “**national court**”. According to the judgments of CJEU and the Information Note, it is interpreted as an **autonomous notion of the EU law**⁴⁵. However, there is no uniform definition and CJEU makes an individual decision in each case if the entity submitting a reference for preliminary ruling is a “national court” as per the community law. The analysis of the judgments of the Court of Justice of the European Union indicates the catalogue of premises to be fulfilled by the institution that will be deemed a national court in the EU law:

- a) it possesses permanent nature and operates on the basis of provisions of the law,
- b) compulsoriness of jurisdiction,
- c) it resolves disputes between the parties (*inter partes*),
- d) it applies the law,
- e) it issues decisions in an independent and impartial manner⁴⁶.

⁴⁵ The Information Note regarding the submitting of petitions for the return of judgments in the prejudicial mode.

⁴⁶ See e.g.: C-96/04 *Standesamt Stadt Niell*, C-54/96 *Dorsch Consult Ingenieurgesellschaft mbH*, C-393/92 *Municipality of Almelo and others*, C-178/99 *Doris Salzmann*.

CJEU has also **granted** the entitlement to submit a reference for preliminary ruling to the bodies that will perform other functions than those of the court (they conduct commercial arbitration⁴⁷, resolve disputes within the scope of professional organisations⁴⁸). However, CJEU has **refused** to grant the status of a national court to the contractual arbitration to which the parties did not have to turn for the resolution of the dispute.⁴⁹ It took a similar stance towards the head of the tax office, emphasising that the court must act as a third party entity to the dispute⁵⁰. Furthermore, according to CJEU the public ministry is also not a court as per the EU law since it does not resolve disputes in an independent manner⁵¹.

As it has been stressed above, the only entity entitled to turn to CJEU with a reference is a national court⁵². It is its discretionary power and none of the parties can oblige the court to conduct such an action⁵³. Only a national judge can request for a preliminary ruling. In consequence, no international court can meet this requirement. The only exception is the Court of the Benelux Economic Union⁵⁴. CJ has taken a similar stance regarding the issue of admissibility of references submitted by the courts in the area of oversea territories of the Member States. Although not all provisions of the Union law are applicable there, their competence has been accepted⁵⁵.

3. The provisions of Art. 267 of TFEU indicate two types of requests **obligatory and optional**. The first type - **obligatory**, concerns questions raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law. This court is obliged to submit a question to CJEU. The other type - **optional**, is a right of any other court to request for a ruling on a questions of interpretation or validity of EU law. In this case the institution of the preliminary judgment is a right, a privilege of the national court that can use the assistance of CJEU in the issue of proper interpretation of the EU law. Whereas in the first situation, it is an obligation of the national court, connected with consequences for the given Member State in the event of its failure to perform the said obligation.

⁴⁷ C-61/65 *G. Vaassen-Göbbels*, C-109/88 *Handels- og Kontorfunktionærernes Forbund I Danmark*.

⁴⁸ C-246/80 *C. Broekmeulen*.

⁴⁹ C-102/81 *Nordsee*.

⁵⁰ C-24/92 *Corbiau*.

⁵¹ C-74 and 129/95 *X*

⁵² The Polish courts and court bodies entitled to address CJEU with prejudicial questions include: common courts and the Supreme Court (except for the cases when they act as registration courts), the Supreme Administrative Court, the Voivodship Administrative Court, the State Tribunal (if it returns a verdict on the basis of the EU law), the Constitutional Tribunal, the Patent Office, maritime chambers, medical courts, disciplinary courts for attorneys and legal counsels.

⁵³ In the context of the national court's entitlement to raise a prejudicial question it must be emphasised that the lack of application of this entitlement by the national courts may constitute the grounds to lodge a complaint to CJ under Article 258 of TFEU - regarding the member states' failure to perform the treaty obligations.

⁵⁴ C-337/95 *Parfums Christian Dior SA*.

⁵⁵ C-100, 101/89 *P. Kaefer, A. Procacci*.

4. An important issue is to determine the court that is obliged to submit the request to CJEU. The literature indicates two theories: **abstractive**, awarding such a position to the highest courts of the member state and **precise**, according to which it is every court from the judgments of which there is no remedy. The CJEU judgments as well as *ratio legis* of Art. 267 TFEU make the foundations of the precise theory more convincing⁵⁶.

5. The obligation to submit a request for a preliminary ruling is not of absolute nature. The court may discharge itself from this obligation invoking two doctrines: ***acte éclairé*** and ***acte clair***.

6. According to the CJEU judgments, **the *acte éclairé* doctrine** means that the court obliged to submit a question can discharge itself from this obligation if the obligation (...) *can be pointless due to the effect of interpretation conducted by the court under Art. 177 of TEC in the cases where the posed question is, in principle, identical to the issue that has already been a subject of the preliminary judgment in a similar case*⁵⁷. The doctrine formulated in such a manner indicates two essential conditions to be met. The first one - **identical legal issue**, the other - **similar factual circumstances of the case**. The Court of Justice of the European Union does not conduct the interpretation irrespective of the factual circumstances of the case, as the interpretation of the legal issue is set in the given circumstances. Thus, the national court can release itself from the obligation to submit a question on the basis of the ***acte éclairé*** theory if these two conditions are fulfilled simultaneously.

7. CJEU has clarified the ***acte clair* doctrine** in the CLIFIT judgment (...) *presentation of the case of preliminary judgment to the Court of Justice is not necessary if application of the community law is so obvious that there are no doubts arising; such a situation is evaluated according to the properties of the community law, particular interpretation difficulties as well as the risk of discrepancies among the court judgments within the Community*⁵⁸. This interpretation indicates **two essential conditions** authorising the national court to discharge itself from the obligation to submit a preliminary reference: **the provision of the EU law is obvious and it raises no interpretation doubts, the assessment of the provision is compliant with its properties**. The national court is capable to conduct the interpretation of the provision in each of the official EU languages, taking into account the different legal terms and the entire legal achievements of the Union.

⁵⁷ C-28 – 30/62 *Da Costa*.

⁵⁸ C-283/81 *CILFIT*.

⁵⁶ More in: e.g. *Prawo instytucjonalne Unii Europejskiej*, (ed.) M. M. Kenig-Witkowska, Warsaw 2007, p 396, J. Skrzydło, *Sędzia polski wobec perspektywy członkostwa Polski w Unii Europejskiej*, PIP 1996, booklet 11, p. 42.

b) Subject matter scope of the preliminary ruling

1. Within the scope of interpretation, **the subject of the preliminary judgment** are mainly the **Founding Treaties or Amending Treaties, conventions and additional protocols which constitute an integral part of the Treaties**. The subject of the preliminary judgment can be also unwritten sources of law, i.e. general principles as well as legal loopholes specified in the petition⁵⁹.

2. In case of a secondary law, CJ holds the power of interpretation and issuing judgments regarding the validity of the **acts of the institutions of the EU as well as bodies and organisational units of the Union**. The national court **cannot decide on the invalidity of an EU law act, but it may dismiss the charges of invalidity of such an act**. Moreover, the national court **cannot suspend the application of the EU law provision**. Nevertheless, if the national court has significant doubts regarding the validity of an EU law act, **it may exceptionally and temporarily suspend the application of the act of the national law issued on the basis of such an act or apply other interim measures**, concurrently it can submit a petition for the issue of a preliminary judgment to CJEU⁶⁰.

3. The subject of the preliminary judgment can also be the **association agreements**. In the *Haegeman* judgment, CJEU adjudicated that they are to be understood as the *acts of one of the community bodies as per Art. 177 TEC (234 TEC)*⁶¹. In such a situation, the preliminary judgment is binding for the EU, but not for a country that is not a member state.

4. The subject matter of the preliminary rulings was expanded under the Treaty of Amsterdam. The Member States could submit a declaration authorising CJEU to accept the prejudicial questions posed by the courts (the states decide independently which courts can pose a prejudicial question) in the matters within the scope of **police and court cooperation in criminal cases**. The preliminary judgment in this case pertains to the **interpretation of the conventions adopted within the scope of the former third pillar as well as interpretation and validity of the framework decisions, decisions and executive means related to the conventions**. Upon the reform introduced by CJ, this condition was preserved within the 5-years-long transition period, unless the instruments adopted in the previously governing form

⁵⁹ K. Wójtowicz, *Orzeczenie wstępne Trybunału Wspólnot Europejskich*, Acta Universitatis Wratislaviensis-Przegląd Prawa i Administracji", vol. 34, Wrocław 1996, p. 132.

⁶⁰ Note point 15 - 17.

⁶¹ C-181/73 *Haegeman*.

would be adopted again in compliance with the new rules. In such a situation, CJEU acquires its competences automatically.

5. There has also been a principle formed in the CJEU judgments stating that a national court may request for **preliminary ruling again in the same case**. In such a situation one of the following conditions must occur:

- a) the judge has difficulties with understanding or application of the judgment,
- b) new issues are raised or
- c) new elements of the assessment are indicated that may result in a different answer provided by CJEU⁶².

6. **The preliminary judgments of CJEU may constitute the subject of the question themselves.** The national court may submit a petition to explain the sense of the previously issued judgment to CJEU⁶³.

7. **The Tribunals' competence does not include the interpretation of the supplementary sources of the EU law** to be understood as the agreements concluded solely by the Member States. Obviously, under the condition that they do not include any special clause that would award such a competence to CJEU. Similarly, the subject of the preliminary judgment cannot be acts adopted by the representatives of the Member States to the Council or by the national law.

c) Legal validity of the preliminary ruling

1. The national court requesting for a preliminary ruling is **bound by the CJEU interpretation**. The verdict becomes final upon public announcement. It is **final and unchallengeable**. Formally, the preliminary ruling was binding **only to the court that requested for its issue - *inter partes* effect, and regarding only the given dispute**. It also binds **the courts examining both the ordinary as well as the extraordinary means of challenging**. However, one must note that the preliminary judgments constitute a commonly recognized source determining the form and content of the law of the European Union⁶⁴.

2. In principle, the preliminary ruling bind with the *ex tunc* effect, i.e. from the time of coming into force of the provision that is the subject of the judgment.

⁶² E. Wojtaszek-Mik, *Charakter i skutki orzeczenia prejudycjalnego*, [in:] *Pytanie prejudycjalne do Trybunału Sprawiedliwości Wspólnot Europejskich*, ed. M. Domańska, M. Wąsek-Wiaderek, E. Wojtaszek-Mik, Warsaw 2007, p. 80.

⁶³ C-28/67 *Molkrei Centrale*.

⁶⁴ One must notice the influence of the CJ judgments on the formation of the system of human rights protection in the European Union.

If the request for a preliminary ruling concerns an act of secondary law, the interpretation becomes binding **from the entry into force of the given act**. The effect is, in principle, similar to the action under Art 263 of TFEU regarding the statement of invalidity of an EU law act. However, in the case of the preliminary judgment the effect is limited - *inter partes*. Moreover, the national court **cannot suspend the effectiveness of the EU law act. It may only cause its inapplicability** (similarly as in the case of the complaint under Art. 277 of TFEU). The national court can also **suspend the application of the national law act issued under an invalid EU law act**. The entities authorised to act are institutions that issued the invalid legal act. They must immediately revoke the governance of such an act.

3. **The effect is also *ex tunc* and *inter partes*** in relation to the preliminary judgments regarding **interpretation of the EU law**. The judgment in this case is of declaratory nature. The interpretation of the given law is binding **from the entry into force of its provisions**.

4. There is also a possibility to **limit the temporary effect of the preliminary judgments** in both cases: judgments on the invalidity of the EU secondary law act and in the event of interpretation of this law.

5. The Court of Justice of the European Union can reserve the *ex nunc* effect of the interpretation or validity of the given EU law act in the same judgment. In such a situation, the interpretation of the EU law act being the subject of the preliminary judgment **is binding from the time of issue of the preliminary judgment**. Similarly, when CJEU issues the judgment on the invalidity of the Union law, it may reserve the *ex nunc* effect.

6. There have been **three premises determining the conditions for the suspension of the temporary effect of the preliminary judgment** formed within the past judgments:

- a) certainty of economic circulation,
- b) good faith,
- c) risk of significant difficulties⁶⁵.

The Court of Justice of the European Union can suspend the temporary effect of the preliminary judgment only in the event when the interpretation of the given EU law is conducted for the first time⁶⁶. Moreover, CJEU has emphasised that the suspension of the temporary effect of the interpretation of the provision does not bind the entities initiating the court proceedings prior to the answer to the preliminary references⁶⁷.

⁶⁵ E.g.: C-43/75 *Defrenne*, C-24/86 *Vincent Blaizot*, C-262/88 *Douglas Harvey Barber*.

⁶⁶ C-24/86 *Denkavit*.

⁶⁷ E.g. C - 437/97 *Krankenhausverein*.

d) Procedure within the scope of preliminary rulings

1. The preliminary ruling procedure is not an appeals procedure. It is a specific type of assistance provided by CJEU for the benefit of the national courts. As it has been indicated above, the only entity entitled to request for a ruling is a national court. It makes the decision based on necessity of the **interpretation or a judgment regarding the validity of the given provision of EU law**. It is difficult to clearly determine at what stage of the proceedings the national court should turn to CJEU. According to the Note, the question must be addressed to CJEU upon the hearing of the parties which will allow the national court to specify the legal and actual framework of the problem.

2. The decision of the national court to turn to CJEU with a preliminary reference is connected with the decision to **suspend the main proceedings** until the answer to the question is obtained. This decision is **subject to challenge** according to the procedural provisions of the given state. In this context, one must consider the moment of posing the question to the Court. There are **two parallel solutions** in the Member States. The question is posed to CJEU **upon the lapse of the time limit for challenging of the court's decision**. The another, **immediate submitting of the question to CJEU**. In such a situation, the annulment of the decision of the national court is connected with the **withdrawal of the question**.

3. The reference must be prepared in the form provided for by the national law for the incidental issues. The petition must be **drawn up in a simple, clear, precise manner and contain the necessary data**⁶⁸. The content of the reference cannot exceed 10 pages. The national court can also present its stance in the given matter.

4. The preliminary reference must be presented **in the context of the given factual circumstances**. The Court of Justice of the European Union does not issue *in abstracto* judgments. The national court can also request for the examination of the compliance of the national law with the EU law in its question. In principle, CJEU is entitled to **reject a preliminary reference** if it is formulated in an incorrect or inexact

⁶⁸ The petition must include: brief presentation of the subject of the dispute as well as findings regarding the factual circumstances or at least explain the factual assumption on which the prejudicial questions is based; invoke the content of the applicable provisions as well as indicate, if needed, the national judgments significant for the case, in each event specifying exact references (e.g. page of the given official journal or collection of judgments; potential references to Internet resources); indicate the EU laws significant for the case as accurately as possible; specify the reasons for which the national court raises the question regarding interpretation or validity of certain EU laws as well as the connection between the said provisions and the national legislation applicable to the dispute before a national court; contain, if needed, a summary of the main arguments of the parties to the proceedings before a national court.

form, if there is no relation between the subject of the question and the subject of the dispute, if the standards of the EU law are not applicable, or if it is of hypothetical nature.

If the preliminary references is **not precise or if it is formulated in an incorrect form**, CJEU may provide answer only to a part of the question or issues it has the competence for⁶⁹.

5. The request for a preliminary ruling, as emphasised above, is a right of the national court. In consequence, CJEU deems the question raised by the national court binding to the time of its withdrawal by the court interested. In this context, CJEU does not analyse the validity of the posed question, but the decision of the national court⁷⁰.

6. The Regulations of CJEU provide for **three modes of proceedings** in the subject of preliminary references: **regular, summary or urgent**⁷¹.

The regular mode of the preliminary reference is applied in the event the national court turns to CJ in cases not covered by the other two modes. This procedure is of basic nature. It commences upon the delivery of questions to the secretariat of CJ. Then, the secretary sends the information to the parties of the proceedings, to the Member States, Commission as well as the organisational unit of the Union which has adopted the disputable act.

The summary mode is applied upon the request of the national court. The decision in this matter is made by the President of the Court of Justice having heard the Advocate General in the situation when the posed question is a particularly urgent matter⁷².

Whereas the **urgent mode** is applied in the cases in which the subject of the question refers to issues within the scope of police and court cooperation in criminal cases as well as in the event of issues regarding visas, asylum, immigration and other policies connected with the free flow of persons, including the court cooperation in civil cases⁷³. The decision is made by the President of the Court of Justice ex officio or upon the request of the national court⁷⁴. The grounds for the application of the urgent

⁶⁹ C-6/64 *Costa against ENEL*.

⁷⁰ C- 65/81 *Francesco Reina*.

⁷¹ The amendments to the Regulations of the Court of Justice, the Information Note regarding submitting by the national courts of the petitions for the issue of judgments in the prejudicial mode, Supplementation issued in connection with the entry into force of the urgent prejudicial mode applicable to the references regarding the Area of Freedom, Security and Justice

⁷² Article 104 a of the Regulations of proceedings before the Court of Justice.

⁷³ Point 3 of the Supplementation to the Information Note.

⁷⁴ Article 104 b of the Regulations of proceedings before the Court of Justice.

mode are constituted by the need to conduct interpretation in the subject of reference in the shortest possible period of time⁷⁵.

7. The proceedings before CJ in the subject of the preliminary ruling are of **non-adversarial nature**. It is concluded with the return of a judgment binding for the national court. Having received the judgment, the national court **resumes the suspended proceedings** and issues the verdict in the given case. In principle, the judgment of CJEU binds not only the court raising the question but also the court which will hear an appeal in this case.

It must be emphasised that the CJEU interpretation is treated as an **authentic source forming the content of the EU law**. Invoking the *acte éclairé* theory, the Court of Justice of the European Union itself refers the national courts to the past judgments, releasing them from the obligation to submit the reference. Thus, it must be assumed that the preliminary judgments issued by CJEU constitute **a source of law**, in the EU.

3. The principle of procedural autonomy

a) General remarks

1. The legal system of the European Union contains, first and foremost, material standards, whereas the procedural provisions belong to the competences of the Member States. In the process of formation of the EU law, it was assumed that the Member States are entitled, in principle, to the freedom of selection of the court procedure, mode of the proceedings or determination of the sanction for the given infringement. Firstly, almost an unlimited freedom was assumed which, however, underwent significant limitation and restriction along with the development of the EU legal system.

2. The literature emphasises that the discussed principle was derived by CJ from the **loyalty principle** (Art. 4 of TEU)⁷⁶. According to the content of the said principle, the Member States are obliged to undertake all necessary actions to perform

⁷⁵ The Supplementation to the Information Note does not indicate any closed catalogue of situations where the application of the urgent mode is possible, but only the exemplary situations: e.g. in case of a person arrested or deprived of liberty if the answer to the question is crucial for the assessment of the situation of the said person (point 7).

⁷⁶ M. Domańska, *Zasada autonomii proceduralnej członkowskich i jej ograniczenia wynikające z zasady efektywności*, [in:] *Stosowanie prawa Unii Europejskiej przez sądy*, vol. III, *Zasady – Orzecznictwo -Piśmiennictwo*, ed. A. M. Szwarc-Kuczer, K. Kowalik-Bańczyk, Warsaw 2007, p. 327.

the obligations arising from the establishing treaties or from the actions of the EU institutions. In the negative aspect, the states refrain from actions that could threaten the implementation of the objectives of the treaties. According to this principle, the Member States are obliged to apply the EU law in their territory, but also to provide effective protection of the rights of the individuals awarded with this law. Thus, the EU law creates the rights and duties of the individual entities, whereas the Member States are obliged to create mechanisms guaranteeing the effectiveness of these rights and protection against any potential infringements.

The above deliberations indicate that the **material law is derived from the EU law, whereas the procedures are standardised by the Member States in an individual manner.**

b) Definition of the principle of procedural autonomy

1. The discussed principle, as indicated by its name, regards the procedural aspect of execution of the EU law by the Member States. Thus, it must be assumed that it means the **overall base conditions, i.e. all issues regarding the overall collection of methods of seeking and enforcement of law provided for by the national law, (...) and in an even broader aspect - as the overall collection of the national regulations regarding the competence of the court to adjudicate in the given case**⁷⁷. Thus, the competences of the Member States include the determination of: **the competence of the national courts to adjudicate in a case within the scope of the EU law, determination of conditions and procedural measures referring to the proceedings before the courts** (trial dates, conditions of complaint admissibility, evidence principles).

2. The doctrine of the EU law distinguishes **two aspects of autonomy of the Member States: institutional and procedural.**

The former means the right of the state to determine the body competent to apply the law. In this case the Member States possess full autonomy.

The latter refers to procedural issues. In this case one must notice that in the specified circumstances the interference of the EU law is possible. The need to guarantee the effectiveness and uniformity of application of the EU law justifies the obligation of adjusting the existing procedural principles to the requirements of the EU law at each stage of the proceedings: at the initial stage of the proceedings - invoking the provisions of the EU law before the court and access to the justice system; in the course of proceedings before the court - e.g. right to apply the EU law ex officio, or at the final stage of the proceedings - court's decision regarding the measures applied in the given case⁷⁸.

⁷⁷ D. Kornobis-Romanowska, *Sąd krajowy w prawie wspólnotowym*, Warsaw 2000, p. 64.

⁷⁸ *Ibidem*, p. 68.

3. The trial autonomy of the Member States has been justified by the judgments of the Court of Justice⁷⁹, where it means the **freedom of the Member States to select the measures which are to ensure proper application of the EU law**. The Court of Justice has indicated the **features** of this structure, determining the **objective and manner of its implementation**. The **objective** is the guarantee of the direct effect of the EU law by the national courts and administrative bodies of the Member States. Whereas **the manner of its implementation** is the possibility of seeking the rights arising from the EU law before the national courts under the same conditions regarding the admissibility and mode of proceedings that would be applied in case of actions instituted under the national law⁸⁰. It has emphasised that **it is applicable solely in the situation when the EU law does not provide for any trial standards**⁸¹.

4. Concurrently, taking into consideration the obligations specified in the loyalty principle, the Court of Justice has emphasised that the national courts must adjust the national measures to the requirements of the Union law and conduct appropriate changes in order to guarantee the uniformity and effectiveness of the said law. For this purpose, the restrictions of the principle of procedural autonomy have been introduced by means of formulation of the following principles: **equivalence and effectiveness**⁸².

c) Restrictions of the principle of procedural autonomy of the Member States

1. **The principle of equivalence** is also referred to as the **principle of compliance, compatibility of equal procedural treatment of the claims based on the EU law in the situation when the Union trial rules have not been adopted**. This principle corresponds to the prohibition of discrimination in every situation being in relation with the EU law. Similarly, this principle is applicable in proceedings before the national court. They are obliged to guarantee **equal procedural treatment of the EU law**. This means **the prohibition to differentiate the complaints lodged on the basis of the EU and national law** as well as **the obligation to provide equal conditions for compa-**

⁷⁹ However, one must note that the stance of the Court of Justice was not uniform. The analysis of the past judgments indicates three manners of understanding of this principle by CJ. The first one - granting almost full freedom to the Member States in the context of application of the procedural principles in the disputes arising from the EU law. The second one - positive harmonization of the procedural provisions on the EU level. Imposing on the Member States the obligation to ensure an appropriate level of protection of the rights of the individuals arising from the EU law by means of appropriate trial measures, even if they are not provided for in the national system. The third one - contemporary - "negative approximation" of the level of legal protection in the member states. More in: M. Domańska, quoted work, p. 329.

⁸⁰ C- 158/80 *Rewe-Handelsgesellschaft*.

⁸¹ C-33/76 *Rewe-Zentralfinanz Eg and Rewe-ZentralAG (Rewe I)*, C- 45/76 *Comet BV*, C- 94/71 *Schlüter &Maack*.

⁸² C-33/76 *Rewe-Zentralfinanz Eg and Rewe-ZentralAG (Rewe I)*, C- 45/76 *Comet BV*, C- 94/71 *Schlüter &Maack*.

able complaints. Thus, the procedural principles and sanctions applied in case of complaint based on the EU law cannot be less advantageous than those for the complaints based on the national law. The Court of Justice has also formulated the **premises** for examination of observance of the principle of equivalence by the national courts. They require the analysis of the **similarity of claims and examine if the applied principles are more advantageous than those applied in the complaint arising from the EU law**⁸³.

Summarising, it must be assumed that the **principle of equivalence means that the legal measures available for the purpose of ensuring the observance of the national law must be available under the same conditions for the purpose of ensuring the observance of the EU law.**

2. The principle of effectiveness of the material and formal conditions of seeking claims based on the EU law is also known as the **principle of practical possibility.** The Court of Justice has formulated this principle referring to the **principle of loyalty**, in the context of the duties of the state/national courts, **priority and effectiveness** of the EU law in the context of relations between the national law and EU law. In its further judgments, the Court of Justice invokes mainly the principle of effective court protection. CJ has emphasised that according to the principle of effectiveness, **the procedural provisions of the Member States should not make seeking of claims based on the EU law feasible or excessively hindered.** The national judge is obliged to examine the legitimacy of application of the trial rules if they do not provide sufficient protection of the individual's rights. **The trial regulations which hinder, in a direct or indirect manner, actually or potentially, the effectiveness of the EU law must be deemed as noncompliant with the EU law.** In consequence, in the event of such a situation, the national court is entitled to refuse to apply the provisions infringing the principle of effectiveness⁸⁴. The observance of the discussed principle is connected with the **examination by the national court of the compliance of the given legal standard with the EU law**⁸⁵.

4. Member States' liability for damages

a) General remarks

The treaties standardize the liability of the state for the failure to perform the treaty obligations according to the procedure provided for in the provisions of Arti-

⁸³ C-326/96 *Levez*.

⁸⁴ C-106/77 *Simmenthal*.

⁸⁵ For detailed situations regarding the implementation of the principle of effectiveness see: C 208/90 *Emmott v. Minister for Social Welfare* – the problem of trial dates, C-312/93 *Peterbroeck* – obligation of the national court to examine the role of the national provision infringing the EU law in the entire procedure.

cles 258, 259 and 260 of TFEU. However, they do not resolve the problem of liability of the state arising from the damage caused by the infringement of the EU law. This problem was the subject of the judgment of CJEU which referred to the issues of liability for damages for the first time in the precedence cases of *Francovich*⁸⁶ and *Brasserie*⁸⁷, expanding the liability in the context of the forms of infringement as well as clarifying the conditions of occurrence and scope of the state's liability.

b) The notion of the "state" in the context of State liability for damages

The infringing entity in the discussed complaint is the state. The Court of Justice of the European Union has interpreted this notion in its judgments and emphasised that it bears liability for the actions of various entities. In consequence, the following entities have been indicated: **legislative bodies, administrative bodies, local authorities, self-government authorities as well as private entities** performing public functions.

c) Conditions of occurrence of the state's liability

1. The state's liability for damages constitutes of instruments aimed at **protection of the rights of an individual in the EU law system** that were interpreted in the CJEU judgments rendered mainly in the 90's. The first and breakthrough judgment in this subject was issued by CJEU in the case of *Francovich*. The infringement of the EU law in this case consisted in the failure to implement the directive in the national order. The state's omission resulted in the complaining entities' damage. The Court of Justice of the European Union, invoking the effectiveness of the Union law as well as the obligation of securing the rights of the individuals, emphasised that the individual must possess the instruments of seeking damages from the state if they incurred any damage due to the state's infringement of the EU law. On the basis of the specified judgment CJEU has formulated for the first time the premises conditional for the state's liability for damages before the national courts. It indicated **four conditions** to be met collectively:

- a) failure to implement the directive and lapse of the time limit,
- b) the objective specified in the directive results in the creation of rights of individual entities,
- c) it is possible to determine the content of the said rights without any intervention of the legislature,
- d) there is a causal link between the failure to implement the directive and the damage.

⁸⁶ C-6/90 and C-9/90 *Francovich*.

⁸⁷ C-46/93 and C-48/93 *Brasserie du Pecheur SA*.

2. In its further judgments, CJEU expanded the liability for damages, covering the entire EU law, clarifying the premises of liability in the *Brasserie* judgment⁸⁸:

- a) the infringed provisions of the EU law grant specifies rights to the individuals,
- b) the infringement is sufficiently actions,
- c) there is a direct causal link between the infringement and damage.

d) Forms of infringement of the European Union law by the Member States

1. The forms of the EU law infringement by the Member States resulting in the state's liability for damages:

- a) failure to implement the directive within the time limit specified therein⁸⁹,
- b) defective or incomplete transposition of the directive to the national order⁹⁰,
- c) infringement of the standards provided in the provisions of the EU law by the local bodies⁹¹,
- d) infringement of the EU standards arising from the legislative activity of the national bodies⁹²,
- e) infringement of the provisions of the EU law by the administrative bodies⁹³.

2. There are many controversies on the subject of state's liability for damages **arising from the activities of the courts**⁹⁴. The Court of Justice of the European Union emphasised in the first judgment returned in this context that the state would bear liability for damages for the judgments nonconforming with the EU law solely **in the event of obvious and grievous infringement**⁹⁵. Then, it clarified these **premises** stating that the national legislature which *excludes in a general manner the liability of the state for the damage inflicted to the individuals in connection with the infringement of the community law by the court of supreme level due to the fact that this infringement arises from the interpretation of the provisions of the law or assessment of the factual circumstances and evidence conducted by this court as well as governance of the national legislature limiting this liability solely to events of infringement of the principle of impartiality or grievous negligence of the judge if this limitation results in the exclusion of liability of the Member state interested in other cases of the apparent infringement of the governing law as per (...) of the judgment in the Köbler case is not compliant with the EU law*⁹⁶.

⁸⁸ C-46/93 and 48/93 *Brasserie du Pecheur SA*.

⁸⁹ C-6/90 and T 9/90 *Andrea Francovich & Daniela Bonifaci*.

⁹⁰ C-392/93 *British Telecommunications*.

⁹¹ C-302/97 *Klaus Konle*.

⁹² C-46/93 and C 48/93 *Brasserie*.

⁹³ C-5/94 *Hedley Lomas*.

⁹⁴ For more information see: E. Wojtaszek-Mik, *Konsekwencje nieuzasadnionego odstąpienia od wystąpienia z pytaniem prejudycjalnym*, [in:] ed. M. Domańska, M. Wąsek-Wiaderek, E. Wojtaszek-Mik, A. Zielony, *Pytanie prejudycjalne do Trybunału Sprawiedliwości Wspólnot Europejskich*, Warsaw 2007 r, ssp. 86 – 90.

⁹⁵ C-224/01 *Gerhard Köbler*.

⁹⁶ C-173/03 *Traghetti del Mediterraneo SpA*.

e) Manner of seeking damages from the state

According to the principles specified in the *Francoovich* judgment, **the entitled entity seeks damages from the state for the damage arising from the infringement of the EU law by the member state before a national court.** The value of the damages must correspond to the damage incurred. In connection with the lack of the EU regulation, **the Member States bear liability according to the national provisions regarding the liability for damages.** The material and formal conditions standardized in the national law cannot be less advantageous than in the case of similar claims based on the national law. Moreover, they cannot be formulated in a manner precluding or significantly hindering the award of the damages⁹⁷. The Court of Justice of the European Union has assumed the stance that seeking damages from the state before a national court is not dependent on the procedure regarding the statement of infringement of the EU law by the Member States.

5. Statistics from the activity of the Court of Justice of the European Union in the years 2004 - 2011.

The Court of Justice of the European Union covers three court instances which supervise the observance of the law in its interpretation and application. The CJEU structure has been forming since 1957 when one Court for three European communities was established. The most important institutional changes the objective of which was to increase the effectiveness of operation of CJEU was the introduction of the Tribunal in 1988 and establishment of the European Union Civil Service Tribunal. However, from the point of view of operation of CJEU it is necessary to indicate three factors possessing influence on its operation:

- CJEU structure expansion
- increase of the number of Member States with concurrent increase of the number of the Court and Tribunal judges,
- increase of the number of areas covered by the jurisdiction of CJEU.

The developed institutional system has resulted in the shortening of time of awaiting for the resolution of the filed cases. It was particularly noticeable in 2005 when the coefficient of completed cases exceeded the number of cases filed with CJEU. This year brought the commencement of operation of the European Union Civil Service Tribunal which has taken part of the burden of the Court (then the First Instance Court) in relation to employee complaints.

⁹⁷ C-6/90 and 9/90 *Francoovich and Bonifaci*.

The specifications presented below cover the period of operation of CJEU in the years 2004-2011, i.e. from the time of the greatest EU accession (including Poland)⁹⁸.

Actions brought before C EU								
Completed proceedings								

One should look at the statistics in terms of the number of cases filed with CJEU regarding the complaints discussed in this chapter.

reliminary references								
reliminary references raised by Poland								
Actions regarding a failure to perform treaty obligations								
Actions regarding a failure to perform treaty obligations filed against Poland	-	-						
review of legality								
Action regarding failure to act								

The institution of the preliminary reference possesses special meaning in the group of issues discussed in this chapter. It constitutes a significant instrument of cooperation between the national courts and CJEU. It is also worth reminding that CJ, providing answers to the references, conducts, among other things, the interpretation of the Union law which is then used on the basis of the *acte éclairé* doctrine by the courts of all Member States.

The first problem to be solved by CJ at the analysis of the preliminary references is the subject matter scope. As specified in point 2 of the chapter, a national court and other bodies of the Member States fulfilling the conditions defined by CJ and issuing judgments on the basis of the Union law, must or can raise questions regarding the interpretation or validity of the Union law acts. It must be emphasised that the international courts are not entitled to this right, except for the courts of Benelux deemed national courts by CJ under Art. 267 of TFEU. In connection with the aforementioned, the table below presents examples of entities which can submit a request for a preliminary ruling from each of the Member States.

⁹⁸ The data included in the specifications used in the paper come from the statistics of the Court of Justice of the European Union for years: 2004, 2005, 2006, 2007, 2008, 2009, 2010. List from 2011 - independent analysis on the basis of data from the website of the Court of Justice.

Another issue is the obligation to submit a reference for a preliminary ruling. It must be noted that, on the one hand, it is a discretionary decision of the court, but on the other - the lack of cooperation between the said court and CJ can constitute grounds for the state's liability for the failure to perform the treaty obligations. The issue has been discussed above. In this context, it is worth tracking the number of questions addressed to CJ by the courts of the Member States. Within the discussed period (2004-2011), the greatest number of references was submitted by the German courts - 498, whereas Poland posed 39 questions. The lowest number of questions was posed by Malta and Cyprus - only 2 each.

	Cour constitutionnelle Cour de cassation Conseil d'Etat ther courts								
	Софийски градски съд Търговско отделение ther courts								
	e vy i soud e vy i spravni soud Ustavni soud ther courts								
	o esteret ther courts								
G	undesgerichtshof undesverwaltungsgericht undesfinan hof undesarbeitsgericht undesso ialgericht Staatsgerichtshof des andes essen ther courts								
E	iigikohus ther courts								
I	Supreme Court igh Court ther courts								
G	Άρειος Πάγος Συμβούλιο της Επικρατείας ther courts								

S	Tribunal Supremo Audiencia nacional u gado Central de lo enal ther courts								
	Cour de cassation Conseil d'Etat ther courts								
I	Corte suprema di Cassazione Corte Costituzionale Consiglio di Stato ther courts								
	Ανώτατο Δικαστήριο ther courts								
	Augstākā tiesa Satversmes tiesa ther courts								
	ietuvos respublikos onstitucinis Teismas ietuvos Aukščiausiasis Teismas ietuvos vyriausiasis administracinis Teismas ther courts								
-	Cour superieure de justice Cour de cassation Conseil d'Etat Cour administrative ther courts								
	Legfelsőbb bíróság Fővárosi Ítélőtábla Szegedi Ítélőtábla ther courts								
	orti costituzionali orti ta' l- Appel ther courts								
	raad van State Rode raad der Nederlanden Centrale raad van beroep College van beroep voor het medefisleven Tariefcommissie ther courts								

A	erfassungsgerichtshof berster gerichtshof berster atent und Markensenat undesvergabeamt erwaltungsgesichtshof ergabekontrollsenat ther courts								
	Supreme Court Supreme Administrative Court Constitutional Tribunal ther courts								
	Supremo Tribunal de ustica Supremo Tribunal Administrativo ther courts								
	Tribunal ambovița ther courts								
S	rhovno sodišče Ustavno sodišče ther courts								
S	Ustavny Sud a vy i sud ther courts								
	orkein hallinto-oikeus orkein oikeus ther courts								

Study questions

1. Describe the structure of the EU law protection system.
2. Describe the notion of the “state” in the context of Action against the Member States’ for failure to perform the treaty obligations.
3. Describe the forms of the EU law infringement by the Member States in the context of Action against the Member States’ for failure to perform the treaty obligations.
4. Describe the stages of proceedings in case of a Action against Member States’ for failure to perform the treaty obligations.
5. Specify the entities entitled to initiate proceedings to review legality of the acts of the European Union.

6. Present the material scope of review of legality.
7. Indicate the grounds of invalidity of an EU law act.
8. Describe the result of the CJEU judgment reviewing legality.
9. Describe the plea for declaration of inapplicability of the act of general application.
10. Present the entities entitled to lodge the complaint regarding the institution's failure to act.
11. Present the conditions of lodging a complaint regarding the institution's failure to act.
12. Describe the premises of EU liability for damages.
13. Define the notion of the "national court" in the context of requests for preliminary rulings.
14. Indicate and explain the types of prejudicial petitions submitted by the national courts.
15. Explain the following doctrines: *acte éclairé* and *acte clair*.
16. Describe the subject matter scope of the preliminary reference.
17. Explain the legal validity of the preliminary ruling.
18. Describe the temporary effect of the preliminary ruling.
19. Explain the structure of procedural autonomy.
20. Define the notion of the "state" in the context of liability for damages.
21. Describe the conditions of the Member States' liability for damages.

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List of main decisions

1. C- 28-30/62 judgment of 27 March 1963 on *Da Costa en Schaake NV and others v. Administratie der Belastingen*,
2. C-25/62 judgment of 15 July on *Plaumann v. Commission*,
3. C-106 and 107/63 judgment of 25 June on *Toepfer v. Commission*,
4. C-6/64 judgment of 3 June 1964 on *Flaminio Costa v. E.N.E.L.*,
5. C-61/65 judgment of 30 June 1966 on *Vaassen-Goebbels v. Beambtenfonds voor het Mijnbedrijf*,
6. C-28/67 judgment of 3 April 1968 on *Molkerei Zentrale Westfalen-Lippe v. Hauptzollamt Paderborn*,
7. C-4/69 judgment of 28 April 1971 on *Lütticke v. Commission*,
8. C-15/70 judgment of 18 November 1970 on *Chevalley v. Commission*,
9. C-94/71 judgment of 6 June 1972 on *Schlüter & Maack v. Hauptzollamt Hamburg Jonas* ,
10. C-5/71 judgment of 2 December 1971 on *Zuckerfabrik Schoeppenstedt v. the Council*,
11. C -181/73 judgment of 30 April 1974 on *Haegemann against Belgian State* ,
12. C-43/75 judgment of 8 April 1976 on *Defrenne v. SABENA*,
13. C-33/76 judgment of 16 December 1976 on *Rewe-Zentralfinanz Eg and Rewe-ZentralAG (Rewe I) v. Landwirtschaftskammer für das Saarland*,
14. C- 45/76 judgment of 16 December 1976 on *Comet BV v. Produktschap voor Siergewassen* ,
15. C-106/77 judgment of 9 March 1977 on *Amministrazione delle finanze dello Stato v. Simmenthal* ,
16. C-92/78 judgment of 6 March 1979 on *Simmenthal v. Commission* ,
17. C-141/78 judgment of 4 October 1979 on *France v. United Kingdom*,
18. C- 246/80 judgment of 6 October 1981 on *Broekmeulen v. Huisarts Registratie Commissie*,
19. C-65/81 judgment of 14 January 1982 on *Francesco Reina v. Landeskreditbank Baden-Württemberg*,
20. C-158/80 judgment of 7 July 1981 on *Rewe-Handelsgesellschaft v. Hauptzollamt Kiel*.
21. C-102/81 judgment of 23 March 1982 on *Nordsee v. Reederei Mond*,
22. C-283/81 judgment of 6 October 1982 in the case of *CILFIT against Ministero della Sanità*,
23. C 29/87 judgment of 14 June 1988 in the case of *Dansk Denkvit against Landbrugsmisteriet* ,
24. C-24/86 judgment of 2 February 1988 in the case of *Vincent Blaizot against Université de Liège and others*,
25. C-305/86 and C-160/87 judgment of 11 July 1990 in the case of *Neotype Techmashexport against Commission and Council*,
26. C-31/86 and 35/86 judgment of 28 April 1988 in the case of *Levantina Agricola Industrial SA (LAISA) and CPC España SA against Council*,
27. C-262/8 judgment of 17 May 1990 in the case of *Douglas Harvey Barber against Guardian Royal Exchange Assurance Group*,
28. C-109/88 judgment of 17 October 1989 in the case of *Handels- og Kontorfunktionærernes Forbund I Danmark against Dansk Arbejdsgiverforening, acting on behalf of Danfoss*,
29. C-188/89 judgment of 12 July 1990 in the case of *Foster and others against British Gas*,

30. C-6/90 and C 9/90 judgment of 19 November 1991 in the case of *Francovich and Bonifaci against Italy*,
31. C-208/90 judgment of 25 July 1991 in the case of *Emmot against Minister for Social Welfare*,
32. C-393/92 judgment of 27 April 1994 in the case of *Municipality of Almelo and others against Energiebedrijf IJsselmij*,
33. C-24/92 judgment of 30 March 1993 in the case of *Corbiau against Administration des contributions*,
34. C-312/93 judgment of 14 December 1995 in the case of *Peterbroek, Van Campenhout & Cie against Belgian State*
35. C-46/93 and 48/93 judgment of 5 March 1996 in the case of *Brasserie du pêcheur against Bundesrepublik Deutschland and The Queen against Secretary of State for Transport, ex parte Factortame and others*,
36. C-392/93 judgment of 26 March 1996 in the case of *The Queen against H.M. Treasury, ex parte British Telecommunications*,
37. C-5/94 judgment of 23 March 1996 in the case of *The Queen against Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland)*,
38. C-163/94 and T 165/94 judgment of 14 December 1995 in the case of *Criminal proceedings against Sanz de Lera and others*,
39. C-74 and 129/95 judgment of 12 December 1996 in the case of *Criminal proceedings against X*,
40. C-265/95 judgment of 9 December 1997 in the case of *Commission against French Republic*,
41. C-326/96 judgment of 1 December 1998 in the case of *Levez against Jennings Ltd*,
42. C-54/96 judgment of 17 September 1997 in the case of *Dorsch Consult Ingenieurgesellschaft mbH against Bundesbaugesellschaft Berlin*,
43. C-437/97 judgment of 9 March 2000 in the case of *Evangelischer Krankenhausverein Wien v Abgabenberufungskommission Wien and Wein & Co. HandelsgesmbH p. Oberösterreichische Landesregierung*,
44. C-302/97 judgment of 1 June 1999 in the case of *Klaus Konle against Republik Österreich*,
45. C-178/99 judgment of 14 June 2001 in the case of *Doris Salzmann*,
46. C-224/01 judgment of 30 September 2003 in the case of *Gerhard Köbler against Austria*,
47. C-173/03 judgment of 13 June 2006 in the case of *Traghetti del Mediterraneo SpA*,
48. C-145/04 judgment of 12 September 2006 in the case of *Kingdom of Spain against United Kingdom*,
49. C-96/04 judgment of 27 April 2006 in the case of *Standesamt Stadt Niebüll*.

CHAPTER VIII

PROTECTION OF THE RIGHTS AND FREEDOMS OF INDIVIDUALS IN THE EUROPEAN UNION

§1. INTRODUCTION

1. Protecting the rights of individuals as a result of the omission of such practical issues in the founding treaties was long considered to be out of the area of competence of the European Communities. According to the functionalist approach to the process of European integration it progressed in the early years of the EC in selected areas, mainly economic. Human rights became a subject of interest to the Court of Justice of the European Communities to an extent in which they (rights) were connected with the implementation of the project of creating a common market. It turned out, however, that the construction of the rules of the common market was not possible without the given level of protection of fundamental rights in the Communities. **The Court of Justice has worked out the concept of treating fundamental rights as general principles of community law.** It also found a formula allowing to make use of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The model developed in the judicature was then validated by the Member States in the Treaty of Maastricht¹. The Treaty on European Union has become a turning point

Article paragraph of the TEU as established by the Treaty of Maastricht

in connection with the recognition that all citizens of EU Member States are also citizens of the Union. As a result, the freedom of movement was no longer dependent on demonstrating the economic purpose of movement; it has become the right of every EU citizen.

2. The scope of protection of the rights of individuals was more and more influenced by the **Charter of Fundamental Rights of the EU** proclaimed at the Nice summit, and attached to the Lisbon Treaty. Although it was not initially binding, the Court of Justice began to refer to it as a source of inspiration and confirmation of general principles of law common to the Member States' constitutional systems². The Charter gained, however, on the basis of the amended in Lisbon Article 6 of the TEU "the same legal value as the Treaties", hence its provisions have become an independent source of rights and freedoms of individuals in the European Union.

3. Regardless of attempts to determine the overall level of protection of human rights in the European Union law, the rights of individuals were protected in a narrow range, with the introduction of the **prohibition of discrimination on grounds of nationality**³ to the Treaty. The Court recognized the treaty non-discrimination (equality⁴) principle as directly effective⁵, which significantly contributed to the equal treatment of nationals of the Member States across the EU. **Prohibition of discrimination**⁶ has over time become, thanks to many creative interpretations of the Court, an independent source of rights and obligations that go far beyond the sphere of the internal market. It complements the current range of protection resulting from the establishment of EU citizenship.

4. Confirmation and fulfillment of the European Union's principle of equality was the introduction under the TA of the **prohibition of discrimination on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation**⁷. This provision was not considered to be directly effective, but it served as a basis for the adoption of important directives⁸ by the European Union. Furthermore, the Treaty

The Charter was included into (not ratified) the Treaty establishing a Constitution for Europe as part of the Treaty of Lisbon did not incorporate the Charter's provisions into its content, but in the new article 6 of the TEU it confirmed that the Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of December 2000, as adapted at Strasbourg, on December 2007. Moreover, the Treaty gave it the same legal value as the Treaties have, making it a part of the primary law

Cf Article 6 of the TEU
 literature puts the sign of equality between them See Tridimas, *General Principles of EU Law*, 2nd Ed., 2008, p. 100
 Case C-181/03, *Marshall*, and the cases C-181/03 and C-181/03
 Article 6 of the TEU
 The former Article 6 paragraph 1 of the EC Treaty - now Article 6 of the TEU
 directive and directive

contained the unanimous authorization of the Council to take appropriate measures to combat discrimination⁹.

§2. THE PROTECTION OF FUNDAMENTAL RIGHTS IN THE EUROPEAN UNION LAW

1. The evolution of the approach of the Court of Justice to the fundamental rights' protection

1. Excluding the fundamental protection of fundamental rights from the founding treaties was the reason for very careful referring by the Court of Justice to all problems, in which the parties relied on the violation of the rights guaranteed by national law. In the *Stork* Case, the Court held that *the High Authority is not empowered to investigate the basis of the complaint, which claims that at the time of making the decision (by the High Authority), it infringed the principle of German constitutional law*¹⁰. The Court held, furthermore, that it was a wrong body to assess the national law, as under the Treaty the role of interpreter of Community law only has been entrusted to it.

2. A change in approach to the problem of protection of fundamental rights can be seen in the judgment in *Stauder v. City of Ulm*, published ten years later. In that case, the Court referred to a German citizen complaint, being a social beneficiary who did not agree to the disclosure of his personal data on social assistance coupons for butter, entitling him to acquire it at a lower price, and put into use by the Commission's Decision. According to Mr. Stauder the obligation violated fundamental right to privacy guaranteed by the German Basic Law. The Court found that the correct interpretation of the decision does not lead to mandatory disclosure of personal information. Therefore, in its opinion, *the provisions of the decision interpreted in such a way did not infringe fundamental human rights contained in the general principles of Community law protected by the Court*. Since then, the general principles of Community law have become the basis to invoke the protection of fundamental rights. Since the general principles were classified as flexible, consequently a catalog of thus protected fundamental rights was also open.

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3. In another case the Court went a step further¹¹. First of all, affirmed that fundamental rights form an integral part of the general principles of law protected by the Court. In addition, it held that the structure and purpose of the Treaty *is to protect the rights arising from the constitutional traditions common to the Member States*. It subsequently confirmed this position in the *Nold Case*¹², arguing that:

Fundamental rights form an integral part of the general principles of Community law, the observance of which the Court ensures. By protecting those rights, the Court draws inspiration from the constitutional traditions common to the Member States. It cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the constitutions of these countries. Similarly, international treaties concerned with the protection of human rights, at the conclusion of which the Member States have collaborated or of which they are signatories, can provide guidance to be followed in the Community scheme.

4. Indication of international agreements as sources of inspiration for the Court, which must be taken into account in determining the standards of protection of fundamental rights in Community law, led directly to the recognition of **the European Convention for the Protection of Human Rights and Fundamental Freedoms** of 1950 as an important point of reference. The Court confirmed this in the *Hauer Case*¹³. When deciding on the scope of Community law protection of property rights and the freedom of establishment, the Court found grounds for temporary restriction of the exercise of these rights both in the constitutional traditions of the Member States, as well as the first protocol to the ECHR. It noted, however, that such restrictions on fundamental rights must actually correspond to the objectives of general interest pursued by the Community and cannot constitute, in relation to the aim pursued, a disproportionate and overly burdensome interference detrimental to the very essence of a fundamental right.

5. Reference to standards under the ECHR, in relation to the dynamics of the two legal systems, can sometimes lead to different interpretations of the law. In the joined *Hoechst Cases*,¹⁴ the Court of Justice, interpreting the scope of the substantive right to privacy, decided that this provision is associated with the development of personal human freedom and, therefore, does not extend to business premises. It reserved at the same time, that there were no judgments of the European Court of Human Rights

¹¹ In the Case *Internationale Handelsgesellschaft* the legality of a Community control system of grain market was questioned.

¹² Case *11/61* *Re Internationale Handelsgesellschaft*.

¹³ Case *29/69* *Hauer* *vs* *Belgium* (1970) *ECR* 1175. Mrs. Hauer demanded recognition of limitations in the development of new grape cultivations, introduced by the Council Regulation for the infringement of property rights and the freedom of establishment guaranteed by the German Basic Law and the German Basic Law.

¹⁴ Cases *269/80* *Hoechst* *vs* *Belgium* and *270/80* *Hoechst* *vs* *Belgium*.

in the matter. Meanwhile, a few years later the ECtHR (European Court of Human Rights) in *Niemietz Case*¹⁵ stated that this provision is the basis for the protection of premises used to conduct business¹⁶.

6. Introduction by the Court of a **pattern in the form of “constitutional traditions common to the Member States”** poses a problem of interpretation when the constitutional protection standards differ considerably. An example of such a situation is the *Grogan Case*¹⁷, which concerned the admissibility of advertising in Ireland the abortion services performed in the United Kingdom. The Irish Constitution guarantees the right to life from the moment of conception, while in the UK the law allows abortion. The Court of Justice, avoiding the question of conflict of constitutional norms, brought the problem to the level of freedom to provide services in the common market. It also acknowledged that abortion is a service, but the ban on the dissemination of information on abortion clinics (carried out by the students association not in cooperation with the clinics) was not contrary to Community law, as it did not restrict the freedom of movement of services¹⁸.

2. Treaty basis for the protection of fundamental rights

1. The court determination of the importance of the protection of fundamental rights in the Community legal system and the mechanism of reference to national or international systems of human rights protection over time gained approval at the political level. In 1977, the European Parliament, the Council and the Commission adopted a joint declaration in which they committed themselves to respect fundamental rights in the exercise of its powers. It was an expression of support for the case-law developed by the Court of Justice. However, it was not binding.

2. Formal codification of solutions developed in the case law of the Court of Justice occurred no sooner than in the Treaty of Maastricht. The solution adopted there was a confirmation of the political consensus on the recognition of fundamental rights as general principles of Community law¹⁹. Subsequent revisions of the Treaties (TA,

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(), where the two Tribunals otherwise interpreted the provision of Article paragraph of the EC
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t seems that the outcome of the case would have been different if promotion of abortion services was not only
a non-profit initiative of the students, but an organi ed form of promotion services with the clinic performing abortions
being responsible for it
rovision of Article of the Treaty (as amended in Maastricht) provided that e ni n is n e n e
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TN, TL) reinforced the importance of protecting human rights in the EU. The confirmation of its importance was introduction by the Amsterdam Treaty the dependence of the acceptability of a new member of the European Union on respect for the values on which the Union is founded²⁰.

3. The new Article 2 of the TEU is currently essential for the protection of fundamental rights in the Union:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

4. This provision is considered to be the foundation of the Union, which confirms the condition of respect of the values set out in this provision by the candidate countries to the European Union.

5. Moreover, the Treaty on European Union includes Article 6, paragraph 1 provisions giving binding effect to the EU Charter of Fundamental Rights. Paragraph 2 contains a legal basis for the Union *accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms*²¹. Finally, paragraph 3 provides that the fundamental rights under the ECHR or under the constitutional traditions common to the Member States, are part of the Union law as general principles of law.

6. The Treaty of Lisbon maintained the TEU sanctions against the Member States who are accused of a serious breach of the values listed in Article 2 of the TEU. In such a situation, after observing by the European Council a serious and persistent breach of the values by a Member State, the Council may decide to suspend certain rights deriving from the application of the EU Treaty to the Member State, including the right to vote of the representative of the government of that Member State in the Council²². The use of the abovementioned sanctions under the Treaty of Nice was subject to a number of procedural guarantees, upheld by the Court. For finding of a violation of the Article 2 of the TEU by a Member State a unanimous European Council decision,

See former Article 49, paragraph 1 of the TEU and the present Article 49 and 50 of the TEU. However, the accession itself depended on the creation of such a real possibility by the Council of Europe Article 49 of the TEU

taken at the request of one third of the Member States or the Commission and after obtaining the consent of the European Parliament is required²³.

3. The Charter of Fundamental Rights of the European Union as an attempt to create a catalog of protected rights and freedoms

1. The adoption of the EU Charter of Fundamental Rights was a further stage in the development of human rights protection in the European Union. It is an important voice in the dialogue between supporters of the Union's accession to the ECHR, and those who saw **the need for the EU's own bill of rights**²⁴. The European Council meeting in 1999 in Cologne decided to consolidate in a single document the fundamental rights in the EU countries to explain what are the Union's obligations in this regard. It was to gather the rights under the ECHR, the constitutional traditions common to the Member States and the European Social Charter and the Community Charter of Fundamental Social Rights of Workers. Pretty soon a catalog was developed (by a special convention), however, it contained some provisions not having patterns in the earlier documents (e.g. prohibition of the reproductive cloning of humans). The Charter was signed by the Presidents of the EP, the Commission and the Council of the European Union and solemnly proclaimed in the presence of the Heads of States and Governments in Nice on 7 December 2000. Its **second solemn proclamation**, in a slightly modified form, took place on 12 December 2007 in Strasbourg, before concluding the Treaty of Lisbon²⁵.

2. Until the entry into force of the TL the Charter was not a binding legal act of the European Union, but merely a political statement (an interinstitutional agreement). Despite its non-binding nature (individuals could not plead it as the sole basis for their claims against the state), it had not only symbolic, but legal significance as well. It was an act **binding the EU institutions**²⁶. The European Commission since 2001 has

It seems that this provision has only a symbolic meaning, but in the conditions of Polish internal political struggle in the past the risk of using it was raised because of the (alleged) threat to democracy posed by the concentration of power by the law and justice authority. The case of Austria ruled by the organ of justice was evoked and the attempts to impose diplomatic sanctions on it in 1999. The Austrian case, however, contributed to the introduction (in Article 46) numerous procedural safeguards to Article 46 of the TEU that keep out so quick addressing the issue of violation Article 46 of the TEU. It is possible that we will soon be able to know in practice the procedure for imposing sanctions on a Member State. At the turn of 2000 and 2001, the European Commission initiated an intervention against Hungary, accused of infringement of the EU law while introducing constitutional reforms by the government of Viktor Orbán. It seems, however, that the Commission will choose a simpler way of referral a complaint to The Court of Justice against Hungary (Articles 258 and 260 of the TEU).

Craig, de la Cour, 2001, p. 100.

On this occasion content of the Charter with explanations was re-published (EU, C-2001-2001).

According to C-2001-2001 the Charter may have legal effect in relation to the institutions that issued it, as well as organs and their subordinate organizational units. C-2001-2001, arta praw odstawowych wy naczyni standard w ochrony, in: (ed) chrona praw podstawowych w Unii Europejskiej, Warszawa, pp. 100-101.

investigated the compliance of the draft legislation submitted to the Council and the European Parliament with the provisions of the Charter. The EU Ombudsman regularly referred to the provisions of the CFR (especially to the right to good administration)²⁷. The Court of Justice confirmed the importance of the Charter over time²⁸. It stressed though that it was not legally binding, but acknowledged the importance of its provisions in the EU legal order, reflecting the general principles of law common to the Member States. The status of the CFR was explained with the entry into force of the Lisbon Treaty, because it gave the CFR binding power, including it into the primary law of the Union.

3. The Charter of Fundamental Rights for the first time pointed to the **catalog of rights, freedoms and principles** that should be protected. Division into the rights, freedoms and principles has been highlighted in the Preamble and Articles 51 and 52 of the new version of the Charter of 2007, as well as *Explanations* for them. While the rights and freedoms must be respected²⁹ (they are the basis for individual claims), the rules may not be the basis for any direct claims for positive action by the EU institutions and the Member States³⁰. Unfortunately, the Charter does not clearly establish the normative character of different fundamental rights, though *Explanations* attached to the Charter may be helpful in qualifying them. In view of these uncertainties the courts will be entitled to the task of determining the nature of the specific provisions of the Union.

4. The Preamble to the Charter says that “it does not create new rights and principles”, but only gathers the rights protected under other (national and international) instruments. The Charter is divided into seven chapters:

- a) Chapter I (*Dignity*) contains the following rights: confirmation of human dignity (Article 1)³¹, the right to life (Article 2), the right to the integrity of the human person (Article 3), the prohibition of torture and inhuman or degrading treatment or punishment (Article 4), prohibition of slavery and forced labor (Article 5).
- b) In Chapter II (*Freedom*) we find the rules governing: the right to liberty and security of person (Article 6); respect for private and family life (Article 7), protection of personal data (Article 8), the right to marry and the right to

In his speech to the Parliament on April 12, 2007, the EU Ombudsman, criticizing the recruitment policy of the EU institutions, said that EU citizens have the right to expect compliance with the provisions of the Charter by the institutions the residents of which solemnly proclaimed it

See C-104/06 *Spain v. Commission*, para. 41. See also C-104/06 *Spain v. Commission*, para. 41.

Cf Article 41(1) of the Charter.

See more in C-341/03 *Mikrosarantis v. Commission*, para. 24.

Human embryos from the moment of fertilization are also entitled to dignity, which in the opinion of the Court, precludes the possibility of patenting stem cells. See C-364/01 *Brüstle v. Greenpeace*, para. 42.

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found a family (Article 9)³², freedom of thought, conscience and religion (Article 10), freedom of expression and information (Article 11), freedom of assembly and association (Article 12), freedom of the arts and sciences (Article 13), the right to education (Article 14)³³, freedom to choose an occupation and right to engage in work (Article 15), freedom of establishment (Article 16), the right to property (Article 17), the right to asylum (Article 18), protection in the event of removal, expulsion or extradition (Article 19)³⁴.

- c) Chapter III (*Equality*) applies to the following laws and rules: everyone is equal before the law (Article 20), prohibition of discrimination (Article 21); respect for cultural, religious and linguistic diversity (Article 22), equality between men and women (Article 23), protection of the rights of the child (Article 24), the right to a dignified and independent living in the elderly (Article 25), the integration of persons with disabilities (Article 26).
- d) In Chapter IV (*Solidarity*) one can find the following rights and principles: the workers' right to information and consultation within the undertaking (Article 27), the right to collective bargaining and action (including strikes) (Article 28), the right to search jobs services (Article 29), protection against unjustified dismissal (Article 30); sound and fair working conditions (Article 31); prohibition of child labor and protection of young people (Article 32), protection of family and professional life (including maternity protection) (Article 33); protection and social assistance (Article 34), health care (Article 35), access to services of general economic interest (Article 36), protection of the environment (Article 37), consumer protection (Article 38).
- e) Chapter V contains a catalog of civil rights: the right to vote and stand as candidates in elections to the European Parliament (Article 39), the right to vote and stand in municipal elections (Article 40), the right to good administration (Article 41), the right of access to the European Parliament, the Council and the Commission documents (Article 42), the right to apply to the Ombudsman of the Union in the cases of maladministration in the activities of the institutions and bodies of the Union (Article 43), the right to petition the European Parliament (Article 44), the right to freedom of movement and residence within the territory of the Member States (Article 45); diplomatic and consular protection (Article 46).
- f) Chapter VI is dedicated to justice, concerning: the right to an effective remedy and fair trial (Article 47), presumption of innocence and right of defense (Ar-

This right is regulated in accordance with the national laws governing the exercise of these rights incorporating the right of parents to ensure education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions, according to the national laws governing the exercise of this right

no one may be removed from the country, expelled or extradited to a state where there is a serious risk that he may be subjected to death penalty, torture or other inhuman or degrading treatment or punishment

ticle 48); *nullum crimen nulla poena sine lege penali anteriori* guarantee [“No crime, no punishment without a previous penal law”] (Article 49); and the *ne bis in idem* [“the right not to be tried or punished twice in criminal proceedings for the same criminal offence”] (Article 50).

5. General provisions of the CFR include the so-called **horizontal clauses**. They define the scope of the provisions of the Charter and their relationships to other sources of law. **The Charter binds the EU institutions and bodies and the Member States to the extent to which they apply the EU law**³⁵. This confirms the rights of individuals, whenever they use the European Union law or the national law implementing the EU law.

6. **Restrictions on the rights and freedoms** recognized in the Charter shall be amended only by the statute; they cannot violate the essence of those rights and freedoms; they must be consistent with the principle of proportionality (allowed only if they are necessary to achieve the objectives that are in the public interest or for the protection of the Union or the rights and freedoms of third parties). Moreover, whenever the Charter refers to rights guaranteed by the Treaties or in the ECHR, the meaning and scope are the same as the rights laid down by the Treaties or the Convention³⁶. With regard to the discrepancies between the provisions of the Charter and the rights regulated in the Treaties, the CFR does not change the scope of these rights and limitations under the Treaty (although not all these limitations are indicated, for example, it does not mention the possibility of limiting the freedom of movement and residence within the EU). If the protection guaranteed by the provisions of the CFR covers the ECHR, its scope must be interpreted in accordance with the case law of the ECtHR. Except that **the EU can introduce a higher level of protection**³⁷. The Charter also guarantees at least the same level of protection of the rights and freedoms provided for by the compulsory provisions of national constitutions, the European Union law and international law³⁸. Finally, the protection of the rights provided for in the CFR cannot be used to abuse the law that would work to unravel any of the rights or freedoms recognized in the Charter or at their limitation to a greater extent than provided for herein. This is a copy of the warranty clause contained in the ECHR³⁹, opposing the possible use of human rights for violation of democratic institutions by the totalitarian groups⁴⁰.

7. The prospect of the CFR emerging as binding as a result of the Treaty of Lisbon has raised concerns of the United Kingdom, traditionally reluctant to host any attempts to strengthen the protection of social rights in the UK. At the European Coun-

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See T Tridimas, *General Principles of EU Law*, 2nd Ed., Oxford, pp -

cil summit in Brussels in 2007, Tony Blair negotiated adding to the Treaty *Protocol No. 30 on the application of the Charter of Fundamental Rights to Poland and the United Kingdom*. „**British protocol**” consists of two articles. Under Article 1 paragraph 1 the Charter does not extend the possibility of recognizing that legislation of countries acceding to the Protocol *are inconsistent with the fundamental rights, freedoms and principles that it reaffirms*. According to paragraph 2 the above applies in particular to the rights of Chapter IV of the CFR, social rights⁴¹. Further on the protocol stipulates that the *provision of the Charter relating to the national practices and national laws, will apply to Poland and the United Kingdom to the extent that the rights or principles that it contains are recognized by the law or practices of Polish or the United Kingdom*⁴².

8. Poland, at the summit in Brussels, in addition to keeping the freedom to adopt the “British protocol” has made a unilateral declaration (No. 61). Poland says that: *The Charter will in no way affect the right of Member States to legislate in the sphere of public morality, family law, and the protection of human dignity and respect for the physical and moral integrity*. The Confirmation of the fact that Polish fears had a different source from the British one, was the announcement of an additional declaration (No. 62) by Poland at the European Council Summit in Lisbon (December 2007), in which it was written that *because of the tradition of social movement, “Solidarity” and its significant contribution to the social and labor rights it fully respects social and labor rights established by European Union law, in particular those reaffirmed in Chapter IV of the CFR*. Reading the total content of the 61. and 62. declarations one can have no doubt that Poland **kept the right not to apply the provisions of the CFR** for a completely different reason than the United Kingdom. Caution of the Polish government was justified by the tendency, observed in recent years in Europe to equate the rights of homosexuals with marriages, adoption by subsequent Member State legislation legalizing euthanasia, the prospect (perhaps distant) of cloning stem cells without respect for human dignity. In Polish academia the position of Jarosław Kaczyński government was received critically⁴. Emphasis is on the questionable effectiveness of objections to the provisions of the Charter, which, after all, does not create any new rights, but only collects the rights and freedoms binding on Member States in one document, as general principles of law. However, knowing the history of the development of the EU, one cannot rule out “touching” family or moral issues by the EU law⁴⁴. There may be rooted the fear that in the near future, the Court of Justice of the European Union may, referring to the CFR, reach the conclusion that the above mentioned standards of some

t does not mean, however, that the protocol applies only to this chapter, although some doubt on this issue arise after reading the judgment of the Court of Justice on Case C-159/10.

Article of the Protocol

See the analysis of the effects of the British protocol, presented by Marc, Myr ykowski, C Mik, A yro umska in separate chapters in arc (ed), *Chrona praw podstawowych w Unii Europejskiej*, arsaw

See A yro umska, *Prawa człowieka w Unii Europejskiej*, arsaw
res i ania i s s ania g ne r le in er re a ne gl nienie san is a ls ieg , in r na ra s a nii r e s ie , arc (ed), arsaw , pp -

Member States have become “common” constitutional traditions of European countries. Ireland had the same concerns, reserving the primacy of constitutional regulation for the protection of life, even though this is not in any way transferred to the competence of the EU. Finally, driven by the fear of Sudeten Germans claiming reimbursement of lost property, Vaclav Klaus negotiated with the leaders of the EU Member States (just before signing the ratification of the Treaty of Lisbon), that the Charter will not apply in relation to the Czech Republic. Although these findings were not included in the Treaty, Klaus has been ensured that the appropriate protocol is to be attached to it in the next revision of the Treaties or the signing of the accession treaty with Croatia⁴⁵. So far, the history of European integration shows that the Court is capable of brave decisions. The work on the Preamble to the Constitutional Treaty and the attacks on the reform of the Hungarian government of Victor Orban, confirm, however, that European political elites deny the importance of Christian values in Europe. This context should be borne in mind when expressing consent to Poland being bound by the Charter of Fundamental Rights, as directly effective legal instrument used over national law.

9. The Court of Justice recently commented on the impact that was caused by the British Protocol being attached to the Treaty⁴⁶. In response to a preliminary reference of a British court it held that *Article 1 paragraph 1 of Protocol (No 30) confirms the wording of Article 51 of the Charter on its scope, and is not intended to release the Republic of Poland and the United Kingdom from the obligation to comply with the provisions of the Charter or prevent the courts and tribunals of the Member States to ensure compliance with these provisions*. It referred to the reasons to attach the British protocol to the Treaty and its recitals. The Court held, inter alia, that *“because the rights affected by national courts are not covered by Title IV of the Charter [social rights], there is no need to interpret art. 1 paragraph 2 of the Protocol (No 30)”*. In this way, the Court of Justice practically narrowed the possibility to rely by the United Kingdom on the British protocol only to situations when the matter concerns the protection of social issues. Polish motifs defined in unilateral declarations were different. It seems that in the area covered by them Poland has the freedom to shape the “Polish” model of protection of fundamental rights. However, the Court’s ruling significantly narrows the possibility for Poland and the United Kingdom to deviate from the “common” protection level. The Brits in Protocol 30 cautioned that *in particular and for the avoidance of doubt, nothing in Title IV of the Charter does create rights that can be enforced through the courts, applicable to [...] the United Kingdom, except in cases where [...] the United Kingdom has provided for such rights in its national law*. As it did not apply social rights, the Court declined to

⁴⁵ However the situation is still not clear in the light of the further developments in this matter. Cf European Parliament resolution of 22 May 2013 on the draft protocol on the application of the Charter of Fundamental Rights of the European Union to the Czech Republic (Article 48(3) of the Treaty on European Union) (00091/2011 – C7-0385/2011 – 2011/0817(NLE).

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interpret Article 1, paragraph 2 of the Protocol, stating at the same time, that the same protocol itself has no effect on responses to the question [of the British court]⁴⁶. It may then mean that the objections raised by Poland and the United Kingdom, in practice, will be of little importance in areas already covered by the European Union and the international community⁴⁸.

4. The European Union Agency for Fundamental Rights

1. Protection of fundamental rights in the European Union have recently gained an important advocate. On 1 March 2007, The European Union Agency for Fundamental Rights started its activity (FRA)⁴⁹, being the legal successor of the European Monitoring Centre on Racism and Xenophobia. A regulation has given the Agency its legal personality and has determined that it will be based in Vienna. The aim is to provide support, expertise relating to fundamental rights to relevant institutions, bodies, offices and agencies of the Member States when implementing Community law⁵⁰. **The competence mandate** of the Agency was thus reduced to helping the EU and the Member States with “implementation of Community law”, leaving out the issues related to the former second and third pillars of the Union. This was a kind of inconsistency, and perhaps a lack of confidence of Member States in such an independent body, as from the entry into force of the Treaty of Amsterdam a gradual increase in the importance of police and judicial cooperation in criminal matters is taking place⁵¹. In view of the transfer of the entire scope of the Area of Freedom, Security and Justice to Title V of the TFEU, it may be assumed that the FRA will soon be able to prove its competence in this field too. The argument against such action may become the present Article 276 of the TFEU, which excludes the jurisdiction of the Court in matters of police cooperation and cooperation in criminal matters. It seems that with the lack of FRA competence to handle the above mentioned areas may be assumed. The EU Council has impact on the scope of the FRA mandate, it, on a proposal from the Commission and after consulting the Parliament sets a five-year work program of the Agency⁵².

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2. The regulation establishing FRA guarantees its independence from the European Union and its Member States. Both the FRA Board members, their deputies and members of the Scientific Committee and the Director of the Agency, who are to act in the public interest are entitled to independence. This independence concerns the exercise of its functions, which are broadly consultative and advisory. A major limitation of its role is the limited opportunity to provide opinions on draft legal acts issued by the EU institutions. Reviews are not issued *ex officio*, but at the request of the Council, the European Commission or the European Parliament.

§3. CITIZENSHIP OF THE EUROPEAN UNION

1. The concept of citizenship of the European Union

1. The Maastricht Treaty established a citizenship common to nationals of the Member States, not only as a symbolic emphasis on the creation of the EU federalist aspirations, but also as a way to strengthen the protection of the rights and interests of citizens. Institution of citizenship was introduced into the Treaty⁵³, by which it enjoys greater protection under the EU law (primacy and direct effectiveness). The nature of the EU citizenship is decided by the TFEU, stipulating that **the Union citizen is any person holding the nationality of a Member State**, and the citizenship complements national citizenship, not replaces it. It is thus **dependent in nature and complementary** to national citizenship. This raises specific consequences in relation to the acquisition of EU citizenship, making it dependent on the acquisition by an individual the nationality of one Member State in accordance with the requirements of the law of that State. It does not matter that the individual also has the nationality of a third country⁵⁴. The same rule also applies in relation to the loss of citizenship. It occurs automatically as a result of loss of nationality of a Member State, subject only to the national legislation⁵⁵. Member States have also pledged not to introduce additional conditions (such as the requirement of residence in the territory of the State of which the individual is a citizen), the fulfillment of which would make granting rights to nationals of other Member States dependent on them.

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Declaration no to the Maastricht Treaty confirms that the question of which Member State an individual is a citizen shall be decided exclusively by domestic law of the State concerned. Member States have the right to make representations, who should be considered a national of a Member State for the purposes of Community law

2. The catalog of rights of EU citizens is included in the TFEU⁵⁶. Among the central provisions of the Treaty that affect the position of citizens of the Union the prohibition of discrimination on grounds of nationality should be mentioned⁵⁷. This prohibition understood in a positive way gives all EU citizens the right to equal treatment in the application of European Union law. In general, however, the legal status of a citizen is defined in the provisions of Part II of the TFEU, entitled *Non-discrimination and citizenship of the Union*, containing, besides the prohibition of discrimination, the right to move and reside freely on the territory of the Member States, voting rights, the right to diplomatic and consular protection, the right to petition the European Parliament and to apply to the Ombudsman.

2. The right to move and reside freely on the territory of the Member States

1. The basic privilege guaranteed to the EU citizens is the right to freedom of movement and residence within the territory of the Member States⁵⁸, subject to the limitations and conditions laid down in the TFEU and the measures adopted to give it effect. The applicable provision of the Treaty is to be understood in connection with the existing treaty regulation of freedom of movement of workers⁵⁹, freedom to provide services⁶⁰, freedom of establishment⁶¹ and appropriate secondary law⁶², as well as the extensive case law of the Court of Justice, gradually expanding the scope of the freedom with new categories of persons.

2. The right to free movement and residence of EU citizens historically **stems out from the freedom of movement for migrant workers**, the personal scope which was gradually extended by the Court of Justice⁶³. The Treaty of Maastricht in this area should be considered as a turning point. The establishment of the Union citizenship lead to a situation when freedom of movement and residence does no longer depend on the condition if a migrating Member State citizen is economically active.⁶⁴ **The scope of the law** includes: leaving their home country, entering the territory of another Member State, the right of a short-term stay or living there permanently, and the right to freedom of movement within the country.

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in particular, directive on the right of EU citizens and their family members to move and reside within the territory of the Member States
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3. Referring to the legal basis included in the TFEU⁶⁵, the European Parliament and the Council adopted **Directive 2004/38**, which regulates the rights of citizens and their family members to move and reside within the territory of the Union. Under the provisions the citizens of the Union and their family members are entitled to three months of residence in the territory of another Member State without compliance with any other conditions or formalities other than the requirement to hold a valid travel document (passport or identity card)⁶⁶. Staying in the host country for a period longer than three months is conditioned by fulfilling one of the following⁶⁷:

- a) employment or self-employment in the territory of the host country;
- b) possession by a citizen of the Union and their family members sufficient resources (so as not to become a burden on the social assistance system of the host country) and having health insurance covering the host country;
- c) studying in the host country, subject to availability of funds for studies and health insurance.

This law is a directly effective and family members of a Union citizen fulfilling conditions a, b, or c are entitled to it, even if they are not nationals of a Member State⁶⁸.

4. Qualification of the actual situation of an EU citizen plays an essential role in determining the possibility of relying on the right of free movement and residence. Freedom of movement for workers does not apply to situations in which the employee not benefiting from the benefits of freedom of movement would rely on the resulting power against his own state (“**purely internal situation**”). The Court of Justice denied this right to employees, not having any relationship with any of the situations set out in the EU law⁶⁹, thus tolerating reverse discrimination. After the establishment of Union citizenship attempts were made to circumvent this problem by relying on the provision of Article 21 of the TFEU, as it was considered to be the norm for a wider range of free movement of workers⁷⁰. The first cases, in which the parties raised this argument, did not bring the prohibition of reverse discrimination⁷¹. In other cases, however, the Court departed from the restrictive use the argument of “purely internal situation”. The EU law was applied when:

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 n the Case C- i e er an a e an r ein- es alen the European Court of stice
 allowed states not to apply the provisions of the Treaty to the citi ens who want to bring family members non-EU
 nationals to ermany The reason was purely internal nature of the dispute, because of no use of the freedom of
 movement of persons by the applicants A similar argument has been made under the decision on C- re -
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- a) the person concerned did not use the freedom of movement of persons, but he could rely on Community law, because he paid alimony to his former wife, who moved to another Member State.
- b) children who have not yet benefited from the freedom of movement of persons, but may rely on the rights arising from the status of citizen of the Union by virtue of being a citizen of another Member State⁷².

5. The establishment of the Union citizenship also affected the rights of those who could not so far rely on the provisions of the Treaty governing the free movement of workers, because they were not economically active or were economically dependent. Thus, the rights arising from citizenship could be invoked by single mothers without a regulated residence in the host country⁷³ and the residents of the Salvation Army shelters benefiting from social allowance⁷⁴, even though they were not covered by sickness insurance and they were a burden on social assistance. In addition, the protection of students against paying discriminatory tuition is greater now⁷⁵, and in some circumstances they got access to social assistance.⁷⁶ The approach of the Court to the discriminatory treatment of migrant unemployed has changed as well. According to Court *in the light of the establishment of the Union citizenship and the interpretation of case law on equal treatment enjoyed by citizens of the Union, it is no longer possible to exclude article 54 of the TFEU - which expresses the fundamental principle of equal treatment, guaranteed by Article 2 of the TEU - a financial benefit, the purpose of which is to facilitate access to the labor market in a Member State*⁷⁷.

3. Voting rights

1. The Maastricht Treaty guaranteed the citizens of the European Union important political rights. Under its provisions any EU citizen resident in a Member State of which they are not nationals shall have **the right to vote and stand as candidates in elections to the European Parliament and local elections** in the Member State in which they reside, under the same conditions as nationals of that State⁷⁸.

C-100/01 *María Martínez Sala* (Spanish citizen) even though she was not economically active person and had to use social assistance (could not to be considered a migrant worker), referring to the provisions of the Treaty, she could claim child benefit, relying on the principle of equality, in connection with the provisions on the citizenship of the Union

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C-100/01 *María Martínez Sala* (Spanish citizen) even though she was not economically active person and had to use social assistance (could not to be considered a migrant worker), referring to the provisions of the Treaty, she could claim child benefit, relying on the principle of equality, in connection with the provisions on the citizenship of the Union

or C-100/01 *María Martínez Sala* (Spanish citizen) even though she was not economically active person and had to use social assistance (could not to be considered a migrant worker), referring to the provisions of the Treaty, she could claim child benefit, relying on the principle of equality, in connection with the provisions on the citizenship of the Union

Article 54 of the TFEU

2. Performing obligations under the Treaty, the Council and the European Parliament adopted two directives specifying the exercise of the rights to vote in elections to the European Parliament⁷⁹ and local elections⁸⁰. In the substantive scope of the second Directive the right of access to elective positions in the executive branch of local government might have been limited by the Member States for the benefit of their own citizens. Both directives dictated equal treatment (regardless of national citizenship) of all citizens of the Union. Basically, every citizen of the Union may use and take part in the elections, if they have the will⁸¹, after fulfilling the same conditions that are required from nationals of the host country. Since there is no uniform electoral law adopted in the European Union, elections to the European Parliament are still organized according to national laws of Member States.

4. Diplomatic and consular protection

In order to highlight the common identity of citizens of the EU in its external relations, the Maastricht Treaty also introduced the right to enjoy the protection of the diplomatic and consular authorities of any EU Member State⁸². This protection is guaranteed in the territory of third countries where there EU citizen has no access to his/her own national Embassy or Consulate. Basically, the exercise of this right takes place at the same conditions as the ones to be met by the citizens of that country. However, performing the duty provided for in the Treaty, Member States agreed that it would only be consular protection in cases of death, serious accident, illness, imprisonment, as well as aid towards the needy citizens of another Member State allowing them go back to their country. To ensure the effective protection of its own citizens, Member States shall establish the necessary rules among themselves and start the international negotiations required to secure this protection. Moreover, The European External Action Service established in Lisbon helps to provide diplomatic and consular service to the Union citizens in third countries⁸³.

5. Rights of citizens in dealings with the European Union organs

The position of the EU citizens was also reinforced in dealings with the EU bodies. Every citizen of the Union **shall have the right to address a request in writing**

Council Directive 2006/105/EC
 Council Directive 2006/105/EC
 The obligation to participate in the elections in some countries also involves nationals of other Member States residing in its territory
 Article 40 of the Treaty of the European Union
 See Article 40 of the Treaty of the European Union

to the principal organs of the Union in one of the official languages and receive an answer in the same language⁸⁴. In addition, they have the right to petition the European Parliament⁸⁵. The petition may relate only to matters that directly affect individuals filing it. Every citizen of the Union may apply to the European Ombudsman with complaints about maladministration in the operation of the EU bodies. Just as the right to petition, so the complaint to the Ombudsman is not reserved only for citizens, but belongs to all natural and legal persons resident or established in a Member State⁸⁶.

The right to good administration⁸⁷ under the CFR is a complement of the treaty regulating relations between individuals and institutions. One should also remember that the Lisbon Treaty expanded the scope of the powers of the EU citizens with the right to submit the so-called **citizens' initiative**⁸⁸. It means the initiative submitted to the Commission, requesting it to submit within its powers an appropriate proposal in matters in respect of which the citizens consider that application of the Treaty requires the EU legislation. The initiative for its successful submission must be supported by no less than **one million of the EU citizens from at least one quarter of all Member States**.

§4 THE EUROPEAN UNION AND THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

1. The Treaty of Lisbon introduced a clear provision to the TEU, according to which "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms." Despite that fact the EU has not yet become party to the Convention. Therefore, the relationship between the EU law and the caselaw of the European Court of Human Rights in Strasbourg are not based directly on conventional grounds. In the past (now non-existent) European Commission of Human Rights considered an application against a Member State executing

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Article 47 of the T EU

The ombudsman does not investigate matters that are or have been in the past, the subject of legal proceedings

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Under Article 47 of the T EU, the Council and the E identified the occurrence of a citizens' initiative within the meaning of article 47 of the TEU See the European Parliament and the Council Regulation of February 2003 on the citizens' initiative

the judgment of the Court of Justice inadmissible⁸⁹. The basis of inadmissibility was the assessment that the system of Community law is consistent with the ECHR.

2. The European Court of Human Rights ruled in the *Matthews* case that EU legal acts have not been evaluated for compliance with the ECHR, since the Community was not a party to the Convention⁹⁰. According to the European Court of Human Rights, **the transfer of powers to the Community (now the European Union), does not relieve the State-party to the Convention of the obligation to comply with the Convention**. However, since the act on the elections was an international agreement concluded by the EC Member States, being parties to the Convention, all of them were jointly and severally liable for breach of its provisions. As a result, acts of primary law (not subject to legal review of the Court of Justice) can be checked for compliance with the Convention, and thus the EU Member States can be held responsible for all the infringements connected with it.

3. **The Bosphorus Case** has become yet another opportunity to determine the relationship between the EU legal order and the Convention. In this case, the Irish authorities confiscated an aircraft belonging to the airlines of Yugoslavia, leased to a Turkish entrepreneur. Doing that Ireland has implemented Regulation 990/93, imposing sanctions on the Federal Republic of Yugoslavia, issued in the consequence of the adoption of the UN Security Council resolutions. A long-standing legal dispute⁹¹ eventually went to the Strasbourg Court, whose position can be summarized as follows⁹²:

- a) The Convention does not prevent the Contracting Parties to transfer sovereign powers to common international or supranational organizations. In the event of the transfer of powers this organization does not become liable for the violation of provisions of the Convention unless it is also a party to the Convention.
- b) Under Article 1 of the ECHR the State being a party to the Convention remains responsible for all acts and omissions of their bodies, regardless of whether they were created by national law or in the execution of international obligations. Otherwise, the protection afforded by the Convention would become illusory.
- c) State action taken to implement such international commitments is justified by the international commitments as long as the organization respects human

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 a e s , o Mr Matthews, the U citi en, resident of ibraltar, complained about taking
 his right to participate in E elections away from him, which took place on the basis of the Act of September
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 These principles have been analy ed in Tridimas, op cit, pp -

— Protection of the rights and freedoms of individuals in the European Union

rights, containing both material safeguards and control mechanism of conformity to a degree at least equivalent to that provided under the Convention. The comparable degree is to be equivalent and not identical.

- d) The existence of such equivalent standards creates a presumption that the state does not distance itself from the requirements of the Convention. This presumption, however, is limited and rebuttable.
- e) The limited nature means that the presumption applies only to a situation that the state only performs the obligations of membership in the organization. The state is fully responsible for the activities that go beyond international obligations in the strict sense.
- f) The presumption may be rebutted if the facts of the case indicate that the protection of Convention rights was clearly reduced. In this case, the interest of international cooperation would have to give way to the protection of the Convention as a constitutional instrument of European public order in the area of human rights.

In *Bosphorus Case*, the ECtHR held that **the protection of the fundamental rights guaranteed in the European Union was equivalent to that of the Convention**, both in material and formal terms. The Strasbourg Court, however, left the freedom to intervene in the future.

4. The issue of full compliance of both protection systems could be solved by adding to the Treaty a procedure of legal questions on the ECHR⁹³ law or the EU accession to the Convention. The initiative of signing of the ECHR by the Community was adopted at the request of the Commission twice in 1979 and 1990. However, the Court of Justice ruled out such a possibility⁹⁴, considering that the Community did not have competence in this area, and the Convention itself did not allow other international organization to become a party to it. Moreover, according to the Court of Justice accession to the Convention would mean substantial changes in the Community legal system, as it would be connected with the Community law incorporation into other international institutional system and the introduction of all the rights of the Convention, regardless of whether they are related to the community matter or to the Community law⁹⁵.

5. The case of the EU accession to the Convention was settled by the Treaty of Lisbon. The Council of Europe Member States have also ratified Protocol 14 to the Convention amending Article 59 paragraph 2 of the ECHR, which currently gives the right to accede to the Convention not only to the states, but the European Union as

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well. In 2010 negotiations on the conditions and any necessary adjustments relating to the participation of the European Union in the Convention system took place. Negotiators of the 47 Council of Europe member states and the European Union on 5 April 2013 have finalized the draft accession agreement of the European Union to the European Convention on Human rights. The Court of Justice of the European Union will now be asked to give its opinion on the text.

Article 1(4) of the Draft Agreement states that, for the purposes of the ECHR "an act, measure or omission of organs of a member State of the European Union or of persons acting on its behalf shall be attributed to that State, even if such act, measure or omission occurs when the State implements the law of the European Union, including decisions taken under the Treaties. This shall not preclude the European Union from being responsible as a co-respondent for a violation resulting from such an act, measure or omission. Moreover, the Member States may become co-respondents in a case against the EU where the alleged violation hinges on provisions on EU law and could only have been avoided by disregarding those obligations (Article 3(3))⁹⁶.

§5. FREEDOM OF RELIGION IN THE EUROPEAN UNION

1. All Member States of the European Union provide for freedom of conscience and religion on the basis of their internal rules. The law sets **different types of relations between the state and the church** (churches and religious associations). Some countries can be described as religious states due to the special status of state religion (the United Kingdom, Denmark, Sweden, Finland, Greece). The other ones can speak of an acute separation of church and state (the French Republic can be an example). In many others we can deal with the interoperability and friendly separation, as evidenced by the fact of signing a concordat with the Holy See (Poland, Italy). Freedom of conscience and religion is also guaranteed by the Convention⁹⁷, ratified by all Member States of the Union. **The Member States, however, did not provide EU bodies with any powers in matters of religion and faith.** As a result, the European Union is an organization ideologically and religiously neutral, which cannot impose any religious model on its members.

⁹⁶ See Fifth Negotiation Meeting between the CDDH ad hoc Negotiation Group and The European Commission on the Accession of the European Union to the European Convention on Human Rights [47+1(2013)R05]. Document available at www.coe.int [access 1.07.2013]. **Article of the EC**

See Stanis , s ne nii r e s i e religii i , in A Me glewski, Mis tal, Stanis ,
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2. The genesis of human rights protection in the Communities and the European Union presented at the beginning of the chapter portrayed the evolution of the Union authorities' approach to protection of the rights and freedoms of individuals. Explicit reference to the protection of fundamental rights was included in the Treaty on European Union. Simultaneous recognition of the rights guaranteed by the ECHR as part of the general principles of Community law is treated as a **basis for the protection of freedom of thought, conscience and religion**⁹⁸. Adoption of Convention standards in the EU law means respect for this freedom in both the internal and the external area. Not only the right to choose one's religion or belief, is guaranteed but also the externalization of them in individual and communal forms, privately and publicly⁹⁹.

3. The Maastricht Treaty also provided that *the Union shall respect the national identities of the Member States, whose systems of governments are based on the principles of democracy*. In Amsterdam the so called "**Clause of the churches**" was added to the Treaty according to which the EU respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States¹⁰⁰. In addition, the TA also included prohibition of discrimination on grounds of religion and belief in the EU law¹⁰¹.

4. The Charter of Fundamental Rights of the European Union proclaimed in 2000 in Nice takes into account the provisions guaranteeing the right to freedom of thought, conscience and religion. In accordance with Article 10 CFR *this right includes freedom to change religion or belief and freedom to manifest, either alone or in community in public or in private the religion or belief through worshiping, teaching, practicing and observance*. In addition, the CFR provisions guaranteed everyone equality before the law irrespective of religion or belief¹⁰², the right to refuse to act contrary to their conscience, according to the national laws governing the exercise of this right, and the parents the right to education and to teaching children in conformity with their religious, philosophical and pedagogical beliefs¹⁰³. In the Charter the Union was once again obliged to respect

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⁹⁹ Article 17 TFEU

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Article , paragraph of the C t is worth to refer to the recent udgment of the European Court of uman rights in Strasbourg from March autsi and thers v taly, changing the udgment of ovember on the autsi v taly Case (application no) The rand Chamber of the Court found that the requirement of hanging a crucifi in talian public schools does not violate Article of rotocol to the EC (xer ising is n - i ns in rela i n e a i n a n e a i n g e a e s a l l r e e e r i g a r e n s e n s r e e a i n a n e a - i n g i n n r i i e i r n r e l i g i s a n i l s i a l n i i n s) n e c a n c o n f i d e n t l y s a y t h a t i f s u c h a c a s e w a s t h e s u b j e c t o f a d i s p u t e b e f o r e t h e j u d i c i a l a u t h o r i t i e s o f t h e E u r o p e a n U n i o n , d u e t o t h e p r i n c i p l e o f r e s p e c t f o r n a t i o n a l i d e n t i t i e s o f M e m b e r S t a t e s , e n s h r i n e d i n t h e T r e a t y , a n d t h e l a c k o f p o w e r t o r e g u l a t e i n t h i s a r e a , t h e C o u r t i n t h e a u t s i v t a l y C a s e s h a l l b e c o n s i d e r e d n o t a p p r o p r i a t e t o r u l e o n t h e m a t t e r , l e a v i n g i t t o t h e M e m b e r S t a t e s

cultural, religious and linguistic diversity¹⁰⁴. With the entry into force of the Treaty of Lisbon, the Charter has gained “the same legal value as the Treaties”¹⁰⁵. It can be expected that the Court of Justice of the European Union empowered to interpret primary law will have to fulfill this role in accordance with the principle of respect for national identities of the Member States of the EU¹⁰⁶, as well as respecting and not prejudicing the status of churches and religious associations or communities in the Member States¹⁰⁷.

4. Developing the clause of the churches was recently reflected in the main text of the Treaty. Under the Treaty of Lisbon Treaty in Treaty on the Functioning of the EU provisions relating to churches, religious associations and communities, and to philosophical organizations and non-confessional associations have been included. The **new Article 17 of the TFEU** requires the Union to respect and not violate the national status of individual churches and religious associations or communities. In addition, the EU has committed itself to respect the status of philosophical and non-confessional organizations assigned to them under national law¹⁰⁸. The novelty to the existing legislation is an obligation on the Union’s open, transparent and regular dialogue with churches and organizations identified in Article 17 of the TFEU, introduced “in recognition of their identity and their specific contribution”¹⁰⁹. While the conduct of the dialogue is not precisely defined, in relation to the Catholic Church the Commission of the Bishops’ Conferences of the European Community (COMECE) has become a major player in the dialogue. It has recently expressed the hope that the Lisbon Treaty will help to intensify the dialogue with the European institutions to promote religious freedom in Europe¹¹⁰.

5. The above regulations on the one hand guarantee freedom of thought, conscience and religion, on the other hand, confirm the freedom of Member States to adjust the status of churches and religious associations, as well as philosophical and non-confessional organizations in national law. In a pluralistic society, the Union maintains the nature of an organization ideologically and religiously neutral. One cannot, therefore, agree with the generalizations presenting the European Union as

Article 17 of the TFEU
 Article 17 paragraph 1 of the TFEU
 Now Article 17 paragraph 1 of the TFEU
 Article 17 of the TFEU Under paragraph 1 of this provision ensure all respect for national identity and national law
 It can be assumed that the lack of non-infringement warranty of the status of philosophical and non-confessional organizations, however, gives the Union more opportunities to possible interference necessary in a pluralistic society in order to ensure the real religious freedom in Europe
 (cf Article 17 of the TFEU)
 Article 17 paragraph 1
 See press release of COMECE of December 2007 posted on the website www.comece.org

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a “structure” fighting the Church¹¹¹ and trying to impose a specific worldview onto European societies. In the light of the above, any attempt to impose a specific ideology (including pushing religion into the realm of complete privacy¹¹²) do not have their basis in EU law¹¹³.

Study Questions

1. What protection of human rights was provided by the founding treaties (the ECSC Treaty, the EAEC Treaty and the EEC Treaty)?
2. What was the evolution of the Court of Justice’s approach to the problem of protection of fundamental rights in the European Communities?
3. On what basis are fundamental rights protected since the entry into force of the Treaty of Maastricht?
4. What is the status of the Charter of Fundamental Rights of the European Union?
5. What is the scope of the CFR?
6. Can the CFR be used as the basis for effective protection of fundamental rights?
7. Characterize the so-called “British protocol”.
8. Give a brief description of the European Union Agency for Fundamental Rights.
9. Who and on what basis can acquire and lose the citizenship of the Union?
10. What is the scope of the powers granted to citizens of the European Union?
11. What was the impact of establishing the citizenship of the EU on the scope of competence of migrant workers within the Union?
12. On what basis can the courts of the European Union apply the ECHR?
13. Is the scope of protection of fundamental rights under the ECHR and EU law the same?
14. Describe the scope of religious freedom regulation in the EU. What other regional instruments affect it?

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2. D. Chalmers, G. Davies & G. Monti, *European Union Law*, 2nd Ed., Cambridge 2010.
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o not forget the Christian-democratic beginning of the European integration after World War II and the recognition that the Catholic Church had for the founding fathers of the European Communities – Robert Schuman and Alcide De Gasperi, who may soon be counted among the patrons of Europe

Article 17 of the Charter, as well as Article 1 of the EC

A completely separate issue is the increasing secularization of European society, resulting in a number of social phenomena and moral choices contradicting the Christian roots of Europe. The sign of breaking with the tradition of Christian Europe was the decision of the European Convention preparing the Treaty establishing a Constitution for Europe on the lack of reference to Christian values in the preamble. Although sometimes the normative value of the preamble to the Treaty is underestimated, the Court of Justice in its most important judgments refers to the spirit of the Treaty, going far beyond its literal wording.

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10. A. Wyrozumska, *Karta Praw Podstawowych – polskie obiekcje*, SM No 4/2007.

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2. 26/69 judgment of 12 November 1969 on *Stauder v. City of Ulm*.
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4. 4/73 judgment of 14 May 1974. on *J. Nold, Kohlen- und Baustoffgroßhandlung v. The Commission*.
5. 175/78 judgment of 28 March 1979 on *R. v. Saunders*.
6. 44/79 judgment of 13 December 1979 on *Liselotte Hauer v. Land Rheinland-Pfalz*.
7. 35 i 36/82 judgment of 27 October 1982 in the Joined Cases *Morson i Jhanjan v. the Netherlands*
8. 293/83 judgment of 13 February 1985 on *Gravier v. City of Liege*.
9. 24/86 judgment of 2 February 1988 on *Blaizot v. University of Liege*.
10. 46/87 and 227/88 judgment of 21 September 1989 on the Joined Cases *Hoechst AG v. the Commission*.
11. 374/87 judgment of 18 October *Orkem v. The Commission*.
12. *M & Co. v. Germany*, No 13258/87 ECHR Y., 1990, 46.
13. *Niemietz v. Germany*, Series A, No 251 (1992).
14. *Funke v. France*, Series A, No 256A (1993)
15. C-159/90 judgment of 4 October 1991 on *Society for the Protection of Unborn Children Ireland Ltd v. Stephen Grogan and others*.
16. C-92/92 i C-326/92 judgment of 20 October 1993 on the Joined Cases *Phil Collins v. Imtrat Handelsgesellschaft mbH and Patricia Im- und Export Verwaltungsgesellschaft mbH and Leif Emanuel Kraul v. EMI Electrola GmbH*.
17. The ECJ Opinion No 2/94.
18. C-369/90 judgment of 30 January 1992 on *M.V. Micheletti p. Delegacion del Gobierno en Cantabria*.
19. *Matthews v. UK*, No 24833/94.
20. C-84/95 judgment of 30 July 1996 on *Bosphorus Hava Yollari Turizim Ve Ticaret Anonim Sirketi v. Ireland*.
21. C-299/95 judgment of 29 May 1997 on *Kremzow v. Austria*.
22. C-85/96 judgment of 12 May 1998 on *Martinez Sala v. Freistaat Bayern*.
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28. C-148/02 judgment of 2 October 2003 on *Carlos Garcia Avello v. Belgium*.
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36. C411/10 i C493/10 judgment of 21 December 2011 on the joined Cases *N.S. v. Secretary of State for the Home Department and M.E., A.S.M., M.T., K.P., E.H. v. Refugee Applications Commissioner & Minister for Justice, Equality and Law Reform*.

CHAPTER IX

FUNDAMENTALS OF SUBSTANTIVE LAW AND EUROPEAN FREEDOMS

§1. INTRODUCTION

1. This chapter is complementary to the earlier discussion on the institutional law of the EU. One can indicate the fact that the most clear and classic division of European Union law is based on the criterion in question. For the purposes of teaching EU law can be divided into two (key) complementary sections.

First of all - **the EU institutional law**, also most often known as constitutional law of the European Union. Its basic scope is presented in the earlier chapters of the handbook.

Secondly - **the substantive law of the European Union**, whose main components are the so-called European freedoms and politics of the European Union. It can be assumed that the substantive law of the EU are legal standards resulting from both primary and secondary EU law directly governing the relationship between law entities (countries, EU institutions, natural and legal persons) and setting out the conditions that cause their formation, interactions and change or termination. There are also rules governing certain obligations, prohibitions or injunctions, and providing specific penalties for non-compliance. The substantive law of the EU is dominated by public law regulations. But we cannot lose sight of the detailed provisions of, for example, consumer protection, regulations in the field of labor law and judicial coop-

eration in civil matters. It can therefore be assumed that the “core” of EU substantive law are public law regulations supplemented by elements of private law.¹

2. Part Three of the TFEU has been called „Union policies and internal actions”. According to the nomenclature adopted in the Treaty, these are all forms of activity within the institutions of the EU integration group. Internal policies and actions thus determine the internal forms of EU activity in contrast to the external activity (external actions). Union policies and internal actions include specifically defined areas. When ordering them, it can be specified that the policies and actions inside the EU relate to the following areas:

- a) the so-called: **European freedoms**: the free movement of goods (Title II), the free movement of persons, services and capital (Title IV);
- b) **Area of Freedom, Security and Justice** (Title V);
- c) **Common rules on competition, taxation and approximation of laws** (Title VII);
- d) **EU policies**, which are: Transport (Title VI), Economic and monetary policy (Title VIII), Agriculture and Fisheries (Title III), Employment (Title IX), Social policy (Title X), The European Social Fund (Title XI), Education, vocational training, youth and sport (Title XII), Culture (Title XIII), Public health (Title XIV), Consumer protection (Title XV), Trans-European networks (Title XVI), Industry (Title XVII), Economic, social and territorial cohesion (Title XVIII), Research and technological development and space (Title XIX) Environment (Title XX), Energy (Title XXI), Tourism (Title XXII), Civil protection (Title XXIII) and Administrative cooperation (Title XXIV).

3. Due to the complementary nature of this chapter, the internal policies and actions of the EU will be indicated. Internal policies and actions reveal and define the nature of the EU “from the inside”. By identifying European freedoms, implementation of a number of policies and common rules of conduct, the EU law sets the basic framework for implementing the integration of the Member States on many levels within this integration group. This framework cannot in any way go beyond what the Member States “conferred” upon the EU defining its powers in the treaties (the principle of conferred powers). Competences not conferred upon the EU in the areas analyzed belong to the Member States.

4. Title V of the TFEU² “Area of Freedom, Security and Justice” (AFSJ) covers the entire area of justice and home affairs, which in the Treaty of Maastricht was (in prin-

¹. A. Kuś, *Podstawowe założenia rynku wewnętrznego Unii Europejskiej*, w: A. Kuś (ed.), *Prawo materialne Unii Europejskiej w zarysie*, Lublin 2011, p. 277.

² Articles 67-80 of the TFEU see more: A. Grzelak, *Reforma współpracy w dziedzinie Przestrzeni Wolności, Bezpieczeństwa i Sprawiedliwości UE w nowym Traktacie zmieniającym (reformującym) UE, Sprawy Między-*

principle) the total area of intergovernmental cooperation. Within the AFSJ there function the EU policies on **border checks, asylum and immigration**. With regard to the EU's **internal borders**, the absence of any controls of persons (whatever their nationality) has been ensured when crossing internal borders. The abolition of internal border controls does not affect the total omission of actions that affect the effectiveness of the cross-border movement of persons (e.g. checks at airports). In exceptional cases, checks at EU internal borders can be temporarily restored. Policy on **external borders** aims to provide checks on persons and efficient monitoring of crossing external borders and the gradual introduction of an integrated management system for external borders. The EU is also developing a common policy on **asylum**. The aim of it is to offer appropriate status to any third-country national requiring international protection. Therefore, the Union shall develop a common **immigration policy** with the task of ensuring effective management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of illegal immigration and human trafficking, as well as enhanced measures to combat them. The EU also forms **judicial cooperation in civil matters**³ having cross-border implications, based on the principle of mutual recognition of judicial and non-judicial judgments. Within **judicial cooperation in criminal matters**⁴, the Lisbon Treaty empowers the EU to issue directives in the form of "minimum rules" concerning the law of criminal procedure, to the extent necessary to facilitate mutual recognition of judgments and judicial decisions, as well as police and judicial cooperation in criminal cross-border matters⁵. As part of this cooperation **Eurojust**⁶ is very important. Its task is to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on common grounds, on the basis of operations conducted and information provided by the authorities of the Member States and **Europol**. The Lisbon Treaty extends the existing EU competences in the area of harmonization of criminal laws⁷. The European Union is empowered to issue directives establishing minimum rules concerning the definition of criminal offenses and sanctions in the areas of particularly serious cross-border crime, resulting from the nature or impact of such offenses or from a special need to combat them⁸. The Union

narodowe 2007, No 4; see also the Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice and the Protocol (22) on the position of Denmark.

³ Article 81 of the TFEU.

⁴ Articles 82-86 of the TFEU.

⁵ Article 82 paragraph 2 subparagraph 1 of the TFEU.

⁶ Eurojust (An agency of the European Union dealing with judicial co-operation in criminal matters) is an EU agency established in 2002 to improve cooperation between judicial authorities of EU Member States in the field of investigation and prosecution of crimes in the sphere of international and organized crime.

⁷ Cf. Article 31 paragraph 1 letter e of the TEU.

⁸ Article 83 paragraph 1 subparagraph 1 of the TFEU.

established **police cooperation**⁹ involving all the Member States, in particular the police, customs and other specialized law enforcement services for the prevention, investigation, detection and prosecution. **Europol**¹⁰ is important in this regard. Its task is to support and strengthen actions taken by the police and other law enforcement authorities of the Member States, as well as their mutual cooperation in preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime which affect the common interest covered by the EU policy.

5. Common rules on **competition** are crucial to the functioning of internal market¹¹. All agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market are incompatible with the internal market and prohibited. The regulation of this group prohibits restrictive business practices (**cartels**). Abuse of a **dominant position** within the internal market or in a substantial part thereof by one or more undertakings, in the extent that may affect trade between Member States is incompatible with the internal market and prohibited. As a general rule, any **aid granted by a Member State** or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall be deemed incompatible with the internal market in so far as it affects trade between Member States. The Treaty establishes a number of exceptions in this regard.

6. In the area of **taxation**, it is essential that no Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products¹². Member States may not impose any internal taxation indirectly protecting other products on the products of other Member States.

7. The aim of the EU is also the **approximation of the laws** of the Member States. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt

⁹ Articles 87-89 of the TFEU.

¹⁰ Europol (European Police Office) was established in 1992 is based in The Hague. It employs representatives of national law enforcement agencies (police, customs). The board of Europol shall consist of one representative of each EU Member State. See more: J. Jura, *Europol*, Warsaw 2005; W. Ostant, *Europejski Urząd Policji (Europol): instytucja europejskiego systemu bezpieczeństwa wewnętrznego i wymiaru sprawiedliwości*, Poznań 2007.

¹¹ Title VII Article 101-118 of the TFEU; See also Protocol No. 27 on the internal market and competition; see more: K. Miaskowska-Daszkiewicz, *Wspólne reguły konkurencji w Unii Europejskiej*, in: A. Kuś (ed.), *Prawo materialne...*, op.cit., p. 383 et seq.

¹² See more K. Lasiński – Sulecki, *Prohibition of tax discrimination of products in Article 90 of the Treaty establishing the European Community*, Tax Law Quarterly 2005, No 2.

the measures for the approximation of the laws, regulations and administrative provisions of the Member States which have as their objective the establishment and functioning of internal market.

8. Issues related to the European freedoms are a consistent supplementation of the European discussion on institutional law. It is impossible to fully understand the functioning of the European Union without - even cursory - knowledge of these issues. The so-called **European freedoms** are in fact the basis for the full implementation of internal market. The philosophy of the common market is the core of the European integration process. **The internal market** comprises an area without internal frontiers in which the free movement of **goods, persons, services, entrepreneurship, capital and payments** is ensured¹³. Thus, EU law created a basis authorizing for the operation of the structure of European freedoms that are the foundation of the European integration process. Each of the freedoms has a specific area, characteristics and allowed exceptions to its application. **Cumulative application of the provisions concerning various freedoms of the internal market** is, as a rule, not possible. In the particular case when analyzed rules are related to one of the freedoms, which has close links with other European freedoms, it must be considered which of the freedoms is dominant in the view of facts. Next, the state's action taken in relation to a particular person from another Member State only in the context of that freedom¹⁴ must be assessed. The **design of individual freedoms** is substantially uniform and based on prohibitions of restriction. Generally, it includes prohibitions of:

- a) direct discrimination,
- b) indirect discrimination,
- c) hindering access to the market.

§2. FREE MOVEMENT OF GOODS

1. General Remarks

1. The basis of the internal market is the free movement of goods to the producers of the Member States to create better opportunities for sales in the European market and offer consumers a wider choice of products. The following **basic features of the free movement of goods** can be distinguished:

¹³ Cf. Article 26 paragraph 2 of the TFEU.

¹⁴ C-71/02 *Kraner*, C-275/92 *Schindler*, C-36/02 *Omega*; but in the judgment C-34/95 *De Agostini* CJEU ruled the provisions both from the perspective of the free movement of goods and services.

- a) free movement of goods is closely related to the concept and essence of the customs union;
- b) it applies to all trade in goods, which means that all the “products” deemed “goods” take the option of free circulation in the customs territory of the EU;
- c) it includes the prohibition of imposing import and export customs duties (as well as unspecified directly in the Treaties - transit customs) between Member States, and any charges having equivalent effect to a customs duty;
- d) it also includes the prohibition of discriminatory taxation, understood as imposing fees (dues) that in different ways treat similar foreign and domestic goods, protecting the latter;
- e) the prohibition of quantitative restrictions between Member States,
- f) in positive terms (i.e., in the category of an order) – it is characterized by the adoption of a common customs tariff in trade relations with third countries.

2. The Treaty on the Functioning of the EU in certain circumstances allowed the possibility of unilateral imposing by the Member States certain **restrictions on imports and exports** of goods within the EU. As an exception to the principle of free movement of goods, these restrictions (i.e. **derogations**) are possible only because of the well-defined public interests (non-economic)¹⁵.

2. The concept of the Customs Union and the customs territory of the European Union

1. The process of economic integration in the world can be divided into five main stages. These are: the free trade zone, customs union, common market, economic and monetary union, and full integration. At each stage, the integration includes progressively more and more areas of economic policy. The customs union concept is essential in the context of economic integration within the EU. The **customs union** is an association of at least two countries that abolish duties and quantitative restrictions and measures having equivalent effect in relation to one another and bring the **common external tariff** in relation to third countries (i.e., the same tariffs on individual products in all the countries of the Customs Union), and have **common policy** in the field of quantitative restrictions and other measures resulting from customs duties and quantitative restrictions. The concept of the customs union has already begun in the GATT¹⁶.

¹⁵ Mentioned in Article 36 of the TFEU.

¹⁶ GATT [*General Agreement on Tariffs and Trade*] - International trade agreement signed on 30 October 1947 in Geneva.

2. The implementation of the customs union proceeded in stages and was completed on **1 July 1968**. Customs Union was established on the basis of four existing customs systems in the six countries that were the first members of the EEC, namely the Benelux¹⁷ and France, Germany and Italy. Customs Union is characterized in that it comprises all trade in goods and prohibits the imposition of customs duties between Member States on imports and exports, as well as any charges having equivalent effect. In addition, it eliminates other barriers in trade between members of the union (such as quantitative restrictions on trade in goods, or measures like quantitative restrictions). Member States also agreed on a common customs tariff to countries outside of the then EEC. It is worth noting that the customs union within the EEC was created with no intermediate step, like for example a free trade zone¹⁸. As a result of the implementation of the customs union quantitative restrictions on trade in industrial goods has been removed, duties in domestic service were liquidated and common external tariff (CCT) applicable to imports from third countries was also introduced in place of national tariffs. The tariff replaced the previously existing national external tariffs, and therefore, Member States may not charge tariffs on goods imported from third countries, if these duties are not provided for in the CCT. It can be assumed that the free movement of goods within the Customs Union is based on one general assumption. All goods lawfully produced or marketed in accordance with the formalities of import in one of the Member States' have the freedom of movement guaranteed in all Member States without any barriers to trade. Free movement of goods applies to both imported goods, as well as their export and transit through a Member State.

3. **The customs territory of the EU** is not the same and equivalent to the territory of the Member States. This area covers exhaustively listed territories of the Member States, with the exception of some islands, cities, and other areas¹⁹. In determining the customs territory of the EU, therefore, one should pay attention to the following issues.

Firstly – not the whole territorial area of all Member States²⁰ is the customs territory of the EU.

Secondly - some parts of the territory of the Member States, although formally an integral part of the country, are not considered as the customs territory of the EU²¹.

¹⁷ Belgium, the Netherlands and Luxembourg already formed a customs union at the time of entry into force of ECCT.

¹⁸ FTA is the elimination of customs barriers between the countries participating in it while maintaining separate, external tariffs - see. e.g. EFTA.

¹⁹ Cf. Article 3 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, hereinafter referred to as CCC.

²⁰ That is: Belgium, Greece, Ireland, Luxembourg, the Netherlands, Austria, Portugal, Great Britain and Northern Ireland, Finland, Sweden, Czech Republic, Cyprus, Estonia, Latvia, Lithuania, Malta, Poland, Slovak Republic, Slovenia, Hungary, Romania, Bulgaria, Croatia.

²¹ For example: Denmark - Faroe Islands and Greenland, Spain - Ceuta and Melilla.

Thirdly - the territorial area of Monaco, even though the state is not a member of the EU, is considered part of the customs territory of the EU²².

Fourthly – it should also be remembered that the EU has entered into an agreement on a common customs union with countries that are not formally members of the EU²³. Those countries in the trade, enjoy the privileges of a customs union (the abolition of customs tariff and tariff barriers).

4. The consequence of the functioning of the EU as a customs union is **the Common Customs Tariff (CCT)**. It has been used in the EU since 1968. It constitutes a trade barrier outside the EU internal market. If each Member State applied different rates of duty, goods from third countries might have been imported by the Member States with the lowest rate of duty or duty-free, and then benefited from the principle of freedom of movement of goods within the EU. Such a situation would be contrary to the idea of the EU and the essence of the customs union. Any country joining the customs union, which represents the EU is obliged to adopt the CCT, which is introduced by a regulation each year²⁴. The Combined Nomenclature is an annex to this Regulation, its codes are made up of 8 digits. The second important element in customs tariff (except for the nomenclature of goods) are the **rates of duty**. The tariff rate is the ratio laid down in the Customs Tariff or any other specific customs regulations for each item of the nomenclature of goods on which duty payable is calculated, as well as import taxes. The rates of duty can be expressed in amount, a percentage or a mixed system (quota-rates).

It can be assumed that the **tariff rate** is an act containing a structured list of names of goods traded internationally with their associated digital codes, units of measurement, general rules of interpretation of the Combined Nomenclature, containing columns of tariff rates with the general rules concerning the manner and extent of the conditions of their use. The tariff consists of two main parts, the first - the nomenclature of goods, and the second - the table of columns with duty rates. As an act of secondary EU law (Regulation) the tariff should be interpreted and applied in the EU in a uniform manner. For this reason, the customs authorities of the Member States cannot issue binding rules on the interpretation of the tariff. The duty tariff is exhaustive. So there are no such products that could not be classified in it. A facilitator of foreign trade in goods is the so-called **Binding Tariff Information (BTI)** on the classification of goods. This is an administrative decision, which determines the proper tariff code for one piece of goods. CCT is a usable version of the Integrated Customs Tariff of the European Union - **TARIC** (*Integrated Tariff of the European Com-*

²² A similar remark applies to the territory of the sovereign areas of the United Kingdom Akrotiri and Dhekelia in regard to Cyprus.

²³ Turkey, Andorra and San Marino.

²⁴ Amending Annex 1 to the Regulation 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff.

munities). Is published once a year in the Official Journal of the EU in the C series²⁵. TARIC does not have the status of a binding legal instrument, but the Commission and the Member States use it as a working tool.

3. The concept of goods and rules of origin

1. The term “goods” is not the same as the civil law concept of “things” that are just material objects²⁶. The term “customs goods” is defined as any movable property that is the subject of trade with foreign countries, subject to customs supervision and customs control. There is no single legal definition of the product. Such a definition cannot also be found directly in the treaties. The wording of it was left to the jurisdiction of the CJEU. In judicial practice, the biggest problem were related to distinguishing the goods and services. Attempts to define the term “commodity” were taken in the case law of the CJEU several times. Goods are **any objects with any material value, which may be the subject of commercial transactions**. Such a wide definition includes waste, as well as some intangible objects (such as electricity). In the early case-law of the CJEU, all products, the value of which could be expressed in money, and that could be the subject of commercial transactions were considered to be goods. Currently, it seems that we can say that it is enough for a product to be the subject of a commercial transaction. Items subject to illegal trade are not goods (e.g., drugs, counterfeit money) as well as legal means of payment of the Member States and proofs of identity. The provisions on the free movement of goods, to a limited extent apply to the following products (goods): weapons, coal, iron and steel, uranium and fissionable materials.

2. The principle of free movement of goods applies not only to goods which have been produced in the customs territory of the EU, so originating from the EU, but also to imported goods, which were released after payment of applicable duties. Goods (products) from third countries (i.e. countries outside the EU), can benefit from the free movement of goods, if two basic conditions are met.

First of all - for the goods imported from the third countries duty and other potential fiscal burden will be paid (taxes, duties, charges having equivalent effect to customs duties or anti-dumping, anti-subsidy) and other formalities of import will be completed (e.g. related to presenting SAD document).

²⁵ The electronic version is updated daily and is available on the website (see http://ec.europa.eu/taxation_customs/dds/home_pl.htm). The content of TARIC is available for general use in all official EU languages. TARIC nomenclature is the basis for the Combined Nomenclature (CN). TARIC nomenclature is based on 14 digits.

²⁶ Article 45 of the Polish Civil Code.

Secondly – the customs duties and other charges paid will not be later on repaid or remitted.

3. **The EU goods** are considered goods that:

- a) were wholly obtained in the customs territory of the EU, not incorporating goods imported from countries or territories not forming part of the customs territory of the EU,
- b) are imported from countries or territories not forming part of the customs territory of the EU and granted a marketing authorization,
- c) are obtained or produced in the EU of goods from outside the EU, but are put into free circulation in the EU, or of goods that are a “mix” of EU goods and non-EU goods, but put into free circulation.

Non-EU goods are all the other goods which are not EU goods. As a rule, EU goods lose their customs status upon leaving the territory of the customs territory of the EU.

4. **Rules of origin of goods** play a supporting role in the trade policy measures implemented by the EU. They are necessary if countries want to make the difference between goods produced in different countries, to admit certain countries preferences in trade policy, or treat them less favorably than others. The rules of origin are part of the so-called taxation elements in the customs law. These are the elements with which import duties and export duties are charged relating to the goods being the subject of trade with foreign countries. Among the taxation elements, there are three that actually affect the amount of customs duties. They include: tariff (other tariff measures and classification of goods), the origin of goods and the customs value of goods.

The origin of the product plays an important role, because it is the basis of preferences involving the use of low or zero rate of duty, if the product comes from a country or region awarded with those preferences. Duties also depend on what country (region) goods come from. The same goods from different countries may be subject to different rates of duty. Because of the need to determine the origin of the goods in the legal systems the so-called rules of origin were created. They determine economic goods belonging to a particular country or region. There are three basic **forms of proof of origin**. They are: first of all - the certificate of origin of goods, secondly - a commercial invoice accompanied by a declaration of origin of goods, thirdly - brand marks clearly indicating the country of manufacture. Proofs of origin can be verified. The purpose of post-clearance verification is to check the accuracy of that origin. The process of producing goods often involves more than one country (the so-called **cumulation of origin of goods**). In such a situation, it is also possible to determine the origin of the goods. Goods whose production involved more than one country are marked as originating from the country where the last, substantial, economically justified processing or working which led to the development of new prod-

ucts, or represent a significant stage in the production in an undertaking equipped for that purpose took place. At the written request of the person concerned customs authorities issue an administrative decision in the form of **binding origin information** (BOI).

4. The prohibition of customs duties and charges having equivalent effect to customs duties

1. Both in the EU legislation as well as Polish customs law, which supplements the provisions of the EU, the concept of duty, its character and nature is not defined and explained. EU customs law only defines the charges on imports and exports, which are the duties and other charges related to the import and export of goods. The concept **customs charges** includes any duty, additional customs duties levied on imported agricultural products from abroad, provisional and definitive anti-dumping duties and countervailing duties and fees. These levies are collected mainly under non-EU Customs Code laws relating to the regulation of trade in goods with foreign countries. The concept of “customs charges” cannot include VAT and excise duty as well as interest and compensatory interest. In the EU, the revenue from customs duties is levied on one basis - binding for all EU Member States - Tariff (CCT). Most levied duties supply the EU general budget (as one of the four basic elements of budget revenues), as 75% of the levied tariff duties are transferred to the EU budget, and only 25% remains with the customs administration, which collected them. The prohibition of intra-EU duty applies to all types of customs duties, regardless of their name, purpose and method of application.

2. Prohibition of new duties related to free movement of goods is a fundamental rule and, consequently, any exceptions must be clearly established and strictly construed. EU regulations prohibit to impose duties, as well as the so-called **charges having equivalent effect** (or similar) **to the duties**, in the marketing of goods within the EU. Prohibition of fees with an effect equivalent to customs duties supplements the ban on duties and is also absolute. It ensures effectiveness of the established prohibition. In an absence of presented restrictions, Member States would be free to circumvent the prohibition of customs duties and charge various other fees (taxes) than the duty (i.e., with a different name, structure, nature), but with the same effect. Both prohibitions are intended to prevent a situation in which the movement of goods between Member States could be in any way distorted as a result of the imposition of financial burdens on products imported or exported by one or more Members. In legal terms, it is difficult to establish a clear definition of these charges. The concept of charges having equivalent effect to a customs duty is very widely under-

stood. The concept of charges having equivalent effect to customs duties primarily meant fiscal or parafiscal charges which, not being duties in the classic sense, as they are collected because of or in the context of the goods crossing the border, and because they raise the price of the goods, they have similar protectionist or discriminatory effect to duties. Violation of this prohibition is the basis for referral to the CJEU, which has repeatedly held in cases on charges having equivalent effect to duties. The charge having equivalent effect to a customs duty should be (regardless of the name and way of collecting) unilaterally imposed charge collected on the importation of goods or thereafter, which also applies to goods imported from other Member States, and does not apply to the same national products, raises the price of the goods and thus entails the same consequences for the free movement of goods as duty. Each charge, however small, imposed on goods solely due to the fact that they cross the border, is an obstacle to the free movement of goods. Extending the prohibition of customs duties on charges having equivalent effect to customs duties is to increase the efficiency and, consequently, the effectiveness of the ban.

In conclusion, the concept of charges having equivalent effect to a customs duty fees must be understood to have the following **features**:

- a) imposed unilaterally by the EU Member State in respect of goods imported (exported) to other Member States;
- b) imposed on the importation into the customs territory of the EU, or later, after the release of the goods to the market;
- c) nature of the charges or the name does not matter (whether they will be fees, additional costs, duties, or whether they will be hiding under a different name);
- c) apply to goods imported from other Member States;
- e) cause the effect of increase in the price of goods;
- f) within the freedom of movement lead to the same consequences as the duty (e.g., fiscal discrimination or potential protection of products).

3. According to the case law of the CJEU, charges that could have an effect equivalent to customs duties are:

- a) **fee for examination of goods**, the aim of which is to finance the costs of compulsory health checks and health products of animal origin;
- b) **fees for veterinary tests and test** of imported goods,
- c) **administrative fees for border checks** (e.g., discharge tax of imported goods),
- d) **taxes levied on part of the territory of a Member State**,
- e) **statistical fees** aimed at funding precise trade mark research,
- f) charges levied on imported goods **for their storage in a customs warehouse** while waiting for completion of customs activities related to the transit of goods. This kind of behavior was not seen as a mandatory service, and thus a justified fee, as customs formalities were required.

The main common feature of such charges is their application to the goods because of crossing the border of a country or a region within the country.

4. However, not every tax imposed on goods imported or exported shall be treated as a charge having equivalent effect to customs duties. You can extract **3 groups of charges that are not charges having equivalent effect to customs duties**.

First of all - these are fees that make up the system of internal dues of a Member State. A charge having equivalent effect to a customs duty is not a charge, which is part of the national tax system²⁷.

Secondly - fees for services rendered to the importer. A charge having equivalent effect to a customs duty is not a charge for services rendered to the importer. The amount of charge must, however, be proportional to the value of the service.

Thirdly - the fees charged for the actions taken by Member States to implement the obligation under EU law.

5. Prohibition of discriminatory taxation

1. Tax policy is a particular expression of national sovereignty. Member States retain fiscal sovereignty (with the exception of VAT and excise duties). Each Member State ensures that foreign goods are not charged more than domestic products, and all reliefs, exemptions - should be extended to similar foreign goods. The EU law²⁸ prohibits discriminatory taxation, understood as imposing various levies (taxes, fees) on foreign and domestic similar goods, to protect the latter. The purpose of this regulation is to facilitate exchange within the EU by ensuring that goods imported (exported) have comparable competitive position in relation to domestic products. An EU imported product is both an original domestic product and a product from a third country from which duty was collected. Member States, using the tax laws, cannot put products from other Member States in a less favorable position than domestic products.

2. In practice, the CJEU case-law adopted two methods for determining the “likeness” of goods.

Firstly - **the goods are similar** if they are classified in the same way from the point of view of the tax, customs and statistics.

Secondly - the goods are similar, if they meet the same needs of the user and thus can be used interchangeably (utility criterion).

²⁷ For this type of charges Article 110 of the TFEU applies.

²⁸ Cf. Article 110 of the TFEU.

In relation to similar goods, the taxes used in the practice of the Member States are **discriminatory** if:

- a) different tax rates are applied (usually higher for imported goods),
- b) the scope of the tax on foreign goods is expanded,
- c) taxes are levied in a diverse manner and terms (e.g., extended for domestic products).

3. A supplement to the prohibition of discriminatory taxation is **the prohibition of protectionist taxation**. EU regulations also govern the situation where there is no direct correspondence between foreign and domestic goods, but they can compete with each other in the market (e.g., beer and wine). It is characteristic that the CJEU case-law on discriminatory and protectionist taxes concerns various types of spirits in particular.

6. Prohibition of quantitative restrictions and measures having equivalent effect to a quantitative restriction

1. Prohibition of quantitative restrictions and measures having equivalent effect to a quantitative restriction is contained in the TFEU²⁹. This regulation is effective immediately and is mandatory. It is directly addressed to the Member States. This includes barriers of a legal, factual and technical nature. The concept of **quantitative restrictions** include quotas, plafonds and other criteria that provide full or partial reduction of export, import or transit of goods.

2. The boundary between the quantitative restrictions and measures having equivalent effect has not been clearly determined. The concept of measure having equivalent effect to a quantitative restriction is defined by three sentences of the CJEU referred to as formulas: *Dassonville*³⁰, *Cassis de Dijon*³¹, *Keck*³². These formulas are a special kind of a road map for the assessment of the measure. Generally, it can be assumed that the term includes any conduct of a Member State which obstructs or may obstruct access for goods imported to the domestic market. They are therefore the behavior of countries that impede imports. These may include national rules which impose on importers all kinds of administrative duties, provisions for the production, quality and labeling of goods, or at least discourage them from selling certain products. Both the rules of laws, regulations and administrative acts as well as judicial decisions may be such measures.

²⁹ Article 34 of the TFEU.

³⁰ 8/74 *Dassonville*.

³¹ 120/78 *Rewe-Zentral*.

³² C-267/91 *Keck*.

3. According to the *Dassonville formula*, measures having equivalent effect to a quantitative restriction are all the trade regulations of Member States, which may hinder directly or indirectly, actually or potentially, the intra-EU trade. Regarding the content of the formula to the facts of the case, the rules requiring a certificate of origin in the case of sale of imported alcohol were found a measure having equivalent effect to a quantitative restriction. Belgian rules hindered import because the importer was forced to apply for obtaining a certain document and, in practice, made it impossible for him to make supplies of goods from another country with other suppliers than the manufacturer or trader coming from the country of origin of the goods. An intermediary could not issue such a document.

4. According to the *Cassis de Dijon formula*, the goods produced in one Member State, in accordance with the applicable rules, and placed legally on the market in that country can be freely sold in other Member States, even if it does not meet current standards in their territory on the principles of production, properties, composition or packaging. This formula also complements the *Dassonville* formula specifying that the prohibition on measures having equivalent effect to a quantitative restriction includes provisions not only for trade, but also the rules for products, and therefore the principles of their production. The essence of this formula is to establish **the principle of mutual recognition of standards**.

5. Measures having equivalent effect to a quantitative restriction are not national rules governing the sale of goods, provided that they apply to all relevant traders operating within the territory of a Member State and have the same (in legal and factual terms) effect on the exchange of domestic goods and those from other Member States (the so-called *Keck formula*). This formula is a narrowing of the scope of the provisions of the TFEU, as too broad an interpretation would restrict the powers of the Member States. *Keck* formula applies to the rules governing the method of placing goods on the market.

6. The following can be identified as **examples** of measures having equivalent effect to a quantitative restriction: import licenses and prior authorization, testing, inspection and control of imported goods, certificates, restrictions on use of the goods, encouraging to purchasing domestic goods, sale or import bans, requirements for labeling and packaging goods, discriminatory procurement law, origin labeling, prohibition of the use of generic names.

7. Permissible restrictions on freedom of movement of goods

1. Free movement of goods is based on the assumption that every product legally manufactured or marketed in accordance with the formalities of import in one of the

Member States should be guaranteed to circulate freely throughout the internal market. Implementation of the above assumptions are set out in EU law prohibitions, such as the prohibition of introducing customs duties in commercial relations between the Member States of the EU and charges having equivalent effect to customs duties³³, and prohibitions on the use of quantitative restrictions and all measures that cause a similar effect in these relations³⁴. In contrast to the prohibition of customs duties and charges having equivalent effect the quantitative restrictions, prohibitions and measures having equivalent effect are not absolute. The possibility of derogation is due to both the regulation formulated in derogation of the TFEU³⁵ and with the legal instruments developed in the case-law of the CJEU. The concept of derogation has a specific meaning in the EU law. **Derogation** is a treaty permit for provisions of national law different from EU law, in certain limited circumstances and under the conditions laid down in the EC Treaty. Derogation allows the country to withdraw from the Treaty rules in order to protect the national interests of a higher order. These interests may be issues specified in detail, but not of economic character.

2. The treaty derogating control on the free movement of goods is an exhaustive list of reasons (grounds), which the member states may rely on, in order to justify the validity of their internal measures for quantitative restriction or measures having equivalent effect. **These premises are** public morality, public health, protection of national treasures, public order, public security and the protection of industrial and commercial property. The reference to these regulations is permissible only if the area in question has not been settled in full by the EU law. Those conditions should be **interpreted narrowly** because it is an exception to the principle of free movement of goods. Effective relying on the derogation requires demonstration of three grounds:

- a) import or export restriction must be justified by one of the values listed in Article 36 of the TFEU,
- b) restriction may not constitute means of arbitrary discrimination or a disguised restriction,
- c) restriction must be proportionate.

3. **Protection of public morality** is considered to be a very delicate matter related to sensitive issues, making reference to the local cultural and social norms. Certainly, especially in this area it would be difficult to introduce a uniform European standard. Grounds of public morality can justify a ban on imports from one Member State to another of certain goods deemed to be obscene or indecent. The EU Court of Jus-

³³ Article 30 of the TFEU.

³⁴ Articles 34-35 of the TFEU.

³⁵ Article 36 of the TFEU.

tice has confirmed that each Member State may use public morality protection according to their own scale of values³⁶.

4. **Public order** protection may be a factor justifying the use of quantitative restrictions and measures having equivalent effect only in the case of a genuine and sufficiently serious threat to a fundamental interest of society or in issues traditionally considered to be the fundamental interests of the state. The premise of public order seemed to allow states for a broader interpretation, enabling to justify any action restricting the freedom of the market, even if the real reason was economic or social. This resulted in special care in the case-law. Therefore, most cases relying on this exception, have been questioned by the CJEU as leading to the abolition of the practice of freedom³⁷.

5. **Public safety** clause is present in all freedoms. This premise can be invoked in the case of regulations which are essential for the functioning of the state, its economy, institutions or viability of its citizens. Security includes both the security outside and inside. Threat to existence of the state may involve, among others, a break in the supply of crude oil, or electricity.

6. Each state has a duty to **protect public health**. Protection of human life and health is regarded as the most important value in the directory of interests, the protection of which justifies the introduction of restrictions on the functioning of the internal market. The Treaty allows for restrictions on the free movement of goods with reference to this kind of condition, as long as the principle of proportionality will be retained, and the state is able to demonstrate the reality of the threat. This premise is of objective nature and the standard of protection should not differ greatly between the Member States of the EU. Restrictions must be dictated by the actual need for health care because of the real risk of danger to the values resulting from conclusive research. For example, you can specify that in one of the judgments the CJEU held that the provision of a Member State which prohibits the sale of bread and other bakery products, in which the salt content ratio to the dry weight exceeded the maximum level of 2%, where it applies to products manufactured and lawfully sold in another Member State, constitutes a measure having equivalent effect to a quantitative restriction and cannot be considered to be justified in order to protect public health³⁸.

7. **Protection of national treasures of artistic, historic and archaeological value** provides another basis for derogation. The term “cultural property” is inconsistent.

³⁶ 34/79 *Henn and Darby*.

³⁷ 231/83 *Cullet v. Centre Leclerc*

³⁸ C-123/00 *Christina Bellamy and English Shop Wholesale SA*.

However, it is not about any goods or items that have artistic value, but objects of national pride and piety. In fact, in the system of free trade, trade in works of art is not limited, but the state may restrict their export. Such regulations are designed to prevent illicit trafficking in this area. EU law stipulates that the export of cultural goods is based on the license of the national authorities is valid throughout the EU. The authorities of the country where the item is located, may refuse permission for cultural goods covered by national legislation to leave its borders. For the sake of cultural goods provisions for the export of cultural goods and codifying administrative regulations for the same content and form of export licenses for cultural goods are introduced³⁹. The above matter is supplemented by the provisions establishing that the objects illegally removed from the country must be returned, and providing for cooperation between national authorities in this field⁴⁰. Restrictions on exports to third countries cover two groups of products. Firstly - the goods being cultural goods⁴¹, and secondly - monuments referred to in the Act on the Protection of monuments and care of monuments, which are movables, their parts or assemblies (movable monuments).

8. **Protection of industrial and commercial property** may be another basis for derogation. The exercise of intellectual property rights in a natural way may lead to a conflict with the free movement of goods as a restriction made by an authorized entity. Prohibitions and restrictions on imports between Member States, which are justified by the protection of industrial property, are permissible, provided that they do not constitute means of arbitrary discrimination or a disguised restriction on trade between Member States. The basis of these obstacles is the very existence of territorially limited industrial property rights. Derogating provision in the TFEU⁴² is an expression of respect for the national industrial property rights. The **industrial property** rights are: patents, rights of registration of utility models, right of registration of industrial designs, registration of trademarks, trade names rights, the rights to designations of origin and geographical indications and copyright and related rights. In accordance with the **principle of territoriality**, the scope of protection of these rights depends on the law of the country in which protection is claimed. At the EU level, the substance of the rights of industrial and commercial property is guaranteed. Therefore, if the placing on the market of imported goods will violate the rights protected in the country, the authorized entity may require cessation of imports. In this sense, national law restrictions on the free movement of goods are justified. The rights of

³⁹ Commission Regulation No 752/93 of 30 March 1993 laying down provisions for the implementation of Council Regulation No 3911/92 on the export of cultural goods.

⁴⁰ Council Directive 93/7/EEC of 15 March 1993 on the return of cultural objects unlawfully removed from the territory of a Member State.

⁴¹ As referred to in the Annex to Regulation No 3911/92.

⁴² Article 36 of the TFEU.

ownership do not, however, lead to an artificial isolation of the markets of the Member States. This is the case when the national regulation gives its holder the right to require the cessation of importation or distribution of goods, which is lawfully placed on the market in another Member State. In this case, execution of industrial property rights violates the TFEU derogations. This is a result of the **principle of exhaustion of rights** abiding in the EU. It means that the holder of trademark rights cannot prevent parallel importation of goods from other Member States, even if the national law would give him that opportunity⁴³.

§3. FREE MOVEMENT OF PERSONS

1. General remarks and basic concepts

1. Free movement of people⁴⁴ (also called freedom of migration, the movement of workers) is one of the fundamental freedoms conferred mainly to the EU citizens. This includes both natural persons and legal entities. The crucial moment in the formation of the present freedom was the establishment of European citizenship and adopting the basic right of all EU citizens to move freely within the EU. Citizenship of the Union confers on every EU citizen a primary and individual right to freedom of movement and residence within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties. The freedom discussed combines movement of workers, freedom of establishment and the free movement of EU citizens not benefiting from Economic Freedom. The provisions on free movement of persons are to be interpreted broadly, since the EU is not only Economic Cooperation, but also the overall promotion of closer relations between the countries.

2. Freedom of movement is not only about **crossing borders freely** (entry and exit) between Member States, **traveling within the EU**, or the right to **freedom of movement and residence** within the territory of the Member States. Free movement of persons (workers) is also about the prohibition of discrimination on grounds of nationality in the field of employment, remuneration and other conditions of work. It is also expressed in the right to **move, stay and work** in selected Member States (subject to restrictions on grounds of public order and safety, and public health). The various prohibitions that make up the freedom are construed in such a way as to ensure that EU citizens have the possibility to exercise any professional activity within

⁴³ C-10/89 CNL-SUCAL / HAG.

⁴⁴ See Article 45-48 of the TFEU; See more T. Sieniow, *Swoboda przepływu osób*, in: A. Kuś (ed.), *Prawo materialne...* op.cit., p. 63 et seq.

the EU. **Directive 2004/38** on the right of EU citizens and their family members to move and reside within the territory of the Member States and the **Regulation No. 1612/68** on freedom of movement for workers within the Community and of the **Schengen *acquis***⁴⁵, in relation to travel without border controls within the Schengen area of the EU citizens and the entry and residence in the EU of third-country nationals are essential to understand the nature of the free movement of persons.

2. Personal Scope

1. Initially, the personal scope of the freedom was limited only to the migrant people (employees). Later, the CJEU extended the personal scope with the derivative status of the employees' family members and others. The freedom of movement of persons requires the determination of the subject of the freedom. Depending on the fact of belonging to a certain category, entities are entitled to different rights in the host country. Personal scope of freedom of movement of workers determines the category of persons who can exercise the rights arising from this freedom. The base of determining the personal scope of the term "employee", the content of which is defined in the case-law of the CJEU.

2. The primary category using the broadest rights in the host country is a **migrant worker**. Two basic criteria that must be met in order for a migrant worker to be able to take full advantage of the present freedom can be distinguished.

First of all - having the **nationality of the Member State**⁴⁶ by the person concerned is a must.

Secondly - it is necessary to **provide subordinate employment** to another party in exchange for a fee.

An employee is a person provided with paid employment in the conditions of subordinate commands of the employer. The qualification of such a person to the category of a "worker" is prejudged by their gainful activity, which can be realized within different legal bases, but not limited to performing work under a contract of employment and duration of employment (this may be a contract for an indefinite term, seasonal work, part-time) or the nature of the employer (public or private). An employee is also a person manifesting their paid activity by the way of services. According to the case-law of the CJEU, the category of a "worker" includes also: professional footballers, members of religious communities, trainees. Another issue is the extent and intensity of labor activity. The CJEU case-law indicates that it needs

⁴⁵ See more: A. Szachorń-Pszenny, *Acquis Schengen a granice wewnętrzne i zewnętrzne w Unii Europejskiej*, Poznań 2011.

⁴⁶ This freedom also applies to the EFTA States.

to be a genuine and effective activity, having a dimension of income. The employer of the employee does not have to run a business focused solely on profits (e.g., charities may be an employer). Given the scope of the work the following can be distinguished: border, seasonal staff and interns. Persons who have previously been migrant workers but lost their jobs for reasons dependent on the employer also benefit from the status of a worker. They may also be people who were migrant workers, but the performance of the work was completed and they have taken additional training to learn on the condition that further education is related to the earlier work.

3. The second group of people enjoying the freedom are **pensioners** who were entitled to a pension on the territory of the host country. In the EU, there is no single European social security system. Respect for the principle of free movement of workers requires the involvement of all EU Member States to ensure that migrant workers exercising their profession in another Member State are entitled to the same benefits under social security as local employees. Between the social security systems in EU countries, however, there are still significant differences, requiring coordination of the regulation of insurance. Benefits of social security available in other Member States relate to the following categories of persons:

- a) workers who are nationals of an EU Member State who are or have been insured in accordance with the provisions of the Member States, as well as their family members,
- b) pensioners who are nationals of an EU Member State,
- c) third-country nationals who are insured under the legislation of the Member State,
- d) stateless persons and refugees, as well as their families, if they are working in the EU and are insured in accordance with the provisions of any of the EU Member States.

EU citizens have the right to retire in another Member State. States in which the employee paid the pension contributions in proportion share responsibility for paying the pensions on the basis of periods of employment.

4. The third group of people enjoying the freedom of movement are the **students**. Students acquire the status of citizens of one of the Member States, when listed as students of one of the universities of the host country. In this group fall those who also are children of migrant workers or who have themselves been a migrant worker. Yet another group are students who are relocated to another Member State. They use their status as long as they have health insurance and sufficient means of subsistence in the host country.

5. Indirectly **family members**⁴⁷ benefit from the status of a worker. Another category are persons who do not qualify for any of the above-mentioned status. As a rule,

⁴⁷ More on this topic later in this chapter.

this group benefits from the freedom provided they have sufficient funds to maintain and pay for health insurance.

3. Prohibition of restrictions on freedom of migration on grounds of nationality

1. Persons exercising their right to free movement in the country of residence must be treated as citizens of this country. It is unacceptable to diversify the situations of staff and employees from other Member States. Employers with respect to individual labor relations are required to comply with the prohibition of discrimination. The order of equal treatment is also addressed to the administration.

2. The prohibition of discrimination covers both **direct discrimination** (differentiation of status of domestic workers and migrant) and **indirect discrimination** (differentiation apparently made for reasons other than citizenship, and leading to the same effects as direct discrimination). Discriminatory solutions cannot be established by the EU or national legislators.

4. The rights of migrants

1. The EU rules grant parties (employees) many migrant rights, which they can use in a Member State other than their country of origin. The following **rights of migrant workers**⁴⁸ can be distinguished: the right to apply for the job offered, to move freely within the territory to the Member States, to stay in the Member States for the purpose of work in accordance with the provisions of the host country, the opportunity to stay in a job at the end of a career. It should be noted that this list is only indicative and not exhaustive. The terms of reference of employees have been specified at the level of secondary legislation⁴⁹.

2. The right to free movement within the territory of the Member States in order to take up employment includes the opportunity to **leave their home country and enter the territory of another Member State**. EU citizens with a valid identity card or passport have the right to leave the Member State to travel to another country. They do not need to have entry visas, show the destination and planned travel period, or have the appropriate amount of funds.

⁴⁸ Cf. Article 45 paragraph 3 of the TFEU.

⁴⁹ See Regulation 1612/68, Directive 2004/38.

3. EU rules give EU citizens possibility of **stay in any of the Member States in order to gain employment** in accordance with the internal regulations of the host country. We can distinguish three **categories of residence**⁵⁰.

First - **less than 3 months**. EU citizens have this right without any conditions or any formalities.

Second - **over three months**. This right is subject to the need to meet a number of conditions⁵¹ (for example, it may be the need to register ones residence).

Third - the **right of permanent residence**. As a rule, those EU citizens who have resided legally in the host country for a continuous period of 5 years⁵² are entitled to it. National authorities issue a document certifying that to EU citizens entitled to permanent residence. After acquiring the right of permanent residence it can be lost through the absence in the host Member State for a period exceeding two consecutive years.

4. Freedom of movement for workers entails **the right to apply for a job offered**. Free access to employment is a fundamental right, granted to each person individually. In connection with the possibility of a 3-month stay in another Member State (subject to proof of identity), without the need to meet additional requirements, an EU citizen can at this time actively seek employment. In the light of the existing case law of the CJEU, the right to reside in another country to look for work is subject to two cumulative conditions:

- a) actively seeking work,
- b) objective possibility of employment⁵³.

Every EU citizen and any employer have the right to exchange job offers as well as conclude and implement contracts. EU law allows for the introduction of the condition of knowledge of the language, if it is necessary due to the nature of the employment offered⁵⁴. The national of a Member State who is seeking employment in another country should receive the same assistance as the employment services provide for their citizens seeking work.

5. The EU law also requires **equal treatment of one's own and migrant workers on any conditions of work**. This applies to wages, rules for the termination and establishment of employment, reinstatement or re-employment. A migrant worker should have equal access to training and retraining. The term "working conditions" should be interpreted broadly, and it also includes the family separation allowance granted by the employer in connection with working outside of the place of resi-

⁵⁰ Chapters III-V of Directive 2004/38.

⁵¹ Articles 7-15 of Directive 2004/38.

⁵² Articles 16-21 of Directive 2004/38.

⁵³ See C-344/95 *Commission v. Belgium* and C-171/91 *Tsiotras*.

⁵⁴ 379/87 *Groener*.

dence, or the possibility to obtain an allowance for termination of employment. It is unacceptable to conclude work contracts of indefinite duration with one's own citizens and only term contracts with foreigners. Migrant workers have the right to participate in the activities of trade unions and representative bodies in the workplace.

6. A migrant worker shall enjoy the same **social and tax advantages** as national workers. This right is subject to a very extensive CJEU case-law, which broadly defines social and tax advantages. These may include: disability allowances, unemployment benefits, childbirth or funeral benefits.

7. Migrant workers in another Member State usually exercise a different profession from the one in which they obtained qualifications in their home country. The aim of the EU's solutions is to enable each person concerned to perform professional activities throughout the EU on the basis of qualifications obtained in any Member State. **The mutual recognition of qualifications act** is detailed both in the CJEU case law, and in the derivative law⁵⁵.

5. Restrictions on freedom of movement for workers

1. Freedom of movement is not unconditional and subject to restrictions due to **security policy, public security or public health**⁵⁶. Any exceptions to the principle of free movement should be strictly interpreted. In connection with the protection of national interests, EU law empowers the authorities of the Member States to take measures which derogate from the principle of the free movement of persons. Restrictions can be applied in individual cases and their imposition must be reasonable and consistent with the principle of proportionality. EU law does not define explicitly what is meant by the term "order, security and public health." The scope of these reasons may include: terrorism, espionage, possession and use of drugs. Reference to the protection of public health allows national authorities to minimize the risk of the occurrence of epidemics and the spread of infectious diseases. These considerations, however, cannot be relied on for economic purposes (e.g., to protect the domestic labor market).

2. A **sanction** for violation of the above rules related to the use of the freedom of movement of persons can be deportation of the national of another Member State from the current country of residence. This is done, however, only in exceptional cases. Lifetime expulsion from the territory of a Member State in the event of a breach

⁵⁵ See Directive 2005/36.

⁵⁶ Cf. Articles 27-33 of Directive 2004/38.

of public order is unlawful according to the EU law. As a general rule, protection against expulsion is the farther-reaching, the longer the duration of stay of the person concerned on the territory of the host country.

3. The EU law provides those affected by the restrictions of freedom of migration with the right to defend their interests. In case of refusal of entry or stay in another country the principle is the **possibility to appeal to the courts or administration**.

6. Restrictions on access to public administration employment

1. Member States themselves determine their administrative structure. National authorities may impose a condition of having their citizenship as a condition of **public administration employment** (such as the judiciary, defense, diplomacy)⁵⁷. The application of this limitation determines the nature of the duties performed on the job. Cumulative fulfillment of two conditions is necessary:

- a) direct or indirect participation in the exercise of power,
- b) protection of the general interests of the State or public authorities.

Only if the job meets the specified criteria, may the Member States reserve jobs in the government for their citizens⁵⁸.

2. This exclusion also results in access to **promotion**. Even if employment in a particular institution does not constitute employment in public administration it is possible to disable promotion that would be connected with the performance of public authority (e.g. a dean, a rector of a university). Another consequence of the permissible limit is the possibility of allowing the employee to work with the exception of the particular activity that is suited to sovereign powers (e.g. issuance of a death certificate).

7. The situation of migrant workers' families

1. The right of EU citizens to free movement and residence within the territory of the Member States should also be guaranteed to their family members, regardless of nationality, for the use of it to be based on objective conditions of freedom and dignity. Bringing people close to the country of residence may facilitate the integration of migrant workers in the new location. Inability to live together with your family can

⁵⁷ 149/79 *Commission v. Belgium*.

⁵⁸ See: 66/85 *Lawrie-Blum*.

be a significant obstacle to the free movement of workers. Family situation of the EU citizens exercising their right to migrate is subject to derivative legislation⁵⁹.

2. The definition of a “**family member**” includes:

- a) a spouse;
- b) a partner with whom the EU citizen has contracted a registered partnership⁶⁰;
- c) direct descendants who are under the age of 21 or are dependents of the employee,
- d) initial direct dependents of the employee.

The EU law grants certain powers both to family members of workers who are nationals of the EU, as well as the ones possessing the nationality of a third country. Family members who are nationals of a Member State have the right to travel alone as EU citizens. Family members holding the nationality of a third country have the right to migrate indirectly, i.e. by virtue of the existence of a legal relationship with the migrant worker.

3. We can specify the following **rights, enjoyed by family members of a migrant worker**:

- a) the right to enter and stay in the host country,
- b) the right to take up employment or self-employment,
- c) the prohibition of discrimination on grounds of nationality,
- d) the right to leave their country of origin and entry into the territory of another Member State.

4. Solutions in the field of **social security** are also a guarantor of freedom of movement of persons. These issues are dealt with in secondary legislation⁶¹. We can specify the following rules related to the coordination of social security systems:

- a) the principle of equal treatment,
- b) aggregation of periods of insurance, employment or residence completed in the Member States, their length conditions the acquisition, retention or recovery of benefits,
- c) conflict rule, according to which social security can be the subject of legislation of a single Member State,
- d) guarantee of the rights acquired.

Health care is provided in accordance with the rules in force in the Member State in which the employee is insured (employed). Coordination is not covered by social assistance. Coordination of services includes:

⁵⁹ Directive 2004/38.

⁶⁰ On the basis of the legislation of a Member State, if the legislation of the host Member State recognizes equivalence between registered partnerships and marriage, and in accordance with the conditions laid down in the relevant legislation of the host country.

⁶¹ Regulation 1408/71/EEC and Regulation 574/72/EEC.

- a) family, sickness and maternity,
- b) disability, old age, the risk of death of the breadwinner,
- c) in the case of accidents at work and occupational diseases,
- d) funeral benefits,
- e) unemployment benefits.

§4. FREEDOM OF ESTABLISHMENT

1. General remarks and basic concepts

1. The purpose of the freedom of establishment⁶² is to ensure **free choice of place of business in the territory of the EU** by individuals and companies. Entities authorized to use this freedom may, inter alia undertake and carry out all types of self-employment in the territory of any other Member State. They can also set up and run businesses, agencies, branches, subsidiaries or representatives. National of a Member State, self-employed in another Member State, has **the right to remain** in the host Member State after termination of operation⁶³.

2. In terms of the concept of freedom of establishment three main reasons can be pointed out.

First of all - **independency** of economic activity (that is, outside of a relationship of subordination), which has a **pecuniary interest** (profit; it can be taken in the activities aiming at profit and as part of mutual consideration).

Secondly - this activity should be **permanent**. This means that the person using the freedom is going to permanently integrate into the economic life of the host country.

Thirdly – **cross-border activities** (i.e. activities carried out in another Member State).

3. The entities eligible under the freedom are individuals and companies. Natural and legal persons enjoy the freedom of establishment in two forms: primary and secondary.

The **primary freedom of establishment** in relation to individuals means the right to leave their home Member State and entry into another Member State in order to

⁶² See Articles 49-55 of the TFUE; see more P. Wojtasik, *Swoboda przedsiębiorczości*, in: A. Kuś (ed.), *Prawo materialne... op.cit.*, p. 159.

⁶³ See Directive 2004/38.

start up activities therein as self-employed. With regard to legal persons it means the right to form a company in accordance with the legislation of a Member State⁶⁴.

Secondary freedom of establishment means that a natural person who has a business on their own account in their own Member State, goes to another Member State in order to start up activities therein as self-employed. In this case it is about the extension of the current economic activity in their own Member State to the other Member States, without termination of their activities in the country of origin. With regard to legal persons, it is about moving part of the undertaking or setting up a new one legally independent unit being a subsidiary (branch) in another Member State or the creation of agencies and departments that are legally dependent and subordinate organizations.

4. A fundamental **relation between freedom of establishment and other European freedoms** can be determined. The distinction between the freedom of establishment and the freedom to provide services is not easy. The main criterion for distinction between the freedoms is the “permanence” of the activities of the freedom of establishment and the “temporary nature” of services. Protection of business is primarily to ensure the freedom of establishment in the specified location selected by an entity in the EU, and the freedom to provide services is to serve the free movement of services across the EU territory. The conditions of establishment are generally more clearly defined than those of the terms of service.

Demarcation of freedom of establishment and the free movement of workers is more legible. Both of these principles are an expression of freedom of movement. The term “employee” has the meaning shaped by the CJEU case-law and is found in the employment relationship. Meanwhile, the self-employment (the self-employed) in the framework of the freedom of establishment is a self-running of business in another Member State by a specific person, self-employed and self-responsible for remuneration paid in the full amount directly to them, without any subordination to third parties.

Freedom of establishment is also carried out taking into account the provisions on free movement of capital (for example, the transfer of payments). Standards governing the free movement of capital constitute *a lex specialis* in relation to the rules governing freedom of establishment.

5. Freedom of establishment requires first of all **the equal treatment in the host Member State**. It is a substantiation of the principle of non-discrimination on grounds of nationality⁶⁵. We can distinguish two situations:

- a) ensuring equal treatment in relation to the business (access to the profession), and
- b) in relations to self-employment.

⁶⁴ Companies in a broad sense - for example, civil or commercial law companies, cooperatives, other legal persons governed by public or private law.

⁶⁵ Article 18 of the TFEU.

2. Restrictions on the freedom of establishment

1. Any national measures taken by the host country, which may put the nationals of other Member States in a worse position than nationals of that Member State are **restrictions** of the freedom of establishment. National legislation restricting freedom of establishment **may be enforced** when four conditions are met:

- a) it is applied without discrimination,
- b) it is justified in the public interest,
- c) it is appropriate for attaining the objective pursued,
- d) it does not go beyond what is necessary for that objective.

2. Member States may restrict the freedom of establishment by refusing nationals of other Member States access to business, even occasionally, connected with **the exercise of official authority**⁶⁶. The exception related to the exercise of public authority is similar to the exception of public administration employment in relation to the free movement of workers. The scope of the exception are activities, which in themselves are directly and specifically connected with the exercise of official authority.

3. The Treaty⁶⁷ provides for the possibility of limiting the freedom of establishment accorded to nationals of Member States, where this is necessary to **protect public order, public security and public health**. This is a closed list of exemptions, which must be strictly interpreted. The Council may make regulations for this purpose coordinating the use of exceptions to the freedom of establishment.

3. The principle of mutual recognition of qualifications

1. The Council **adopted directives** for the **mutual recognition of diplomas, certificates and other evidence of qualifications**⁶⁸. The EU initially adopted a sectoral approach aimed at creating recognition systems in particular regarding certain professions (e.g., nurses, dentists, midwives, architects, doctors). The host Member State has an obligation to recognize the equivalence of the diploma presented and may not require the applicant to meet requirements other than those laid down in a specific directive⁶⁹. A new approach to harmonization dates back to the entry into force of the SEA. Interest was transferred from the detailed harmonization of training and qualifications to the mutual recognition of professional qualifications⁷⁰.

⁶⁶ Article 51 of the TFEU.

⁶⁷ Article 52 of the TFEU.

⁶⁸ Article 53 of the TFEU.

⁶⁹ C-238/98 *Hocsmán*.

⁷⁰ See Directives: 89/48, 92/51, 99/42.

2. Since 2007, the current system based on the recognition of specific directives and directives of the general system for the recognition has been replaced by the **Directive on the recognition of professional qualifications**⁷¹. Only two directives on legal professions remained in force⁷². The new directive makes a distinction between the recognition for the purpose of freedom of movement of services and freedom of establishment.

4. Companies

1. Companies are also entitled under the freedom of establishment. According to the TFEU⁷³, a **company** is any company under civil or commercial law, a cooperative, or any other legal entity under public or private law. The activities of these entities must be profit-making. The freedom of establishment may be used only by a company which:

- a) was incorporated under the laws of a Member State,
- b) has its registered office, central administration or principal place of business in the territory of the Member States.

The fulfillment of these two conditions allows to consider a company as belonging to companies operating in the EU market. The nationality of the shareholders does not matter in that case.

2. Freedom of establishment grants primarily the power to **start and conduct business** in the territory of one Member State to legal persons established in other Member States. The freedom requires the abolition of any discrimination based on nationality in access to the market of the host country and in the course of business activities in the country. Therefore, companies may carry out business in the form of subsidiaries, branches, representative offices or agencies. They must use the same terms and privileges as are granted to domestic companies.

§5. FREEDOM TO PROVIDE SERVICES

1. General remarks and the concept of service

1. The creation of an internal market without borders is realized among other things through the freedom to provide services. Freedom to provide services is gov-

⁷¹ Directive 2005/36.

⁷² 77/249 and 98/5.

⁷³ Article 54 part 2 of the TFEU.

erned by the TFEU and is the fundamental freedom for the system of EU law. It assumes the abolition of all, based on the origin, discrimination of service recipient of another Member State or a service provider established in another Member State, as well as the elimination of all restrictions under the provisions of national law, even if they are applied equally to service providers from the same country, and service providers from other Member States if these restrictions may prohibit, impede or render the activities of a service provider from another Member State where he lawfully provides these services. This freedom has much in common with the other freedoms and some rights arising for individuals in the exercise of those freedoms are common (the so-called **ancillary rights** - such as the right of residence in the host country). The activities of the entity may be treated as the freedom to provide services as long as such activities are not regulated by treaties related to other freedoms (movement of goods, people and capital). In relation to the freedom of establishment, freedom to provide services is a subsidiary.

2. Defining **the concept of service** is essential for discussing the free movement of services. For the purposes of EU law, the service is any business activity conducted on one's own account, which fulfills the three basic conditions.

First of all - this activity is usually **paid**. Services are provided for remuneration, although the service does not always have to be paid for by the direct consumer. Valuable consideration of services highlights the economic link between the service and the consideration.

Secondly - it is **temporary**. Temporary (transitional) nature is due to the limited stay of the service provider in the host country. Assessment of this item should include the duration of the service, its frequency, regularity and continuity.

Thirdly - it is carried **across borders**. The service provider must have a seat established in a Member State other than that of the customer's. This means that the services of a fully internal nature are not subject to the provisions on the freedom to provide services. In the case of services the key criterion for recognition of service as a cross-border one is that the service provider and the customer are entities from two different Member States. Such situation involving a cross-border element can occur in four forms.

The first, called **active freedom to provide services**, occurs when a service provider from one Member State and running constant activity moves temporarily to another Member State to perform services there (for example, a lawyer traveling to another Member State in order to represent before the courts of the host country a client who is a national of that State).

The second form is called the **passive freedom to provide services**. It lies in the fact that the recipient from one Member State moves to another Member State in which the service provider has his business established in order to receive those services provided there (e.g., a German citizen arriving in Poland in order to use the services of a hairdresser).

The third form occurs **when the service itself crosses the border between the Member States** (e.g. an expertise ordered and sent).

The fourth form involves a situation in which a provider who is a national of one Member State and the recipient, who is a national of another Member State are **in a third country in which the service is provided**.

3. Services include in particular the activities of: industrial, commercial, craft character, and services of freelancers. The CJEU case law includes such services as: business travel, construction, medical and legal services, television broadcasting. The scope of the freedom to provide services does not include transport and insurance and banking, which are more closely related to the rules governing the movement of capital.

2. Personal Scope

1. The beneficiaries of the freedom to provide services are individuals possessing the **nationality** of a Member State. For the use of the freedom to provide services in the EU it is also required to establish and operate **business activities** in one of the forms prescribed by the law of that State. **Self-employed** persons are also entitled to exercise this freedom.

2. In addition to those directly providing services (service provider) and those using the services provided for them (the customer) **family members** are also eligible to enjoy the freedom to provide services within the scope defined in the acts of secondary law⁷⁴.

3. **Legal persons** are also covered by the personal freedom to provide services. For submission of legal services in the EU to benefits from EU law it is crucial to determine whether the legal person is a participating entity of the Member State. European companies can be such entities.

3. Material scope

1. The material scope of the freedom to provide services is formulated in the form of a prohibition addressed to the Member States of the EU within refraining from such legal and actual actions that would temporarily impede the activity of the serv-

⁷⁴ Directive 2004/38.

ice providers from other Member States in their territory. Non-discrimination and prohibition of restrictions are addressed to the state and cause direct effect. The obligation to act in accordance with these principles lies on the administration and the courts as well.

2. A service provider may temporarily pursue his activity in another State using benefits under the same conditions as the state imposes on its own citizens (**prohibition of discrimination**). A model with which we are to compare the treatment of migrant service providers from other Member States is the system of treatment of nationals providing services in a particular area, and incorporated in the state of legal persons involved in the provision of services. Migrant provider does not have to satisfy all the conditions of the host country the state imposes on its own citizens (e.g. place of residence) or legal persons (for example, the establishment of national law) that provide the same type of service. National entities perform services in the country of origin indefinitely, rather than temporarily.

3. **Prohibition of restrictions** is understood as a ban of such provisions of national law in the Member States, which, although not formally discriminate for the providers and recipients of services from other Member States residing in the host country, make it difficult for them to use the freedom to provide services. The difference between non-discrimination and prohibition of restrictions is the fact that in the case of non-discrimination a Member State may not issue regulations aimed at treating entities that are in the same situation differently. Prohibition of restrictions is to prevent such legislation in the Member States, which as themselves do not introduce discrimination, but cause that entities migrating from other Member States (after the application of these rules) will be in a worse situation (legal, actual) compared to the host country ones.

4. Permitted exclusions and limitations

The Treaty allows Member States to apply the principles of freedom to provide services differentiating its own citizens and nationals of other Member States. Member States may grant exemptions and limitations on three levels.

First - Member States may retain the rules discriminating service providers from other Member States, if the business is connected with the **exercise of official authority**. The Court of Justice has accepted that if certain actions in the exercise of the profession are related to the exercise of public authority, it is only in relation to such activities, that the use of discrimination on grounds of membership of a particular state is allowed⁷⁵.

⁷⁵ C-114/97 *The Commission v. Spain*.

Secondly - the use of discriminatory measures against the associated other Member States can be justified by the values falling within the area of public interest in the form of **order, public security or public health**. Exemptions related to this condition, allow Member States to only exceptionally use the indicated values to justify such discriminatory measures applied to nationals or companies of other Member States, including access and the nature of business services in the form of self-employment.

Thirdly - it is possible to use the so-called **restrictive measures**. The CJEU⁷⁶ case-law formed a view that the allowed national measures restricting the freedom to provide services must:

- a) be designed to protect the public interest,
- b) be proportionate to the objective pursued,
- c) respect the control exercised over the service provider in the country of its origin.

§6. THE FREE MOVEMENT OF CAPITAL AND PAYMENTS

1. General remarks and basic concepts

1. The distinction between the movement of capital and payments is justified only historically. Currently, both the movement of capital and payments are governed by the same principles. The question of the distinction between the movement of capital and payments was analyzed in the case-law of the CJEU. Current **payments** are transfers of foreign currency which is the consideration under the contract which is the basis of this provision, while the **flow of financial capital** is an operation aimed at investment or capital investment, and not pay for a service.

2. The free movement of capital and payments has a different meaning in relation to other freedoms. The relation between this freedom to the free movement of goods is separable, i.e. a factual situation may apply to only one of the indicated freedoms. The situation is different in the context of freedom of establishment and freedom to provide services, as in some part of their area the freedoms overlap and the distinction between them is extremely difficult.

⁷⁶ 279/80 *Webb*.

2. The essence of the free movement of capital and payments

1. The free movement of capital and payments⁷⁷ is **not defined** in the Treaties. The content of this notion has been perpetuated by the CJEU case. In general, this freedom is related to the unilateral transfer of assets to another Member State. This freedom is primarily for implementation, by means of financial instruments or measures of spontaneous commercial investment or deposit outside the country of residence and the possible use of its effects and therefore the return transfer of profits (e.g. interest). When analyzing the CJEU case-law, one can point to a few basic (selected) elements of the analyzed freedom.

2. First - **direct investment**. These include the creation and extension of branches or new undertakings belonging solely to the person providing the capital, and the full acquisition of existing undertakings, long-term loans aimed at establishing or maintaining lasting economic links, inclusion or acquisition of shares in commercial companies. Direct investments are all kinds of investments made by private individuals and legal entities, which serve to establish or maintain lasting and direct links between the person providing the capital and the entrepreneur or company, who provides capital for a business.

3. Second – investment in **real estate**. This point includes investments in real estate other than representing implementation of direct investment. This may be the purchase of buildings and land and construction of buildings by private persons for gain or for personal use. The subject of free movement of capital are investments in real estate on national territory by non-residents and real estate investments abroad by residents.

4. Third - activities relating to **securities traded on the capital market**. These activities include transactions relating to securities and admission of securities to capital markets. These may include the following: the acquisition by non-residents of domestic securities traded on a stock exchange, or the introduction of the company on the stock exchange. They may also be activities related to other instruments traded on the money market (such as Treasury bills, bankers' acceptances).

5. Fourth - the activities of **units in investment funds**. These include, for example, the introduction of shares on the stock exchange and managing them, or acquisition by nationals of a Member State of shares in foreign investment funds.

⁷⁷ Article 63 et seq. of the TFEU and Directive 88/361/EEC see, more K. Woch, *Swoboda przepływu kapitału i płatności*, in: A. Kuś (ed.), *Prawo materialne...* op.cit., p 329.

6. Fifth - **operations on current and deposit accounts** of financial institutions. These include transactions by non-residents with domestic financial institutions and transactions by residents with foreign financial institutions.

7. Sixth - credits related to **commercial transactions or services in which a resident participates**. These are: short-term credits (less than one year), medium term credits (1 to 5 years) and long term credits (over 5 years), conventional commercial loans, factoring operations.

8. Seventh – **credits and cash loans**. These include funding of any kind, provided by financial institutions, including financing of commercial transactions or services in which residents do not participate. They can also be mortgage loans, consumer loans, finance leases.

9. Eighth - **warranties, guarantees, liens**. These activities relate to the relationship between residents and non-residents, such as the German bank providing bank guarantee in favor of Polish entrepreneurs.

10. Ninth - transfers resulting from the fulfillment of **insurance contracts**. There are different types of contributions and payments such as life insurance or credit insurance.

11. Tenth - flows of **personal capital**. These may include loans, donations, legacies and bequests, transfers of assets constituted by residents in the event of emigration, transfer of the immigrants' savings in the period of their stay abroad to their previous place of residence.

12. Member States are required to **remove restrictions** on the movement of capital between citizens being residents of Member States. Any internal laws of the Member States, if they discourage investors from other Member States from investing may be seen as such restrictions. In reviewing the case-law of the CJEU in restricting the freedom of movement of capital and payments, a few specific issues can be pointed out:

- a) the issue of “**golden shares**” available to the Member States,
- b) restriction on the exercise of **voting rights** in certain limited liability companies,
- c) the issue of **tax laws** discouraging capital investment from abroad (taxation of acquisition of shares and the exercise of rights attached to shares - taxation of dividends or buyback),
- d) restricting the purchase of **real estate** (permits, taxation, the problem of the so-called secondary residences),

- e) restrictions on **mortgages** (denial of the mortgage entry in the Land Register),
- f) restrictions on making **direct investments** (permits),
- g) restrictions on **credits and loans**,
- h) restrictions on the acquisition of **inheritance**.

3. Permissible restrictions on freedom of movement of capital and payments

1. Prohibition of restrictions on the free movement of capital is not absolute. By examining the compatibility of the national measure with the free movement of capital the CJEU carries out the so-called **proportionality test**. If the CJEU considers that the measure constitutes a restriction on the freedom, then it decides whether the infringement can be justified. Measures restricting the freedom used by the Member States are considered justified if they meet **four conditions**:

- a) their use is dictated by considerations laid down in the TFEU⁷⁸ by overriding requirements of **public interest**,
- b) they are used in a non-discriminatory way (condition of **equal treatment**),
- c) they are appropriate to the objective they are to reach (**relevance** condition),
- d) they do not go beyond what is necessary to achieve the objective (**proportionality** condition).

2. Member States may apply the provisions of the **tax law**, treating taxpayers differently because of the different residence or investment capital. Member States often rely on this provision to justify its own tax laws. EU Court of Justice issued a lot of decisions on this issue, which recognize or refuse to recognize the different treatments as acceptable. Member States may take the measures necessary to prevent violations of the tax law, particularly in the context of the so-called **money laundering**.

3. It is permissible for the Member State to take measures which restrict the free movement of capital and payments under the so-called **prudential supervision of financial institutions** (e.g. banks, insurance companies). This applies above all to ensuring the safety of deposits held by banks and other financial institutions.

4. The so-called **disclosure obligations** are other conditions allowing for restrictions of the discussed freedom. Three main groups of disclosure obligations for cross-border movement of capital can be distinguished. These obligations result from the regulations of:

⁷⁸ Cf. 65 of the TFEU.

- a) foreign exchange trading,
- b) tax,
- c) statistics.

5. **Protection of public order and security** is an acceptable restriction (the value of the public interest) common to all freedoms. Public safety requirements cannot justify the violation of freedoms, as long as they are not compatible with the principle of proportionality. They can lead to arbitrary discrimination and must be interpreted restrictively, so that their scope cannot be determined unilaterally by a Member State without any control of the parties to the EU institutions. Terms of the public interest may be invoked when a genuine and sufficiently serious threat to a fundamental interest of society is an option (such as securing energy supplies in the event of a crisis).

6. Among other restrictions requirements resulting from **land use**, in particular to maintain constant population and economic activity independent of the public sector in the area, can be enumerated as well as predictability and **transparency of the mortgage system** and the Member States ensuring **services of general interest**, such as postal services.

Study questions

1. The range of policies and internal actions of the EU.
2. List the basic features of the free movement of goods.
3. Explain the concepts of: Customs Union, customs territory of the EU, Common Customs Tariff, the goods and their rules of origin.
4. What is the prohibition of customs duties and charges having equivalent effect to customs duties?
5. Explain the importance of the prohibition of discriminatory taxation.
6. What does the prohibition of quantitative restrictions and measures having equivalent effect to a quantitative restriction mean.
7. Explain the meaning of the *Dassonville*, *Cassis de Dijon*, *Keck* formulas to the free movement of goods.
8. What are the permissible restrictions on freedom of movement of goods?
9. The essence of freedom of movement of persons.
10. What are the rights of migrants?
11. Name the restrictions on the freedom of movement for workers.
12. What are the rights of family members of a migrant worker?
13. Explain the essence of freedom of establishment.
14. Does primary and secondary freedom of establishment mean?
15. What are the restrictions on freedom of establishment?
16. The principle of mutual recognition of qualifications.
17. Functioning of the company and the freedom of establishment.

18. The concept and characteristics of services in the context of the freedom to provide services.
19. Personal scope of freedom to provide services.
20. Material scope of the freedom to provide services.
21. Permitted exclusions and limitations on the freedom to provide services.
22. The concept and the essence of the free movement of capital and payments.
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