5. THE TREATY ON EUROPEAN UNION

288. General. As is discussed above, the constitutional structure of the European Union is based upon three so-called pillars. The Communities and their law are the central pillar. The two other pillars are outside the scope of Community law: common foreign and security policy and co-operation in the fields of justice and home affairs (Titles V and VI respectively of the Treaty on European Union). But all three pillars, including the Community, are part of, and subject to, the constitutional order of the Union. The effect of Titles V and VI is to bring within the single institutional framework of the Union areas which were already the subject of co-operation amongst the member states: 'political co-operation’ in foreign affairs under the Single European Act and co-operation in the fields of justice and home affairs under, for example, the Schengen Agreement on the elimination of border controls (to which the United Kingdom is not party), and the Dublin Convention on asylum. The TEU contains general and final provisions applicable to all three pillars, again including the Community.

289. The law of the European Union in the United Kingdom. Because Titles V and VI of the TEU are, in effect, traditional intergovernmental treaty agreements governed by public international law and their subject matters fall within prerogative powers in the United Kingdom, they were not incorporated into, and form no part of, United Kingdom law. Indeed, the European Union is not, as such, recognised by United Kingdom law.

290. Institutions of the European Union. According to the Treaty on European Union

'The Union shall be served by a single institutional framework which shall ensure the consistency and the continuity of the activities carried out in order to attain its objectives while respecting and building upon the acquis communautaire. . . .

1 See para 37.
2 The 'Common Provisions' of the TEU (arts A-F) provide very little in the way of constitutional norms which bind the Union and its institutions in their conduct. They do, however, require that 'the Union shall respect the national identities of its Member States’ and 'the Union shall respect fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions of the Member States’ (arts F(1)-(2)). Note that articles of the TEU are identified by letters rather than numbers in order to distinguish them from articles of the Community treaties.
3 See para 29 above.
4 Convention of 14 June 1985 concerning the Gradual Elimination of Controls at External Frontiers, [1990] CLE F271. The parties to the Schengen Agreement are the Community member states other than Ireland, Austria, the three Scandinavian member states and the UK.
5 Convention of 15 June 1990 Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities (1991) 30 ILM 425; Cmd 1623. The Convention is not yet in force.
6 See the European Communities (Amendment) Act 1993, which expressly excludes Titles V and VI (and the Social Protocol; see para 273 above) from the ambit of those treaties recognised as having force in UK law.
The European Parliament, the Council, the Commission and the Court of Justice shall exercise their powers under the conditions and for the purposes provided for, on the one hand, by the provisions of the Treaties establishing the European Communities ... and, on the other hand, by the other provisions of this Treaty'.

The Union therefore adopts, or ‘borrows’, the institutions established by the Community treaties in order to carry out the tasks of the non-Community pillars of the Union. The one exception is the European Council, which is hardly mentioned in the Community treaties. It is probably best seen as an institution of the European Union rather than of the Community.

291. Decision making in the European Union. The principal institution competent to act by authority of Titles V and VI is the Council (of Ministers). The Commission is to be ‘fully associated’ with the work carried out under both Titles and may propose joint positions, joint action and multilateral Conventions under Title VI, but is otherwise accorded no specific powers. Where any institution acts under these Titles, its conduct and activities are of a qualitatively wholly different nature from those pursued under the Community treaties. The Council may adopt ‘decisions’ and other measures under both Titles, but they are not decisions in the sense of article 189 of the EC Treaty: they are acts adopted autonomously, without formal input from the other institutions, by unanimous vote within the Council meeting inter-governmentally; they bind the parties to the TEU as a matter of international law but have, and can produce, no internal legal effect, at least in the United Kingdom. The status of these rules has yet to be defined, but they seem to constitute a new, emergent category of legal norm, that of ‘intergovernmental law’. Decisions adopted by the Council, particularly under common foreign and security policy, are frequently accompanied or followed up by Community action in order to give effect to them.

292. Political and judicial control of the European Union. The European Parliament has no formal right to influence activities undertaken within Titles V and VI. In the area of common foreign and security policy the Presidency of the Union is required to consult the Parliament ‘on the main aspects and the basic choices’, and in both areas the Parliament is entitled to be informed regularly of discussions and developments, to have its views ‘duly taken into consideration’ and to ask questions of, and make

1 TEU, arts C and E.
2 Ibid, arts J.9 and K.4(2).
3 Ibid, art K.3(2).
5 See paras 142ff above.
6 TEU, arts J.8(2) and K.4(3). The Council may by unanimity decide that certain procedural matters are to be decided by qualified majority; TEU, arts J.3(2), J.8, K.3 and K.4(2). A Declaration on voting in the field of common foreign and security policy attached to the TEU provides that member states will ‘to the extent possible’ avoid preventing the adoption of a unanimous decision where a qualified majority exists in favour of its adoption; the declaration has no legal force.
7 This may not be so in other, ‘monist’ member states the constitutions of which recognise general treaty law as a source of law directly effective within the national legal system.
8 TEU, art J.7.
recommendations to, the Council. It has no formal role to play in the adoption of measures under either Title. With one minor exception, jurisdiction of the Court of Justice to consider these provisions is expressly excluded. So, measures adopted by the institutions under Titles V and VI are not subject to judicial review before the Court; and if they are adopted without reference to the (minimal) prerogative powers of the Parliament the Court cannot interfere. The two Titles therefore fall almost entirely outwith the political and judicial supervisory control of Community machinery.

293. International personality of the European Union. The Treaty on European Union contains no provisions equivalent to articles 210 and 238 of the EC Treaty. The Union therefore has no international personality and no treaty making power; third countries may treat only with the Community qua Community (where the subject matter falls within Community competence) and/or with the member states.

(1) COMMON FOREIGN AND SECURITY POLICY

294. Common foreign and security policy. The provisions on common foreign and security policy are contained in Title V of the TEU, comprising articles J to J.11. The common foreign and security policy is ‘established’ by the TEU and defined and implemented by the Union and its member states. Its objectives are: to safeguard the common values, fundamental interests and independence of the Union, to strengthen its security, to preserve peace and strengthen international security, to promote international co-operation and to develop and consolidate democracy and the rule of law and respect for human rights and fundamental freedoms. They are to be pursued by establishing systematic co-operation and gradually implementing joint action within principles and general guidelines established by the European Council. The member states have a general obligation of loyalty and mutual solidarity to Union policy and to refrain from any action contrary to its interests. They must inform and consult one another on any matter of foreign and security policy of general interest. The Council defines common

1 TEU, arts J.7 and K.6.
3 Ibid, art L. Art L also excludes from the jurisdiction of the Court the Preamble and the Common Provisions (arts A-F) of the TEU. However, as these provisions form constitutional rules of the Union to which all three pillars (including the Community) are subject, some aspects of their interpretation fall within the Court’s legitimate jurisdiction. Arts J.11 and K.8 also refer to matters falling within the Court’s jurisdiction.
4 See para 284 above.
5 TEU, art J.
6 Ibid, art J.1(1).
7 Ibid, art J.1(2).
8 Ibid, art J.1(3).
9 Ibid, art J.8(1).
10 Ibid, art J.1(4).
11 Ibid, art J.2(1).
positions 'whenever it deems it necessary', and the member states are bound to uphold them and ensure that their national policies conform to them. The Council may also decide when joint action is appropriate, which then commits the member states in the positions they adopt and in the conduct of their activities. Diplomatic and consular missions of the member states and Commission delegations have a duty to co-operate. There are special provisions for co-operation with the Western European Union (of which all member states are full members or observers) and NATO and for consultation with member states, members (permanent or otherwise) of the UN Security Council. The Council is assisted by a Political Committee, with responsibilities analogous to those of COREPER in the Community sphere. In matters coming within foreign and security policy the Union is represented by the Presidency.

(2) JUSTICE AND HOME AFFAIRS

295. General. The provisions on co-operation in justice and home affairs are contained in Title VI of the TEU, comprising articles K to K.9. Title VI deals with areas which are, if anything, more sensitive than those of common foreign and security policy, embracing immigration, residence, asylum and refugee policies and judicial and police co-operation in the detection, pursuit and punishment of crime. Hence, Title VI provides for 'co-operation' in these fields, not as in Title V, the creation and implementation of a 'policy'. Any action is firmly within the control of the member states, which 'inform and consult one another within the Council with a view to coordinating their action'.

296. Fields subject to Title VI. Title VI declares the following matters to be of 'common interest': asylum policy, external border controls, immigration policy and policy on third country nationals, drug addiction, fraud, customs co-operation, judicial co-operation in civil matters and judicial and police co-operation in criminal matters. The Council may adopt joint positions,

1 TEU, art J.2(2).
2 Ibid, arts J.2(2)-(3).
3 Ibid, art J.3.
6 Ibid, arts J.4(2)-(5), J.5(4). See also the Declaration on Western European Union attached to the TEU.
7 Ibid, art J.8(5). The Political Committee was first established to assist in the process of EPC under the Single European Act; SEA, art 30(10). As to COREPER, see para 60 above. A Declaration on practical arrangements in the field of common foreign and security policy attached to the TEU provides for the examination of the division of work between the Political Committee and COREPER, and implicitly a degree of merging of their functions.
8 TEU, art J.5(1).
9 Ibid, art K.3(1).
promote co-operation and, subject to a subsidiarity test, adopt joint action. A Co-ordinating Committee, again analogous to COREPER, was established in order to assist the Council. The member states are bound (although in language less mandatory than that of Title V) to defend in international fora any common position adopted and are required to establish collaboration amongst their relevant government departments. All activities under Title VI must be dealt with in compliance with the European Convention on Human Rights and the 1951 Convention on the Status of Refugees.

297. Complementary Community competences. The provisions on justice and home affairs are not hermetically sealed from Community competences. The EC Treaty empowers the Community to determine the third countries whose nationals require a visa to enter the Community and a uniform format for visas is to be adopted by the (EC) Council by 1996. A number of the fields of activity addressed by Title VI may, without Treaty amendment, be transferred to Community competences by unanimous decision of the Council followed by ratification by all member states - a 'double lock' in the view of the United Kingdom government.

298. Complementarity with the Community. As was mentioned above, the internal market was not fully achieved by the end of 1992. This is particularly so for the free movement of persons. Co-operation between the member states pursued under Title VI may therefore assist, if indirectly, the completion of the internal market.

(3) FINAL PROVISIONS OF THE TREATY ON EUROPEAN UNION

299. Amendment to the Treaties. The EC Treaty provides relatively simple mechanisms for amendment in certain minor 'housekeeping' areas.
Otherwise, it may be amended only in accordance with the procedures laid
down by the Treaty on European Union\(^1\). The Commission or a member state
must first submit to the Council a proposal for amendment 'of the Treaties
on which the Union is founded', ie, the TEU and the Community treaties.
The Council may by simple majority, after consulting the Commission, the
Parliament, and the European Central Bank if the proposals address mone­
tary issues, convene an intergovernmental conference to determine 'by com­
mon accord' the appropriate amendments to be made to the Treaty. If the
conference is successful in reaching unanimous agreement upon a text, it is
submitted to the member states to be ratified in accordance with their own
constitutional procedures and requirements\(^2\). If ratified, the amendments
then enter into force in accordance with the terms of the amending treaty. In
all cases hitherto this has been in the month following deposit of the last rat­
ification. The EEC Treaty was amended by analogous, now repealed\(^3\), proce­
dures on eight occasions, most significantly by the Single European Act and
the Treaty on European Union. The latter now itself provides that another
intergovernmental conference is to be convened in 1996 in order to consider
further amendments to the Treaties\(^4\).

300. Accession to the European Union. Accession of new member states
is possible only to the European Union as a whole, and no longer to the
Community alone\(^5\). Any European state may apply for accession to the
Union. An application must be approved by a unanimous Council and
have the assent of the Parliament\(^6\), after which the existing member states
and the applicant state(s) agree the conditions of accession and the neces­
sary adjustments to the treaties. This agreement, or treaty, is then submit­
ted for parliamentary ratification by all member states and the applicant
state(s), and enters into force following ratification and in accordance with
its terms. There have been three accession treaties accommodating the
enlargements of the Community in 1973 (Denmark, Ireland and the
United Kingdom), 1981 (Greece) and 1986 (Spain and Portugal) and one
accession treaty accommodating enlargement of the Union in 1995

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1 TEU, art N.
2 In the United Kingdom ratification is normally accompanied by legislation in order to give
effect in UK law to the changes. For important amending treaties this is done by statute (see
eg the European Communities (Amendment) Acts 1986 and 1993, which gave the force of law
to the provisions of the Single European Act and the Treaty on European Union respectively).
However, the same result may be, and on occasion has been, achieved by Order in Council
following a positive resolution of both Houses of Parliament by authority of the European
Communities Act 1972, s 1(3).
3 EEC Treaty, art 236, repealed by TEU, art G(B)(83).
4 TEU, art N(2).
5 Ibid, art O, which replaces equivalent, repealed provisions in each of the Community treaties,
eg EEC Treaty, art 237.
6 Parliamentary assent to accession requires - uniquely - an affirmative vote cast by an absolute
majority of MEPs.
(Austria, Finland and Sweden). The reunification of Germany in 1990 and the consequent ‘accession’ to the Community of the five Eastern Länder did not require recourse to this procedure, or indeed any treaty amendment, as the former German Democratic Republic was dissolved and its territory deemed to revert to the Federal Republic. At the time of writing, formal applications for accession have been received from Turkey, Cyprus, Malta, Hungary and Poland. At the Essen Summit in December 1994 it was agreed in principle that Bulgaria, the Czech Republic, Hungary, Poland, Romania and Slovakia ought to be admitted to the Union, but no date was set.

301. Secession from the European Union. The Treaty on European Union does not address secession of a member state. Most treaties establishing international organisations include provisions for withdrawal or denunciation, usually requiring only a period of notice. The EC, Euratom and European Union treaties do not; rather they are concluded for ‘an unlimited period’. Secession of Greenland from the Communities was brought about in 1985 by formal amendment to the treaties in accordance with the then existing procedures. It was universally accepted at the time that treaty amendment was necessary to give effect to the wishes of Greenlanders to secede, and that it was beyond the power of Greenland and/or Danish authorities to do so unilaterally. It is submitted that, owing to the nature of the treaties as now interpreted and applied, any purported unilateral secession from the Union of a member state or part of a member state would be unlawful without negotiated amendment to the treaties. This is of course contrary to the conventional United Kingdom view of the supremacy of Parliament. Whether or not United Kingdom courts would give effect to an Act of Parliament purporting to amend or repeal the European Communities Act 1972 in order unilaterally to take the United Kingdom out of the Union is a question of theological nicety beyond the scope of this book.

1 For the texts see the (Brussels) Accession Treaty of 1972 (OJ L73, 27.3.72, p 1; Cmd 7462); the (Athens) Accession Treaty of 1979 (OJ L291, 19.11.91, p 1; Cmd 7650); the Accession Treaty of 1985 (OJ L302, 15.11.85, p 1; Cmd 9634); and the (Corfu) Accession Treaty of 1994 (OJ C241, 29.8.94, p 9 as amended by the Adaptation Decision of 1 January 1995). Each treaty includes an Act of Accession which sets out the conditions and a transitional period for accession.

2 EC Treaty, art 240; Euratom, art 208; TEU, art 2. The exception is the ECSC Treaty, which is concluded for a period of fifty years (art 97). The ECSC is therefore scheduled to come to an end in the year 2002. The option now most seriously considered is that, rather than renewing it, the ECSC ought to be allowed to die a natural death, all coal and steel activity thereafter to be subsumed within the EC Treaty, either as it stands or with special new provisions.